Fernandez v City of New York
2017 NY Slip Op 32066(U)
September 19, 2017
Supreme Court, Queens County
Docket Number: 704447/14
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

ANGELO FERNANDEZ,

Plaintiff,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.

Index No. 704447/14

Motion Date July 14, 2017

Motion Seq. Nos. 5 and 6

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Upon the foregoing papers it is ordered that the motion by defendants, Kareem A. Griffith and Brenda P. Griffith and the motion by New York City Department of Environmental Protection for an order granting leave to file late summary judgment motions and for an order granting summary judgment are hereby joined solely for purposes of disposition of the instant motions and are hereby decided as follows:

Those branches of defendants', Kareem A. Griffith and Brenda P. Griffith and New York City Department of Environmental Protection's motions for an order granting leave to file a late summary judgment motion are granted.

Pursuant to CPLR 3212, a motion for summary judgment "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." In the instant case, the record reveals that the Note of Issue was filed on May 24, 2016. Therefore, all summary judgment motions need have been made on or about September 24, 2016. It

is undisputed that the instant motions for summary judgment motion were untimely served. Any summary judgment motion made later than one hundred twenty days after the filing of the note of issue, requires court approval and a showing of "good cause." In *Brill v. City of New York*, the Court of Appeals held that: "'good cause' in CPLR 3212(a) requires a showing of good cause for making the delay in the motion - - a satisfactory explanation for the untimeliness - - rather than simply permitting meritorious, non judicial findings, however tardy." 2 NY3d 648 (NY 2004). "[S]tatuory time frames - like court-ordered time frames - are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored." (*Micelli v. State Farm Automobile Insurance Company*, 3 NY3d 725 [2004][internal citations omitted]; *see also*, *Dettmann v. Page*, 18 AD3d 422 [2d Dept 2005]; *First Union Auto Finance, Inc. v. Donat*, 16 AD3d 372 [2d Dept 2005]).

The Court finds that moving defendants have presented good cause shown for the delay in filing the late summary judgment motions. It is undisputed that at the time of the filing of the Note of Issue, significant discovery remained outstanding and plaintiff did not appear for her deposition until January 4, 2017 and her independent medical examination until March 2, 2017. The defendants made the instant motion shortly after the receipt of the doctor's IME report. The Court finds that moving defendants have provided good cause (*Kunz v. Gleeson*, 9 AD3d 480 [2d Dept 2004]; *Brown v. The City of New York*, 800 NYS2d 343 [Sup Ct, Bronx County 2005]; *Gonzalez v. 98 Mag. Leasing Corp.*, 95 NY2d 124 [2000]).

Accordingly, those branches of moving defendants' motions for leave to serve a late summary judgment motion are granted.

Those branches of defendants', Kareem A. Griffith and Brenda P. Griffith's and defendant, New York City Department of Environmental Protection's motions for summary judgment dismissing the complaint of plaintiff, Angelo Fernandez, pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of the Insurance Law § 5102(d) are decided as follows:

This action arises out of an automobile accident that occurred on July 18, 2013. Moving defendants have submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury. Moving defendants submitted inter alia, an affirmed report from an independent examining orthopedic surgeon, and plaintiff's own verified bill of particulars.

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. Moving *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 moving defendants' independent examining orthopedic surgeon, Dana A. Mannor, M.D., indicates that an examination conducted on March 2, 2017 revealed a diagnosis of: resolved cervical, lumbar, and thoracic spine sprain/strains and status post left shoulder arthroscopic surgery on May 8, 2015-healed. Dr. Mannor opines that there is no causally related disability or evidence of permanency. Finally, Dr. Mannor concludes that there is no need for further treatment or diagnostic testing.

Additionally, moving defendants established a prima facie case for the category of "90/180 days." The plaintiff's verified bill of particulars indicates that: he was confined to his bed as a result of the accident for one (1) month after the accident and periodically and intermittently thereafter; and he

was he was confined to his bed as a result of the accident for one (1) month after the accident and periodically and intermittently thereafter. 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 moving 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 fails to raise a triable issue of fact

In opposition to the motion, plaintiff submitted, inter alia,: unsworn medical records and reports, an attorney's affirmation, an affirmed medical report of Igor E. Cohen, M.D.; a sworn MRI report of the Cervical Spine by plaintiff's radiologist, Anuraag Sahal, M.D.; a sworn MRI report of the Left Shoulder by plaintiff's radiologist, Kevin Dunham, M.D.; a sworn narrative report of plaintiff's orthopedic surgeon, Jerry A. Lubliner, M.D.; and plaintiff'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 plaintiffs' examining doctors will not be sufficient to defeat a motion for summary judgment (*see*, *Grasso v. Angerami*, 79 NY2d 813 [1991]).

Plaintiff submitted no proof of objective findings contemporaneous with the accident establishing causality. The only admissible medical proof submitted by plaintiff on the causality issue is the sworn narrative report of plaintiff's evaluating orthopedic surgeon, Jerry A. Lubliner, M.D. who evaluated plaintiff more than three (3) years and ten (10) months after the accident date. Plaintiff has failed to establish a causal connection between the accident and the injuries. 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]). An examination 3

three (3) years and ten (10) months after the accident is 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]).

Furthermore, in his narrative report, Dr. Lubliner states that he reviewed medical records of other doctors and affirms that he determined his diagnosis in part based on the medical records of Joseph Gorum, M.D., however, no medical report of Dr. Gorum has been submitted to the court in competent and admissible form. The probative value of Dr. Lubliner's affirmation is reduced by the doctor's reliance on medical reports that are not in the record before the court. Since Dr. Lubliner'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]).

Also, the plaintiff has failed to come forward with sufficient evidence to create an issue of fact as to whether the plaintiff sustained a medically-determined injury which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 of the 180 days immediately following the underlying accident (*Savatarre v. Barnathan*, 280 AD2d 537 [2d Dept 2001]). The record must contain objective or credible evidence to support the plaintiff's claim that the injury prevented plaintiff from performing substantially all of his customary activities (*Watt v. Eastern Investigative Bureau, Inc.*, 273 AD2d 226 [2d Dept 2000]). 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; *Licari v. Elliott*, 57 NY2d 230 [1982]; *Berk v. Lopez*, 278 AD2d 156 [1st Dept 2000], *lv denied* 96 NY2d 708 [2001]). Plaintiff fails to include experts' reports or affirmations which render an opinion on the effect the injuries claimed may have had on the plaintiff for the 180-day period immediately following the accident. As such, plaintiff's submissions were insufficient to establish a triable issue of fact as to whether plaintiff suffered from a medically determined injury that curtailed him from performing his usual activities

for the statutory period (*Licari v. Elliott*, 57 NY2d 230, 236 [1982]). Accordingly, plaintiff's claim that his injuries prevented him from performing substantially all of the material acts constituting his customary daily activities during at least 90 of the first 180 days following the accident is insufficient to raise a triable issue of fact (*see, Graham v. Shuttle Bay*, 281 AD2d 372 [1st Dept 2001]; *Hernandez v. Cerda*, 271 AD2d 569 [2d Dept 2000]; *Ocasio v. Henry*, 276 AD2d 611 [2d Dept 2000]).

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 (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Accordingly, the moving defendants' motions for summary judgment are granted and the plaintiff's Complaint is dismissed as to all categories.

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: September 19, 2017

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Howard G. Lane, J.S.C.