Tagufa v Pierre-Pierre
2017 NY Slip Op 32315(U)
October 31, 2017
Supreme Court, Nassau County
Docket Number: 600094-15
Judge: Daniel R. Palmieri

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. DANIEL PALMIERI, J.S.C.

----------X TRIAL/IAS PART 17

FREDELINA TAGUFA and GILL TAGUFA, Index No.: 600094-15

Plaintiffs, Mot. Seq. 001, 002

- against -

Mot. Date:6-29-16
Submit Date: 9-16-16

F. PIERRE-PIERRE, JR., ISLANDE RAPHAEL and LYONEL PAUL,

XXX

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 4-21-16.....1
Notice of Motion, dated 5-4-16.....2
Affirmation in Opposition, dated 7-21-16.....3
Reply Affirmation, dated 7-27-16.....4
Reply Affirmation, dated 8-26-16.....5
Sur-ReplyAffirmation, dated 9-16-16.....6

These separate motions by defendants pursuant to CPLR 3212 for an order dismissing the complaint are granted and the complaint is dismissed.

This is an automobile accident case arising from a rear-end collision that occurred in Uniondale, New York, on June 20, 2013. Defendant Lyonel Paul, and defendants F. Pierre-Pierre Jr. and Islande Raphael, representing the second and third cars in this chain collision, separately move for an order dismissing the complaint on the ground that plaintiff Fredelina Tagufa (plaintiff) has not met the "No-Fault" threshold. That is, she has not suffered a "serious injury" as defined by the Insurance Law, and thus is barred from pursuing this action by statutory proscription.

"Serious injury" is

> "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 one hundred and eighty days immediately following the occurrence of the injury or impairment."

Insurance Law § 5102(d).

The legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries. *Dufel v. Green*, 84 NY2d 795, 798 (1995). Prior to trial this task falls to the courts by way of motions for summary judgment. *Licari v Elliot,* 57 NY2d 230 (1982). On such a motion, the movant bears the initial burden of presenting competent evidence that there is no cause of action. *Browdame v Candura*, 25 AD3d 747, 748 (2d Dept. 2006). Absent such a showing, the Court must deny the motion without reference to the strength of the opposing papers under well-established summary judgment jurisprudence. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985); *Greenidge v Righton Limo, Inc.*, 43 AD3d 1109 (2d Dept. 2007).

Once such a showing is made, however, the burden shifts to the plaintiff to demonstrate the presence of an injury that satisfies at least one of the categories of injuries set forth above. Objective proof of such an injury is required. *Toure v. Avis Rent a Car Systems*, 98 N.Y.2d 345, 350 (2002). It is well-established that a plaintiff's subjective complaints alone are not sufficient. *Gaddy v. Eyler*, 79 NY2d 955, 957-58

(1992).

In her bills of particulars served in response to defendants' demands, the plaintiff alleges that she sustained 1) a "permanent consequential limitation of use of a body organ or member," 2) a "significant limitation of use of a body function or system, " and 3) injuries that satisfy the "90/180" definition of a "serious injury." Accordingly, the Court need not and does not address the first six categories set forth in the statute. The plaintiff bases these claims on, among others, the following alleged physical injuries: tendon tear and other injuries to the right shoulder; disc herniations of the lumbar and cervical spine; and radiculopathy of the cervical, thoracic and lumbar spine.

The defendants present certain medical records, including an affirmed report by Dr. Isaac Cohen, an orthopedist, who examined the plaintiff on behalf of defendants. He used a goniometer and compared his findings to normal values. While noting MRI reports that showed spinal disc herniations, he attributed them to normal degenerative changes associated with the plaintiff's age (mid-fifties), and in any event not causing restrictions on motion of a significant nature. The defendants thus have made out their *prima facie* case that plaintiff suffered no more than strains and/or sprains, as concluded by Dr. Cohen, which cannot satisfy the first two categories identified in plaintiff's bill of particulars. *See, e.g., Rabolt v Park,* 50 AD3d 995 (2d Dept. 2008); *Washington v Cross,* 48 AD3d 457 (2d Dept. 2008).

Further, plaintiff's own deposition transcript provides *prima facie* proof undermining the claim that she was unable to perform substantially all of the material acts which constituted her usual and customary daily activities for 90 of the 180 days following the accident, as she went back to work full time within 90 days after the

accident. *See Bravo v Martinez,* 105 AD3d 458 (1st Dept. 2013). The record also reveals prior injuries to the same affected areas in 1998 and 2010 resulting from motor vehicle accidents. There was also a work-related accident in 2005 causing injury to the affected areas, right shoulder and back. Dr. Cohen could not comment on the plaintiff's assertions regarding the same because he indicated that she refused to provide him with information about past accidents/injuries.

In response, plaintiff concedes the earlier injuries to the lumbar and cervical spine and right shoulder, but argues that she was asymptomatic until the accident that led to this present suit. She is thus relying on exacerbation of prior injuries, or re-injury where she had previously healed.

