Cruz v Leano
2016 NY Slip Op 30123(U)
January 12, 2016
Supreme Court, Queens County
Docket Number: 703914/13
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

ROSANNA CRUZ, Plaintiff, -against- SEVERO R. LEANO and NELLIE H. LEANO, Defendants.	Index No. 703914/13 Motion Date November 12, 2015 Motion Cal. No. 43 Motion Sequence No. 3

	Papers Numbered
Notice of Motion....................	EF 19
Aff. In Support.....................	EF 20
Exhibits............................	EF 21-31
Affidavit...........................	EF 32

Upon the foregoing papers it is ordered that this motion by plaintiff, Rosanna Cruz for an order granting leave to reargue the motion of defendants for summary judgment submitted to the Court on January 20, 2015 and upon such granting, denying defendants' motion for summary judgment, is in all respects granted without opposition. Leave to reargue is granted and the Court vacates the decision dated June 23, 2015 and issues the following in its place:

Upon the foregoing papers it is ordered that this motion by defendants for summary judgment dismissing the complaint of plaintiff, Rosanna Cruz, 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 March 2, 2013. 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 surgeon 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 orthopedic surgeon, Howard Levin, M.D., indicates that an examination conducted on August 25, 2014 revealed a diagnosis of: resolved cervical spine sprain, resolved lumbar spine sprain, s/p surgery left knee contusion, and resolved right ankle contusion. He opines that there is no orthopedic disability related to the subject accident.

Additionally, defendants established a prima facie case for the category of "90/180 days." The plaintiff's examination before trial transcript indicates: that plaintiff was only confined to bed for about 15 days and only confined to home for about one (1) month and she only missed about two (2) weeks of school 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 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

In opposition to the motion, plaintiff submitted: an attorney's affirmation, unsworn and uncertified medical records, sworn medical reports of plaintiff's physician, Ahmed Riaz, M.D., an unnotarized medical report of plaintiff's accupuncturist, L. Vadim Dolsky, L.AC., an unnotarized report form plaintiff's chiropractor, Bruce Kamins, D.C., an affirmation of plaintiff's radiologist, William A. Weiner, M.D., affirmed reports of plaintiff's physician, Kenneth McCulloch, M.D., a notarized narrative report of plaintiff's accupuncturist, Yong G. Kim, L.AC., a sworn narrative report of plaintiff's physician, Raghava R. Polavarapu, M.D., plaintiff's own examination before trial transcript testimony, and plaintiff's own affidavit.

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 inter alia, range of motion limitations of the right ankle (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the right ankle injuries. The affirmation submitted by plaintiff's treating physician, Dr. Kenneth McCulloch, 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 limitations of the right ankle. Dr. McCulloch's affirmation details plaintiff's symptoms, including pain in her right ankle. He further opines that the right ankle injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of March 2, 2013. Furthermore,

plaintiff has provided a recent medical examination detailing the status of her injuries at the current point in time (Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]). The affirmation of Dr. McCulloch provides that a recent examination by Dr. McCulloch on March 18, 2015 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 right ankle. He further opines that the right ankle injuries are causally related to the subject motor vehicle accident. 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 defendants' 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 herself, in her affidavit, wherein she states that: "I could not afford to pay out of pocket for treatment despite the pain and swelling in my left knee, right ankle . . .If I had the ability to treat using no fault insurance, I would have continued to do [so]." 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 right ankle, 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: January 12, 2016

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Howard G. Lane, J.S.C.