SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present: HON. ZELDA JONAS
Justice

TRIAL/IAS PART 25

EMMA J. LAPRINCE,

Plaintiff,

Index No. 11468/01

- against -

Sequence No. 1
Motion Date: January 15, 2003

DANIEL J. NAGLER and PAUL S. NAGLER,

Defendants.

The following papers read on this motion:

Notice of Motion 1
Affirmation in Opposition 2
Memorandum of Law 3

Defendants move for summary judgment on the issue of serious injury.

Plaintiff commenced this action for personal injuries allegedly sustained in an automobile collision that occurred on July 18, 2000 at or near the intersection of North Franklin Avenue and Columbia Street, Hempstead, New York. Plaintiff was driven to Mercy Medical Center (located in Rockville Centre, NY) in a police car. Plaintiff went to the emergency room, was treated, and was discharged the same day. Plaintiff only missed two (2) days from work and has been able to perform her work functions the same as she did before the accident. Plaintiff claims that as a result of the collision, plaintiff is not able to lift "very heavy things." However, plaintiff is not prevented from

enjoying or having difficulty with any social, sports, or recreational activities now as a result of the collision. Plaintiff had acupuncture, "shock therapy," massage, and ice packs two to three times a week for five (5) months after the collision. Plaintiff states her condition improved with the therapy, but she stopped getting treatments when the insurance benefits ran out. Plaintiff asserts that she has periodic pain and she currently uses a massager at home. Plaintiff takes Naprosyn and applies ice packs to deal with the pain. However, plaintiff continues to do her own housecleaning (with her daughter's help), yard work, and grocery shopping.

Defendants have shown that plaintiff's injuries were not serious under Insurance Law §5102(d). Defendants have included the sworn affidavit of Dr. Frank M. Hudak, an orthopedic surgeon (exhibit E annexed to defendants' motion), which report is based upon the doctor's examination of plaintiff that occurred on August 5, 2002. Dr. Hudak examined plaintiff and concluded there was no objective evidence to support plaintiff's complaints of pain and that plaintiff has no disability.

Where the evidence presented by a defendant establishes that the plaintiff's injuries were not serous within the meaning of Insurance Law §5102(d) (*see, Sainte-Aime v. Ho*, 274 A.D.2d 569), the burden shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether the plaintiff suffered a serious injury.

Medical evidence submitted by a plaintiff in opposition to a motion for summary judgment on the issue of serious injury must be sworn or it does not constitute

competent evidence (CPLR 2106; *Mezentseff v. Ming Yat Lau*, 284 A.D.2d 379). Here plaintiff has supplied unsworn reports of Dr. Stephen Sirota, dated July 26, 2000 (see plaintiff's exhibit 1 annexed to the affirmation in opposition) and unsworn MRI reports of Dr. Steven Brownstein and Dr. Joseph Inzinnia dated July 24, 2000 and August 29, 2000 respectively (see exhibit 2 annexed thereto). These reports are not sufficient to raise triable issues of fact.

Since the report of Dr. Sirota is not deemed to constitute proper evidence, plaintiff has, in effect, failed to submit any competent proof that was contemporaneous with the accident showing any initial range of motion restrictions (*Lanza v. Carlick*, 279 A.D.2d 613).

Plaintiff also relies on the affirmation of Dr. Daniel W. Wilen, which incorporates by reference his unsworn report from an examination of plaintiff on December 30, 2002, as well as the unsworn MRI reports and the unsworn report of Dr. Stephen Sirota.

On a summary judgment motion relating to serious injury, a plaintiff physician in opposing the motion may not rely on unsworn medical reports prepared by another physician (*Rozengauz v. Lok Wing Ha*, 280 A.D.2d 534). Accordingly, Dr. Wilen's reliance on unsworn reports in order to form a diagnosis is patently improper (*Shay v. Jerkins*, 263 A.D.2d 475).

Since the MRI reports are not sworn, there is no competent medical evidence showing objective proof of plaintiff's subjective complaints of serious injury (*Toure v. Avis Rent A Car Systems*, 98 N.Y.2d 345).

Plaintiff's own subjective complaints without objective medical evidence are not enough to provide an issue of fact to defeat motion for summary judgment on the issue of serious injury (*Buonaiuto v. Shulberg*, 254 A.D.2d 384).

Accordingly, defendants' motion for an award of summary judgment dismissing plaintiff's complaint due to plaintiff's failure to have sustained a "serous injury" is granted.

Dated: 3/10/03

J.S.C.