Reyes v Digennaro
2012 NY Slip Op 32277(U)
July 31, 2012
Sup Ct, Nassau County
Docket Number: 19123/10
Judge: Denise L. Sher
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.

SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ALBA P. REYES,

Plaintiff,

- against -

GENARO J. DIGENNARO,

Defendant.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 19123/10
Motion Seq. No.: 02
Motion Date: 04/18/12

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting him summary judgment on the ground that plaintiff did not sustain a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d). Plaintiff opposes defendant's motion.

The action arises from a motor vehicle accident which occurred on November 9, 2007, at or about 10:20 a.m., on Newbridge Road at its intersection with W. Cherry Street in Hicksville, County of Nassau, State of New York. The accident involves two vehicles, a 2001 Ford Focus owned and operated by plaintiff and a vehicle owned and operated by defendant.

Briefly, it is plaintiff's contention that the accident occurred when the vehicle she was driving northbound on Newbridge Road, at approximately thirty miles-per-hour (30 mph), was struck in the rear passenger side by defendant's vehicle, which was exiting a gas station. Plaintiff claims that defendant was the negligent party in that he operated his vehicle at an excessive rate of speed, failed to keep the vehicle under control, failed to obey the traffic regulations and signals in effect at the time and place of the accident, failed to apply the brakes so as to avoid a collision, operated his motor vehicle in a careless and reckless manner, failed to give any signal or warning to plaintiff, and failed to keep cognizance of the driving conditions then and there existing. Defendant argues that the injuries or damages allegedly sustained by plaintiff at the time and place of the subject accident were caused in whole or in part as a result of plaintiff's own culpable conduct. Defendant further argues that plaintiff did not suffer any serious injury as defined by New York State Insurance Law § 5102(d).

As a result of the subject accident, plaintiff claims that she sustained the following injuries:

Disc Bulge at C4-5 and C5-6:

Disc Bulge at L4-5;

Tendinosis of the Right Shoulder;

Right C5-C6 Radiculopathy per Needle EMG;

Loss of Range of Motion of Cervical Spine;

Loss of Range of Motion of Lumbar Spine;

Loss of Range of Motion of Right Shoulder. *See* Defendant's Affirmation in Support Exhibit C ¶ 7.

Plaintiff commenced the action by service of Summons and Verified Complaint on or about October 7, 2010. Issue was joined on or about January 7, 2011.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S. 2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law § 5102(d). *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Upon such a showing, it becomes incumbent upon the non-moving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury." *See Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physicians or the unsworn reports of the plaintiff's examining physicians. *See Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment. *See Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002) stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical

examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both sides rely on those reports. *See Gonzalez v. Vasquez*, 301 A.D.2d 438, 754 N.Y.S.2d 7 (1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *See Pommells v. Perez,* 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005).

Whether plaintiff can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of admissible evidence. *See Manrique v. Warshaw Woolen Associates, Inc.*, 297 A.D.2d 519, 747 N.Y.S.2d 451 (1st Dept. 2002).

Plaintiff claims that, as a consequence of the above described automobile accident with defendant, she has sustained serious injuries as defined in New York State Insurance Law § 5102(d) and which fall within the following statutory categories of injuries:

> 1) a permanent consequential limitation of use of a body organ or member; (Category 7)
>
> 2) a significant limitation of use of a body function or system; (Category 8)
>
> 3) 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.(Category 9).

See Defendant's Affirmation in Support Exhibit C.

To meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation 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. *See Gaddy v. Eyler*, *supra*; *Licari v. Elliot*, *supra*. A minor, mild or slight limitation will be deemed insignificant within the meaning of the statute. *See id.* A claim raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories can be made by an expert's designation of a numeric percentage of a plaintiff's loss of motion in order to prove the extent or degree of the physical limitation. *See Toure v. Avis Rent-a-Car Systems, supra*. In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff's limitation to the normal function, purpose and use of the affected body organ, member, function or system. S*ee id.*

Finally, to prevail under the "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" category, a plaintiff must demonstrate through competent, objective proof, a "medically determined injury or impairment of a non-permanent nature" (Insurance Law § 5102(d)) "which would have caused the alleged limitations on the plaintiff's daily activities." *See Monk v. Dupuis*, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dept. 2001). A curtailment of the plaintiff's usual activities must be "to a great extent rather than some slight curtailment." *See Licari v. Elliott, supra* at 236. Under this category specifically, a gap or

cessation in treatment is irrelevant in determining whether the plaintiff qualifies. *See Gomez v. Ford Motor Credit Co.,* 10 Misc.3d 900, 810 N.Y.S.2d 838 (Sup. Ct., Bronx County, 2005).

With these guidelines in mind, the Court will now turn to the merits of defendant's motion. In support of his motion, defendant submits the pleadings, plaintiff's Verified Bill of Particulars, the transcript of plaintiff's Examination Before Trial testimony, the affirmed report of Arnold M. Illman, M.D., who performed an independent orthopedic medical examination of plaintiff on November 3, 2011, the affirmed report of Steven Ender, D.O, who performed an independent neurological evaluation on November 29, 2011 and the affirmed report of Steven L. Mendelsohn, M.D., who reviewed plaintiff's cervical spine MRI which was performed on December 20, 2007, plaintiff's lumbar spine MRI which was performed on December 20, 2007 and plaintiff's right shoulder MRI which was performed on January 3, 2008.