She presents an affirmed orthopedic report dated May 20, 2016 containing a review of medical records and a physical examination by Dr. David Benatar, an orthopedist. He had assessed her before, related to the 2010 accident, and states that "these injuries essentially overlap." He thus indicates that he had a basis for comparison. He performed range of motion testing with the aid of a goniometer, which could apply to the first two categories of "serious injury" asserted in plaintiff's bill of particulars, and found deficits. He states that she had to stop working as a nurse as a result of her ongoing symptoms.

However, he does not submit in his affirmation evidence of objective testing regarding range of motion deficits stemming from the prior 2010 accident or contemporaneous with the present accident in 2013. Thus, plaintiff's contention that she was asymptomatic until the subject accident is unsupported by any objective proof. That

is not cured by Dr. Benatar's statement that she returned to work as a nurse after the 2010 accident but had to stop working after the 2013 accident, as it too is unsupported by admissible medical proof prior to, and then contemporaneous with, the 2013 accident.

Dr. Benatar cannot rely on MRIs from prior accidents in support of his conclusion that her back and right shoulder injuries were significantly worse after the 2013 accident, because the earlier MRI reports are inadmissible. Dr. Benatar states on the first page of his report that "first is an attempt at comparing MRI results. I do not have the studies. I have the reports. I have previously reviewed her prior studies. I did not have the opportunity to review the studies after this accident." A physician is not permitted to rely upon the unsworn MRI reports of another physician. *Hernandez v Cespedes,* 141 AD3d 483 (1st Dept. 2016); *Vickers v Francis,* 63 AD3d 1150 (2d Dept. 2009); *Porto v. Blum,* 39 AD3d 614 (2d Dept. 2007).

Here, there is no indication that the MRI reports relied upon by Dr. Benatar were sworn to by the (original) reading radiologist. Nor is there any clear averment by Dr. Benatar that he personally reviewed either the pre-accident MRI films that formed the basis of his comparison or the sworn MRI report of a prescribing radiologist. His statement that he "previously reviewed" the prior studies is without probative value because he does not identify any particular MRI film (as opposed to those where he was relying only on the unsworn reports), nor, relatedly, what each one he read showed.

The Addendum to Orthopedic Narrative Report dated June 13, 2016 cures the inadmissible nature of the MRI reports made contemporaneously with the subject accident and thereafter, as Dr. Benatar had before him a CD-ROM containing images of

the actual films. However, none predate the accident and thus the conclusion that they show a worsening of her condition as a result of the accident is not based on competent evidence, as the Court has no basis for comparison of admissible findings pre- and post-accident. *See Frisch v Harris,* 101 AD3d 941 (2d Dept. 2012); *Cantave v Gelle,* 60 AD3d 988 (2d Dept. 2009). As noted above, the same infirmity is present with regard to the deficits found in the range of motion testing that is claimed to have been the result of this accident.

The several affirmed reports by Alvin Stein, M.D. and Rashid Altafi, M.D. from Hempstead Medical, P.C. are similarly defective; they contain indications of current deficits and reports of pain, with conclusions of disability caused by the accident of June 20, 2013 – but without comparison to her condition before the accident. In that regard, the simple statement found in these reports that "Patient was in her usual state of health until she was involved in a motor vehicle accident, which occurred on June 20, 2013" is clearly conclusory and thus insufficient, as it is made without reference to admissible medical proof.

The Court also notes that in his report dated September 5, 2013 Dr. Stein stated that she has a moderate disability of 50-74% (which is found in the other reports from Hempstead Medical as well), but also that she has returned to work full-time as a nurse, which was within 90 days of the accident. On October 7, 2013 he notes that she had stopped working, but this was "due to unrelated surgery." On January 17, 2014 he noted that she had returned to work, full-time. There remains no evidence that plaintiff was forced to forego "substantially all of the material acts which constitute such person's

usual and customary daily activities for not less than ninety days during one hundred and eighty days immediately following the occurrence." Insurance Law § 5102(d). Thus, there is insufficient proof to rebut the defendants' showing that plaintiff cannot satisfy the "90/180" category of "serious injury."

In sum, the plaintiff has presented admissible proof that she has suffered injuries sufficient to satisfy the first two categories of injuries set forth in her Bill of Particulars. However, in view of her prior injuries to the same areas of the body she has not shown that they were caused by this accident, given the lack of admissible medical proof of her medical condition before the subject accident occurred. In that regard, plaintiff does not cite cases for the proposition that a court may accept the simple undocumented statement of a physician that the latest injury was the one that caused the injuries alleged where there had been a prior traumatic injury to the same parts of the body (as opposed to simple degenerative changes).

Accordingly, both motions are granted and the plaintiff's complaint is dismissed in its entirety. In view of this result, her husband's derivative action also is dismissed.

All contentions not discussed either are unnecessary to the result reached or are without merit. All requrests for relief not specifically addressed are denied.

This shall constitute the Decision and Order of this Court.

ENTER:

DATED: October 31, 2016
Mineola, New York

HON. DANIEL PALMIERI
Supreme Court Justice

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