Nuzzi v ABA Transp. Holding Co.
2018 NY Slip Op 33728(U)
December 17, 2018
Supreme Court, Nassau County
Docket Number: 603362/17
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ASHLEIGH NUZZI,

Plaintiff,

- against -

ABA TRANSPORTATION HOLDING CO., INC. d/b/a BAUMANN BUS COMPANY, BAUMANN BUS COMPANY, INC. and EVELYN WALKER,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 603362/17
Motion Seq. No.: 01
Motion Date: 08/13/18

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting them summary judgment dismissing plaintiff's Complaint on the grounds that plaintiff did not suffer a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d). Plaintiff opposes the motion.

This action arises from a motor vehicle accident which occurred on January 24, 2017, at approximately 8:15 a.m., on North Newbridge Road, at or near its intersection with Carnation Road, Levittown, County of Nassau, State of New York. The accident involved two (2) vehicles, a 2016 Jeep Compass, owned and operated by plaintiff, and a bus, owned by defendants ABA

Transportation Holding Co. Inc. d/b/a Baumann Bus Company and Baumann Bus Company Inc., and operated by defendant Evelyn Walker. *See* Defendants' Affirmation in Support Exhibits C and G.

Plaintiff commenced the action with the filing of a Summons and Complaint on or about April 19, 2017. *See* Defendants' Affirmation in Support Exhibit A. Issue was joined by defendants on or about June 19, 2017. *See* Defendants' Affirmation in Support Exhibit B.

As a result of the accident, plaintiff claims that she sustained the following injuries and/or aggravation of pre-existing conditions:

CERVICAL SPINE

Straightening of the normal cervical lordosis;

C2/3 subligamentous disc bulge flattening the ventral thecal sac and approaching the ventral cord;

C3/4 subligamentous disc bulge with encroachment on the neural foramina;

C4/5 broad left paracentral subligamentous disc herniation;

C5/6 focal central subligamentous disc herniation approaching the ventral cord;

C6/7 broad central subligamentous disc herniation impressing on the midline ventral spinal cord;

C7/T1 subligamentous disc bulging;

Segmental and somatic dysfunction of cervical region;

Cervicalgia;

Cervical disc disorder at C4-C5 level with radiculopathy;

Cervical disc disorder at C5-C6 level with radiculopathy;

Cervical radiculopathy;

Cervical radiculopathy at C5;

Cervical epidural steroid injections: May 10, 2017, June 14, 2017;

LEFT SHOULDER

Tendinosis/tendinopathy of the distal supraspinatus tendon;

Left shoulder rotator cuff tendinopathy with glenohumeral subluxation;

LUMBAR SPINE

L4/5 broad posterior subligamentous disc herniation with ventral thecal sac impression with peripheral disc encroachment toward the foramen;

L5/S1 retrolisthesis accompanied by posterior disc bulging and impressing on the ventral thecal sac and has peripheral components encroaching toward the foramen bilaterally;

Segmental and somatic dysfunction of lumbar region;

Sprain of ligaments of lumbar spine;

Lumbago with sciatica;

Strain of muscle, fascia and tendon of lower back;

Intervertebral disc displacement, lumbar region;

[OTHER]

Left knee contusion;

Bilateral hip sprain/strain;

Left thumb sprain/strain;

Headaches. *See* Defendants' Affirmation in Support Exhibit C ¶ 9.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*,

68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra.* When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film, supra.* Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S. 2d 793 (1988). Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law § 5102(d). *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Upon such a showing, it becomes incumbent upon the non-moving party to come forth with sufficient evidence in admissible form to raise an

issue of fact as to the existence of a "serious injury." *See Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physicians or the unsworn reports of the plaintiff's examining physicians. *See Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment. *See Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002) stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both sides rely on those reports. *See Gonzalez v. Vasquez*, 301 A.D.2d 438, 754 N.Y.S.2d 7 (1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *See Pommells v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005).

Plaintiff claims that, as a consequence of the above described automobile accident with defendants, she has sustained serious injuries as defined in New York State Insurance Law § 5102(d) and which fall within the following statutory categories of injuries:

1) permanent loss of a body organ, member, function or system; (Category 6)

2) a permanent consequential limitation of use of a body organ or member; (Category 7)

3) a significant limitation of use of a body function or system; (Category 8)

4) 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.(Category 9). *See* Defendants' Affirmation in Support Exhibit C ¶ 8.

For a permanent loss of a body organ, member, function or system to qualify as a "serious injury" within the meaning of No-Fault Law, the loss must be total. *See Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295, 727 N.Y.S.2d 378 (2001); *Amata v. Fast Repair Incorporated*, 42 A.D.3d 477, 840 N.Y.S.2d 394 (2d Dept. 2007).

To meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. *See Gaddy v. Eyler*, *supra*; *Licari v. Elliot*, *supra*. A minor, mild or slight limitation will be deemed insignificant within the meaning of the statute. *See Licari v. Elliot*, *supra*. A claim raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories can be made by an expert's designation of a numeric percentage of a plaintiff's loss of motion in order to prove the extent or degree of the physical limitation. *See Toure v. Avis Rent-a-Car Systems*, *supra*. In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff's limitation to the normal function, purpose and use of the affected body organ, member, function or system. S*ee id.*

Finally, to prevail under the "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" category, a plaintiff must demonstrate through competent, objective proof,

a "medically determined injury or impairment of a non-permanent nature" (Insurance Law § 5102(d)) "which would have caused the alleged limitations on the plaintiff's daily activities." *See Monk v. Dupuis*, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dept. 2001). A curtailment of the plaintiff's usual activities must be "to a great extent rather than some slight curtailment." *See Licari v. Elliott*, *supra* at 236. Under this category specifically, a gap or cessation in treatment is irrelevant in determining whether the plaintiff qualifies. *See Gomez v. Ford Motor Credit Co.*, 10 Misc.3d 900, 810 N.Y.S.2d 838 (Sup. Ct., Bronx County, 2005).

With these guidelines in mind, the Court will now turn to the merits of defendants' motion. In support of their motion, defendants submit the pleadings, plaintiff's Verified Bill of Particulars, the un-affirmed report of Mitchell Goldstein, M.D., who performed an independent orthopedic examination of plaintiff on April 2, 2018, and the transcript of plaintiff's Examination Before Trial testimony.

When moving for dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a serious injury. *See Gaddy v. Eyler*, *supra*. Within the scope of the movant's burden, defendant's medical expert must specify the objective tests upon which the stated medical opinions are based, and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. *See Gastaldi v. Chen*, 56 A.D.3d 420, 866 N.Y.S.2d 750 (2d Dept. 2008); *Malave v. Basikov*, 45 A.D.3d 539, 845 N.Y.S.2d 415 (2d Dept. 2007); *Nociforo v. Penna*, 42 A.D.3d 514, 840 N.Y.S.2d 396 (2d Dept. 2007); *Meiheng Qu v. Doshna*, 12 A.D.3d 578, 785 N.Y.S.2d 112 (2d Dept. 2004); *Browdame v. Candura*, 25 A.D.3d 747, 807 N.Y.S.2d 658 (2d Dept. 2006); *Mondi v. Keahan*, 32 A.D.3d 506, 820 N.Y.S.2d 625 (2d Dept. 2006).

In support of their motion, defendants rely exclusively upon the unsworn report of Mitchell Goldstein, M.D. ("Dr. Goldstein"), which is insufficient to support said summary judgment motion. It is clear that said report is neither sworn, nor affirmed; accordingly, it is

presented in inadmissible form and is devoid of any probative value. *See* Defendants' Affirmation in Support Exhibit F; *Grasso v. Angerami*, *supra*; *Pagano v. Kingsbury*, *supra*.

Furthermore, even if said report had been admissible, defendants' medical expert must specify the objective tests upon which the stated medical opinion is based, and, when rendering an opinion with respect to plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. Applying the aforesaid criteria to the report of Dr. Goldstein, the Court finds that defendants have failed to demonstrate that plaintiff did not sustain a "serious injury" with respect to Categories 6, 7 and 8. *See Gaddy v Eyler*, *supra*. Here, while Dr. Goldstein specified the basis for his findings and compared plaintiff's range of motion measurements to those which are deemed normal, Dr. Goldstein observed limitations in specific areas tested; to wit, plaintiff's cervical spine, lumbar spine and left shoulder. *See Zamaniyan v. Vrabeck*, 41 A.D.3d 472, 835 N.Y.S.2d 903 (2d Dept. 2007); *Bentivegna v. Stein*, 42 A.D.3d 555, 841 N.Y.S.2d 316 (2d Dept. 2007); *Morales v. Theagene*, 46 A.D.3d 775, 848 N.Y.S.2d 325 (2d Dept. 2007); *Tchjevskaia v. Chase*, 15 A.D.3d 389, 790 N.Y.S.2d 175 (2d Dept. 2005).

Since defendants have failed to establish their *prima facie* burden, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact as to same. *See Tchjevskaia v. Chase*, *supra*; *Mariaca-Olmos v. Mizrhy*, 226 A.D.2d 437, 640 N.Y.S.2d 604 (2d Dept. 1996). Where defendants fail to demonstrate that they have met their *prima facie* burden, the Court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers. *See Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *David v. Bryon*, 56 A.D.3d 413, 867 N.Y.S.2d 136 (2d Dept. 2008); *Barrera v. MTA Long Island Bus*, 52 A.D.3d 446, 859 N.Y.S.2d 483 (2d Dept. 2008); *Breland v. Karnak Corp.*, 50 A.D.3d 613, 854 N.Y.S.2d 765 (2d Dept. 2008).

Accordingly, defendants' motion, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting them summary judgment dismissing plaintiff's Complaint on the grounds that plaintiff did not suffer a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d), is hereby **DENIED**.

All parties shall appear for Trial, in Nassau County Supreme Court, Differentiated Case Management Part (DCM), at 100 Supreme Court Drive, Mineola, New York, on December 20, 2018, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
December 17, 2018

ENTERED

DEC 18 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE