Betancourt v Memco LLC
2015 NY Slip Op 32324(U)
December 3, 2015
Supreme Court, New York County
Docket Number: 157630/12
Judge: Arlene P. Bluth

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

----------x

Daniel Betancourt,

Plaintiff,

-against-

MEMCO LLC and Leo Edelman,

Defendants
and a third party action

----------x

Motion Seq 01

Index No. 157630/12

DECISION AND ORDER

HON. ARLENE P. BLUTH

Defendants/ third-party plaintiffs' motion for summary judgment dismissing the complaint on the grounds that plaintiff has not demonstrated that his injuries meet the serious injury threshold pursuant to Insurance Law § 5102(d) is granted, and the action is dismissed. Plaintiff's cross-motion for summary judgment on the issue of liability is denied as moot.

In his verified bill of particulars plaintiff claims that he injured, inter alia, his cervical and lumbar spine and right knee in the subject 9/13/12 motor vehicle accident.

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]).

In support of their motion, defendants submit the affirmed report of Dr. Berman, an orthopedist who examined plaintiff on 4/9/15 and found that plaintiff had normal

ranges of motion in his cervical and lumbar spine, wrists, shoulders, hands and knees. Dr. Berman concluded that any sprains/strains in plaintiff's back and contusions on the right knee had resolved. Additionally, defendants submit the affirmed medical report of Dr. Desrouleaux, a neurologist, who examined plaintiff on 12/4/14, found normal ranges of motion in plaintiff's cervical and lumbar spine and stated that plaintiff had a normal neurological exam[1]. Dr. Desrouleaux opined that any back sprains had resolved.

Defendants also submitted the affirmed reports of Dr. Fischer, a radiologist who reviewed MRIs of plaintiff's cervical and lumbar spine and right knee taken within a few weeks after the accident; he stated that he saw no evidence of a traumatic injury in any of these films and that all three films were normal studies.

As for the 90/180 category, defendants cite to plaintiff's deposition testimony that he was confined to bed/home for only two weeks after the accident, and that plaintiff was not employed or attending school at this time. Thus, defendants set forth a prima facie case to dismiss, and the burden shifts to plaintiff to raise a triable issue of fact.

In opposition, plaintiff submits only one exhibit, a narrative report signed by, but not affirmed by Dr. Tsatskis, who examined plaintiff on a single occasion (8/5/15) which was almost 3 years after the subject accident. Thus, as defendants point out in their reply, plaintiff has not submitted any proof of a contemporaneous examine sufficient to support causation and defeat the motion. Absent admissible contemporaneous

---

[1]The Court notes that the differences in the defense experts' range-of-motion findings are minor, and because both doctors concluded that plaintiff's range of motion and examinations were normal, defendants set forth a prima facie case for dismissal. *See Ramkumar v Grand Style Transp. Enterprises Inc.*, 94 AD3d 484, 485, 941 NYS2d 610, 611 (1st Dept 2012), citing *Feliz v Fragosa,* 85 AD3d 417, 418, 924 NYS2d 82 (1st Dept 2011).

evidence of alleged limitations, plaintiff cannot raise an inference that her injuries were caused by the accident. *See Stephanie N. ex rel. Miriam E. v Davis,* 126 AD3d 502, 502-03, 5 NYS3d 412, 413 (1st Dept 2015). Additionally, Dr Tsatskis relied on unaffirmed reports of other doctors and did not address the effects of plaintiff's 2008 accident.

As for the 90/180 category, plaintiff's counsel assertion, that defendants' doctors have no personal knowledge of plaintiff's condition during the first 6 months after the accident, is not sufficient to raise an issue of fact as to whether plaintiff sustained a non-permanent injury that prevented him from performing substantially all material daily activities for at least 90 of the first 180 days following the accident.

Accordingly, it is

ORDERED that defendants/third-party plaintiffs' motion for summary judgment dismissing the complaint on the grounds that plaintiff has not demonstrated that his injuries meet the serious injury threshold pursuant to Insurance Law § 5102(d) is granted, and the action is dismissed. Plaintiff's cross-motion is denied as moot.

This is the Decision and Order of the Court.

Dated: December 3, 2015
New York, New York

HON. ARLENE P. BLUTH, JSC