Gonce v Columbus Tr., LLC
2015 NY Slip Op 31807(U)
September 25, 2015
Supreme Court, New York County
Docket Number: 158467/12
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

--x

CARMEN GONCE,

Plaintiff,

-against-

COLUMBUS TRANSIT, LLC, ROSE RUIZ, MTA NEW YORK CITY TRANSIT and METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.

Index No. 158467/12
Motion Seq. 004
Decision and Order

--x

HON. ARLENE P. BLUTH, J. :

Defendants' motion for summary judgment dismissing the complaint against them on the grounds that plaintiff has not demonstrated she sustained a serious injury as defined by the Insurance Law §5102(d) is granted only to the extent that her 90/180 claim is dismissed, and otherwise denied.

In her bill of particulars, plaintiff claims she sustained the following injuries as a result of the subject motor vehicle accident: a tear of the right shoulder tear, a partial tear of the left shoulder, a ligament tear in her left hand, a C3/4 herniation, a C6/7 bulge, and a sprain to her thoracic spine.

To prevail on a motion for summary judgment, 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 (1st Dept 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). In order to establish prima facie

entitlement to summary judgment under the 90/180 category of the statute, 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).

Once defendant meets his or her initial burden, plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury. *See Shinn* at 197. Plaintiff's expert may provide a qualitative assessment that has an objective basis and use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion. *See Toure v Avis Rent A Car Sys.,* 98 NY2d 345, 350-351 (2002).

In support of their motion, defendants submit the 5/31/12 emergency room record from Mount Sinai Hospital (one day after the accident) and the affirmed report of Dr. Varriale who examined plaintiff on 5/20/14 and measured full ranges of motion in plaintiff's cervical spine, right and left shoulders. Dr. Varriale opined that plaintiff had a resolved lumbar and right shoulder strain and contusion to the left hand, and noted that the limited lumbar range of motion was related to a lumbar surgery that was performed prior to the accident.

Defendants also submit the affirmed neurological report of Dr. Cohen. He examined plaintiff on April 23, 2014, and found plaintiff to be neurologically intact, with no evidence of any radiculopathy related to the subject accident or any aggravation of her pre-existing condition, a Chiari malformation (a condition in which brain tissue extends into the spinal canal).

Additionally, defendants submits the affirmed reports of Dr. Fisher, a radiologist who reviewed plaintiff's MRI films and stated the cervical MRI was normal, and the MRIs of the left shoulder, right shoulder and left hand were all normal and showed no evidence of trauma.

Finally, defendants annex plaintiff's bill of particulars wherein she stated that she was not

confined to bed or home after the subject accident.

Thus, defendants have set forth a prima facie case for dismissal, and the burden shifts to plaintiff to oppose.

In opposition, plaintiff submits affirmations and reports from Dr. Katzman, Dr. Khakhar and Dr. Paruchuri.

In Dr. Khakhar's affirmation, he states that he first examined plaintiff on 6/8/12, then again on 11/16/12 and 2/11/13. At the most recent exam on 1/19/15, Dr. Khakhar measured significant range of motion restrictions in plaintiff's right and left shoulder and cervical spine which he states are permanent and causally related to the subject motor vehicle accident.

In his affirmation, Dr. Katzman states that he first examined plaintiff on 7/3/12, and again on 8/7/12 when he measured flexion in her left shoulder as 90° out of a normal 180°. At his most recent examination of plaintiff on 2/11/15 he measured significant restrictions in both shoulders which he opines are permanent and causally related to the subject accident.

Additionally, Dr. Paruchuri, a radiologist, reviewed the films of plaintiff's cervical spine, both shoulders and left hand; he concludes that plaintiff has a disc bulge and herniation in her cervical spine which are not degenerative in nature, a chiari malformation but no evidence of "syrinx" (cavity) plaintiff has tears in her both shoulders and her left hand which are not degenerative. Thus, Dr. Paruchuri disagrees with defendants' expert Dr. Fisher who interpreted the same MRIs and stated that they were all normal.

Finally, plaintiff does not oppose dismissal of the 90/180 claim. Thus, plaintiff has raised issues of facts through her treating doctors reports, and the jury must decide which doctor(s) to believe. Accordingly, defendants' motion for summary judgment is granted only to the extent

[* 4]

that her 90/180 claim is dismissed, and otherwise denied.

DATED: September 25 2015
New York, NY

HON. ARLENE P. BLUTH, JSC