Keo v Lim
2011 NY Slip Op 34249(U)
October 6, 2011
Supreme Court, Bronx County
Docket Number: 300989/09
Judge: Sharon A.M. Aarons

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IAS 24

----------X

STEPHANIE KEO,

Plaintiff,

-against -

KIMMY H. LIM, MONY KEO, JOSE GUERRA and RAMON E. MEJIA,

Defendants.

----------X

Index No. 300989/09
Submission Date 7/29/11

DECISION and ORDER

Hon. SHARON A.M. AARONS

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of motion, as indicated below:

Papers	**Numbered**
Notice of Motion/Order to Show Cause and Exhibits Annexed	1
Answering Affidavit and Exhibits	2
Reply Affidavit and Exhibits	3

Upon the foregoing papers the Decision and Order on this motion is as follows:

Defendants moved for summary judgment pursuant to CPLR § 3212 dismissing the complaint and cross-claims on the grounds that the plaintiff did not sustain a serious injury within the meaning of the no-fault law as set forth in New York State Insurance Law § 5102(d).

Plaintiffs commenced this action seeking compensation for injuries sustained as a result of a motor vehicle accident on June 23, 2006.

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. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). In the present action, the burden rests on the defendant to establish, by the submission of evidentiary proof in admissible form, that the plaintiff did not suffer a

"serious injury." *Lowe v. Bennet*, 122 A.D.2d 728, 511 N.Y.S.2d 603 (1st Dept. 1986), *aff'd*, 69 N.Y.2d 701, 512 N.Y.S.2d 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, in opposition to a defendant's motion, to submit proof of serious injury in admissible form. *Alvarez*, 68 N.Y.2d at 326; *Licari*, 57 N.Y.2d at 235, *Lopez v. Senatore*, 65 N.Y.2d 1017, 494 N.Y.S.2d 101 (1985); *Reid v. Wu*, 2003 WL 21087012, 2003 N.Y. Slip Op. 50816U, * 2 (Sup. Ct., Bronx County 2003).

In support of their motion, defendants submitted a copy of the pleadings; an affirmed report from Dr. Guatam Khakhar; three unaffirmed reports by Dr. Alexander Visco; three affirmed reports by Dr. Visco; two unaffirmed reports by Dr. Louis Rose; an affirmed report by Dr. Robert Israel; two affirmed reports by Dr. Stephen Lastig; and the plaintiff's deposition transcript. Only evidence submitted in proper form will be considered by the court. *Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991); *Copeland v. Kasalica*, 6 A.D.3d 253, 775 N.Y.S.2d 276 (1st Dept. 2004); *Shinn v. Catanzaro*, 1 A.D.3d 195, 767 N.Y.S.2d 88 (1st Dept. 2003).

Defendants established a prima facie entitlement to summary judgment on the threshold serious injury question by the submission of the expert medical affirmation of Dr. Isreal who conducted an independent orthopedic examination of plaintiff on November 17, 2010, quantifying normal range of motion to the plaintiff's actual range of motion in numerical degrees for her cervical, thoracic and lumbar spines; her left shoulder and her left wrist and hand. Dr. Isreal concluded that plaintiff had full range of motion in all the aforementioned regions of her body. He diagnosed her as having resolved sprains to the cervical, thoracic and lumbar spines, the left shoulder and the left wrist/hand. Dr. Lastig did an independent radiological review of the MRI films of plaintiff's lumbar spine and left hand and found them to be within normal limits.

In support of her opposition, plaintiff submitted copies of an affirmed report from Dr. Visco dated May 29, 2007, unaffirmed reports by Dr. Visco, affirmed report of Dr. Guata, Khakhar, and affirmed and unaffirmed MRI and x-ray reports.

In his report, Dr. Visco summarized the treatment of plaintiff from her first visit on July 5, 2006, to her last visit on April 26, 2007. On the plaintiff's first visit, Dr. Guata Khakhar, who worked at the same facility as Dr. Viscoo, did an examination of plaintiff's lumbar spine quantifying normal range of motion to the plaintiff's actual range of motion in numerical degrees. Dr. Khakhar found that she had limitation in her lumbar spine. Dr. Visco incorporated Dr. Khakhar's report into his report dated May 29, 2007. Dr. Visco's report indicated that on subsequent visits after July 5, 2006, he did physical examinations of plaintiff's cervical and lumbar spine, and lower extremities, but failed to quantify normal range of motion to the plaintiff's actual range of motion in numerical degrees.

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 can be used to substantiate a claim of a serious injury (*see, e.g., Dufel v. Green*, 84 N.Y.2d 795, 798, 647 N.E.2d 105 (1995); *Lopez*, 65 N.Y.2d at 1020). An expert's *qualitative* assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see Dufel,* 84 N.Y.2d at 798); *Toure v. Avis Rent A Car*; 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002)). To raise a triable issue of fact plaintiffs' physician must delineate a specific percentage of the loss of range of motion or a sufficient description of the quantitative nature of plaintiffs' limitations based on the normal function, purpose and use of the body part. *Vasquez v. Reluzco,* 28 A.D.3d 365, 814 N.Y.S.2d 117 (1st Dept. 2006); *Bent v. Jackson*, 15 A.D.3d 46, 49, 788 N.Y.S.2d 56(1st Dept. 2005). Here, plaintiff failed to offer reports by Dr. Visco in acceptable

form, comparing plaintiff's actual range of motion to normal range of motion, except on plaintiff's first visit. Hence, plaintiff has not raised a triable issue of fact as to whether she has restriction in her range of motion.

