Chauca v Legac
2013 NY Slip Op 33173(U)
October 16, 2013
Supreme Court, Queens County
Docket Number: 701039/12
Judge: Howard G. Lane

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

LUIS CHAUCA and SOLEDAD CHAUCA,

Plaintiffs,

-against-

RAYMOND J. LEGAC,

Defendant.

Index No. 701039/12

Motion
Date October 16, 2013

Motion
Cal. No. 38

Motion
Sequence No. 1

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Upon the foregoing papers it is ordered that this motion by defendant for summary judgment dismissing the complaint of plaintiff, Luis Chauca, pursuant to CPLR 3212, on the ground that plaintiff has 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 23, 2011. Defendant has submitted proof in admissible form in support of the motion for summary judgment for all categories except for the ninth category of "90/180 days." Defendant submitted, inter alia, affirmed reports from two physicians (an independent examining neurologist and an independent examining orthopedist).

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. *Defendant established a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d) for all categories except for the ninth category of "90/180 days."*

The affirmed report of defendant's independent examining neurologist, Monette Basson, M.D., indicates that an examination of plaintiff on April 8, 2013 revealed a diagnosis of: no objective neurologic abnormalities whatsoever. She opines that plaintiff sustained sprains from which she has long since fully recovered and he sees no evidence of disc protrusions of the cervical spine and disc bulges of the lumbar spine which are entirely within limits for his age. Dr. Basson concludes that plaintiff can continue working full time with no disability,

The affirmed report of defendant's independent examining orthopedist, Edward A. Toriello, M.D., indicates that an examination of plaintiff on April 18, 2013 revealed a diagnosis of: resolved cervical strain and resolved low back strain. He opines that the plaintiff's injury from the subject accident has long since resolved and he has a low back strain from another etiology. Dr. Toriello concludes that plaintiff has no causally related disability and no causally related work or activity restrictions.

Defendant has failed to raise a triable issue of fact as to the 90/180-day claim. 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 his usual activities to a great extent, rather than some slight curtailment (see, Gaddy v. Eyler, 79 NY2d 955, supra; Licari v. Elliott, 57 NY2d 230, supra; Berk v. Lopez, 278 AD2d 156 [2000], lv denied 96 NY2d 708 [2001]). Defendant's experts examined plaintiff more than 1 year after the date of plaintiff's alleged injury and accident on December 23, 2011. Defendant's experts failed to render an opinion on the effect the injuries claimed may have had on the plaintiff for the 180-day period immediately following the accident. The reports of the IME's relied upon by defendant fail to discuss this particular category of serious injury and further, the IME's took place well beyond the expiration of the 180-day period (Lowell v. Peters, 3 AD3d 778 [3d Dept 2004]). With respect to the 90/180-day serious injury category, defendant has failed to meet its initial burden of proof and, therefore, has not shifted the burden to plaintiff to lay bare his evidence with respect to this claim. As defendant has failed to establish a prima facie case with respect to the ninth category, it is unnecessary to consider whether the plaintiff's papers in opposition to defendant's motion on this issue were sufficient to raise a triable issue of fact (Manns v. Vaz, 18 AD3d 827 [2d Dept 2005)]). Accordingly, defendant is not entitled to summary judgment with respect to the ninth category of serious injury.

The aforementioned evidence amply satisfied defendant's initial burden of demonstrating that plaintiff did not sustain a "serious injury" for all categories except for the ninth category of "90/180 days".

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, 57 NY2d 230, supra).

B. Plaintiff fails to raise a triable issue of fact

In opposition to the motion, plaintiff submitted: an attorney's affirmation, an affirmation of plaintiff's physiatrist, Stephen Wilson, M.D., sworn narrative reports of plaintiff's physician, Aric Hausknecht, M.D., a sworn narrative report of plaintiff's physician, Harold James, M.D., an un-notarized narrative report of plaintiff's chiropractor, Edwin Thompson, D.C., unsworn MRI reports, an unsworn narrative report of plaintiff's physician, Sukhbir Guram, M.D., and an affirmation

of plaintiff's physician, Sebastian Lattuga, M.D.

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 also, Pagano v. Kingsbury, 182 AD2d 268 [2d Dept 1992]). 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]). The narrative report of Edwin Thompson, D.C., therefore, is not an affidavit and is inadmissible. The MRI reports are unsworn as well.

Furthermore, plaintiff's medical affirmation detailing a recent examination of plaintiff, a necessary requirement to rebutting defendant's prima facie case (see, Sauer v. Marks, 278 AD2d 301 [2d Dept 2000]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]; Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]) is insufficient. The only recent affirmation, which is by plaintiff's physician, Stephen Wilson, M.D., fails to indicate how he measured the range of motion in the cervical and lumbar spines. Besides setting forth measurements for range of motion, a physician must identify the objective tests performed in ascertaining those measurements (see, Taylor v. Terrigno, 27 AD3d 316 [1st Dept 2006]; see also, Hernandez v. Taub, 19 AD3d 368 [2d Dept 2005]). Furthermore, in his affirmation, Dr. Wilson states that he reviewed MRI's of other doctors and affirms that he relied in part on the MRI reports, however, no MRI reports have been submitted to the court in competent and admissible form. The probative value of Dr. Wilson's affirmation is reduced by the doctor's reliance on MRI's that are not in the record before the court. Since Dr. Wilson's conclusions improperly rested on another expert's work product, it is insufficient to raise a material triable factual issue (see, Constantinou v. Surinder, 8 AD3d 323 [2d Dept 2004]; Claude v. Clements, 301 AD2d 432 [2d Dept 2003); Dominguez-Gionta v. Smith, 306 AD2d 432 [2d Dept 2003); Codrington v. Ahmad, 40 AD3d 799 [2d Dept 2007]). Additionally, 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]).

Therefore, plaintiff's submissions are insufficient to raise a triable issue of fact as to all categories except for the ninth category of "90/180 days" (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the plaintiff's Complaint is dismissed as to all categories except for the ninth 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: December 5, 2013

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Howard G. Lane, J.S.C.