

**Sanchez v Ka**

2013 NY Slip Op 30194(U)

January 30, 2013

Sup Ct, Queens County

Docket Number: 15604/2010

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
Justice

- - - - - x

RACHEL SANCHEZ, Index No.: 15604/2010  
Plaintiff, Motion Date: 12/06/12  
- against - Motion No.: 16  
MAMADOU KA and AMOS JEAN PHARUNS, Motion Seq.: 2

Defendants.

- - - - - x

The following papers numbered 1 to 13 were read on this motion by defendants, MAMADOU KA and AMOS JEAN PHARUNS, for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing the plaintiff's complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers  
Numbered

Notice of Motion-Affidavits-Exhibits-Memo of Law.....1 - 6  
Affirmation in Opposition-Affidavits-Memo of Law.....7 - 13

In this action for negligence, the plaintiff, Rachel Sanchez, seeks to recover damages for personal injuries she sustained as a result of a motor vehicle accident that occurred on December 31, 2009. The accident took place on the approach to the Madison Avenue Bridge in New York County, New York. Plaintiff alleges that she sustained injuries when her vehicle was struck in the rear during a snowstorm by the vehicle owned by defendant Amos Jean Pharuns and operated by defendant Mamadou Ka.

This action was commenced by the plaintiff by the filing of a summons and complaint on June 18, 2010. Issue was joined by service of defendant's verified answer on July 9, 2010. A note of issue was filed on March 13, 2012. The case is presently

calendared in the Trial Scheduling Part for April 10, 2013.

The defendants now move for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the plaintiff's complaint on the ground that the injuries claimed by the plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

In her verified Bill of Particulars, the plaintiff, age 46, states that as a result of the accident she sustained, inter alia, disc bulging at the L3-4, L4-5 and L5-S1 levels and disc bulging at the C3-4, C4-5 and C5-6 levels. Plaintiff underwent a right shoulder arthroscopy on April 9, 2010 to repair a partial tear of the rotator cuff of the right shoulder. Plaintiff contends that she was confined to bed and house from January 1, 2010 through January 4, 2010 after the incident. She was also confined to bed and house from April 9, 2010 through April 12, 2010 after arthroscopic surgery. She states that she missed one week from work in February 2010 and three days of work per week from April 9, 2010 through May 4, 2010 for physical therapy.

The plaintiff contends that she sustained a serious injury as defined in Insurance Law § 5102(d) in that she sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

In support of the motion, defendant submits an affirmation from counsel, Robert J. Yenchman, Esq., a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical reports of orthopedist, Dr. Thomas Nipper and neurologist, Dr. Marianna Golden, copies the transcript of the examinations before trial of the plaintiff and the defendant and a copy of the police accident report.

Dr. Nipper, an orthopedist retained by the defendant to perform an independent orthopedic examination, evaluated the plaintiff on September 14, 2011. Plaintiff told Dr. Nipper that as a result of the accident of December 11, 2008 she injured her mid-back, lower back and right shoulder. She told Dr. Nipper that she underwent right shoulder arthroscopy on April 9, 2008. She presented with pain to her right shoulder, mid and lower

back. She also told Dr. Nipper that she is employed as an accountant at South Shore Medical Center on a full time basis and noted that she lost no time from work due to her injuries. After performing objective and comparative range of motion tests, the doctor reported that the plaintiff had no limitations of range of motion of the lumbar spine or either shoulder. After performing the physical examination, Dr. Nipper states that the plaintiff had no objective evidence of any disability and his impression was that the plaintiff has resolved thoracic sprain/strain; resolved lumbosacral sprain/strain and status post right shoulder surgery resolved.

Dr. Golden, a board certified neurologist retained by the defendants, examined the plaintiff on September 14, 2011. Plaintiff told Dr. Golden that her injuries were to her mid-back, lower back and right shoulder. Her range of motion testing revealed no limitations of range of motion of the cervical spine and thoracolumbar spine. Dr. Golden concludes that there was a normal neurological examination and no objective evidence of any disability. She stated that the plaintiff is capable of performing all activities of daily living and is independent in ambulation.

In her examination before trial, taken on August 17, 2011, Ms. Sanchez testified that on December 31, 2009 her vehicle was struck in the rear by the defendant's vehicle while she was driving on the Madison Avenue Bridge in the Bronx. She did not request an ambulance and proceeded to her job at Soundview. She then went to her home in Beacon, New York. As she was feeling pain in her back and shoulders over the next few days she sought medical attention three days post-accident at Healthquest emergency walk-in Center in Wappingers Falls. She was given a prescription for painkillers and then followed up with chiropractor, Dr. Angela Loiacono in New Rochelle. She treated with Dr. Loiacono twice a week for three weeks. She then went to an orthopedist, Dr. Palmeiri who treated her beginning in January 2010 for pain in her lower back and right shoulder. After having been referred for MRI imaging she learned that she had a bulging disc in her lower back and a torn right rotator cuff. She then began treating with Dr. Palmeiri. She was also referred for physical therapy where she was treated three times per week through October 2010. Dr. Palmieri then recommended that she have surgery for her torn rotator cuff injury. The arthroscopic surgery was performed by Dr. Palmeri at Surgi-care in April 2010 at which time two tears were repaired. She testified that after the accident she was home for three days but she did not lose any time from work as a result of the accident. However, she stated that she lost two weeks of work following the surgery.

