Tsui v Coislou
2016 NY Slip Op 30998(U)
March 21, 2016
Supreme Court, New York County
Docket Number: 151614/13
Judge: Arlene P. Bluth

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

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Jason Tsui,

Plaintiff,

-against-

Francis Coislou, Sargent Operating Corp., MD A. Rashid, and Beata Transit Inc.,

Defendants.

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Index No. 151614/13
Mot. Seq. 003 and 004

DECISION AND ORDER
Hon. ARLENE P. BLUTH, JSC

Motion sequence numbers 003 and 004 are consolidated for joint disposition.

The motion of defendants Coislou and Sargent Operating Corp. (seq 003) for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d), and the motion of defendants Rashid and Beata Transit Inc. (seq 004) for the same relief are granted and the action is dismissed.

In his verified bill of particulars, plaintiff alleges that on April 10, 2012 he suffered (1) a cut and resulting scar above his left eye, and (2) cervical range of motion limitations when he was a passenger in a taxi owned by defendant Beata and operated by defendant Rashid that allegedly collided with a vehicle operated by defendant Coislou and owned by defendant Sargent.

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, 582 NYS2d 395 [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, 767 NYS2d 88 [1st Dept 2003], quoting *Grossman v Wright*, 268 AD2d 79, 84, 707

NYS2d 233 [1st Dept 2000]). Where there is objective proof of injury, the defendant may meet his 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, 907 NYS2d 479 [1st Dept 2010], citing *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [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*, 58 AD3d 434, 435, 870 NYS2d 318 [1st Dept 2009]). 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, 767 NYS2d at 90). 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, 746 NYS2d 865 [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, 873 NYS2d 537 [1st Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214, 820 NYS2d 26 [1st Dept 2006]).

Defendants Coislou and Sargent's Motion for Summary Judgment

In support of their motion, Coislou and Sargent submit the affirmed report of Dr. Desrouleaux, a neurologist, who measured normal ranges of motion in plaintiff's cervical spine on 10/9/14. Dr. Desrouleaux concluded that plaintiff's cervical spine injury was resolved and that plaintiff could perform his daily activities without any neurological restrictions.

Coislou and Sargent also submit an affirmed report from Dr. Bromley, a plastic surgeon, who examined the scar above plaintiff's left eyebrow on 10/9/14. Dr. Bromley found that the scar measured 1 cm in length by 0.5 cm in width. Dr. Bromley also attaches dated photographs of plaintiff's scar. Dr. Bromley concluded that the scar did not interfere with plaintiff's ability to participate in daily activities.

Regarding the 90/180 claim, Coislou and Sargent cite to plaintiff's deposition testimony where plaintiff said that he returned to work two or three days after the accident.

Defendants Rashid and Beata Transit Inc.'s Motion for Summary Judgment

In support of their motion, Rashid and Beata submit the affirmed report of Dr. Goldstein, a plastic surgeon, who examined plaintiff's scar on 10/21/14. Dr. Goldstein measured the scar at 1.5 cm by 0.4 cm and attached dated photos of the plaintiff's scar. Dr. Goldstein concluded that the scar was permanent, but it did not prevent plaintiff from the activities of daily living or gainful employment.

Rashid and Beata also submit the affirmed report of Dr. Schwartz, an orthopedist, who examined plaintiff on 10/6/14 and found normal ranges of motion in plaintiff's cervical spine. Dr. Schwartz concluded that plaintiff suffered no permanent injuries to the cervical spine.

Rashid and Beata also cited to plaintiff's deposition testimony where plaintiff said that he

returned to work two or three days after the accident.

Thus, all defendants have met their burden of establishing a prima facie case that plaintiff did not suffer a serious injury, and the burden shifts to plaintiff to oppose.

Plaintiff's Opposition

In opposition to defendants' motions, plaintiff submits 4 photographs of his face (exh I). In his affidavit (exh H, para. 6), plaintiff states that the photographs "depict the facial injuries I sustained immediately after the April 10, 2012 motor vehicle accident and *how the permanent scarring looks at the present time* (emphasis supplied)." However, while the Court will assume that the photo showing blood on plaintiff's face was taken immediately after the accident, it is unclear when the other 3 photographs, which show bruising, were taken. Plaintiff has not presented any proof, or even an estimation, of when those other 3 photos were taken. The Court notes that plaintiff did not deny the accuracy of the Dr. Bromley's and Dr. Goldstein's October 2014 photos of his face.

Plaintiff submits an undated affirmation from Dr. Monasebian who states that on May 30, 2014, he measured plaintiff's scar as 2 mm by 4 mm in the widest area. Although Dr. Monasebian concluded that the scar is causally related to the accident on April 10, 2012 and that it is a permanent and significant disfigurement, he did not state that he took any photographs of plaintiff on the exam date, and no photos are attached to his affirmation.

Defendants established their prima facie entitlement to judgment as a matter of law by demonstrating, through the affirmed reports of two plastic surgeons and photographs, that plaintiff did not sustain a "significant disfigurement" within the meaning of Insurance Law § 5102(d). Rather, defendants' photographs depict a small healed scar in plaintiff's left eyebrow.

In opposition, plaintiff did not submit a recent photograph and did not challenge defendants' doctor's recent photographs. *See Sidibe ex rel. Sarata v Cordero*, 913 NYS2d 78, 79 (1st Dept 2010). The Court is unable to conclude that a reasonable person would view the small eyebrow scar as unattractive, objectionable or that it would subject plaintiff to pity or scorn. Thus, plaintiff failed to raise an issue of fact regarding his significant disfigurement claim.

Regarding the alleged cervical injury, plaintiff submits reports and notes from Dr. Podhorodecki (ex K). Significantly, Dr. Podhorodecki did not submit an affidavit, affirmed report or an affirmation. Instead, this exhibit was certified by Denise Valeggia. "[O]nly hospital records, and not physician office records, are admissible by certification" (*Bronstein-Becher v Becher*, 25 AD3d 796, 797, 809 NYS2d 140 [2d Dept 2006] [internal citations omitted]). Therefore, the documents in this exhibit are inadmissible. Even if these documents were admissible, Dr. Podhorodecki does not raise an issue of fact; he saw plaintiff only once, 3 weeks after the accident. Thus, plaintiff failed to raise any issue of fact regarding his alleged cervical spine injury and did not raise any issue of fact regarding a 90/180 day claim.

Accordingly, it is

ORDERED that the motions for summary judgment by Francis Coislou, Sargent Operating Corp., MD A. Rashid, and Beata Transit, Inc. are granted, and the case is dismissed.

This is the Decision and Order of the Court.

Dated: March 21 2016
New York, New York

HON. ARLENE P. BLUTH, JSC