Hoffman v Banta
2012 NY Slip Op 30999(U)
April 2, 2012
Supreme Court, Nassau County
Docket Number: 23479/10
Judge: Michele M. Woodard
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------x

MARY HOFFMAN,

Plaintiff,

-against-

JENNIFER BANTA,

Defendant.

----------x

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 8
Index No.: 23479/10
Motion Seq. Nos.: 01 & 02

DECISION AND ORDER

Papers Read on this Motion:

Plaintiff's Notice of Motion	01
Defendant's Affirmation in Opposition	xx
Defendant's Notice of Cross-Motion	02
Plaintiff's Affirmation in Opposition	xx
Defendant's Reply	xx

In motion sequence number one, the plaintiff, Mary Hoffman, moves for an Order, pursuant to CPLR §3212, granting her summary judgment on the issue of liability.

In motion sequence number two, the defendant, Jennifer Banta, cross-moves for an Order, awarding her summary judgment dismissing the plaintiff Mary Hoffman's complaint on the grounds that her injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d).

This action arises out of a three car accident that occurred on April 6, 2007 on Route 110 and Jefferson Avenue, Town of Babylon, County of Suffolk. The vehicle driven by plaintiff Mary Hoffman was struck from behind by the vehicle owned and operated by the defendant Jennifer Banta. (As a result of this collision, plaintiff's vehicle, in turn, was allegedly propelled into the rear of the vehicle operated by non-party Barbara O'Neal).

Plaintiff claims that, as a result of the collision, she sustained injuries to her neck, back and knee. Specifically, she alleges, *inter alia*, the following injuries: disc herniation at C2-3; disc bulge at

C4-5; straightening of the normal cervical lordosis; C4-5 mild loss of disc space height, exacerbation of the anterior osteophyte and bilateral disc/ridge complexes with a left sided disc/ridge complex causing foraminal compromise and C5 nerve root impingement; C5-6 loss of disc space height and exacerbation of the bilateral disc/ridge complexes causing bilateral neural foraminal encroachment and probable C6 nerve root impingement; severe neck pain; muscle spasms; lumbar retrolisthesis at L5 on S1; radial tear through the inner two thirds of the posterior horn of the left medial meniscus requiring menisectomy on February 12, 2009; and, Baker's cyst (Verified Bill of Particulars ¶5; Supplemental Bill of Particulars, ¶5).

Plaintiff claims that following this accident, she was intermittently confined to her bed and home for approximately six months (*Id.* at ¶6). She testified that at the time of this accident, she was retired. As to activities, plaintiff testified that she did not have any hobbies (Hoffman Tr., p. 8). She states that while she does not do any formal exercise, she walks "just about" every day for fifteen minutes to half an hour. She states that she spends her time with friends, shopping and visiting her children all over the country (*Id.* at 9). Plaintiff testified that although she has driven to Pennsylvania and Rochester since the accident to visit her children, she has not been able to go down to Georgia to visit one of her children since this accident (*Id.* at 10-11). She testified that as a result of this accident she can no longer reach up with her left arm or turn her head to the left without pain and difficulty(*Id.* at 65).

Plaintiff, who was 65 years old at the time of the accident, claims that her injuries fall within only one of the nine categories of the serious injury statute: to wit, significant limitation of use of a body function or system (*Id.*, ¶16). Thus, since the plaintiff does not allege in her complaint or bill of particulars that her injuries satisfy any of the remaining eight categories of Insurance Law §5102(d), and since the plaintiff has not made any motion for leave to amend the bill of particulars so as to

include a claim that her injuries satisfy the remaining eight categories of the serious injury statute, the evidence pertaining to any of these categories will not be considered by this Court (*Sharma v Diaz*, 48 AD3d 442 [2d Dept 2008]; *Ifrach v Neiman*, 306 AD2d 380 [2d Dept 2003]).

Under the no-fault statute, to meet the threshold significant limitation of use of a body function or system, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Licari v Elliot*, 57 NY2d 230 [1982]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Scheer v Koubeck*, 70 NY2d 678 [1987]). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (*Licari v. Elliot*, supra; *Grossman v Wright*, 268 AD2d 79, 83 [2d Dept 2000]).

Further, when, as in this case, a claim is raised under the "significant limitation of use of a body function or system" category, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Id*).

Having said that, recently, the Court of Appeals in *Perl v Meher*, 2011 NY Slip Op. 08452, held that a quantitative assessment of a plaintiff's injuries does not have to be made during an initial examination and may instead be conducted much later, in connection with litigation (*Perl v Meher*, 2011 NY Slip Op. 08452 [2011]).

In support of her instant motion, defendant, Jennifer Banta relies upon, *inter alia*, plaintiff's unsworn emergency room records from Good Samaritan Hospital where she was transported

immediately after the accident; the unsworn MRI report of Dr. Elizabeth P. Maltin, M.D. dated March 10, 2009 of her cervical spine; the unsworn report of Dr. Peter Stefanides, M.D., dated April 15, 2009; the unsworn MRI report of Dr. Alex Rosioreanu, M.D. dated January 23, 2009 of her left knee; the unsworn patient information forms for Rehabilitation Services Department from Good Samaritan Hospital dated March 6, 2009; the unsworn report of Dr. Jonathan Owens, M.D., dated January 21, 2009; and the sworn affirmed report of Dr. Issac Cohen, M.D., an orthopedic surgeon who performed an independent orthopedic examination of the plaintiff on August 18, 2011.

Initially, it is noted that while the defendant is permitted to rely upon unsworn MRI reports in support of her motion (*Gonzalez v Vasquez*, 301 AD2d 438 [1st Dept 2003]), where, as in this case, the reports are not paired with the doctor's observations during his or her physical examination of the plaintiff, they fail to constitute objective medical evidence and fly in the face of the requirements spelled out by the Court of Appeals in *Toure v Avis Rent A Car* Sys., supra.

