Pendergrass v Dowe
2013 NY Slip Op 32250(U)
September 23, 2013
Sup Ct, New York County
Docket Number: 104128/2011
Judge: Arlene P. Bluth

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. ARLENE P. BLUTH

PRESENT: _____ Justice PART 22

Index Number : 104128/2011
PENDERGRASS, CHARLET
vs.
DOWE, LANTONYA T.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 4, were read on this motion to/for SJ against Pendergrass

Notice of Motion/Order to Show Cause — Affidavits — Exhibits and Cross-motion | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3

Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/23/13

_____, J.S.C.
ARLENE P. BLUTH
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

----------x Index No.: 104128/2011

Charlet Pendergrass and Victor Ortiz, Motion Seq 003

Plaintiffs,

-against-

Latonya T. Dowe and Jose Hernandez, DECISION/ORDER

Defendants.

Hon. Arlene P. Bluth, JSC

----------x

The motion for summary judgment of defendant Latonya T. Dowe and cross-motion of defendant Jose Hernandez to dismiss this action against plaintiff Charlet Pendergrass only on the ground that said plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) are both granted.

In this action, Pendergrass alleges that, on December 13, 2010, she sustained personal injuries while she was a passenger in a vehicle driven by defendant Jose Hernandez that collided with defendant Latonya T. Dowe's vehicle. In support of their motions, defendants claim that Pendergrass did not sustain a permanent consequential limitation of a body, organ, member, function or system, a significant limitation of use of a body part or system, or a 90/180 curtailment of activities, as required by Insurance Law § 5102 (d).

To prevail on a motion for summary judgment in a serious injury case, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a

"serious injury" (*see Santos v Perez*, 107 AD3d 572, 573 [1st Dept 2013]). 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 [2nd 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, 818 [1st Dept 2010], citing *Pommells v Perez*, 4 NY3d 566, 572 [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 [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 [the 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 organ or body system's use and purpose, or a quantitative assessment that assigns numeric percentage to plaintiff's loss of range of motion (*Perl v Meher,* 18 NY3d 208, 217 [2011] citing *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]).

In the verified bill of particulars, Pendergrass claims neck, lower back and right knee injuries (herniated disc with extension of the disc into the neural foramen at L3-L4 and L4-L5, disc bulge at C3-C4 impinging on the neural canal, joint effusion in the right knee, "severe strain and sprain") and severe anxiety. Pendergrass testified at her deposition that she did not seek medical treatment on the day of the accident, but sought out treatment a day or two later (Mulle aff, exhibit E at 80). She testified that she could not recall if she missed any work after the accident, that she continued to perform her responsibilities after the accident as best she could, and that she had no current complaints (Mulle aff, exhibit E at 20 and 106).

Defendants' showing

In support of their motions, defendants submit the February 8, 2012 affirmed medical report of Dr. Robert Israel, a board certified orthopedic surgeon. Dr. Israel saw Pendergrass on that date and examined her cervical spine, lumbar spine and right knee. He measured all ranges of motion with a goniometer and found that there were no limitations. He found no spasms and all tests were negative for deficits. In sum, Dr. Israel found that Pendergrass has no disability as a result of the accident.

Defendants also submit the February 21, 2012 affirmed report of Dr. A. Robert Tantleff, M.D., a radiologist who reviewed the MRI of Pendergrass' cervical spine. The findings from the report establish a straightening of the cervical lordosis and a focal bulge at C3-4, creating impingement in the neural canal. According to Dr. Tantleff, there is no evidence in the MRI that would suggest changes to the structure of the cervical spine due to trauma; instead, he affirms that the MRI indicates the presence of degenerative changes that are consistent with Pendergrass' age, and are unrelated to the accident. According to the report, the bulge identified at C3-4 is a result of "the malalignment secondary to the degenerative nonisthmic spondylolisthesis" (Richard C. Mulle aff, exhibit H, at 4). In the report, Dr. Tantleff concludes that the findings are "chronic longstanding processes requiring years to develop ... and

consistent with the wear-and-tear of the normal aging process" and, therefore, are unrelated to the accident (Mulle aff, exhibit H, at 4).

Based upon these two reports, defendants have presented evidence of a pre-existing degenerative condition, which caused Pendergrass' alleged injuries, and thereby established a prima facie absence of a serious injury, shifting the burden to plaintiff to raise a triable issue of fact (*Pommells v* Perez, 4 NY3d 566, 579 [2005]; Kone *v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013]).

Plaintiff's showing

In support of her opposition to defendants' motions, Pendergrass submits multiple reports. Exhibit B is an unsigned and therefore unaffirmed report, accompanied by various notes, from Dr. Milivoje Milosevic. These are inadmissible and were not considered by the Court. "The uncertified and unaffirmed medical reports submitted by plaintiffs could not be used to raise an issue of fact" (*Luetto v Abreu*, 105 AD3d 558, 963 NYS2d 112 [1st Dept 2013], citing *Lazu v Harlem Group, Inc.*, 89 AD3d 435, 435-436, 931 N.Y.S.2d 608 [1st Dept. 2011]; *Rubencamp v Arrow Exterminating Co., Inc.*, 79 AD3d 509, 510, 913 NYS2d 68 [1st Dept. 2010]).