The plaintiff testified that on November 30, 2010 she was involved in another motor vehicle accident in which she was struck from behind and re-injured her lower back. She did not re-injure her shoulder. She stated that she still suffers from pain in the right shoulder.

Defendant's counsel contends that the medical reports of Drs. Nipper and Golden as well as the transcript of the plaintiff's examination before trial in which she testified that she returned to work three days following the accident are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

In opposition, plaintiff's attorney, Elizabeth S. Levine, Esq., submits her own affirmation, as well as a copy of the police accident report, the affirmation of plaintiff's treating orthopedist, Dr. Michael Palmeri, the affidavit of the plaintiff dated October 18, 2012, the operative report from the plaintiff's arthroscopic surgery and a copy of the plaintiff's examination before trial.

Dr. Michael Palmeri states in his affidavit dated October 1, 2012 he first examined Ms. Sanchez on January 27, 2010 with regard to the injuries she sustained in her accident of December 31, 2009. His initial evaluation of her thoracolumbar spine and right shoulder revealed moderate restriction of range of motion on the thoracolumbar spine and right shoulder. His review of the plaintiff's MRI studies indicated disc bulging in the cervical and lumbar spines. The right shoulder MRI indicated possible tear of the rotator cuff. Dr. Palmeri stated at that time his opinion was that plaintiff sustained a possible rotator cuff tear and cervical and thoracolumbar strain. Ms. Sanchez then attended physical therapy sessions without significant relief and it was determined that she reached the maximum medical improvement therapy could offer. Plaintiff then elected to undergo arthroscopic surgery of her right shoulder on April 9, 2010.

In her affidavit, Ms. Sanchez states that following the accident she saw Dr Palmeri on January 27, 2010, February 24, 2010, March 3, 2010 and March 31, 2010. She also attended

physical therapy sessions in February and March 2010. Thereafter, she elected to undergo arthroscopic surgery of her right shoulder rotator cuff to repair two tears in April 2010. She states that she continued physical therapy sessions through the fall of 2010. She states that presently she is unable to participate in daily activities without discomfort.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, it is defendant's initial obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendants, including the affirmed medical reports of Drs. Nipper and Golden, as well as the plaintiff's deposition transcript in which she stated that she returned to work three days after the accident, were sufficient to meet defendants' prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

In opposition, plaintiff failed to raise a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557, [1980]; Cohen v A One Prods., Inc., 34 AD3d 517 [2d Dept. 2006]). The affirmed contemporaneous report of Dr. Palmeri is sufficient to provide evidence in admissible form to demonstrate that soon after the accident the plaintiff sustained causally related injuries (see Perl v Meher, 18 NY3d 208 [2011]). However, plaintiff failed to provide any evidence that the defendant had limitations of range of motion in a recent examination. There was no proof submitted by the plaintiff as to any medical examinations or proof of

limitations of range of motion subsequent to the plaintiff's arthroscopic surgery in April 2010. Without a medical report indicating the plaintiff's current physical condition, the plaintiff's submissions were insufficient to raise a triable issue of fact as to whether the plaintiff sustained a permanent consequential limitation or use of a body organ or member or a significant limitation of use of a body function or system; (see Sham v B&P Chimney Cleaning & Repair Co., Inc., 71 AD3d 978 [2d Dept. 2010][any projections of permanence have no probative value in the absence of a recent examination]; Harris v Ariel Transp. Corp., 55 AD3d 323 [2d Dept. 2008]; Sullivan v Johnson, 40 AD3d 624 [2d Dept. 2007]; Barrzey v Clarke, 27 AD3d 600 [2d Dept. 2006]; Farozes v Kamran, 22 AD3d 458 [2d Dept. 2005][in order to raise a triable issue of fact the plaintiff was required to come forward with objective medical evidence, based upon a recent examination, to verify his subjective complaints of pain and limitation of motion]; Ali v Vasquez, 19 AD3d 520 [2d Dept. 2005]).

Further, the courts have held that the mere existence of a tear in a tendon or a herniated disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (see Bleszcz v Hiscock, 69 AD3d 890 [2d Dept. 2010]; Ferber v Madorran, 60 AD3d 725 [2d Dept. 2009]; Ponciano v Schaefer, 59 AD3d 605 [2d Dept. 2009]; Sealy v. Riteway-1, Inc., 54 AD3d 1018 [2d Dept. 2008]; Nannarone v Ott, 41 AD3d 441 [2d Dept. 2007]).

Lastly, the plaintiff failed to submit competent medical evidence that the injuries allegedly sustained by her as a result of the subject accident rendered her unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days following the accident (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Valera v Singh, 89 AD3d 929 [2d Dept. 2011]; Lewars v Transit Facility Mgt. Corp., 84 AD3d 1176 [2d Dept. 2011]; Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]).

Accordingly, because the evidence relied upon by plaintiff is insufficient to create a triable issue of fact with respect to any of the statutory categories of serious injury and for the reasons set forth above, it is hereby,

ORDERED, that the defendant's motion for summary judgment is granted and the plaintiff's complaint against

defendant MAMADOU KA and AMOS JEAN PHARUNS is dismissed, and it is further,

ORDERED, that the Clerk of Court is directed to enter judgment accordingly.

Dated: January 30, 2013  
Long Island City, N.Y.

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**ROBERT J. MCDONALD, J.S.C.**