Connolly v Ahmed
2015 NY Slip Op 30621(U)
April 20, 2015
Supreme Court, New York County
Docket Number: 150576/13
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

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Jacquelin Connolly,

Plaintiff,

-against-

Khandakar Ahmed and Spindle Cab Corp.,

Defendants.

---x

Motion Seq 01

Index No. 150576/13

DECISION AND ORDER

HON. ARLENE P. BLUTH, JSC

Defendants' motion for summary judgment dismissing the complaint on the grounds that plaintiff has not demonstrated that her injuries meet the serious injury threshold pursuant to Insurance Law § 5102(d) is granted, and the action is dismissed.

In her verified bill, supplemental bill and second supplemental bill of particulars plaintiff claims that she injured, inter alia, her cervical and lumbar spine, left shoulder and right knee, and sustained a concussion in the subject 9/27/12 motor vehicle accident. By so-ordered stipulation dated 3/10/14, plaintiff withdrew her claim that she suffered a facial scar.

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Rodriguez v Goldstein*, 182 AD2d 396 [1992]). Such evidence includes "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003], *quoting Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]). Where there is objective proof of injury, the defendant may meet his

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or her burden upon the submission of expert affidavits indicating that plaintiff's injury was caused by a pre-existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818 [1st Dept 2010], *citing Pommells v Perez*, 4 NY3d 566 [2005]). In order to establish prima facie entitlement to summary judgment under the 90/180 category of the statute, a defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident (*Elias v Mahlah*, 2009 NY Slip Op 43 [1st Dept]). However, a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*id.*).

Once the defendant meets his or her initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury (*see Shinn*, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Further, where the defendant has established a pre-existing condition, the plaintiff's expert must address causation (*see Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]).

In support of this motion, defendants submit the affirmed medical report of Dr. April, a neurologist, who examined plaintiff on 6/25/13, found normal ranges of motion in plaintiff's cervical and lumbar spine and stated that she had a normal neurological exam. Dr. April opined that any sprains and/or a concussion had resolved. Additionally, defendants submit the affirmed report of Dr. Nason, an orthopedist who examined plaintiff on 6/27/13 and measured normal ranges of motion in her cervical, thoracic and lumbar spine, left shoulder, right knee, left foot and left ankle. Dr. Nason concluded that any sprains in these areas had resolved.

Defendants also submit the affirmed reports of Dr. Springer, a radiologist who reviewed plaintiff's MRI films. Dr. Springer stated that plaintiff's (1) lumbar MRI taken approximately 10 weeks after the accident showed two disc bulges which are degenerative in nature and no evidence of trauma; (2) right knee MRI also taken approximately 10 weeks after the accident was normal and showed no evidence of joint effusion or other posttraumatic changes; and (3) cervical MRI taken approximately 7 weeks after the accident showed minimal degenerative changes in C3 through C6 and no evidence of trauma.

As for the 90/180 category, defendants cite to (1) plaintiff's bill of particulars that she missed only 2 days of work as a result of the accident, and (2) plaintiff's deposition testimony that she was confined to home for two days after the accident. Thus, defendants set forth a prima facie case to dismiss, and the burden shifts to plaintiff to raise a triable issue of fact.

In opposition, plaintiff submits the affirmation of Dr. Druckman. Although in paragraph 11, Dr. Druckman states that "based upon her examination of plaintiff.....",

she never specifically states on which date she personally examined plaintiff, and what the results of her exam were. She does not state that she performed the October 5, 2012 initial exam (8 days after the accident), and does not attach a single exam record. Accordingly, as defendants point out in their reply, plaintiff has not submitted any proof of a contemporaneous examine sufficient to support causation and defeat the motion. Absent admissible contemporaneous evidence of alleged limitations, plaintiff cannot raise an inference that her injuries were caused by the accident. *See Shu Chi Lam v Wang Dong*, 84 AD3d 515, 922 NYS2d 381 (1st Dept 2011).

Moreover, Dr. Druckman's opinion that plaintiff sustained a serious injury (para. 3) is entirely conclusory. She states that she relied on the affirmed cervical MRI report of Dr. Wilde (attached as exh B) in forming this opinion. But Dr. Wilde said nothing about causation in that report, and in fact agreed with Dr. Springer's finding of disc protrusions in two locations. Dr. Wilde did not mention any evidence of traumatic injury. Dr. Druckman also states that she relied on Dr. Wertheim's affirmed report of the attached 4/2/13 CT of plaintiff's lumbar spine (exh C). However, the report attached to Dr. Wertheim's affirmation is actually her report of the 12/11/12 MRI of plaintiff's lumbar spine wherein she found no evidence of a disc bulges or herniations. This is the same MRI that Dr. Springer reviewed and noted two degenerative bulges. Finally, Dr. Druckman states that she relied on "narrative medical reports and records prepared in connection with [plaintiff's] physical examinations and therapy visits while under my care...."; yet not a single record is identified or attached. Dr. Druckman's affirmation fails to raise an issue of fact sufficient to defeat summary judgment.

The only other doctor's report submitted in opposition is the affirmed report of Dr.

Lubliner who examined plaintiff on 7/16/13, almost 10 months after the accident, which cannot be considered a contemporaneous exam. On 7/16/13, Dr. Lubliner found normal ranges of motion in plaintiff's left shoulder and right knee; plaintiff did not submit any affirmed neurological report in connection with her claim of that she sustained a concussion.

Significantly, while Dr. Lubliner submits the results of his range of motion testing which show some restrictions in plaintiff's cervical and lumbar areas, Dr. Lubliner did not address Dr. Springer's opinion that this was attributable to degenerative changes and not caused by the accident. Because plaintiff failed to refute defendants' evidence of a preexisting degenerative conditions in her cervical and lumbar spine, plaintiff failed to raise an inference that injury to either of these areas was caused by the accident. *See Arroyo v Morris*, 85 AD3d 679, 680, 926 NYS2d 488, 489 (1st Dept 2011). Finally, because Dr. Lubliner relies on unaffirmed reports and uncertified hospital records, his affirmation is conclusory and does not raise an issue of fact. *See Malupa v Oppong*, 106 AD3d 538, 966 NYS2d 9 (1st Dept 2013).

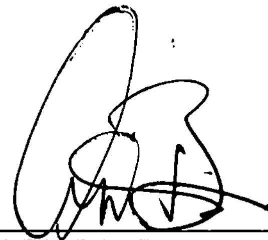
As for the 90/180 category, plaintiff's counsel asserts that while plaintiff returned to work after 2 days after the accident, she further testified that she stopped working on 10/26/12, approximately one month later accident. Not only does this contradict the bill of particulars, the supplemental and second supplemental bill of particulars, plaintiff has not submitted that any proof she was medically directed not to return to work, or any proof from her employer that she actually stopped working after 10/26/12 sufficient to raise an issue of fact.

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint on the grounds that plaintiff has not demonstrated that her injuries meet the serious injury threshold pursuant to Insurance Law § 5102(d) is granted, and the action is dismissed.

This is the Decision and Order of the Court.

Dated: April 20, 2015
New York, New York



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