Norton v Singh
2013 NY Slip Op 32495(U)
October 11, 2013
Supreme Court, New York County
Docket Number: 104702/10
Judge: Arlene P. Bluth
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[* 1]
SCANNED ON 10/17/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH **PART** 22
Justice

Index Number : 104702/2010
NORTON, NICOLE
vs
SINGH, AVTAR
Sequence Number : 002
DISMISS

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

The following papers, numbered 1 to 3 **, were read on this motion to/for** MSJ - serious injury

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 17 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10/17/13

_____, 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.: 104702/10
Motion Seq 02

Nicole Norton,

Plaintiff,

-against-

Adtar Singh and Alekses Javich,

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

In this action, plaintiff alleges that on September 30, 2009 she sustained personal injuries when she was struck by defendants' vehicle as she crossed the street at West 42nd Street and Eighth Avenue. Defendants move 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), and that they are not liable for this accident. The branch of the motion regarding serious injury is is granted only to the extent that defendants are granted partial summary judgment dismissing plaintiff's 90/180-day claim, and otherwise denied; the branch of the motion seeking summary judgment on liability is denied.

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

Serious Injury

In her verified bill of particulars (exh. 4 to moving papers), plaintiff claims she sustained injuries to her cervical spine (including disc bulges), and bruises to her right leg, hip and right side of her head.

Defendants met their prima facie burden by submitting the affirmed reports of Dr. Desrouleaux, a neurologist, who examined plaintiff on January 9, 2012, and found that her cervical sprains and strains had resolved (exh 6), and Dr. Bleifer, an orthopedist, who examined plaintiff on November 8, 2011, and found that her post-concussion syndrome, post-traumatic cervical sprain and right hip contusion had all resolved (exh 7). Defendants' attorney cites to plaintiff's bill of particulars to show that she does not meet the requirements of a 90/180-claim.

In opposition, plaintiff submits records from the Bellevue Hospital Emergency Room (exh D) and Holy Name Hospital in New Jersey (date of service 10/3/09) (exh F); because neither of these records is certified, they are inadmissible. Plaintiff also submits unaffirmed records from Valley Health Medical Group (date of service 10/12/09) (exh E), unaffirmed records from Premier Orthopaedics & Sports Medicine, P.C. (exh G), various unsworn records from MaxHeath Chiropractic, P.C. (Exh H) and the unaffirmed report of Dr. Kushnerik of New York Pain Management Services. Because none of these reports is in admissible form, they were not considered in opposition to the motion.

Plaintiff submits the 11/12/09 Dr. Diamond's MRI report of 2 disc bulges and a sclerotic change in plaintiff's cervical spine and his accompanying (undated) affirmation (exh L and M). These exhibits, standing alone, are not sufficient to raise a triable factual question because "bulging or herniated discs are not, in and of themselves, evidence of serious injury without competent objective evidence of the limitations and duration of the disc injury" (*Wetzel v Santana*, 89 AD3d 554, 55 [1st Dept 2011]).

In further opposition to the motion, plaintiff submits the affidavit of Ruth Fernandez, a chiropractor (exh I), who first examined plaintiff on November 9, 2009, approximately 6 weeks after the accident, and recorded muscle spasm, decreased muscle strength, decreased deep tendon

reflexes and restrictions in the range of motion of her cervical spine, ranging from 30% through 55%[1]. Dr. Fleischer, a neurologist who examined plaintiff the next day, November 10, 2009, reported limitations in plaintiff's cervical spine, close to or identical to Ms. Fernandez's measurements (exh K). Ms. Fernandez continued to treat plaintiff through early 2011; she last examined plaintiff on March 7, 2012 and found restrictions in the range of motion of plaintiff's cervical spine from 37% to 55%. She opines that these injuries are causally related to the subject accident because the symptoms started after the accident, and that because these symptoms have persisted for more than three years after the accident, they are permanent.

In reply, defendants contend that in March of 2012 Ms. Fernandez found significantly greater limitations in plaintiff's cervical spine than Dr. Fleischer found just months after the accident, and that this unexplained inconsistency requires that their motion be granted. The Court has compared the cervical spine range of motion measurements from Dr. Fleischer's November 2009 exam and Ms. Fernandez's March 2012 exam, and notes the following: a 5 degree worsening in left rotation, a 10 degree worsening in flexion and extension, a 15 degree worsening right rotation and right and left lateral rotation. This situation is distinguishable from *Dorrian v Cantalico*, 101 AD3d 578, 957 NYS2d 47 (1st Dept 2012) where the court held that plaintiff's chiropractor failure to reconcile his measurements of range of motion deficits with earlier full range of motion deficits made by a physician warranted granted of defendants' motion. Here, the "recent quantified range of motion limitations, positive tests, and permanency provided the

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[1]Because plaintiff claimed injuries only to her cervical spine the verified bill of particulars and supplemental bill, and not her thoralumbar spine, the Court will refer to range of motion measurements in the cervical spine only. The supplemental bill added only out of pocket expenses and violation of a traffic rule–it did not set forth any injuries to any other parts of plaintiff's body.

requisite proof of limitations and duration of the disc injuries" (*Pietropinto v Benjamin*, 104 AD3d 617, 617-618 [1st Dept 2013]). Through the affidavit of plaintiff's chiropractor, plaintiff has created an issue of fact which requires a jury to decide. Simply put, with respect to plaintiff's cervical spine, the medical providers disagree about range of motion (restricted or full) and whether plaintiff is disabled in any way. It is up to the jurors, not this Court, to evaluate the medical testimony and decide who and what to believe.

However, plaintiff fail to raise an issue of fact as to whether her claimed injuries prevented her from "performing substantially all of the material acts which constitute[d his] usual and customary daily activities" (Insurance Law § 5102 [d]; *Merrick v Lopez-Garcia*, 100 AD3d 456, 457 [1st Dept 2012]). Plaintiff's bill of particulars claims only that she was confined to bed and home for one week, and missed one week of work; her affidavit in opposition to the motion (exh A) does not raise an issue of fact. Therefore, defendants are granted partial summary judgment dismissing plaintiff's 90/180-day claim (*Colon v Torres*, 106 AD3d 458, 965 NYS2d 90 [1st Dept 2013], *Martin v Portexit Corp.*, 98 AD3d 63 [1st Dept 2012]).

Liability

In support of the branch of defendants' motion for summary judgment on the issue of liability, defendants' counsel refers to a subsequent hearing that was held before the New York State Department of Motor Vehicles in connection with a ticket that defendant Singh was issued at the scene of the subject accident. Counsel also refers to the police officer's deposition testimony and concludes that "(t)he officer's version of events is impossible to have occurred in conjunction with the plaintiff's version of events" (aff., para. 12). This attorney's speculation only means that there are two (or maybe more) versions of how the accident occurred, not that

defendants have satisfied their burden of demonstrating there are no issues of fact requiring a trial. Moreover, counsel's argument, that because the summons issued to Singh for failing to yield to a pedestrian was vacated this automatically means that Singh did not do anything to cause the subject accident, ignores the difference in the burdens of proof at that hearing and this civil action. Moreover, because plaintiff did not participate in that hearing, she cannot be bound by any determinations made at that hearing as to how the accident happened; indeed, defendant has not established what findings, if any, were made. All that is annexed to defendants' moving papers is the notice of the hearing (exh 13).

With respect to liability, it is the Court's duty to determine whether there are issues of fact; it is up to the jury to determine which witnesses they believe. According to plaintiff, she was in the crosswalk with the pedestrian crossing sign in her favor when Singh's vehicle struck her. According to defendants, plaintiff crossed either in front of or through a crosswalk when there were oncoming vehicles and without the right of way. Because there is an issue of fact as how the accident happened, defendants' motion for summary judgment on liability is denied. *See Odikpo v American Transit, Inc.*, 72 AD3d 568, 569, 899 NYS2d 219, 220 (1st Dept 2010) (the parties' testimony as to the manner in which each driver controlled his vehicle, the circumstances surrounding their collision, and the chain of events leading up to the collision involving plaintiff's vehicle raise questions of fact, which are best left for a jury to decide).

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment on the issue of serious injury is granted only to the extent that defendants are granted partial summary judgment dismissing plaintiff's 90/180-day claim (*Colon v Torres*, 106 AD3d 458, 965 NYS2d 90 [1st Dept 2013],

Martin v Portexit Corp., 98 AD3d 63 [1st Dept 2012]), and otherwise denied; the branch of defendants' motion seeking summary judgment on liability is denied.

This is the Decision and Order of the Court.

Dated: October 11, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC