Lissaint v Ballenger
2014 NY Slip Op 31833(U)
June 11, 2014
Supreme Court, New York County
Docket Number: 101264/12
Judge: Arlene P. Bluth

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH Justice

PART 22

Index Number : 101264/2012
LISSAINT, DIANE
vs.
BALLENGER, RICKEY
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for Summary judgment/ 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

JUL 16 2014

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 7/11/14

_____, 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.: 101264/12
Mot. Seq. 001

Diane Lissaint and Burnie Pleasant,
Plaintiffs,

-against-

Ricky Ballenger,
Defendant.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendant's motion for summary judgment dismissing the claims of plaintiffs Lissaint and Pleasant on the ground that they both failed to satisfy the serious injury threshold as defined by Insurance Law §5102(d) is granted only to the extent that the 90/180-day claims of both plaintiffs are dismissed; the motion is otherwise denied.

In this September 24, 2009 accident, defendant's vehicle hit plaintiffs' vehicle in the rear; Lissaint was the driver; Pleasant was her passenger.

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]).

Plaintiff Lissaint

In her verified bill of particulars, Lissaint alleges that she sustained lumbar disc bulges and radiculopathy (exh C to moving papers, para. 11).

In support of his motion, defendant submits the affirmed report of Dr. Passick, an orthopedist, who examined Lissaint, found full ranges of motion in her lumbar and thoracic spine and stated that plaintiff had resolved sprains of her thoracic and lumbar spine.

Defendant also cites to Lissaint's deposition testimony wherein she stated that she missed one or two days of school after the accident (memo of law, p. 9).

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

In opposition, Lissaint submits the affirmed report of Dr. Harrison (exh C to opp), who first examined her 3 weeks after the accident and noted pain and stiffness on various range of motion testing. Although no precise measurements are set forth in the report, the Court of Appeals in *Perl* rejected a rule that would make contemporaneous quantitative measurements a prerequisite to recovery (Perl v Meher 18 NY3d 208 at 218). Dr. Harrison saw Lissaint most recently on February 23, 2013 and found range of motion restrictions, spasm, atrophy and reflex depression concludes that Lissaint has a partial, permanent disability of her lower spine which is causally related to the subject accident.

Defendant's orthopedist affirms that Lissaint's sprains have resolved and Lissaint's treating doctor affirms that Lissaint had significant range of motion restrictions, a few weeks after the accident and more recently, and (2) that there was a direct causal relationship between her current condition and the subject accident. Thus, Lissaint raised a triable issue of fact as to her claimed spinal injuries, and the jury must decide which expert(s) to believe. *See Diaz v Guzman*, 115 AD3d 448, 982 NYS2d 21 (1st Dept 2014). However, because defendant demonstrated that Lissaint did not satisfy the 90/180-category of serious injury and Lissaint did not present any evidence sufficient to raise an issue of fact as to that category, her 90/180-day claim is dismissed. *See Arena v Guaman*, 98 AD3d 461, 949 NYS2d 688 (1st Dept 2012).

Plaintiff Pleasant

In his verified bill of particulars, Pleasant alleges that he sustained injuries to his right knee and lumbar spine (exh C to moving papers, para. 11).

In support of his motion, defendant submits the affirmed report of Dr. Passick (exh I), who examined Pleasant, found full range of motion in his right knee, and some limitation of motion in the lumbar spine "secondary to poor effort". Dr. Passick opined that Pleasant had a resolved lumbar spine strain and a normal bilateral knee exam.

Defendant also annexes Pleasant's bill of particulars wherein he stated that he was confined to bed for 3 days and to home for 7 days following the accident.

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

In opposition, Pleasant submits the affirmed report of his orthopedist Dr. Harrison (exh D to opp), who first examined him 3 weeks after the accident and noted pain and stiffness in his low back, a limp on the right side, and a swollen right knee. Dr. Harrison saw Pleasant most recently on February 23, 2013, found range of motion restrictions in his lumbar spine and right knee, and concluded that Pleasant has a significant partial permanent disability of his lower spine and a partial permanent disability of his right knee which is causally related to the subject accident.

Defendant's orthopedist affirms that Pleasant's sprains have resolved and Pleasant's treating doctor affirms that he had significant range of motion restrictions in his lumbar spine and right knee, a few weeks after the accident and more recently, and (2) that there was a direct

causal relationship between his current condition and the subject accident. Thus, Pleasant raised a triable issue of fact as to his claimed spinal injuries, and the jury must decide which expert(s) to believe. *See Diaz v Guzman*, 115 AD3d 448, 982 NYS2d 21 (1st Dept 2014). However, because defendant demonstrated that Pleasant did not satisfy the 90/180-category of serious injury and Pleasant did not present any evidence sufficient to raise an issue of fact as to that category, his 90/180-day claim is dismissed. *See Arena v Guaman*, 98 AD3d 461, 949 NYS2d 688 (1st Dept 2012).

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing the claims of plaintiffs Lissaint and Pleasant on the ground that they failed to satisfy the serious injury threshold as defined by Insurance Law §5102(d) is granted only to the extent that the 90/180 day claims of both plaintiffs are dismissed; the motion is otherwise denied.

This is the Decision and Order of the Court.

Dated: July 11, 2014
New York, New York

HON. ARLENE P. BLUTH, JSC