

**Moses v Forsythe**

2020 NY Slip Op 35688(U)

April 30, 2020

Supreme Court, Queens County

Docket Number: Index Number 716171/2017

Judge: Lourdes M. Ventura

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SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C. IAS Part 37

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JANICE G. MOSES and TIM MOSES,  
Plaintiffs,

Index  
Number: 716171/2017

-against-

Motion  
Date: December 2, 2019

AARON T. FORSYTHE and  
ARTHUR L. CUMBERBATCH and  
BRENDA P. CUMBERBATCH,  
Defendants.

Motion  
Seq. No.: 3

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The following numbered papers read on this Motion by Defendants Arthur L. Cumberbatch and Brenda P. Cumberbatch and Cross-Motion by Defendant Aaron T. Forsythe for an Order: pursuant to CPLR § 3212 granting summary judgment in Defendants favor, dismissing the Complaint and any and all cross claims against them on the basis that Plaintiff did not sustain a "serious injury" as defined under Insurance Law §5102(d), and for such other and further relief as this Court may deem just and proper.

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Upon the foregoing papers, it is Ordered that the Motion by Defendants Arthur L. Cumberbatch and Brenda P. Cumberbatch and Cross-Motion by Defendant Aaron T. Forsythe for an Order pursuant to CPLR 3212 granting summary judgment to in their favor and dismissing the Complaint against them are determined as follows:

Plaintiffs commenced the instant personal injury action to recover damages for injuries allegedly sustained in a motor vehicle collision that occurred on or about September 25, 2017 on 147th Avenue in the County of Queens. It is alleged that Plaintiff Janice Moses was a passenger in a vehicle owned and operated by Defendant Aaron Forsythe (hereinafter “Defendant Forsythe”) at the time of the collision. It is further alleged that Defendant Forsythe’s vehicle and a vehicle owned and operated by Defendant Arthur L. Cumberbatch (hereinafter “Defendant Cumberbatch”) collided. It is further alleged that Plaintiff sustained injuries to the cervical spine, lumbar spine and right shoulder.

Defendant Cumberbatch filed the instant motion and asserts that Plaintiff did not sustain a "serious injury" under Insurance Law §5102(d) and that therefore, this matter must be dismissed. In support of Defendant Cumberbatch's motion, he submits the following evidence: Plaintiff's Summons and Complaint, Defendant Cumberbatch's Answer, Defendant Forsythe's Answer, Note of Issue, Plaintiff's Verified Bill of Particulars, Plaintiff's Deposition Transcript with execution letter, Dr. R. Hillman's Independent Medical Examination Report.

Defendant Forsythe cross-moves and joins in the arguments set forth in the motion of the co-defendant Cumberbatch and fully supports the positions set forth therein. Defendant Forsythe asserts that the identical arguments apply to the claims against him. Defendant Forsythe asserts that it is clear that the injury sustained by Plaintiff does not rise to the level contemplated by the law and as such, the Complaint must be dismissed as well as all cross claims.

Plaintiff's opposes Defendant Cumberbatch's motion and Defendant Forsythe's cross-motion. Plaintiff Janice G. Moses asserts that she suffered a "serious injury" as a result of the motor vehicle accident of September 25, 2017, specifically to her neck, lower back and right shoulder and that said injuries are permanent injuries, including a limitation of range of motion to the present date. In support of Plaintiff's opposing papers, she submits the following evidence: Affidavit, Affirmation and evaluation reports from Doctor John Velez, Md., and Affirmation and MRI reports.

Pursuant to New York Insurance Law § 5102(d), " 'serious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

In order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained (*Licari v. Elliot*, 57 NY2d 230 [1982]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York Univ. Medical Center*, 64 NY2d 851[1985]). The burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury" (*Lowe v. Bennett*, 122 AD2d 728 [1st Dept 1986], *affd*, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury (*Licari v. Elliot*, 57 NY2d 230 [1982]; *Lopez v. Senatore*, 65 NY2d 1017 [1985]). In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on

the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (*Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]).

Once the burden shifts, it is incumbent upon plaintiff, in opposition to defendant's motion, to submit proof of serious injury in "admissible form". Unsworn reports of plaintiff's examining doctor or chiropractor will not be sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]). Thus, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (*O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418 [1st Dept 1998]). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (*Gonzalez v. Vasquez*, 301 AD2d 438 [1st Dept 2003]; *Ayzen v. Melendez*, 749 NYS2d 445 [2d Dept 2002]).

