Marsh v City of New York
2018 NY Slip Op 30752(U)
March 26, 2018
Supreme Court, Bronx County
Docket Number: 301284/2013
Judge: Mitchell J. Danziger
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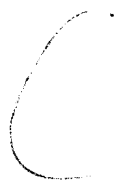

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
---x

SAMAREA MARSH,

Plaintiff,

-against-

CITY OF NEW YORK,

Defendant.

---x

DECISION AND ORDER
Present: Hon. MITCHELL J. DANZIGER
Index No. 301284/2013

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of the motions as indicated below:

Papers	Numbered
Notice of Motion and Affidavits Annexed	1 - 16
Opposition	17 - 19
Reply	20 - 21

Defendants move for an order pursuant to CPLR 3212 granting summary judgment in their favor on the ground plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102 (d). Plaintiff opposes the motion, arguing that defendants failed to meet their burden of proof. Alternatively, plaintiff asserts that a triable issue exists as to whether she suffered an injury within the "limitation of use" categories of Insurance Law § 5102 (d). For the reasons set forth below, the motion is granted.

Plaintiff commenced this action seeking damages for personal injuries she allegedly suffered as a result of a motor vehicle accident that occurred on the Bruckner Expressway, near the exit for the Bronx River Parkway, on the morning of March 1, 2012. The accident allegedly happened when a vehicle owned by defendant, City of New York, and driven by defendant, Nathaniel Walls, spun out of control and collided with the vehicle in which plaintiff

was riding as a passenger. By her bill of particulars, plaintiff alleges she suffered various injuries and symptoms due to the accident, including a disc "protrusion" at level C3-C4, disc bulges at levels L3-L4 through L5-S1, sprains and strains of the left shoulder and left knee, and cervical and thoracic radiculopathy.

Defendants' submissions in support of the motion include copies of the pleadings and the bill of particulars, transcripts of the deposition testimony of plaintiff and defendant Walls, an affirmed medical report of Dr. Rashmi Sheth, and an addendum to such report. At defendants' request, Dr. Sheth, an orthopedist, performed a medical examination of plaintiff on April 16, 2014, and reviewed various medical reports relating to the injuries plaintiff allegedly sustained due to the accident. Plaintiff's evidence in opposition consists of an affirmed report of Dr. Rafael Abramov, a physiatrist, who examined her on April 10, 2017.

It is for the court to determine in the first instance, where the issue properly has been raised, whether a plaintiff claiming personal injury as a result of a motor vehicle accident has a prima facie case that he or she sustained "serious injury" and may maintain a common law tort action (*see Licari v Elliott*, 57 NY2d 230, 237 [1982]). Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

A defendant moving for summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Law bears the initial burden of establishing a prima facie case

that the plaintiff did not sustain a "serious injury" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352 [2002]; *Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011]). A defendant can demonstrate a plaintiff did not suffer "serious injury" within the meaning of Insurance Law § 5102 (d) by presenting affidavits or affirmations of medical experts who examined the plaintiff and determined that there is no objective medical evidence supporting the plaintiff's claims (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]; *see Shinn v Catanzano*, 1 AD3d 195 [1st Dept 2003]). When a defendant seeking summary judgment based on the lack of a serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992]; *see Grossman v Wright*, 268 AD2d 79 [1st Dept 2000]; *Rodriguez v Goldstein*, 182 AD2d 396 [1st Dept 1992]). A defendant also may establish the lack of a serious injury by submitting unsworn medical reports and records prepared by the plaintiff's treating medical providers (*see Newton v Drayton*, 305 AD2d 303 [1st Dept 2003]; *Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]), or the plaintiff's own deposition testimony (*see Diaz v Almodovar*, 147 AD3d 654 [1st Dept 2017]; *Bailey v Islam*, 99 AD3d 633 [1st Dept 2012]). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see Gaddy v Eyler*, 79 NY2d 955 [1992]; *see generally Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Defendants' submissions are sufficient to establish a prima facie case that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Lee v Rodriguez*, 150 AD3d 481 [1st Dept 2017]; *Aflalo v Alvarez*, 140 AD3d 434 [1st Dept 2016]; *Mulligan v City of New York*, 120 AD3d 1155 [1st Dept 2014]). Dr. Sheth's affirmed report states that plaintiff presented at the April 2014 examination with complaints of pain in her neck, back, left shoulder and left knee. It states, in relevant part, that

palpation of plaintiff's spine and paravertebral muscles revealed no spasms and no tenderness; that plaintiff exhibited normal muscle strength, reflexes and sensation in her extremities; and that there was no evidence of muscle atrophy. It states that range of motion testing of plaintiff's cervical region revealed 50 degrees of flexion (50 degrees normal), 60 degrees of extension (60 degrees normal), 45 degrees of right and left lateral bending (45 degrees normal), and 80 degrees of rotation (80 degrees normal), and that range of motion testing of her lumbar region revealed 70 degrees of flexion (60 degrees normal), 25 degrees of extension (25 degrees normal), and 25 degrees of right and left lateral bending (25 degrees normal).

