Khanfour v Nayem
2016 NY Slip Op 30893(U)
April 18, 2016
Supreme Court, Bronx County
Docket Number: 309119/12
Judge: Betty Owen Stinson
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[* 1] FILED Apr 21 2016 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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MAHMOUD M. KHANFOUR,

DECISION AND ORDER

Plaintiff(s), Index No: 309119/12

- against -

MOHAMMAD NAYEM AND JAKE ROSS HACKING CORP.,

Defendant(s).

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Stinson, J.

In this action for personal injuries stemming from an automobile accident, defendants move for an order granting them summary judgment, thereby dismissing plaintiff's complaint on grounds that he failed to sustain a serious injury as defined by the Insurance Law. Plaintiff opposes the instant motion asserting that defendants fail to establish *prima facie* entitlement to summary judgment and that questions of fact nevertheless preclude summary judgment.

For the reasons that follow hereinafter, defendants' motion is granted.

The instant action is for personal injuries allegedly sustained in a motor vehicle accident. Read together, the complaint and bill of particulars allege the following. On September 24, 2011, on Lexington Avenue near its intersection with

East 73rd Street, New York, NY, plaintiff was involved in a motor vehicle accident. Specifically, plaintiff's vehicle came into contact with a vehicle operated by defendant MOHAMMAD NAYEN and owned by defendant JAKE ROSS HACKING CORP. Plaintiff alleges that defendants were negligent in the operation and ownership of their vehicle, said negligence causing him to sustain injuries. Plaintiff alleges to have sustained a host of injuries, the most serious being disc herniations at C3-C4 and C6-C7. Plaintiff alleges that the foregoing injuries are serious as defined by Insurance Law § 5102(d), inasmuch as he sustained a (1) permanent loss of use of a body organ, member, function or system; (2) permanent consequential limitation of use of a body organ or member; (3) significant limitation of use of a body function or system; and/or (4) a medically determined injury or impairment of a non-permanent nature which prevented him from performing all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following his accident.

The evidence establishes that with regard to all categories of serious injury alleged, plaintiff's injuries were the result of prior accidents, wherein he hurt the same parts of his body which he claims were injured here. Accordingly, defendants negate causation.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish *prima facie* entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

The Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

Insurance Law § 5104(a), also known as the "no-fault law," by

design and intent, severely limits the number of personal injury law suits brought as a result of motor vehicle accidents (*Licari v Elliott*, 57 NY2d 230, 236 [1982]). Thus, because any injury not falling within the statute's definition of "serious injury" is minor, it should not be accorded a trial by jury, and, therefore, "[i]t is incumbent upon the court to decide in the first instance whether plaintiff has a cause of action to assert within the meaning of the statute" (*id.* at 237).

A defendant seeking summary judgment on grounds that plaintiff's injuries are not serious under the Insurance Law must establish that plaintiff's injuries do not meet the threshold promulgated by the statute (*Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Brown v Achy*, 9 AD3d 30, 31 [1st Dept 2004]; *Rodriguez v Goldstein*, 182 AD2d 396, 397 [1st Dept 1992]), and can meet the requisite burden in a myriad of ways.

Significantly, a defendant can establish entitlement to summary judgment by negating causation, meaning by the tender of evidence establishing that the injuries alleged are not related to the accident at issue (*Pommells v Perez*, 4 NY3d 566, 573-574 [2005]; *Franchini v Plameri*, 1 NY3d 536, 537 [2003]; *Marsh v City of New York*, 61 AD3d 552, 552 [1st Dept 2009]; *Kaplan v Vanderhans*, 26 AD3d 468, 469 [2d Dept 2006]; *Giraldo v Mandanici*, 24 AD3d 419, 419-420 [2d Dept 2005]). Once defendant establishes the foregoing, a plaintiff's failure to rebut a defendant's *prima facie* showing

that the injuries sustained by plaintiff pre-dated the accident or were caused by some other event or condition warrants dismissal of the action (*Franchini* at 537 ["Plaintiff's submissions were insufficient to defeat summary judgment because her experts failed to adequately address plaintiff's preexisting back condition and other medical problems."]; *Marsh* at 552; *Kaplan* at 469; *Giraldo* at 420).

Notably, the court in *Linton v Nawaz* (62 AD3d 434 [1st Dept 2009] *affd*, 14 NY3d 821 [2010]) held, despite the foregoing cases, that where a defendant's assertion to negate causation is evidence of degeneration and/or a preexisting condition based solely on the review of plaintiff's imaging studies, a plaintiff sufficiently raises an issue of fact by merely submitting a medical affirmation from an examining doctor containing an opinion causally relating the injuries alleged to the accident giving rise to the suit (*id.* at 443). Specifically, the court stated

> [d]efendants' sole competent evidence in favor of summary judgment was a doctor's opinion that plaintiff's injuries pre-existed the accident. Plaintiff submitted the affirmation of a treating physician, based on a physical examination performed within days of the accident, opining that the injuries were caused by the accident. There is no basis on this record to afford more weight to defendants' expert's opinion and there are no 'magic words' which plaintiff's expert was required to utter to create an issue of fact. If anything, plaintiff's expert's opinion is entitled to more weight. Moreover, that opinion

> constituted an unmistakable rejection of defendants' expert's theory.

