Jun v Azam
2015 NY Slip Op 32447(U)
December 16, 2015
Supreme Court, Queens County
Docket Number: 702950/13
Judge: Howard G. Lane

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

MIN KYU JUN and HYO EUN KWAK,

Plaintiffs,

-against-

RIZWAN AZAM and NATHAN DRUCKER,

Defendants.

Index No. 702950/13

Motion
Date November 5, 2015

Motion
Cal. No. 99

Motion
Sequence No. 5

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Upon the foregoing papers it is ordered that this motion by defendants, Rizwan Azam and Nathan Drucker for summary judgment dismissing the complaint of plaintiff, Hyo Eun Kwak, 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 July 3, 2010. Defendants have submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury except for the ninth category of "90/180 days." Defendants submitted inter alia, an affirmed report from 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 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, Hyo Eun Kwak 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 defendants' independent examining orthopedist, Howard Levin, M.D., indicates that an examination conducted on May 19, 2014, revealed a diagnosis of: resolved cervical and lumbar spine sprains. He opines that plaintiff is capable of performing all the tasks of daily living and working without any causally related restrictions.

Defendants have failed to establish a prima facie case with respect to the 90/180 category

Defendants have failed to raise a triable issue of fact as to 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. Elliot, 57 NY2d 23, supra; Berk v. Lopez, 278 AD2d 156 [2000], lv denied 96 NY2d 708 [2001]). Defendants' expert examined plaintiff almost four (4) years after the date of plaintiff's alleged injury and accident. Defendants' expert 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. With respect to the 90/180-day serious injury category, defendants have failed to meet their initial burden of proof and, therefore, have not shifted the burden to plaintiff to lay bare its evidence with respect to this claim. The report of the IME relied upon by defendants fails to discuss this particular category of serious injury, and further, the IME took place well beyond the expiration of the 180-day period. Lowell v. Peters, 3 AD3d 778 (3d Dept 2004). As defendants have 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 defendants' motion on this issue, are sufficient to raise a triable issue of fact (Manns v. Vaz, 18 AD3d 827 [2d Dept 2005]). Accordingly, defendants are not entitled to summary judgment with respect to the ninth category of serious injury.

The aforementioned evidence amply satisfied defendants' 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, Hyo Wun Kwak 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 fails to raise a triable issue of fact

In opposition to the motion, plaintiff submitted: an attorney's affirmation, an affirmation of plaintiff's physician, Benjamin Chang, M.D.; an unsworn narrative report of plaintiff's physician, Chang H. Lee, M.D.; an unsworn narrative report of plaintiff's physical therapist, Kevin Kim, PT; and plaintiff, Hyo Eun Kwak's own affidavit.

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, Pagano v. Kingsbury, 182 AD2d 268 [2d Dept 1992]; McLoyrd v. Pennypacker, 178 AD2d 227 [1st Dept 1991]). Therefore, unsworn reports of plaintiff's examining doctors will not be sufficient to defeat a

motion for summary judgment (see, Grasso v. Angerami, 79 NY2d 813 [1991]).

In his narrative report, Dr. Chang states that he reviewed medical records and MRI's of other doctors however no medical records or MRI's have been submitted to the court in competent and admissible form. The probative value of Dr. Chang's affidavit is reduced by the doctor's reliance on medical records that are not in the record before the court. Since Dr. Chang'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]).

Plaintiff submitted no proof of objective findings contemporaneous with the accident proving causation. Plaintiff has failed to establish a causal connection between the accident and any injury. 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 failed to submit any competent medical proof that was contemporaneous with the accident showing any range of motion limitations (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). The affirmation of Benjamin Chang, M.D. who initially examined plaintiff more than five (5) years after the accident cannot establish causation. Examinations more than five (5) years after the accident are not contemporaneous and are insufficient to establish a causal connection between the accident and the injuries (see, Soho v. Konate, 85 AD3d 522 [1st Dept 2011][holding that a medical report based upon an examination five (5) months after the accident is not contemporaneous]); see also, Toulson v. Young Han Pae, 13 AD3d 317 [1st Dept 2004]; Thompson v. Abassi, 15 AD3d 95 [1st Dept 2005]).

While it is well-established law that the rule with respect to defeating a motion for summary judgment is more flexible for the opposing party as contrasted with the moving party, as the opposing party is allowed to proffer an acceptable excuse for failing to meet the strict requirements of tender in admissible form, Friends of Animals, Inc. v. Assoc. Fur Manufacturers, Inc., 46 NY2d 1065 [NY 1979], plaintiff has failed to establish such an acceptable excuse in the instance case. Plaintiff's excuse for failing to submit a contemporaneous report in admissible form is that the facility in which plaintiff received initial treatments and examinations is closed and plaintiff was not able to locate

her treating physicians. Plaintiff does however, attach uncertified and unsworn medical reports from the initial treating physicians, but fails to explain how she obtained said reports. Plaintiff has failed to provide sufficient proof as to why there is no contemporaneous report submitted.

Furthermore, 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]).

Moreover, plaintiff's self-serving affidavit is "entitled to little weight" and is insufficient to raise triable issues of fact (see, Zoldas v Louise Cab Corp., 108 AD2d 378, 383 [1st Dept 1985]; Fisher v. Williams, 289 AD2d 288 [2d Dept 2001]).

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

Accordingly, the defendants' motion for summary judgment is granted in its entirety and the plaintiff, Hyo Eun Kwak's Complaint is dismissed.

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 16, 2015

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Howard G. Lane, J.S.C.