Exhibit C are three MRI reports from Excel Imaging and are of plaintiff's right knee, cervical and lumbar spine. Although they are signed by Mark Shapiro, MD, they are not affirmed. "The uncertified and unaffirmed medical reports submitted by plaintiffs could not be used to raise an issue of fact" *Luetto v Abreu*, 105 AD3d 558, 963 NYS2d 112 (1st Dept 2013). And so exhibit C was not considered by the Court.

Pendergrass also submits the affirmed records of Diana Vizakova, D.C. (Exhibit D). As a chiropractor, Dr. Vizakova was required to submit an affidavit; therefore, Dr. Vizakova's statement was not in admissible form and exhibit D was not considered by the Court. *See* CPLR 2106; *Gibbs v Reid*, 94 AD3d 636, 942 NYS2d 355 (1st Dept. 2012).

Pendergrass also submits a February 19, 2013 affirmation from Dr. Arkadiy Shusterman, D.O.; this is in admissible form and was considered by the Court. He first examined plaintiff February 13, 2013[1], which is more than two years after the

---

[1]Although on the first page of Dr. Shusterman's 2/19/13 affirmation he states that he examined plaintiff recently, on 2/13/12, that year 2012 obviously a typographical error and should have been 2013. Elsewhere he indicates the exam was in 2013 (paragraph 9). He also states that he reviewed the 2/8/12 report of Dr. Israel and the 2/21/12 radiology reports of Dr. Tantleff; it is unlikely that he would have received Dr. Israel's report so quickly and, if he meant 2012, then it would have been impossible for him to have seen Dr. Tantleff's reports because it would have been before they were even written.

December 13, 2010 accident. He conducted range of motion tests, using a goniometer, on Pendergrass' right knee, cervical spine and lumbosacral spine. He found limitations in all areas and indicated this by producing the numerical findings in the report, along with the normal range of motion and the percentage decrease. Dr. Shusterman concluded that the injuries, which are permanent and significant, are a result of the motor vehicle accident on December 13, 2010.

Analysis

Plaintiff has not shown a causal connection between her injuries/loss of range of motion and the accident. The only admissible relevant proof she has submitted in opposition to this motion was Dr. Shusterman's affirmation, but he did not see her until more than two years after the accident. "Absent admissible contemporaneous evidence of alleged limitations, plaintiff cannot raise an inference that his injuries were caused by the accident" *Shu Chi Lam v Wang Dong*, 84 AD3d 515, 922 NYS2d 381 (1st Dept 2011). An initial consultation two years after the accident is not contemporaneous. *See Soho v Konate* 85 AD3d 522, 523, 925 NYS2d 456, 457 (1st Dept 2011) (must show contemporaneous limitations as a result of the accident even where plaintiff has undergone surgery; five months after accident is too long),

Cabrera v Gilpin, 72 AD3d 552, 899 NYS2d 211 (1st Dept 2010) (six months is too long); *Toulson v Young Han Pae*, 13 AD3d 317, 788 NYS2d 334 (1st Dept 2004) (five months is too long).

In *Rosa v Mejia*, 95 AD3d 402 (1st Dept 2012), a case where the plaintiff did not present any admissible proof that she was evaluated for the injuries which she tried to attribute to the accident until five months after the accident, the Court found plaintiff did not prove causation. The Court held:

> The recent Court of Appeals decision in Perl v Meher (18 NY3d 208 [2011]) does not require a different result. Perl did not abrogate the need for at least a qualitative assessment of injuries soon after an accident (see Salman v Rosario, 87 AD3d 482, 484 [2011]). In fact, the Court noted with approval the comment in a legal article that "a contemporaneous doctor's report is important to proof of causation; an examination by a doctor years later cannot reliably connect the symptoms with the accident. But where causation is proved, it is not unreasonable to measure the *severity* of the injuries at a later time" (18 NY3d at 217-218).
>
> ***
>
> "While the Court of Appeals in Perl "reject[ed] a rule that would make contemporaneous quantitative measurements a prerequisite to recovery" (*Perl v Meher* 18 NY3d 208 at 218), it confirmed the necessity of some type of contemporaneous treatment to establish that a plaintiff's injuries were causally related to the incident in question."

Rosa v Mejia, 95 AD3d 402.

For the foregoing reasons, defendants met their burden with respect to the "permanence" and "significant" categories of serious injury, and, based upon plaintiff's deposition, with respect to the 90/180 day category of § 5102 (d) as well. Plaintiff has failed to submit admissible evidence to raise an issue of fact to support her claim of serious injury caused by the accident.

Accordingly, it is

ORDERED that defendants' motions for summary judgment dismissing this action is granted. The action is dismissed as against Charlet Pendergrass only; the balance of the action shall continue.

Dated: New York, New York
September 23, 2013

Hon. ARLENE P. BLUTH, JSC