(*id.* at 443). In rejecting the magic word rule, however, it is clear that the court in *Linton* was only doing so in cases where causation was negated via a medical affirmation undergirded solely by a review of radiological films, which the court deemed unpersuasive (*id.* at 441). In fact, the court cited cases such as *Becerril v Sol Cab Corp.* (50 AD3d 261 [1st Dept 2008]) and *Brewster v FTM Servo, Corp.* (44 AD3d 351 [1st Dept 2007]) with approbation, noting that these cases

> involved plaintiffs who were undisputedly involved in a prior accident in which the same body parts were injured but [who] failed to address why the prior accidents were not a possible cause of their current symptoms

(*Linton* at 442). Thus, where a defendant's evidence establishes that the injuries alleged are causally unrelated to an accident because they can be traced to a prior accident, to avoid summary judgment, plaintiff's doctor must specifically address that contention and relate the injuries alleged to the accident giving rise to the suit (*Becerril* at 261-262 ["Notably, plaintiff conceded at his deposition that he sustained injuries to his neck and back in a prior accident, and an MRI conducted shortly after the subject accident showed degenerative disc disease. In these circumstances, it was incumbent upon plaintiff to present proof addressing the asserted lack of causation."]; *Brewster* at 352 ["Brewster conceded

at his deposition that he had sustained injuries to his neck, back and shoulder in a prior automobile accident. Once a defendant has presented evidence of a preexisting injury, even in the form of an admission made at a deposition, it is incumbent upon the plaintiff to present proof to meet the defendant's asserted lack of causation. Brewster's submissions totally ignored the effect of his previous mishap on the purported symptoms caused by the latest accident. The fact that Hernandez's expert discerned some minor loss of motion in Brewster's lumbar spine is irrelevant where the objective tests performed by this physician were negative, and Brewster had testified to a preexisting injury in that part of his body." (internal citations omitted)]).

In support of this motion, defendants submit five sworn medical reports, only two of which are relevant to this decision.

The first, authored by Audrey Eisenstadt (Eisendstat), a radiologist, details her review of an MRI study to plaintiff's cervical spine. Specifically, she reviewed images of a study performed on December 29, 2011, three months after the accident alleged. While noting herniations in the spine, Eisendstat opines that the dessication and osteophyte formation present in the study suggest degenerative disc disease which preexisted the accident on September 24, 2011. The second report is also authored by Eisensdstat and details her review of on an MRI study to plaintiff's right shoulder performed on September 29, 2011,

approximately two months after the accident alleged herein. Eisendstadt opines that while the image indicates some joint effusion, the same has no relationship to the accident giving rise to the suit.

Defendants also submit a portion of plaintiff's deposition transcript, wherein he testified that prior to the instant accident, he was involved in two prior motor vehicle accidents where he sustained injury. Specifically, in 1988, plaintiff was involved in an accident where he sustained four fractured ribs, a hip fracture, and a fracture to his left shoulder. In 1999, he was also involved in an accident, fracturing two teeth and herniating a disc in his lower back.

Based on the foregoing, defendants establish *prima facie* entitlement to summary judgment in that they tender evidence which demonstrates that the injuries sustained by plaintiff, namely, cervical and lumbar spine herniations and tendinitis in his right shoulder, were not caused by his accident on September 24, 2011 (*Pommells* at 573-574; *Franchini* at 537; *Marsh* at 552; *Kaplan* at 469; *Giraldo* at 419-420). Specifically, plaintiff testified that he had two prior motor vehicle accidents wherein he hurt his back, herniated a disc and also fractured his hip and left shoulder. Eisendstadt opined that with respect to plaintiff's claimed cervical spine injuries, the same preexisted the accident. Similarly, with respect to plaintiff's claimed right shoulder

injury, Eisendstadt opined that any injury evinced in the images she reviewed - such as joint effusion - was not the related to the instant accident.

Thus, because defendants' evidence negating causation is more than just an opinion by a doctor who reviewed plaintiff's films, the burden shifts to plaintiff to rebut the absence of causation by specifically addressing the foregoing, namely the claim that the injuries sustained were caused by the instant accident rather than plaintiff's prior accidents (*Linton* at 442; *Becerril* at 261-262; *Brewster* at 352). Any argument that plaintiff's testimony doesn't specify that he injured all the same body parts claimed here in the prior accident such that his current injuries cannot be attributed to those accidents, is unavailing. Significantly, plaintiff testified that the accident in 1988 was "a bad accident," so much so, that he sustained fractures to his upper and lower body. Such testimony coupled with Eisenstadt's opinion is sufficient to negate causation and shift the burden to plaintiff who must appropriately rebut the foregoing evidence.

Plaintiff's opposition fails to sufficiently rebut the absence of causation so as to raise an issue of fact sufficient to preclude summary judgment. To be sure, while plaintiff submits a legion of medical evidence, evincing treatment from the date of the instant accident through 2015, none of it addresses defendants' evidence that all of plaintiff's injuries predate the instant accident and

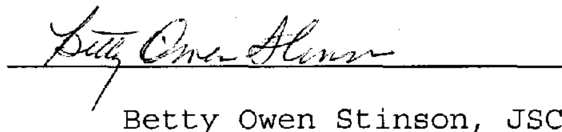
were caused by his prior two accidents. In particular, the affirmation from Leon Reyfman (Reyfman), a pain management doctor, simply states that "[t]here is a direct causal relationship between the accident described and the patient's injuries." Plaintiff's opposition fails to raise an issue of fact and defendants' motion is granted (*see Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006] ["Where, as here, plaintiff sustained injuries as a result of accidents or incidents that preceded the accident giving rise to the litigation, plaintiff's expert must adequately address how plaintiff's current medical problems, in light of her past medical history, are causally related to the subject accident."]). It is hereby

ORDERED that the complaint be dismissed with prejudice. It is further

ORDERED that defendants serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : April 18, 2016
Bronx, New York



Betty Owen Stinson, JSC