Plaintiff testified that she was in a prior car accident in 1996 in which she injured her neck and and a subsequent car accident in 2010, in which she again injured her neck. She testified that she experienced pain in her hand and was to have surgery, but the insurance company would not pay for it. She dropped out of high school in tenth grade for reasons unrelated to the accident, and since the accident has remained at home preparing for the GED examination. She further testified that she was in bed for only two weeks. She was not employed at the time of the accident and was not employed at the time of the deposition in June 2010 although she looked for work at places like Best Buy. She testified that her limitations are that she does not ride the bicycle and run as much as she used to before the accident.

A review of Dr. Visco's affirmed report dated December 12, 2006, shows that plaintiff for the first time complains of pain to the left hand. Irrespective of the MRI findings of the left hand taken on February 9, 2007, there is no casual connection between the accident and the complaint of pain some six months after the accident, and where she had been seeing Dr. Visco for complaints regarding the spine.

The court finds that the existence of bulging/herniation discs does not per se constitute a serious injury and it is still incumbent upon the plaintiff to provide objective admissible evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration. *Noble v. Ackerman*, 252 A.D.2d 392, 675 N.Y.S.2d 86 (1st Dept 1998); *Santiago v. Nimbus Serv. Corp.*, 18 Misc. 3d 136A, 862 N.Y.S.2d 817, 2008 NY Slip Op 50253U (App. Term, 1st Dept 2008). Here, plaintiff failed to raise a triable question of fact as to whether her injuries were serious or casually related to the accident *See Byong Yol Yi v. Canela*, 70 A.D.3d 584, 895 N.Y.S.2d 397 (1st Dept 2010); *Torres v. Triboro Servs.*,

Inc., 2011 NY Slip Op 3189, * 1 (1st Dept April 21, 2011); *Shu Chi Lam v. Dong,*, 2011 NY Slip Op 3915, * 1 (1st Dept May 10, 2011). Furthermore, plaintiff failed to raise a triable issue that the herniation caused any physical limitation.

Plaintiff offered no medical records to show that any symptoms she experienced as a result of the accident differed from the symptoms she experienced due to the fibromyalgia. *See Pommells v. Perez*, 4 N.Y.3d 566, 580, 830 N.E.2d 278, 797 N.Y.S.2d 380 (2005); *Valentin v. Pomilla*, 59 A.D.3d 184, 873 N.Y.S.2d 537 (2009).

Plaintiff has not offered any evidence that she received any medical treatment since May 2007. Dr. Visco stated in his report that she had reached maximum benefit and that she should return for possible re-evaluation with any pain exacerbations. Plaintiff testified that she stopped therapy because she was feeling somewhat better and Dr. Visco told her she could stop, there was nothing else he could do for her. Other than seeking treatment for her hand, she has not sought any treatment for any of the injuries she sustained as a result of the accident. The First Department has held that an unexplained gap in treatment renders the medical proof by the plaintiff insufficient. *Fowlin v. Diallo,* 18 Misc. 3d 141A, 859 N.Y.S.2d 894 (App. Term 1st Dept 2008); *Yagi v. Corbin,* 44 A.D.3d 440, 843 N.Y.S.2d 276 (1st Dept 2007); *Baez v. Rahamatali,* 24 A.D.3d 256, 808 N.Y.S.2d 171 (1st Dept 2005); *Melendez v. Feinberg*, 306 A.D.3d 98, 759 N.Y.S.2d 869 (1st Dept 2003). The Court of Appeals held that "the law surely does not require a record of needless treatment in order to survive summary judgment ... a plaintiff who terminates therapeutic measures ... must offer some reasonable explanation for having done so." *Pommells v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005). The court finds that plaintiff's cessation of treatment renders her medical proof insufficient to raise a triable issue of fact.

Plaintiff failed to establish that she sustained a serious injury in any of the applicable categories of Insurance Law § 5102 (d). *Hernandez v. Almanzar*, 32 A.D.3d 360, 821 N.Y.S.2d 30 (1st Dept .2006); *Shamsooden v. Kibong*, 41 A.D.3d 577, 839 N.Y.S.2d 765 (2nd Dept. 2007); *Oberly v. Bangs Ambulance Inc.*, 96 N.Y.2d 295, 299, 751 N.E.2d 457, 727 N.Y.S.2d 378 (2001).

It is hereby

ORDERED, that the complaint an cross-claims against the defendants KIMMY H. LIM, MONY KEO, JOSE GUERRA and RAMON E. MEJIA are dismissed; it is further

ORDERED, that the defendants serve a copy of this Order with notice of entry upon plaintiff within thirty (30) days of this order and file proof thereof with the Clerk of this Court.

The forgoing constitutes the decision and Order of the Court.

Dated: October 6, 2011

SHARON A.M. AARONS. J.S.C.