Further, as to plaintiff's left knee, Dr. Sheth's report states that range of motion testing showed normal joint function, and that orthopedic testing revealed no evidence of kneecap, ligament or meniscus injury. In addition, the addendum to Dr. Sheth's report states that an examination of plaintiff's left shoulder revealed no effusion, no tenderness on palpation, and no sign of rotator cuff impingement or crepitus, and that plaintiff exhibited normal joint function in such shoulder, as well as in her right shoulder, during range of motion testing. Dr. Sheth diagnoses plaintiff as having suffered sprains and strains in her spine, left shoulder and left knee as a result of the subject accident, and concludes that such soft tissue injuries have resolved.

In addition, plaintiff's deposition testimony established a prima facie case that she does not have a 90/180 claim (*see Rose v Tall*, 149 AD3d 554 [1st Dept 2017]; *Haniff v Khan*, 101 AD3d 643 [1st Dept 2012]; *Valdez v Benjamin*, 101 AD3d 622 [1st Dept 2012]). Here, plaintiff, who is employed as an assistant basketball coach, testified that she was confined to home for one day and missed two days of work due to the injuries she sustained in the collision.

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see Gaddy v Eyler*, 79 NY2d 955 [1992]). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the

extent or degree of the limitation of movement caused by the injury and its duration (*see Kofi Adu v Kirby*, 132 AD3d 517 [1st Dept 2015]; *Vasquez v Almanzar*, 107 AD3d 538 [1st Dept 2012]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of the plaintiff or a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see Perl v Meher*, 18 NY3d 208 [2011]; *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]; *Kang v Almanzar*, 116 AD3d 540 [1st Dept 2014]; *Vega v MTA Bus Co.*, 96 AD3d 506 [1st Dept 2012]; *Martinez v Goldmag Hacking Corp.*, 95 AD3d 682 [1st Dept 2012]; *Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [1st Dept 2011]).

The evidence submitted in opposition to defendants' motion fails to raise a triable issue of fact. Although the Court of Appeals has held contemporaneous quantitative range of motion measurements are not a prerequisite to recovery under the "limitation of use" categories, it also has recognized "[a] contemporaneous doctor's report is important to proof of causation" (*Perl v Meher*, 18 NY3d 208, 218, 936 NYS2d 655 [2011]; *see Rosa v Mejia*, 95 AD3d 402 [1st Dept 2012]). Here, plaintiff failed to present any competent medical evidence contemporaneous with the subject accident showing significant injuries to her spine, left shoulder or left knee (*see Stephani N. v Davis*, 126 AD3d 502 [1st Dept 2015]; *Henchy v VAS Express Corp.*, 115 AD3d 478 [1 st Dept 2014]; *Rosa v Mejia*, 95 AD3d 402 [1st Dept 2012]; *Soho v Konate*, 85 AD3d 522 [1st Dept 2011]; *Atkinson v Oliver*, 36 AD3d 552 [1st Dept 2007]). In fact, plaintiff offers no medical proof as to the medical treatment she received after the subject accident for her alleged injuries. And while Dr. Abramov avers in his report that range of motion testing conducted in April 2017 showed substantial limitations in joint function in plaintiff's cervical and lumbar regions and left shoulder, he examined plaintiff on only one occasion, five years after the subject accident, following the making of the instant motion.

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Further, it is clear that Dr. Abramov improperly relied upon the unsworn reports of other physicians in forming his opinion as to the cause and extent of plaintiff's injuries (*see Clemmer v Drah Cab Corp.*, 74 AD3d 660 [1st Dept 2010]; *Ortega v Maldonado*, 38 AD3d 388 [1st Dept 2007]; *Hernandez v Almanzar*, 32 AD3d 360 [1st Dept 2006]). Thus, Dr. Abramov's report, which opines merely "[i]f the above statements are true and accurate causality is established between the above-stated accident and today's pathological findings," lacks probative value and is insufficient to defeat defendant's motion for summary judgment (*see Clemmer v Drah Cab Corp.*, 74 AD3d 660 [1st Dept 2010]; *Lopez v Abdul-Wahab*, 67 AD3d 598 [1st Dept 2009]; *Vaughan v Baez*, 305 AD2d 101 [1st Dept 2003]; *see also Pou v E&S Wholesale Meats, Inc.*, 68 AD3d 446 [1st Dept 2009]; *Lopez v Simpson*, 39 AD3d 420 [1st Dept 2007]).

Finally, in addition to failing to raise a triable issue as to whether she suffered an injury with the "limitation of use" categories, plaintiff fails to offer any evidence, or make any argument, in support of her 90/180 claim.

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted; and it is further

ORDERED that defendants shall serve plaintiff with a copy of this order with notice of entry.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: 3/26, 2018

Hon. MITCHELL J. DANZIGER, J.S.C.