However, in order to be sufficient to establish a prima facie case of serious physical injury the affirmation or affidavit must contain medical findings, which are based on the physician's own examination, tests and observations and review of the record rather than manifesting only the plaintiff's subjective complaints. The findings, which must be submitted in a competent statement under oath (or affirmation, when permitted) must demonstrate that plaintiff sustained at least one of the categories of "serious injury" as enumerated in Insurance Law § 5102(d) (*Marquez v. New York City Transit Authority*, 259 AD2d 261 [1st Dept 1999]; *Tompkins v. Budnick*, 236 AD2d 708[3d Dept 1997]; *Parker v. DeFontaine*, 231 AD2d 412 [1st Dept 1996]; *DiLeo v. Blumberg*, 250 AD2d 364 [1st Dept 1998]). "A physician's observation as to actual limitations qualifies as objective evidence since it is based on the physician's own examinations." *Tompkins v. Burtnick*, 236 A.D.2d 708, 652 N.Y.S.2d 911 (1997). Furthermore, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

Defendants assert that Plaintiff did not sustain a serious injury and submit the medical evaluation report affirmed by Doctor (hereinafter "Dr.") Regina Hillsman, M.D., who performed an independent orthopedic examination of Plaintiff on December 20, 2018, wherein she examined and concluded the following:

**"REVIEW OF MEDICAL RECORDS:**

I had the opportunity to review the following medical records:

- Verified bill of particulars
- Lenox Hill Radiology: MRI of the right shoulder dated 11/11/17
- Lenox Hill Radiology: MRI of the cervical spine dated 11/11/17
- Lenox Hill Radiology: MRI of the brain dated 11/18/17
- Lenox Hill Radiology: MRI of the lumbar spine dated 11/18/17
- Long Island Physical Medicine & Rehabilitation Associates: notes dated 12/21/17 - 1/22/18
- Marianna Golden MD: independent examination reports dated 1/3/18, 2/14/18
- Michael L Russ MD: independent examination report dated 1/3/18

- Paul Lerner MD: note dated 11/6/17
- Premier Physical Medicine & Rehabilitation PC: office visit and procedure notes dated 10/5/17 - 3/2/18
- Premier PMR Valley Stream: evaluation and SOAP notes dated 10/5/17 - 3/2/18

**CERVICAL SPINE:**

Inspection of the cervical spine revealed a normal lordosis. Palpation revealed no tenderness. There was no evidence of muscle spasm. No atrophy is noted. Distraction test is negative. Compression test is negative. Jackson's test is negative. Soto Hall test is negative.

Cervical spine active range of motion measured with a goniometer:

forward flexion 50 degrees (50 degrees normal)

extension 60 degrees (60 degrees normal)

right rotation 80 degrees (80 degrees normal)

left rotation 80 degrees (80 degrees normal)

right lateral bending 45 degrees (45 degrees normal)

left lateral bending 45 degrees (45 degrees normal)

Reflexes are present, equal and symmetrical in the upper extremities. Muscle strength is good with no noted atrophy, Sensation is intact. There are no neurotrophic changes noted.

**THORACIC SPINE:**

The shoulder blades are symmetrical, and no discomfort is noted. There is no tenderness over the trapezius proximal to the superior angle of the scapula, along the medial border down to the inferior angle or over the spinous process from T1 through T12. The thoracic curvature is normal with no paraspinal spasm. There is no sensory loss.

Thoracic spine active range of motion measured with a goniometer:

flexion 45 degrees (45 degrees normal)

extension 0 degrees (0 degrees normal)

right lateral bending 45 degrees (45 degrees normal)

left lateral bending 45 degrees (45 degrees normal)

right rotation 30 degrees (30 degrees normal)

left rotation 30 degrees (30 degrees normal)

**LUMBAR SPINE:**

Inspection of the lumbar spine revealed a normal lordosis. Palpation revealed no tenderness. There was no evidence of muscle spasm.

Lumbar spine active range of motion measured with a goniometer:

forward flexion 60 degrees (60 degrees normal)

extension 25 degrees (25 degrees normal)  
right lateral bending 25 degrees (25 degrees normal)  
left lateral bending 25 degrees (25 degrees normal)

Reflexes are present, equal and symmetrical in the lower extremities. Muscle strength is good with no noted atrophy. Sensation is intact. There are no neurotrophic changes noted. Measurements of the quadriceps, calf muscles, knee girth and foot and ankle girth are equal and symmetrical.

**RIGHT SHOULDER EXAMINATION:**

Inspection of the right shoulder revealed no tenderness. There is no evidence of heat, swelling, erythema or effusion. There is no crepitus noted.

Right shoulder active range of motion measured with a goniometer:

forward flexion 180 degrees (180 degrees normal)  
extension 40 degrees (40 degrees normal)  
abduction 180 degrees (180 degrees normal)  
adduction 30 degrees (30 degrees normal)  
Internal rotation 80 degrees (80 degrees normal)  
External rotation 90 degrees (90 degrees normal)  
Impingement and cuff tear signs are not present.

**DIAGNOSIS:**

Cervical spine sprain/strain - resolved  
Lumbar spine sprain/strain - resolved  
Right shoulder strain/contusion - resolved

**DISABILITY:**

Based on orthopedic clinical evaluation, the claimant does not demonstrate any disability with regard to this accident.

