Webber v Ferreras
2016 NY Slip Op 32418(U)
November 16, 2016
Supreme Court, Bronx County
Docket Number: 300214/13
Judge: Barry Salman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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JUNIE WEBBER,

Plaintiff(s),

- against -

BIENVENIDO FERRERAS, CHARLIE FOX, INC., NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX OPERATING AUTHORITY, THE CITY OF NEW YORK, AND CHANNELLE DUDLEY,

Defendant(s).

DECISION AND ORDER

Index No: 300214/13

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In this action for personal injuries arising from an automobile accident, defendants BIENVENIDO FERRERAS (Ferreras) and CHARLIE FOX, INC. (Charlie) move for an order granting them summary judgment and dismissing plaintiff's complaint on grounds that she did not sustain a serious injury as defined by the Insurance Law. Plaintiff opposes the instant motion asserting that questions of fact preclude summary judgment. Plaintiff also cross-moves for an order striking Ferreras and Charlie's answer on grounds that they've failed to appear for depositions. Ferreras and Charlie oppose plaintiff's cross-motion asserting that the failure to appear for depositions is attributable to their motion for summary judgment, which pursuant to CPLR § 3214 stayed all discovery during its pendency.

For the reasons that follow hereinafter, Ferreras and Charlie's motion and plaintiff's cross-motion are granted, in part.

Ferreras and Charlie's Motion

On this record, with respect to all categories of injury, permanent and under 90/180, Ferreras and Charlie establish prima facie entitlement

to summary judgment in that they tender objective medical evidence negating injury. Plaintiff's proof, however, establishing a serious injury both contemporaneous with the accident and during a recent examination, raises a question of fact sufficient to preclude summary judgment under the permanent category of injury. Plaintiff's proof, however, fails to demonstrate that her activities of daily living were curtailed to the degree or for the duration required by law thereby failing to raise an issue of fact as to that category of injury and warranting the grant of that portion of Ferreras and Charlie's motion.

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 supported 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)]; *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."]).

Here, Ferreras and Charlie submit a sworn report from Audrey

Eisenstadt (Eisenstadt), a radiologist, wherein she details her review of MRI studies to plaintiff's left shoulder and cervical spine - the body parts plaintiff alleges to have injured. Significantly, the MRI studies were performed on March 1, 2012, 24 days after the accident which allegedly occurred on February 6, 2012. With respect to the left shoulder and cervical spine, Eisenstadt notes that the studies reveal degenerative changes, unrelated to trauma. Based on the foregoing, Ferreras and Charlie establish prima facie entitlement to summary judgment in that they negate causation by establishing that plaintiff's injuries were unrelated to trauma and instead degenerative.

Plaintiff's opposition establishes the existence of a permanent injury to her shoulder and relates those injuries to the instant accident. Thus, Farrera and Charlie's motion with respect to permanent injury is denied. In order to raise an issue of fact with respect to serious injury under the permanent category, a plaintiff must establish that the injuries alleged are the result of the accident claimed and that the limitations alleged are the result of those injuries (*Noble v Ackerman*, 252 AD2d 392, 394-395 [1st Dept 1998]). Plaintiff's proof establishing serious injury, medical or otherwise, must not only be admissible, but it must also be objective (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 350 [2002]; *Grasso v Angerami*, 79 NY2d 813, 814-815 [1991]; *Blackmon v Dinstuhl*, 27 AD3d 241, 242 [1st Dept 2006]; *Thompson v Abassi*, 15 AD3d 95, 97 [1st Dept 2005]; *Shinn* at 198; *Andrews v Slimbaugh*, 238 AD2d 866, 867-868 [2d Dept 1997]; *Zoldas v Louise Cab Corporation*, 108 AD2d 378, 382 [1st Dept 1985]). Plaintiff's proof must also demonstrate the existence of a serious injury contemporaneous with the accident alleged

(*Blackmon* at 242; *Thompson* at 98 [Court held that the failure by plaintiff's doctor to provide objective proof of injury contemporaneous with the accident was fatal and was not cured by same doctor's finding of injury, with objective evidence, two and one half years later.]; *Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]; *Pajda v Pedone*, 303 AD2d 729, 730 [2d Dept 2003]; *Jimenez v Kambli*, 272 AD2d 581, 583 [2d Dept 2000]). Additionally, in order to raise an issue of fact as to the existence of a serious injury the medical evidence presented must include a recent examination of the plaintiff at which the injuries are objectively established (*Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Thomson v Abassi*, 15 AD3d 95, 97 [1st Dept 2005]; *Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). In addition, where as here, movants negate causation, plaintiff must proffer evidence linking the accident alleged to the injuries sustained.

Here, plaintiff submits a sworn affirmation from Louis C. Rose (Rose), an orthopedic surgeon, wherein he asserts that has been treating plaintiff since the accident alleged; ultimately preforming arthroscopic surgery to her left shoulder. Significantly, Rose first saw plaintiff on February 15, 2012, nine days after the accident alleged. Upon examining plaintiff, Rose noted that the range of motion in her left shoulder was restricted in all planes. Notably, Rose disclosed plaintiff's ranges of motion, comparing it to disclosed normal ranges. Rose prescribed physical therapy, which proved unsuccessful, thereby requiring surgery on December 26, 2013. On August 14, 2015, Rose reexamined plaintiff, again noting restricted range of motion in her left shoulder. Based on the foregoing, Rose concludes that plaintiff's

shoulder injury is permanent, limiting, and was caused by the accident alleged.

Based on the foregoing objective medical evidence, plaintiff establishes the existence of a serious injury contemporaneous with the instant accident and which has persisted unabated thereafter. Moreover, here, where Ferreras and Charlie negated causation through the use of plaintiff's own medical records which allegedly indicate that her injuries were degenerative, Rose's assertion that plaintiff's injuries were caused by the instant accident is sufficient to raise an issue of fact as to causation (*Linton* at 443).

Plaintiffs' opposition, however, fails to raise an issue of fact sufficient to preclude summary judgment with respect to the 90/180 category of injury.

Once defendant establishes the absence of injury under the 90/180 category of injury, plaintiff must come forward with competent medical evidence demonstrating that as result of the accident alleged, plaintiff was unable to perform substantially all of his activities of daily living for not less than 90 of the first 180 days after the accident (*Ponce v Magliulo*, 10 AD3d 644, 644 [2d Dept 2004]; *Sainte-Aime v Ho*, 274 AD2d 569, 570 [2d Dept 2000]).

Here, while plaintiff's evidence certainly establishes a medically determined injury, she fails to establish that her activities were significantly curtailed for at least 90 days during the first 180 days after the accident. Specifically, at her deposition, which plaintiff submits, she testified that at the time of the accident, she worked as desk clerk, but only missed three weeks of work as a result of the

instant accident.

Plaintiff's Cross-Motion

Plaintiff's cross-motion is granted to the extent of compelling Ferreras and Charlie to appear for depositions.

It is well settled that "[t]he nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion" (*Zakhidov v Boulevard Tenants Corp.*, 96 AD3d 737, 738 [2d Dept 2012]). However, since striking a party's pleading for failure to provide discovery is an extreme sanction, it is only warranted when the failure to disclose is willful and contumacious (*Bako v V.T. Trucking Co.*, 143 AD2d 561, 561 1st Dept 1999]). Similarly, since the discovery sanction imposed must be commensurate with the disobedience it is designed to punish, the sanction of preclusion is also only appropriate when there is a clear showing that a party has willfully and contumaciously failed to comply with court-ordered discovery (*Zakhido* at 739; *Assael v Metropolitan Transit Authority*, 4 AD3d 443, 444 [2d Dept 2004]; *Pryzant v City of New York*, 300 AD2d 383, 383 [2d Dept 2002]). Accordingly, where the failure to disclose is neither willful nor contumacious, and instead constitutes a single instance of non-compliance for which a reasonable excuse is proffered, the extreme sanction of striking of a party's pleading is unwarranted (*Palmenta v. Columbia University*, 266 AD2d 90, 91 [1st Dept 1999]). Nor is the striking of a party's pleadings warranted merely by virtue of "imperfect compliance with discovery demands" (*Commerce & Industry Insurance Company v Lib-Com, Ltd*, 266 AD2d 142, 144 [1st Dept 1999]). Because willful and contumacious behavior can be readily inferred upon a party's repeated

non-compliance with court orders mandating discovery (*Pryzant v City of New York*, 300 AD2d 383, 883 [2d Dept 202]), only when a party adopts a pattern of willful non-compliance with discovery demands (*Gutierrez v Bernard*, 267 AD2d 65, 66 [1st Dept 1999]) and repeatedly violates discovery orders, thereby delaying the discovery process, is the striking of pleadings warranted(*Moog v City of New York*, 30 AD3d 490, 491 [2d Dept 2006]; *Helms v Gangemi*, 265 AD2d 203, 204 [1st Dept 1999]).

Here, contrary to plaintiff's assertion, Ferreras and Charlie's failure to appear for depositions is neither willful nor contumacious. To be sure, CPLR § 3214 states that "[s]ervice of a notice of motion under rule 3211, 3212, or section 3213 stays disclosure until determination of the motion unless the court orders otherwise." Thus, insofar as Ferreras and Charlie made the instant motion for summary judgment, discovery was stayed during its pendency such that they had no obligation to appear for depositions. However, inasmuch as this Court has denied a portion of Ferreras and Charlie's motion for summary judgment, they, as parties, must now appear for depositions. It is hereby

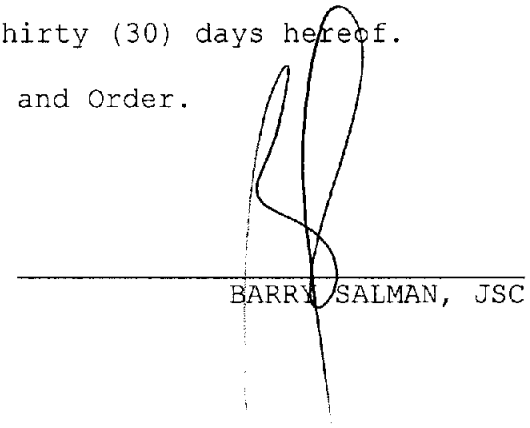
ORDERED that at trial, plaintiff be precluded from asserting the the instant accident caused injuries falling within the ambit of the 90/180 category of injury under the Insurance Law. It is further

ORDERED that Ferreras and Charlie appear for depositions within thirty (30) days of service of this Decision and Order upon them with Notice of entry. It is further

ORDERED that plaintiff 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 : November 16, 2016
Bronx, New York



BARRY SALMAN, JSC