Frederique v Chatterjee
2013 NY Slip Op 32350(U)
October 1, 2013
Sup Ct, NY County
Docket Number: 114032/10
Judge: Arlene P. Bluth

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Fredenque, Paul

-v-

Chattuge, Tiara

INDEX NO. 114032/10

MOTION DATE

MOTION SEQ. NO. 03

The following papers, numbered 1 to 3, were read on this motion to/for Summ J / Sanctions

Notice of Motion/Order to Show Cause — Affidavits — Exhibits — No(s). 1

Answering Affidavits — Exhibits — No(s). 2

Replying Affidavits — No(s). 3

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED

OCT 03 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10/1/13

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

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

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

Index No.:114032/10
Motion Seq 03

Paul Frederique,

Plaintiff,

-against-

Tiara Chatterjee,

Defendant.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

In this action, plaintiff alleges that on March 31, 2008 he sustained personal injuries when he was in a motor vehicle accident with defendant. Defendant's 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) is denied.

To prevail on a motion for summary judgment, 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]).

In his verified bill of particulars (exh. C to moving papers), plaintiff claims he sustained, among other things, injuries to his left shoulder (including rotator cuff and labral tears) which were surgically repaired on November 28, 2008 and various injuries to his cervical spine.

Defendant met his prima facie burden by submitting the affirmed reports of Dr. Berkowitz, a radiologist, who reviewed the MRI films of plaintiff's cervical spine and shoulder taken less than two months the accident. With respect to the cervical spine, Dr. Berkowitz made findings but opined "These findings are all chronic and degenerative in origin ... there is no evidence of acute traumatic injury to the cervical spine". With respect to the left shoulder MRI,

Dr. Berkowitz found only "degenerative changes ... There is no evidence of acute traumatic injury to the shoulder such as fracture, bone marrow edema or musculotendinous tear" (exh F). Defendant also submitted the affirmed report of Dr. Israel, an orthopedic surgeon who performed an IME on May 2, 2012; Dr. Israel found normal range of motion in plaintiff's cervical spine and shoulders; specifically with respect to the shoulders, Dr. Israel reported a negative Hawkins test, no sign of impingement and no pain with movement (exh. D).

Based on the foregoing, defendant satisfied his burden of establishing prima facie that plaintiff did not suffer a serious injury, and the burden shifts to plaintiff to raise a triable factual question as to whether he sustained a serious injury.

In opposition, plaintiff submits, inter alia, an affirmed report of Dr. Mark S. McMahon, which incorporates Dr. McMahon's records. Dr. McMahon, an orthopedic surgeon who performed shoulder surgery on plaintiff, contradicts the findings of Dr. Berkowitz and Dr. Israel. In contrast to Dr. Berkowitz, Dr. McMahon read the shoulder MRI films before he performed the surgery and he found rotator cuff and labral tears; after examining him, Dr. McMahon diagnosed the left shoulder injury as rotator cuff and labral tears, AC joint injury and cervical radiculitis. He specifically states that he disagrees with Dr. Berkowitz's shoulder MRI findings, that the shoulder MRI does not show severe degeneration and that when he performed the surgery, he "specifically saw that the tears described were not associated with chronic degeneration".

And in contrast to Dr. Israel, Dr. McMahon examined plaintiff on August 9, 2012 (three months after Dr. Israel's IME) and found significant decreased range of motion. Unlike Dr. Israel, regarding the shoulders, Dr. McMahon found significant decreased range of motion in elevation (50%), a positive Hawkins test, positive signs of impingement and pain with movement. Also unlike Dr. Israel, regarding the cervical spine, Dr. McMahon found significant

decreased range of motion in flexion (25.50), Extension (25/50) and bend to left/right (15/40).

In his affirmation, Dr. McMahon also specifically states his opinion that the injuries are due to the accident of March 31, 2008 and not as a result of any degenerative condition, and that they are permanent. Contrary to defendant's arguments in the reply, Dr. McMahon does not gloss over other accidents and his opinions do not rely on findings from other providers - he was plaintiff's treating physician and performed shoulder surgery on plaintiff. In preparation for the surgery, he read the shoulder MRI taken less than two months after the accident and totally disagreed with Dr. Berkowitz's reading of the MRI. He then did the surgery and what he found comported with what he saw on the MRI and disproved what Dr. Berkowitz saw.

Conclusion

Plaintiff has demonstrated that there are issues of fact which require a jury to decide. Quite simply, the doctors disagree and it is up to the jury, not this Court, to evaluate the medical testimony and decide who and what to believe.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff has not met the serious injury threshold as defined by Insurance Law §5102[d] is denied.

This is the Decision and Order of the Court.

HON. ARLENE P. BLUTH

Dated: October 1, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC