Swinnie v Mathieu
2015 NY Slip Op 31390(U)
July 20, 2015
Supreme Court, Queens County
Docket Number: 18783/12
Judge: Howard G. Lane

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

ERIKA SWINNIE,

Plaintiff,

-against-

RICO MATHIEU, et al.,

Defendants.

Index No. 18783/12

Motion
Date May 15, 2015

Motion
Cal. No. 120

Motion
Sequence No. 3

	Papers Numbered
Notice of Motion-Affidavits-Exhibits...	1-4
Opposition.....	5-6
Reply.....	7-8

Upon the foregoing papers it is ordered that this motion by plaintiff for an order pursuant to CPLR 2221 granting renewal and reargument of this court's order dated January 26, 2015, which order granted defendants' motion for summary judgment and, upon renewal/reargument, denying defendants' summary judgment motion is decided as follows:

A motion to renew must be based upon new facts that were not offered in the prior motion, and the party must set forth a reasonable justification for the failure to present such facts in the prior motion (see, CPLR 2221[e]; Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle Inc., 271 AD2d 636 [2d Dept 2000]; McNeill v. Sandiford, 270 AD2d 467 [2d Dept 2000]; Shapiro v. State, 259 AD2d 753 [2d Dept 1999]); or the motion must demonstrate that there has been a change in the law that would change the prior determination (see, CPLR 2221[e]; Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle Inc., supra). Renewal is not applicable here because no newly discovered material facts have been submitted by plaintiff. Additionally, even assuming arguendo that plaintiff has submitted newly discovered material facts, which it has not, plaintiff has failed to set forth any justification for failure to present such facts in the original

motion (McNeill v. Sandiford, 270 AD2d 467 [2d Dept 2000]; Shapiro v. State, 259 AD2d 753 [2d Dept 1999]). Therefore, to the extent that plaintiff seeks renewal, plaintiff's motion is denied.

A motion to reargue is addressed to the sound discretion of the court and is designed to afford a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts or misapplied controlling principles of law (see, Schneider v. Solowey, 141 AD2d 813 [2d Dept 1988]; Rodney v. New York Pyrotechnic Products, Inc., 112 AD2d 410 [2d Dept 1985]). A "motion to reargue is not an opportunity to present new facts or arguments not previously offered, nor it is designed for litigants to present the same arguments already considered by the court" (see, Pryor v. Commonwealth Land Title Ins. Co., 17 AD3d 434 [2d Dept 2005]; Simon v. Mehryari, 16 AD3d 664 [2d Dept 2005]). Moving defendant fails to set forth any relevant facts that this Court overlooked or misapprehended, or any controlling principles of law that this Court misapplied.

Plaintiff, who now submits a Supplementary Affidavit, is granted leave to renew and reargue and upon renewal/reargument, the court finds as follows:

Upon the foregoing papers it is ordered that this motion by defendants for summary judgment dismissing the complaint of plaintiff, Erika Swinnie pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of the Insurance Law § 5102(d)is decided as follows:

This action arises out of an automobile accident that occurred on April 6, 2012. Defendants have submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury. Defendants submitted inter alia, an affirmed report from an independent examining 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. *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 defendants' independent examining orthopedist, Stuart J. Hershon, M.D., indicates that an examination conducted on November 19, 2013 revealed a diagnosis of: S/P cervical sprain and lumbar sprain, resolved; S/P contusion and sprain to right thumb, right wrist and right hand, resolved. He opines that there is no current disability related to the above noted areas. Dr. Hershon concludes that the plaintiff has residual subjective complaints.

Additionally, defendants established a prima facie case for the category of "90/180 days." The plaintiff's examination before trial transcript testimony indicates that: plaintiff did not know how long she was confined to home or bed, and while she was working as a babysitter at the time of the accident, there is no lost wages claim. 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 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 raises a triable issue of fact

A medical affirmation or affidavit which is based upon a physician's personal examinations and observation of plaintiff, is an acceptable method to provide a doctor's opinion regrading the existence and extent of a plaintiff's serious injury. (O'Sullivan v. Atrium Bus Co., 246 AD2d 418, 688 NYS2d 167 [1st Dept 1980]). 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]). Plaintiff submitted medical proof that was contemporaneous with the accident showing range of motion limitations of the lumbar spine (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the lumbar spine injuries. The affirmation submitted by plaintiff's physician, Nizarali Visram, M.D. sets forth the objective examination, tests, and review of medical records which were performed contemporaneously with the accident to support his conclusion that the plaintiff suffered from significant injuries, to wit: range of motion limitation of the lumbar spine. Dr. Visam's affirmation details plaintiff's symptoms, including, low back pain. He further opines that the lumbar spine injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of March 6, 2012. Furthermore, plaintiff has provided a recent medical examination detailing the status of her lumbar spine injuries at the current point in time (Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]). The affirmation of Dr. Hasan Chughtai, D.O. provides that a recent examination by Dr. Chughtai on September 29, 2014 sets forth the objective examination, tests, and review of medical records which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit: range of motion limitations of the lumbar spine and a lumbar disc bulge, herniation, and tear. He further opines that the lumbar spine injuries are permanent in nature, significant, and causally related to the motor vehicle accident of March 6, 2012. Clearly, the plaintiff's experts' conclusions are not based solely on the plaintiff's subjective complaints of pain, and therefore are sufficient to defeat the motion (DiLeo v. Blumber, supra, 250 AD2d 364, 672 NYS2d 319 [1st Dept 1998]).

Additionally, despite defendant's contentions that there is an unexplained gap in treatment (the Court of Appeals held in Pommells v. Perez, 4 NY3d 566 [2005], that a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so), the Court finds that the gap in treatment is explained by plaintiff in her Supplementary Affidavit wherein she

avers, inter alia, that: she was denied no-fault benefits by her insurance company, she was not employed at the time of the accident and she did not have any other insurance at the time of the accident to cover the costs of further medical treatment. Such is a sufficient explanation (see, Jules v. Barbecho, 55 AD3d 548 [2d Dept 2008]).

Since there are triable issues of fact regarding whether the plaintiff sustained a serious injury to her lumbar spine, plaintiff is entitled to seek recovery for all injuries allegedly incurred as a result of the accident (Marte v. New York City Transit Authority, 59 AD3d 398 [2d Dept 2009]).

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

Accordingly, the defendants' motion for summary judgment is denied.

The clerk is directed to enter judgment accordingly.

Dated: July 20, 2015

.....
Howard G. Lane, J.S.C.