As previously mentioned, when moving for dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a serious injury. *See Gaddy v. Eyler, supra.* Within the scope of the movant's burden, defendant's medical expert must specify the objective tests upon which the stated medical opinions are based, and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. *See Gastaldi v. Chen,* 56 A.D.3d 420, 866 N.Y.S.2d 750 (2d Dept. 2008)*; Malave v. Basikov,* 45 A.D.3d 539, 845 N.Y.S.2d 415 (2d Dept. 2007); *Nociforo v. Penna,* 42 A.D.3d 514, 840 N.Y.S.2d 396 (2d Dept. 2007)*; Meiheng Qu v. Doshna,* 12 A.D.3d 578, 785 N.Y.S.2d 112 (2d Dept. 2004); *Browdame v. Candura,* 25 A.D.3d 747, 807 N.Y.S.2d 658 (2d Dept. 2006); *Mondi v. Keahan,* 32 A.D.3d 506, 820 N.Y.S.2d 625 (2d Dept. 2006).

Dr. Arnold M. Illman, a board certified orthopedist, reviewed plaintiff's medical records and conducted an examination of her on November 3, 2011. *See* Defendant's Affirmation in Support Exhibit E. Dr. Illman performed range of motion tests on plaintiff's cervical spine and lumbosacral spine, as well as bilateral exams on both of her shoulders and knees. The results of the tests indicated no deviations from normal. Dr. Illman's diagnosis was "[r]esolved lumbosacral, cervical, both shoulders, and both knees....If history is correct there is causal relationship....I found no objective evidence of disability. The claimant requires no orthopedic treatment and is capable of carrying out her normal activities and prior job were it to be made available to her."

Dr. Steven Ender, board certified in neurology and electromyography, reviewed plaintiff's medical records and conducted an examination of her on November 29, 2011. *See* Defendant's Affirmation in Support Exhibit F. Dr. Ender examined plaintiff's cranial nerves motor and sensory reflexes/coordination. Dr. Ender also performed a musculoskeletal examination using a goniometer. The results were, "[n]eck: Lateral rotation was performed to 80 degrees bilaterally (80 degrees being normal). Flexion and extension was performed to 45 degrees (45 degrees being normal). There is no cervical paraspinal muscle tenderness or spasm noted. Back: Straight leg raising is negative in the seated position. The claimant can flex her lumbar spine to approximately 70 degrees, where she stopped and complained of pain (90 degrees being normal). There is bilateral lumbosacral paraspinal muscle tenderness, but no spasm noted. There is no tenderness of the sciatic notch region." Dr. Ender's diagnosis was, "[r]esolved cervical and lumbosacral paraspinal muscle strain. The claimant has a normal neurological examination. I find no residual neurological disability. She can continue with her

current activities of daily living, as well as working full time as a customer service representative without restrictions."

Dr. Steven L. Mendelsohn, a licensed radiologist, independently reviewed the films from plaintiff's cervical spine MRI and lumbar spine MRI that were originally done on December 20, 2007, as well as her right shoulder MRI which was done on January 3, 2008. *See* Defendant's Affirmation in Support Exhibit G. With respect to the cervical spine, Dr. Mendelsohn concluded, "[v]ery mild age related cervical degenerative changes. This MRI reveals no evidence of a focal herniation or any abnormality causality related to trauma of 11-9-07." With respect to the lumbar spine MRI, Dr. Mendelsohn concluded, "[n]ormal MRI of the lumbar spine." With respect to the right shoulder MRI, Dr. Mendelsohn concluded, "[n]ormal MRI of the right shoulder."

At the outset, the Court notes that Dr. Illman fails to set forth the specific tests administered on plaintiff to arrive at his findings with respect to his examination of plaintiff's cervical spine, lumbar spine, shoulders and knees. There is no indication of any objective tests which he may or may not have administered, nor does said report indicate how the range of motion measurements were determined. The Court does not know if such measurements were taken with a goniometer or if they were done by visual observation. Where the defendant's experts fail to set forth objective tests administered which resulted in normal ranges of motion, the Court will find that the defendant has failed to meet his *prima facie* burden. *See Perez v. Fugon*, 52 A.D.3d 668, 861 N.Y.S.2d 86 (2d Dept. 2008); *Giammalva v. Winters*, 59 A.D.3d 595, 873 N.Y.S.2d 227 (2d Dept. 2009); *Stern v. Oceanside School District*, 55 A.D.3d 596, 865 N.Y.S.2d 325 (2d Dept. 2008); *Giammanco v. Valerio*, 47 A.D.3d 674 (2d Dept. 2007).

The Court additionally notes that Dr. Ender observed limitation in the range of motion of plaintiff's lumbar spine. *See* Defendant's Exhibit F. Dr. Ender fails to render an opinion as to whether or not said limitation was causally related the subject accident.

Where, as here, defendant fails to demonstrate that he has met his *prima facie* burden, the Court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers. *See Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *David v. Bryon*, 56 A.D.3d 413, 867 N.Y.S.2d 136 (2d Dept. 2008); *Barrera v. MTA Long Island Bus*, 52 A.D.3d 446, 859 N.Y.S.2d 483 (2d Dept. 2008); *Breland v. Karnak Corp.*, 50 A.D.3d 613, 854 N.Y.S.2d 765 (2d Dept. 2008).

Accordingly, defendant's motion, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting him summary judgment on the ground that plaintiff did not sustain a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d) is hereby **DENIED**.

It is further ordered that parties shall appear for Trial in the Differentiated Case Management Part (DCM) of the Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on August 8, 2012, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
July 31, 2012

ENTERED
AUG 02 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE