SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

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CAROL TESTA and MICHAEL TESTA,

Plaintiff(s),

-against-

RED EXPRESS CAB CORP. and ATM M. HOSSAIN,

Defendant(s).

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Index #: 153173/14
Mot. Seq: 01

DECISION/ORDER

HON. LETICIA M. RAMIREZ

Defendants' motion, pursuant to CPLR §3212, for summary judgment on the basis that plaintiff Carol Testa ("plaintiff") did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) is granted.

Summary judgment is appropriate where there is no genuine triable issue of fact and where the papers submitted warrant that the court directs judgment in favor of the moving party as a matter of law. *Andre v Pomeroy, 35 N.Y.2d 361 (1974).* While the plaintiff has the burden of proof, at trial, of establishing a prima facie case of sustaining a "serious injury" in accordance with Insurance Law §5102(d), the defendants have the burden, on a summary judgment motion, of making a prima facie showing that plaintiff has not sustained a "serious injury" as a matter of law. In doing so, defendants must submit admissible evidence to demonstrate that there are no material issues of fact to require a trial. *Zuckerman v City of New York, 49 N.Y.2d 557 (1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Alvarez v Prospect Hosp., 68 NY2d 320 (1986).* Only if the defendants have met their burden, must the plaintiff then present evidence that she sustained a "serious injury" within the meaning of Insurance Law §5102(d). *Licari v. Elliot, 57 N.Y.2d 230 (1982).*

To establish the existence of a "serious injury" based upon the "significant limitation of use of a body function or system" or "permanent consequential limitation of use of a body organ or member" categories, the law requires more than a mild, minor or slight limitation of use. Plaintiff's claim must be supported by admissible medical evidence of a quantified medical injury or condition that has been objectively measured. *Licari v. Elliot, 57 N.Y.2d 230 (1982);*

Style v Joseph, 32 A.D.3d 212 (1st Dept. 2006); Cruz v Lugo, 67 A.D.3d 495 (1st Dept. 2009); Ikeda v Hussain, 81 A.D.3d 496 (1st Dept. 2011); Sone v Qamar, 68 A.D.3d 566 (1st Dept. 2009); Tuberman v Hall (61 A.D.3d 441 (1st Dept. 2009).

Proof of a tear in a tendon, alone, is insufficient to establish a "serious injury." Such proof must be supported by additional objective medical evidence demonstrating a significant physical limitation, and its duration, as a result of the tear. *Cruz v Lugo, 29 Misc.3d 1225(A) (Sup. Ct. Bronx 2008); Shvartsman v Vildman, 47 A.D.3d 700 (2nd Dept. 2008); Tobias v Chupenko, 41 A.D.3d 583 (2nd Dept. 2007).* In addition, subject complaints of pain, alone, will not satisfy the plaintiff's burden of establishing a "serious injury." *Scheer v Koubek, 70 N.Y.2d 678 (1987); Lloyd v Green, 45 A.D.3d 373 (1st Dept. 2007).* The Court has held that where "the evidence proffered by a plaintiff is limited to conclusory assertions tailored to meet the statutory requirements or where a doctor's submission is based only on the plaintiff's subjective complaints" summary judgment is warranted. *DiLeo v Blumberg, 250 A.D.2d 364, 365 (1st Dept. 1998).*

A review of the papers submitted reveals that, on August 2, 2013, plaintiff was a pedestrian who was allegedly struck by a taxi owned by Red Express Cab Corp. and operated by Atm Hossain. According to the plaintiff's Bill of Particulars, plaintiff alleges, inter alia, high-grade partial thickness tears of the gluteus minimus and lateral band of the gluteus medius with a small amount of fluid in the sub gluteus bursa and mild-moderate greater trochanteric bursitis of the left hip; focal intrasubstance tendinosis/partial tear of the conjoined hamstring tendon of the left hip; internal derangement of the left hip; and left elbow abrasion. Plaintiff further alleges confinement to bed for approximately one day immediately after the accident and intermittently thereafter and confinement to home for approximately five days immediately following the accident and intermittently thereafter. Plaintiff was unemployed at the time of the accident.

In support of their motion, the defendants submitted the affirmed report of orthopedist, Dr. Igor Rubinshyteyn, who examined the plaintiff on April 10, 2015. Upon his examination of the plaintiff's hips, Dr. Rubinshyteyn found normal ranges of motion in forward flexion, abduction and adduction in both hips. However, he noted limited range of motion at external rotation to 40 degrees (normal is 50 degrees) and internal rotation to 30 degrees (normal is 40 degrees) in the left and right hips. He found that the plaintiff had normal range of motion of both

elbows. Dr. Rubinshyteyn diagnosed the plaintiff with a resolved left hip sprain/strain and a resolved left elbow contusion. He opined that the plaintiff was capable of performing all of her tasks of daily living without restriction.

In opposition, the plaintiff submitted, inter alia, the affirmed report of orthopedist, Dr. Orrin Sherman, dated August 25, 2015. Although plaintiff complained of tenderness at the gluteus medius and increased gluteus pain with resisted adduction upon his examination of the plaintiff on August 25, 2015, Dr. Sherman noted that she had full ranges of motion of all examined areas, including her left hip and left knee. He further noted that she had no ecchymosis or neurologic deficit. Notably, Dr. Sherman did not state a specific diagnosis. Instead, he concluded that the plaintiff sustained "an injury to her left gluteus medius and left knee" as a result of the subject accident. He opined that her left hip injury "may" worsen over time and "may result" in permanent and residual damage. However, he opined that "further active medical treatment would be merely palliative."

The plaintiff also submitted the affirmation of radiologist, Dr. Jodi Cohen, who confirmed her MRI findings on March 13, 2014, to wit: that the plaintiff sustained high-grade partial thickness tears of the gluteus minimus and lateral band of the gluteus medius with a small amount of fluid in the sub gluteus medius bursa and mild-moderate greater trochanteric bursitis of the left hip; and focal intrasubstance tendinosis/partial tear of the conjoined hamstring tendon of the left hip.

Based upon the foregoing, the defendants met their burden of making a prima facie showing that plaintiff has not sustained a "serious injury" as a matter of law, by submitting Dr. Rubinshyteyn's affirmed report, in which he identified and described the objective medical tests employed in measuring the plaintiff's ranges of motion and concluded that the plaintiff had only minor 10 degree limitations in external and internal rotation of the left hip. See, *Style v Joseph, 32 A.D.3d 212 (1st Dept. 2006),* where the Court found that 20 degree limitations in forward elevation and abduction of the left shoulder was neither a "significant" nor "consequential" limitations; and *Sone v Qamar, 68 A.D.3d 566 (1st Dept. 2009),* where the Court held that the defendant meet it's burden, despite submission of a neurologist's affirmed report finding a 20 degree limitation of the lumbar spine at flexion with no neurological deficits.

The burden then shifted to plaintiff to raise a triable issue of fact that she sustained a

"serious injury" within the meaning of the Insurance Law. Plaintiff failed to meet this burden. Although Dr. Cohen confirmed her MRI findings of tears in the plaintiff's left hip, Dr. Sherman found no objective limitations of motion of the plaintiff's left hip and no neurologic deficit upon his examination. In order to raise a triable issue of fact, plaintiff must demonstrate, with objective medical evidence, a significant limitation of range of motion based on a recent examination. *Mejia v. DeRose, 35 A.D.3d 407 (2nd Dept. 2006); Cruz v Lugo. 29 Misc.3d 1225(A) (Sup. Ct. Bronx 2008); Shvartsman v Vildman, 47 A.D.3d 700 (2nd Dept. 2008); Tobias v Chupenko, 41 A.D.3d 583 (2nd Dept. 2007).* Positive MRI findings of tears, alone, are insufficient to raise an issue of fact. *Cruz v Lugo, 29 Misc.3d 1225(A) (Sup. Ct. Bronx 2008); Shvartsman v Vildman, 47 A.D.3d 700 (2nd Dept. 2008); Tobias v Chupenko, 41 A.D.3d 583 (2nd Dept. 2007); Mejia v. DeRose, 35 A.D.3d 407 (2nd Dept. 2006).* Furthermore, Dr. Sherman's conclusory allegations of permanency are insufficient to establish a prima facie case of "serious injury," as a matter of law. *Licari v. Elliot, 57 N.Y.2d 230 (1982); DiLeo v Blumberg, 250 A.D.2d 364, 365 (1st Dept. 1998).*

The fact that Dr. Cohen and Dr. Rubinshyteyn's diagnoses differ is of no import, since neither Dr. Rubinshyteyn nor Dr. Sherman found that the plaintiff had a significant physical limitation stemming from the subject accident upon their objective examinations of the plaintiff. *Licari v. Elliot, 57 N.Y.2d 230 (1982); Style v Joseph, 32 A.D.3d 212 (1st Dept. 2006); Cruz v Lugo, 67 A.D.3d 495 (1st Dept. 2009); Ikeda v Hussain, 81 A.D.3d 496 (1st Dept. 2011); Sone v Qamar, 68 A.D.3d 566 (1st Dept. 2009); Tuberman v Hall (61 A.D.3d 441 (1st Dept. 2009).*

Lastly, plaintiff also failed to establish that she was prevented from performing substantially all of her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident in accordance with the Insurance Law. The plaintiff, who was unemployed at the time of the accident, only alleges confinement to bed for approximately one day immediately following the accident and intermittently thereafter and confinement to home for approximately five days immediately following the accident and intermittently thereafter in her Bill of Particulars. In addition, the plaintiff did not submit any objective medical evidence of a substantial physical limitation during the requisite time period. The plaintiff's subject complaints of pain and limitation, without more, do not rise to the level of a "serious injury" in accordance with Insurance Law §5102(d). *Scheer v Koubek, 70 N.Y.2d 678 (1987); Lloyd v Green, 45 A.D.3d 373 (1st Dept. 2007).* A plaintiff must submit objective medical

evidence to establish a claim under the 90/180 category of the Insurance Law. *Eliah v Mahlah, 58 A.D.3d 434 (1st Dept. 2009); Springer v Arthurs, 22 A.D.3d 829 (2nd Dept. 2005); Bennett v Reed, 263 A.D.2d 800 (3rd Dept. 1999).* Accordingly, the defendants' summary judgment motion is granted and the plaintiffs' Complaint is hereby dismissed.

This constitutes the Decision/Order of the Court.

Dated: February 22, 2016
New York, New York

HON. LETICIA M. RAMIREZ, J.S.C.