Houghtaling v Alvord
2017 NY Slip Op 33503(U)
December 6, 2017
Supreme Court, Livingston County
Docket Number: Index No. 0245-2015
Judge: Robert B. Wiggins
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SUPREME COURT
STATE OF NEW YORK COUNTY OF LIVINGSTON

LOIS HOUGHTALING,

Plaintiff, **DECISION & ORDER**

vs. **Index No. 0245-2015**

DONNA ALVORD,

Defendant.

Plaintiff commenced this action seeking damages for personal injuries she allegedly sustained in a motor vehicle accident. Plaintiff was in the passenger seat of a car that was hit on the passenger side by Defendant's vehicle. She claimed at the time of the accident that her right shoulder, right wrist, neck, left knee and stomach hurt as a result. Plaintiff had been on disability since breaking her left arm in a fall from a porch in 2009. She also suffered spinal injuries in a 2010 car accident. Defendant now moves for summary judgment, claiming that plaintiff does not meet the threshold for a serious injury.

Initially, Defendant claims that she is entitled to dismissal because Plaintiff did not specify in her BOP what category of serious injury she is claiming - she just recited the entire definition from the statute. While Defendant contends that this warrants summary judgment, "[t]he drastic remedy of striking a pleading is not appropriate absent a clear showing that the failure to comply with discovery demands was willful or contumacious and, here, defendant failed to make that showing. The remedy for a plaintiff's failure to comply with a demand for a bill of particulars is a motion to compel compliance, and it does not appear on the record before us that defendant made such a motion" (*Johnson v Dow*, 56 AD3d 1288 [4th Dept 2008] [internal quotations and citations omitted]).

Plaintiff also raises a procedural argument - that the transcript of her

deposition was not served upon and signed by her as required by CPLR 3116 (a), and, therefore, it is not in admissible form and can not be relied upon to support dismissal of the 90/180 day category of serious physical injury. However, as Defendant points out, the usual stipulations at the outset of the deposition included a stipulation that reading and signing of the deposition was waived. Accordingly, Plaintiff's deposition testimony is admissible on this motion and, as is implicit in Plaintiff's making only a procedural argument on this point, her testimony supports dismissal of the 90/180 day claim. Plaintiff has offered no substantive proof in admissible form in opposition to this portion of the motion, and, accordingly, the motion is granted to that extent.

The categories implicated here are the "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system" categories. "Whether a limitation of use or function is 'significant' or 'consequential' (i.e., important) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Dufel v Green*, 84 NY2d 795, 798 [1995][internal citation omitted]). A consequential or significant limitation must have an objective basis *(see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]), and must be more than minor, mild, or slight (*see Licari v Elliot*, 57 NY2d 230, 236 [1982]). Moreover, "even where there is objective medical proof" of a serious injury, the existence of a preexisting injury may render summary judgment appropriate (*Pommells v Perez*, 4 NY3d 566, 572 [2005]). Once a defendant meets the initial burden of establishing that plaintiff's injuries were the result of a preexisting condition, plaintiff must " 'adequately address how [the alleged injuries] in light of his past medical history, [are] causally related to the subject accident' " (*Webb v Bock*, 77 AD3d 1414, 1415 [4th Dept 2010], citing *Anania v Verdgeline*, 45 AD3d 1473, 1474 [4th Dept 2007]).

In support of the motion, Defendant submits the IME report of Dr. Daniel

Carr, an orthopaedic surgeon, who says that there is no objective medical evidence of any injury to plaintiff's neck, shoulder, wrist or knee. However, while Dr. Carr says that range of motion is normal in the cervical spine, he notes significant loss of range of motion in the shoulder. Such significant loss of range of motion is objective proof of serious physical injury, and there is no attempt to explain why these objective findings should be disregarded. Accordingly, regardless of the adequacy of the Plaintiff's responding papers (and they are largely inadequate, including the inclusion of an unsigned purported affidavit), the motion must be denied with respect to these claims (*see e.g. Ramos v Baig*, 145 AD3d 695, 695-696 [2d Dept 2016] ["The defendants failed to make a prima facie showing that the plaintiff did not sustain a serious injury. . . The defendants' own submissions revealed significant limitations in the range of motion of the plaintiff's spine and right shoulder"]; *Cook v Peterson*, 137 AD3d 1594 [4th Dept 2016]). Accordingly, it is hereby

ORDERED that the Defendant's motions to for summary judgment is GRANTED to the extent of dismissing Plaintiff's claims under the 90/180 category of serious physical injury; and DENIED with respect to the permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system categories.

Date: December 6, 2017

Hon. Robert B. Wiggins
Acting Supreme Court Justice