The medical evaluation report contained a signature and affirmation of Dr. Regina Hillsman that in pertinent part states:

“I, Regina Hillsman, MD., being a physician duly licensed to practice medicine in the State of New York, pursuant to CPLR section 2106, hereby affirm under the penalty of perjury that the statements contained herein are true and accurate.”

In opposition, Plaintiff raises triable issues of fact through the medical evaluation reports dated October 5, 2017, November 2, 2017, December 7, 2017, March 2, 2018, June 1, 2018, August 10, 2018 and September 20, 2019 affirmed by Dr. John Velez, M.D., who is Plaintiff's treating physician. Plaintiff submits an affirmation from Dr. Velez which in pertinent part reads as follows:

“JOHN VELEZ, MD, a physician duly licensed to practice medicine in the State of New York, hereby affirms the following under the parties of perjury:

I first saw Janice Moses in our office at Premier Physical Medicine and Rehabilitation, PC, on October 5, 2017, for an evaluation and treatment of injuries she sustained as a result of a motor vehicle accident that occurred on September 25, 2017. Ms. Moses thereafter commenced a course of physical therapy rendered in conjunction with massage therapy within my office from October 5, 2017 through August 10, 2018.

That the information contained within my initial physiatric evaluation reports dated October 5, 2017, November 2, 2017, December 7, 2017, March 2, 2018, June 1, 2018, August 10, 2018 and September 20, 2019, and my procedure note dated December 18, 2017, is true and accurate based upon my physical examinations of Ms. Moses, the history as relayed to me by the patient, and based upon my review of the certified MRI studies of the cervical spine and right shoulder conducted on November 11, 2017, the certified MRI studies of the brain and lumbar spine conducted on November 18, 2017, in regards to injuries Ms. Moses sustained in a motor vehicle accident that occurred on September 25, 2017.

That the dates of treatment, reflecting examinations and physical therapy treatment rendered within this facility from October 5, 2017 through August 10, 2018, are true and accurate to the best of my knowledge. As per the history as relayed to me by Ms. Moses, she was asymptomatic regarding her cervical spine, lumbar spine and/or right shoulder prior to this accident and denies any pre-existing trauma or illness to these body parts

My reports are of a type of material that is accepted in the medical profession as reliable in forming a professional opinion. I certify and attest that these records are an accurate and complete copy of the original records, and that the original records were kept in the regular course of business for the purpose of diagnosing and treating Ms. Moses' condition, and were made at the time of the event described or within a reasonable time thereafter.

Based upon my examination findings, which include decreased range of motion, tenderness and positive orthopedic testing, the history as relayed to me by the patient, and my review of the certified diagnostic studies, it is my opinion to a reasonable degree of medical certainty that Ms. Moses sustained the following injuries as a result of the accident of September 25, 2017: status post motor vehicle accident on September 25, 2017; cervical spine disc bulges; multiple cervical spine disc herniations associated with foraminal stenosis; lumbar spine disc bulges; lumbar spine disc herniations associated with severe foraminal stenosis; and right shoulder interstitial rotator cuff tear with associated tendinosis.

That the steroidal injection I administered to Ms. Moses' right shoulder on December 18, 2017, was causally related to her right shoulder injuries sustained in a motor vehicle accident on September 25, 2017.

Furthermore, I opine that Ms. Moses' injuries are permanent in nature, traumatically induced and causally related to the accident of September 25, 2017.”

Most significant is Dr. Velez prognosis where he concluded based on his last examination of Plaintiff on September 20, 2019 that: “[t]he loss of cervical extension of 17%, cervical bilateral rotation of 12%, lumbar extension of 33% and right shoulder abduction of 6%, as well as her persistent neck pain, low back pain and right shoulder pain, are significant. Based on the fact that these restrictions are occurring almost two years post-trauma, they can be considered permanent and a prognosis for a full recovery is poor.”

The Court finds that Dr. Velez's findings are sufficient to raise a triable issue of fact as to whether as a result of the collision, Plaintiff Janice G. Moses sustained a serious injury to her right shoulder, lumbar and cervical spine under the permanent consequential limitation of use and/or the significant limitation of use categories of Insurance Law § 5102(d).” (See *Perl v. Meher*, 18 N.Y.3d 208 [2011]; *Young Chool Yoo v. Rui Dong Wang*, 88 A.D.3d 991 [2nd Dept 2011]; *Dixon v. Fuller*, 79 A.D.3d 1094 [2nd Dept 2010].)

Accordingly, Defendant Cumberbatch’s Motion and Defendant Forsythe’s Cross-Motion for an Order pursuant to CPLR 3212 on the ground that the injuries claimed by Plaintiff Janice G. Moses do not satisfy the “serious injury” threshold requirement of New York Insurance Law § 5102(d), are hereby denied. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Date: April 30, 2020



LOURDES M. VENTURA, J.S.C.

