Adusei v Aburekhanlen
2017 NY Slip Op 30761(U)
March 3, 2017
Supreme Court, Bronx County
Docket Number: 303712/2014
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

REGINA ADUSEI,

Plaintiff,

-against-

VERONICA ABUREKHANLEN,

Defendants.

INDEX NUMBER: **303712/2014**

Present:
HON. **ALISON Y.TUITT**
Justice

The following papers numbered 1 to 5

Read on this Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

On Calendar of **2/8/16**

Notices of Motion/Cross-Motion-Exhibits and Affirmations 1, 2

Affirmations in Opposition 3, 4

Reply Affirmation 5

Upon the foregoing papers, plaintiff's motion for summary judgment on her threshold 90/180 claim and defendant's cross-motion for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury are consolidated for purposes of this decision. For the reasons set forth herein, plaintiff's motion is granted and defendant's cross-motion is denied.

The within action arises from a motor vehicle accident on August 24, 2012 in which plaintiff alleges she sustained serious injuries to her right elbow, in relevant part, a likely incomplete fracture of the capitellum and epicondylitis with partial tear of the common extensor and tendon origin, edema, bone contusions and sprain. Plaintiff received treatment for the right elbow for over four months and claims that she was unable to work during that time. Dr. Pramila Kolisetty, plaintiff's treating physician, states in an affirmation that she treated plaintiff from August 24, 2012 through January 15, 2013 and the medical records maintained by her office confirm plaintiff's complaints, limitations and physical disability regarding her elbow. On her initial

visit, plaintiff complained of pain in the right arm and Dr. Kolisetty noted limitations in the range of motion of the elbow together with swelling of the elbow and distal arm. Dr. Kolisetty states that throughout her treatment, plaintiff exhibited restricted range of motion of the right elbow with pain and tenderness. It is her opinion that the subject accident was the competent producing cause of plaintiff's injuries; that plaintiff was disabled from work as she was physically unable to perform her duties as a registered nurse during the time period from August 24, 2012 through January 1, 2013; and that performing work or other strenuous activities during that time period would have greatly increased plaintiff's risk of further exacerbating and aggravating her injuries.

In opposition, defendant submits the affirmed report of Dr. Harry Goldmark who examined plaintiff almost three years after the accident. With respect to plaintiff's 90/180 claim, Dr. Goldmark states that "[t]he claimant reports she missed only 3.5 months from work immediately following the accident, therefore, she was not disabled the first 6 months following the accident. She was able to perform her activities of daily living the first 6 months following the accident."

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

In the present action, 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, 511 N.Y.S.2d 603 (1st Dept. 1986), *aff'd*, 69 N.Y.2d 701 (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 N.Y.2d 230 (1982); Lopez v. Senatore, 65 N.Y.2d 1017 (1985). When a claim is raised under the "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 prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion is acceptable. Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (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. Toure, supra. [1]

In order to make a prima facie showing pursuant to the 90/180 claim of serious injury, plaintiff must show "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." To establish a claim under the 90/180 category, there must be proof that plaintiff's usual and customary activities were impaired in some significant way for 90 out of the first 180 days after the accident. Cruz v. Calabiza, 641 N.Y.S.2d 255 (1st Dept. 1996). The claim must be supported by "competent medical proof that directly substantiated the claim". Cruz v. Aponte, 874 N.Y.S.2d 442 (1st Dept. 2009) quoting Uddin v. Cooper, 820 N.Y.S.2d 44 (1st Dept. 2006)(citations omitted).

As to plaintiff's 90/180–day claim, plaintiff met her prima facie burden with respect thereto. Plaintiff submitted evidence that she remained out of work for over four months and her day-to-day activities were substantially restricted. Plaintiff has presented evidence that she could not work as she was unable to fulfill her duties as a nephrology nurse which included accessing patients, applying dialysis machines to patients, checking patients' blood pressure and pulses, and taking notes. Plaintiff's claims are corroborated by Dr. Kolisetty's affirmation wherein she states that treated plaintiff for over four months and based upon her examinations of the plaintiff and diagnostic testing, plaintiff was disabled during that time. See, Venegas v. Signh, 962 N.Y.S.2d 67 (1st Dept. 2013)(Plaintiff's evidence that his injuries were caused by the accident and his physician's statements that he was totally disabled for over three months during the relevant period is sufficient to raise an issue of fact); Feliz v. Weir, 968 N.Y.S.2d 11 (1st Dept. 2013)(Plaintiff raised an

[1]The Toure decision appears to indicate that claims of neck or back injury resulting from bulging or herniated discs may be considered either under the category of a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system," as well as the 90/180 day category (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 352, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002].

issue of fact by submitting evidence that she did not go to work and received disability benefits for over 90 days during the 180 days following her accident, as well as medical reports of her treating physician revealing continuing range of motion limitations throughout the relevant period, which prevented her from working and performing regular daily activities during the relevant time period, and rendered her totally disabled); James v. Perez, 945 N.Y.S.2d 283 (1st Dept. 2012)(The opinion of plaintiff's treating physician, as well as the medical reports relied upon, were sufficient to raise an issue of fact as to the 90/180–day claim).

In opposition, defendant fails to raise any issues of fact. Dr. Goldmark did not examine plaintiff until almost three years after the accident. See, Seepersaud v. L & M Bus Corp., 33 N.Y.S.3d 692 (1st Dept. 2016)(Defendants failed to meet their prima facie burden as to plaintiff's 90/180–day claim where its experts did not examine plaintiff until over three years after the accident and did not offer an opinion concerning her condition during the relevant period; and did not submit other evidence, such as medical records or deposition testimony, to disprove plaintiff's claim that she was confined to home and disabled from work during the relevant 180–day period); Steele v. Santana, 4 N.Y.S.3d 181 (1st Dept. 2015)(Defendants failed to meet their initial burden where examinations by defendants' physicians took place well after the relevant 180–day period, they did not opine about plaintiff's condition during that period, and defendants submitted no other evidence refuting plaintiff's claim that she did was unable to return to work for three months following the accident). See also, Silverman v. MTA Bus Co., 955 N.Y.S.2d 597 (1st Dept.2012); Jeffers v. Style Tr. Inc., 952 N.Y.S.2d 541 (1st Dept.2012); Quinones v. Ksieniewicz, 915 N.Y.S.2d 70 (1st Dept.2011).

Here, Dr. Goldmark fails to offer a relevant medical opinion regarding plaintiff's condition during the four month period of treatment. Moreover, his statement that plaintiff was not disabled for the first six months after the accident carries no probative value as the 90/180 claims requires that plaintiff's customary activities be significantly impaired only 90 out of the first 180 days, or stated another way, for three months out of the first six months following the accident. Therefore, since Dr. Goldmark's affidavit fails to raise a triable issue of fact regarding plaintiff's 90/180 claim, plaintiff's motion must be granted. See, Nicholson v. Bader, 962 N.Y.S.2d 350 (2d Dept. 2013)(Plaintiff satisfied this burden by establishing that he was out of work for more than 90 days during the 180–day period following the accident and that the causes of his absence were medically determined injuries that were caused by the accident); Refuse v. Magliore, 919 N.Y.S.2d 886 (2d Dept. 2011)(Defendant failed to raise a triable issue of fact as to whether the plaintiffs had a medically determined injury that prevented them from performing substantially all of the material acts constituting their

usual and customary daily activities during not less than 90 days during the first 180 days immediately following the subject accident; In his reports detailing his medical findings, the defendant's expert failed to relate those findings to the plaintiffs' 90/180 serious injury claims, thus, the reports were not sufficient to raise an issue of fact in opposition to the plaintiffs' prima facie showing); Kapeleris v. Riordan, 933 N.Y.S.2d 92 (2d Dept. 2011) (Plaintiff's evidence was sufficient to establish that she sustained "a medically determined injury" which prevented her from performing substantially all of her usual and customary daily activities for at least 90 of the first 180 days following the accident; in opposition, defendant failed to raise a triable issue of fact where defendant's expert failed to relate his findings to the plaintiff's serious injury claims under the 90/180–day category for the period of time immediately following the accident); Barnes v. Stewart, 684 N.Y.S.2d 698 (3d Dept. 1999)(Plaintiff's medical records indicate that as a result of the injury, she was out of work for 141 days following the accident, and plaintiff's affidavit state that plaintiff was unable to perform her usual and customary daily activities for at least 90 days following the accident; since defendant submitted no medical evidence to contradict the opinions of plaintiff's physicians, there is no issue of credibility to be resolved by a jury and Supreme Court properly found that plaintiff had suffered a serious injury "if in no other way then by compliance with the '90/180' rule").

Notwithstanding that plaintiff here did not present sufficient evidence to raise an issue of fact with respect to "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system, since she demonstrated a serious injury pursuant to the 90/180 claim, she may recover for all injuries causally related to the accident, (Rubin v. SMS Taxi Corp., 898 N.Y.S.2d 110 (1st Dept. 2010), even those that do not meet the serious injury threshold. Birch v. 31 Northern Blvd., 32 N.Y.S.3d 142 (1st Dept. 2016); Lopez v. Abayev Transit Corp., 960 N.Y.S.2d 419 (1st Dept. 2013); Vanegas v. Signh, 962 N.Y.S.2d 67 (1st Dept. 2013). Accordingly, defendant's cross-motion for summary judgment must be denied.

This constitutes the decision and Order of this Court.

Dated: 3/3/17

Hon. Alison Y. Tuitt