Minskaya v Summa
2013 NY Slip Op 34208(U)
September 13, 2013
Supreme Court, New York County
Docket Number: 112616/11
Judge: Arlene P. Bluth

[* 1]

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

Index No.: 112616/11
Motion Seq 02, 03 and 04

Marina Minskaya,

Plaintiff,

-against-

Jaime R. Summa and Joseph N. Antico,

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Motion Sequences 02, 03 and 04 are consolidated for joint disposition.

Motion Sequence 02 is plaintiff's motion to compel discovery, specifically, defendant driver's (Antico's) medical records from the emergency room after the accident and his prior medical history. Motion Sequence 03 is defendants' motion for summary judgment dismissing this action on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5012(d). Motion Sequence 04 is plaintiff's motion for partial summary judgment on liability.

In this automobile accident case, plaintiff was a passenger in a car driven by non-party Rusina Volkova which was collided with defendants' car on July 13, 2011 on the Brooklyn-Queens Expressway. Defendant-driver Antico denies any memory of the accident - he remembers driving and then he remembers being taken out of the car by emergency personnel.

Plaintiff's motion for Summary Judgment on Liability (mot seq. 004)

In order to prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. *Alvarez v Prospect Hospital,* 68 NY2d 320, 508 NYS2d 923 (1986). Once the movant demonstrates entitlement to judgment, the burden shifts to the

opponent to rebut that prima facie showing. *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872, 433 NYS2d 1015 (1980). In opposing such a motion, the party must lay bare its evidentiary proof. Conclusory allegations are insufficient to defeat the motion; the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. *Zuckerman v. City of New York,* 49 NY2d 557 at 562, 427 NYS2d 595 (1980).

In deciding the motion, the court must draw all reasonable inferences in favor of the non-moving party and must not decide credibility issues. (*Dauman Displays, Inc. v Masturzo,* 168 AD2d 204, 562 NYS2d 89 [1st Dept 1990], *lv. denied* 77 NY2d 939, 569 NYS2d 612 [1991]). As summary judgment is a drastic remedy which deprives a party of being heard, it should not be granted where there is any doubt as to the existence of a triable issue of fact (*Chemical Bank v West 95th Street Development Corp.*, 161 AD2d 218, 554 NYS2d 604 [1st Dept 1990]), or where the issue is even arguable or debatable (*Stone v Goodson,* 8 NY2d 8, 200 NYS2d 627 [1960]).

Rusina Volkova, the driver of plaintiff's host vehicle, submits an affidavit stating that plaintiff was her passenger. In any event, there is no issue of fact and everyone agrees that plaintiff was not driving. Therefore, she was an innocent passenger. Accordingly, because she "cannot be found at fault under any version of how the accident occurred" the plaintiff's motion is granted. *Mello v Narco Cab Corp.*, 105 AD3d 634, 963 NYS2d 581 (1st Dept 2013). *See also Garcia v Tri-County Ambulette Serv.*, 282 AD2d 206 (1st Dept 2001). Plaintiff is granted summary judgment in that she had no fault in the happening of the accident.

Defendants' threshold motion (mot. seq. 03)

To prevail on a motion for summary judgment on threshold, 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 [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]). 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 [1st Dept 2010], *citing Pommells v Perez*, 4 NY3d 566 [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*, 2009 NY Slip Op 43 [1st Dept]). 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). 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 [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 [1st Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]).

Besides orthopedic injuries, in the supplemental bills of particulars, plaintiff claims, inter alia, that she suffered vertigo, various vision problems and cognitive disorders. In the defendants' moving papers, however, they offer only an orthopedist's affirmed report, that of Dr. Robert Israel and the affirmed report of Dr. Melissa Cohn, a radiologist. The defendants do not address vertigo, various vision problems or cognitive disorders. The defendants do not even present a neurologist's affirmed report. By failing to address all the injuries alleged in the various bills of particulars, defendants' motion papers failed to adequately address plaintiff's claims that she developed neurological injuries as a result of the subject accident, which were plainly set forth in the supplemental bills of particulars. Therefore, the Court finds that because defendants have not met their prima facie burden on this motion, it is unnecessary to determine whether the papers submitted in opposition were sufficient to raise a triable issue of fact, and the motion is denied. *See Yanping Xu v Gold Coast Freightways*, Inc. 2013 WL 3034079, 1 (2d Dept 2013), citing *Bove v Zanelli*, 102 AD3d 644, 956 NYS2d 920 (2d Dept 2013).

Plaintiff's motion to compel (mot. seq. 02)

Because defendant Antico testified that he doesn't remember anything about the accident, plaintiff seeks his medical records. By notice for Discovery and Inspection dated July 17, 2012, plaintiff sought authorizations for defendant's medical records from 2008 (3 years before the accident) to the present, including the emergency room and hospital records from the date of the accident. This motion is denied.

Defendant does not claim that he had a condition which precludes a finding of liability

against him. He merely claims that he doesn't remember anything having to do with the accident. To the extent plaintiff claims that defendant made certain other representations at his deposition, plaintiff has not supported that claim with any specific citations to deposition pages; merely annexing the entire transcript as an exhibit does not fulfill any burden whatsoever, and such a practice is prohibited by this Court's rules. Therefore, plaintiff has not shown that there is any reason to delve into defendant Antico's medical records just because he said he has no memory of what happened. Should he miraculously regain his memory at the trial, however, plaintiff may make appropriate applications and the trial judge will rule on those.

Accordingly, it is hereby

ORDERED that Motion Sequence 02, plaintiff's motion to compel discovery, is denied; and it is further

ORDERED that Motion Sequence 03, defendants' motion for summary judgment dismissing this action for lack of "serious injury" within the meaning of Insurance Law §5012(d) is also denied; and it is further

ORDERED that Motion Sequence 04, plaintiff's motion for partial summary judgment on liability is granted to the extent that plaintiff, an innocent passenger, is not at fault for the happening of the accident.

This is the Decision and Order of the Court.

Dated: September 13, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC