Mangano v Berger
2013 NY Slip Op 32725(U)
October 21, 2013
Supreme Court, Queens County
Docket Number: 20819/11
Judge: Howard G. Lane

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

PETER MANGANO, ALYSSA MANGANO by her mother and natural guardian GAETANA MANGANO, LEAH MANGANO by her mother and natural guardian, GAETANA MANGANO and GAETANA MANGANO individually,

Plaintiffs,

-against-

HELEN BERGER,

Defendant.

HELEN BERGER,

Third-Party Plaintiff,

-against-

PETER MANGANO,

Third-Party Defendant.

Index No. 20819/11

Motion Date September 3, 2013

Motion Cal. No. 102

Motion Sequence No. 2

	Papers Numbered
Notice of Motion-Affidavits-Exhibits...	1-4
Opposition.....	5-7

Upon the foregoing papers it is ordered that this motion by defendant, Helen Berger for summary judgment dismissing the complaint of plaintiffs, Peter Mangano, Alyssa Mangano, and Leah Mangano, pursuant to CPLR 3212, on the ground that said plaintiffs have not sustained a serious injury within the meaning of Insurance Law § 5102(d) is decided as follows:

This action arises out of an automobile accident that occurred on December 26, 2010. Defendant has submitted proof in admissible form in support of the motion for summary judgment for plaintiff, Peter Mangano as to all categories and as to plaintiffs, Alyssa Mangano and Leah Mangano as to only the ninth category of "90/180 days."

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 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(1) Defendants Alyssa and Leah Mangano

Regarding plaintiffs, Alyssa Mangano and Leah Mangano, defendant has failed to establish a prima facie case as to all categories other than the ninth category of "90/180 days" as she has failed to submit competent medical evidence regarding said plaintiffs for the other categories. 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]). In the instant case, defendant has presented no medical evidence from any physicians regarding plaintiffs, Alyssa Mangano or Leah Mangano.

Defendant established a prima facie case for the category of "90/180 days" regarding infant plaintiffs, Alyssa Mangano and Leah Mangano. The infant plaintiffs' mother, Gaetana Mangano's examination before trial transcript testimony indicates that neither infant plaintiff sustained any injuries as a result of the accident. Such evidence shows that the plaintiffs, Alyssa Mangano and Leah Mangano were not curtailed from nearly all activities for the bare minimum of 90/180, required by the statute.

For all categories except for the category of "90/180 days," the evidence submitted by defendant in support of the motion was insufficient to establish a *prima facie* case that the plaintiffs, Alyssa Mangano and Leah Mangano had not sustained a serious

injury as defined by Insurance Law § 5102(d) (see, CPLR 3212[b]; Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Oxford Paper Co. v. S.M. Liquidation Co, Inc., 45 Misc 2d 612 [Sup Ct, NY County 1965]; Loadholt v. NYCTA, 12 AD3d 352 [2d Dept 2004]; Mariaca-Olmos v. Mizrhy, 226 AD2d 437 [2d Dept 1996]; Coscia v. 938 Trading Corp., 238 AD2d 538 [2d Dept 2001]). Since the defendants failed to establish a prima facie case that the plaintiffs, Alyssa Mangano and Leah Mangano had not sustained a serious injury, the burden does not shift to these plaintiffs to produce evidence in admissible form to support the claim of serious injury, for any category other than the category of "90/180 days." The motion must be denied as to these categories regardless of the sufficiency of the opposing papers (see, Alvarez, supra). The Court "need not consider whether the plaintiff's papers in opposition to the defendant's motion were sufficient to raise a triable issue of fact," for all categories except for that of "90/180 days" (see, Loadholt, supra).

A(2) *Defendant established a prima facie case that plaintiff, Peter Mangano did not suffer a "serious injury" as defined in Section 5102(d).*

Regarding plaintiff, Peter Mangano, defendant submitted, inter alia, an affirmed report from an independent examining orthopedist and plaintiff's own examination before trial transcript testimony.

The affirmed report of defendant's independent examining orthopedist, Howard Levin, M.D., indicates that an examination of plaintiff, Peter Mangano, on February 25, 2013 revealed a diagnosis of: resolved cervical spine sprain, resolved lumbar spine sprain, resolved left wrist sprain, resolved right knee contusion, and normal examination of the left thumb. He opines that there is no permanent injury, and no physical therapy or treatment is necessary. Dr. Levin concludes that plaintiff can perform all activities of daily living including full employment without restrictions.

Additionally, defendant established a prima facie case for the category of "90/180 days" regarding plaintiff Peter Mangano. The plaintiff's examination before trial transcript testimony indicates that he was not confined to bed or home following the accident. 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 defendant's 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. Plaintiffs fail to raise a triable issue of fact as to plaintiff, Peter Managno for all categories or as to the category of "90/180 days" for the plaintiffs, Alyssa Mangano and Leah Mangano.

The plaintiff has not sustained such burden as plaintiff has not submitted any papers opposing the defendant's motion. As the motion is unopposed by plaintiff, Peter Mangano, there are no triable issues of fact. Accordingly, the defendant's motion is granted as against plaintiff, Peter Mangano. Accordingly, the plaintiff, Peter Mangano's Complaint is dismissed as to all categories based upon a failure to satisfy the no-fault threshold.

The plaintiffs have failed to come forward with sufficient evidence to create an issue of fact as to whether the plaintiffs, Alyssa Mangano and Leah Mangano sustained a medically-determined injury which prevented them from performing substantially all of the material acts which constituted their 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]).

Accordingly, the Complaint of plaintiffs, Alyssa Mangano and Leah Mangano remains as to only the category of "90/180 days."

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: October 21, 2013

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Howard G. Lane, J.S.C.