Similarly, while the defendant is permitted to rely upon the unsworn reports of the plaintiff's examining physicians such as the unsworn report of Dr. Peter Stefanides, M.D., dated April 15, 2009 and the unsworn report of Dr. Jonathan Owens, M.D., dated January 21, 2009 (*Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992]), where the reports fail to document any medical findings based on the physician's own examinations, tests and observations and review of the record, instead manifesting only the plaintiff's subjective complaints, said reports are entirely insufficient. Indeed, Dr. Stefanides and Dr. Owens both fail to support their findings by any credible medical evidence of an objectively measured and quantified medical injury or condition (*Licari v Elliot*, supra; *Gaddy v Eyler*, supra; *Scheer v Koubeck*, supra).

The balance of defendant's proof, however, sufficiently and competently establishes that the plaintiff's injuries do not satisfy the threshold "significant limitation of use of a body function or

system" category. Specifically, the affirmed report of Dr. Issac Cohen, M.D., who examined the plaintiff and performed quantified range of motion testing on her cervical spine, left shoulder and left knee with a goniometer, compared his findings to normal range of motion values and concluded that the ranges of motion measured were normal, defendants' medical evidence sufficiently demonstrates that the plaintiff did not sustain a "serious injury" as a result of this accident. The defendant's medical proof confirms that despite extensive motor and sensory testing, there were no deficits, and based on the clinical findings and medical records review, the plaintiff had preexisting left knee arthritis, and as a result of this accident, sustained a cervical spine strain, and a left shoulder/left arm contusion all of which have since resolved (*Staff v Yshua*, 59 AD3d 614 [2d Dept 2009]; *Cantave v Gelle*, 60 AD3d 988 [2d Dept 2009]).

Having made a *prima facie* showing that the plaintiff did not sustain a "serious injury" within the meaning of the statute, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*Pommels v Perez,* 4 NY3d 566 [2005]; *Grossman v Wright*, supra).

In opposition, the plaintiff submits, the unsworn records from Metro Comprehensive Physical & Aquatic Therapy; the unsworn reports of Dr. Peter Stefanides, M.D., dated July 17, 2009, May 29, 2009, and April 15, 2009; the unsworn, unsigned records of Dr. Michael Raio, M.D.; the unsworn emergency room records from Good Samaritan Hospital dated April 29, 2009; and, finally, the unsworn, unaffirmed "affirmation" of Dr. Michael Raio, Jr.

Plaintiff's proof is wholly insufficient to present a triable issue of fact herein.

First, the unsworn records from Metro Comprehensive Physical & Aquatic Therapy, the unsworn emergency room records from Good Samaritan Hospital dated April 29, 2009 (nearly two years after this accident), the unsworn reports of Dr. Peter Stefanides, M.D., dated July 17, 2009, May

29, 2009 and April 15, 2009, and the unsworn, unsigned records of Dr. Michael Raio, M.D., are all insufficient to defeat summary judgment. Said reports are neither sworn nor affirmed; accordingly, they are presented in inadmissible form and are devoid of any probative value (*Pagano v Kingsbury*, supra; *Grasso v Angerami*, 79 NY2d 813 [1991]). That is, unlike the movant's proof, unsworn reports of plaintiff's examining doctor are not sufficient to defeat a motion for summary judgment (*Grasso v Angerami*, supra).

To the extent that the defendant relied upon Dr. Stefanides' unsworn report dated April 15, 2009 in support of their motion, and in so doing, opened the door for the plaintiff to rely upon the same report and records in opposition to the motion (*Pech v Yael Taxi Corp.*, 303 AD2d 733 [2d Dept 2003]), this Court notes that the only report that *would* be considered under this analysis would be that specific report (dated April 15, 2009); Dr. Stefanides' remaining reports would nonetheless be precluded. In any event, for the reasons stated above, the April 15, 2009 report, fails to constitute admissible evidence herein.

Finally, with respect to the "affirmation" of Dr. Michael Raio, Jr., this Court simply cannot deem it competent and admissible medical evidence in opposition to the defendant's motion. CPLR §2106 is very clear:

> The statement of an attorney admitted to practice in the courts of the state, or of a physician, osteopath or dentist, authorized by law to practice in the state, who is not a party to an action, when subscribed and ***affirmed by him to be true under the penalties of perjury***, may be served or filed in the action in lieu of and with the same force and effect as an affidavit. (Emphasis Added).

No where does Dr. Raio "affirm" that the statements contained in his report are true under the penalties of perjury.

Moreover, even if considered, Dr. Raio fails to set forth any of his objective medical findings or state what objective testing he used, if any. This is contrary to the requirements of *Toure v Avis Rent a*

Car Systems, rendering his opinion as to any purported loss insufficient (*Toure v Avis Rent a Car Systems*, supra; *Powell v Alade*, 31 AD3d 523 [2d Dept 2006]).

Therefore, in the absence of any competent or admissible evidence supporting a claim for serious injury, defendant's motion for summary judgment dismissing the plaintiff's complaint must be ***granted***. As such, is it hereby

ORDERED, that the defendant's application is ***granted*** and the plaintiff's complaint is ***dismissed*** in its entirety.

Under these circumstances, the motion by plaintiff, Mary Hoffman, for an Order, pursuant to CPLR §3212, granting her summary judgment on the issue of liability is ***denied*** as ***moot***.

This shall constitute the decision and order of this Court.

DATED: April 2, 2012
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.
X X X

ENTERED
APR 10 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE