Edney v Rosado
2017 NY Slip Op 30879(U)
April 21, 2017
Supreme Court, Queens County
Docket Number: 524/15
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

ERIKA EDNEY,

Plaintiff,

-against-

JOSE ROMAN ROSADO, et al.,

Defendants.

Index No. 524/15

Motion
Date March 7, 2017

Motion
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Upon the foregoing papers it is ordered that this motion by plaintiff, Erika Edney for summary judgment against defendants Jose Roman Rosado, All Transit, LLC., New York City Transit Authority, Metropolitan Transportation Authority and the City of New York on liability grounds and cross motion by defendants Jose Roman Rosado, All Transit, LLC, New York City Transit Authority, Metropolitan Transportation Authority and the City of New York for summary judgment dismissing the complaint of plaintiff, Erika Edney, pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of the Insurance Law § 5102(d) are decided as follows:

This action arises out of an automobile accident that occurred on March 21, 2014. Cross-moving defendants have submitted proof in admissible form in support of the motion for summary judgment on serious injury grounds, for all categories of serious injury. Cross-moving defendants submitted inter alia, affirmed reports from two independent examining physicians (a neurologist and an orthopedist) and plaintiff's own examination before trial transcript testimony.

APPLICABLE LAW

Under the "no-fault" law, 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]). In the present action, the burden rests on defendants 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, supra; 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. It must be noted that a chiropractor is not one of the persons authorized by the CPLR to provide a statement by affirmation, and thus, for a chiropractor, only an affidavit containing the requisite findings will suffice (see, CPLR 2106; Pichardo v. Blum, 267 AD2d 441[2d Dept 1999];

Feintuch v. Grella, 209 AD2d 377[2d Dept 2003]).

In any event, 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]). For example, in Parker, supra, it was held that a medical affidavit, which demonstrated that the plaintiff's threshold motion limitations were objectively measured and observed by the physician, was sufficient to establish that plaintiff has suffered a "serious injury" within the meaning of that term as set forth in Article 51 of the Insurance Law. In other words, "[a] physician's observation as to actual limitations qualifies as objective evidence since it is based on the physician's own examinations." 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]).

DISCUSSION

A. *Cross-moving defendants established a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d), for all categories.*

The affirmed report of cross-moving defendants' independent examining neurologist, Monette G. Basson, M.D., indicates that an examination conducted on April 5, 2016 revealed a diagnosis of: no objective abnormalities at all. She opines that an MRI of the cervical spine shows degenerative changes. Dr. Basson concludes that "there is no objective evidence of ongoing neurologic disability or need for test or treatment."

The affirmed report of cross-moving defendants' independent examining orthopedist, Igor Rubinshteyn, M.D., indicates that an examination conducted on June 6, 2016 revealed a diagnosis of: resolved cervical spine sprain, resolved lumbar spine sprain, resolved left shoulder/arm pain referred from neck, normal examination of bilateral wrists/hands, and resolved left knee sprain. He opines that the examination was within normal limits. He further opines that there is no evidence of carpal tunnel syndrome. Dr. Rubinshteyn concludes that plaintiff can

perform all tasks of daily living, including full employment, without restrictions.

Additionally, cross-moving defendants established a prima facie case for the category of "90/180 days." The plaintiff's examination before trial transcript testimony indicates that she was not sure of how long of a period she was confined to her house and that she was able to leave her house to do something other than go to a medical appointment within the first three months; and she was confined to bed the first couple of days after the accident and she doesn't remember how long after that. Such evidence shows that the plaintiff was not curtailed from nearly all activities for the bare minimum of 90/180, required by the statute.

The aforementioned evidence amply satisfied cross-moving defendants' initial burden of demonstrating that plaintiff did not sustain a "serious injury." Thus, the burden then shifted to plaintiff to raise a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (see, Gaddy v. Eyler, 79 NY2d 955 [1992]). Failure to raise a triable issue of fact requires the granting of summary judgment and dismissal of the complaint (see, Licari v. Elliott, supra).

B. Plaintiff fails to raise a triable issue of fact

In opposition to the motion, plaintiff submitted: an attorney's affirmation, plaintiff's own examination before trial transcript testimony, unsworn medical records, an affirmation of plaintiff's orthopedist, Andrew Tarleton, M.D., unsworn MRI reports, an unsworn narrative report, and a sworn operative report.

Medical records and reports by examining and treating doctors that are not sworn to or affirmed under penalties of perjury are not evidentiary proof in admissible form, and are therefore not competent and inadmissible (see, Pagano v. Kingsbury, 182 AD2d 268 [2d Dept 1992]; McLoyrd v. Pennypacker, 178 AD2d 227 [1st Dept 1991]). Therefore, unsworn reports of plaintiffs' examining doctors will not be sufficient to defeat a motion for summary judgment (see, Grasso v. Angerami, 79 NY2d 813 [1991]).

Plaintiff submitted no proof of objective findings contemporaneous with the accident. The only admissible medical proof submitted by plaintiff is the affirmed narrative report of plaintiff's orthopedist, Andrew Tarleton, M.D., who did not examine plaintiff until February 20, 2015, 11 months after the

accident. Plaintiff failed to submit any admissible medical proof that was contemporaneous with the accident showing any bulges, herniations, or range of motion limitations (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has failed to establish a causal connection between the accident and the injuries. The causal connection must ordinarily be established by competent medical proof (see, Kociocek v. Chen, 283 AD2d 554 [2d Dept 2001]; Pommels v. Perez, 4 NY3d 566 [2005]). An examination almost a year after the accident is insufficient to establish a causal connection between the accident and the injuries (see, Soho v. Konate, 85 AD3d 522 [1st Dept 2011][holding that a medical report based upon an examination five (5) months after the accident is not contemporaneous]); see also, Toulson v. Young Han Pae, 13 AD3d 317 [1st Dept 2004]; Thompson v. Abassi, 15 AD3d 95 [1st Dept 2005]).

Also, the plaintiff has failed to come forward with sufficient evidence to create an issue of fact as to whether the plaintiff sustained a medically-determined injury which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 of the 180 days immediately following the underlying accident (Savatarre v. Barnathan, 280 AD2d 537 [2d Dept 2001]). The record must contain objective or credible evidence to support the plaintiff's claim that the injury prevented plaintiff from performing substantially all of her customary activities (Watt v. Eastern Investigative Bureau, Inc., 273 AD2d 226 [2d Dept 2000]). When construing the statutory definition of a 90/180-day claim, the words "substantially all" should be construed to mean that the person has been prevented from performing her usual activities to a great extent, rather than some slight curtailment (see, Gaddy v. Eyler, 79 NY2d 955; Licari v. Elliott, 57 NY2d 230 [1982]; Berk v. Lopez, 278 AD2d 156 [1st Dept 2000], lv denied 96 NY2d 708 [2001]). Plaintiff fails to include experts' reports or affirmations which render an opinion on the effect the injuries claimed may have had on the plaintiff for the 180-day period immediately following the accident. As such, plaintiff's submissions were insufficient to establish a triable issue of fact as to whether plaintiff suffered from a medically determined injury that curtailed her from performing her usual activities for the statutory period (Licari v. Elliott, 57 NY2d 230, 236 [1982]). Accordingly, plaintiff's claim that her injuries prevented her from performing substantially all of the material acts constituting her customary daily activities during at least 90 of the first 180 days following the accident is insufficient to raise a triable issue of fact (see, Graham v Shuttle Bay, 281 AD2d 372 [1st Dept 2001]; Hernandez v. Cerda, 271 AD2d 569 [2d Dept 2000]; Ocasio v. Henry, 276 AD2d 611 [2d Dept 2000]).

Furthermore, plaintiff's attorney's affirmation is not admissible probative evidence on medical issues, as plaintiff's attorney has failed to demonstrate personal knowledge of the plaintiff's injuries (Sloan v. Schoen, 251 AD2d 319 [2d Dept 1998]).

Moreover, plaintiff's self-serving deposition statements are "entitled to little weight" and are insufficient to raise triable issues of fact (see, Zoldas v Louise Cab Corp., 108 AD2d 378, 383 [1st Dept 1985]; Fisher v. Williams, 289 AD2d 288 [2d Dept 2001]).

Therefore, plaintiff's submissions are insufficient to raise a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the cross motion by defendants Jose Roman Rosado, All Transit, LLC., New York City Transit Authority, Metropolitan Transportation Authority and the City of New York for summary judgment on "serious injury" grounds is granted and the plaintiff's Complaint is dismissed as to all categories.

As the defendants' cross motion for summary judgment on serious injury grounds is granted, plaintiff's motion for summary judgment on liability grounds is hereby rendered moot.

The clerk is directed to enter judgment accordingly.

Movant shall serve a copy of this order with Notice of Entry upon the other parties of this action and on the clerk. If this order requires the clerk to perform a function, movant is directed to serve a copy upon the appropriate clerk.

The foregoing constitutes the decision and order of this Court.

Dated: April 21, 2017

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Howard G. Lane, J.S.C.