Mehlman v Chain Cab Corp.
2016 NY Slip Op 30224(U)
February 10, 2016
Supreme Court, New York County
Docket Number: 157819/12
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

Ira Mehlman,

Plaintiff,

-against-

Chain Cab Corp. and MD Kahn,

Defendants.

Index No. 157819/12
Motion Seq 01

DECISION AND ORDER

Hon. ARLENE P. BLUTH, JSC

Defendants' 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 only to the extent that the 90/180 claim is dismissed, and otherwise denied.

Plaintiff claims that on September 9, 2012 defendants' taxi ran over his right foot. In his verified bill of particulars, plaintiff claims that the accident caused and/or aggravated a tear of a tendon in his right leg, aggravated a previously asymptomatic left ankle fracture and caused a lumbar spine sprain.

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 annex the affirmed report of Dr. Desrouleaux, a neurologist, who measured the ranges of motion in plaintiff's lumbar spine on 8/22/13, noted that the restrictions were related to 2 lumbar spine surgeries which were performed before this accident, and found that plaintiff was able to carry out his daily activities without any neurological restriction. Defendants also submit the affirmed report of Dr. Nason, an orthopedist, who measured ranges of motion in plaintiff's lumbar spine, both feet and ankles on 9/12/13. Dr. Nason noted that this 71 year old plaintiff had undergone 2 prior spine surgeries and 6 prior left ankle operations which would contribute, along with plaintiff's age, to the decreased ranges of motion she measured. She stated that there were no positive objective findings on examination and remarked that the slight decrease in the range of motion of plaintiff's right ankle was clinically insignificant, likely age-related.

Finally, regarding any 90/180 claim, defendants' attorney cites to plaintiff's deposition testimony that he was not employed at the time of the accident, and that he was confined to his home for only 8-10 days within the first 6 months after the accident.

Based on the foregoing, defendants have satisfied their 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.

In opposition, plaintiff submits the affirmation of Dr. Drakos dated 12/5/14 (exh B); he states that plaintiff first received treatment at his facility on September 21, 2012, 12 days after the subject accident and that plaintiff has continued under Dr. Drakos's care. Dr. Drakos further states that plaintiff was diagnosed with a type II posterior tibial tendon dysfunction in his right foot but Dr. Drakos does not say when he

most recently examined plaintiff, or give the results of a single objective test. Dr. Drakos's office records (exh D) were "certified" by someone named Kathy Dorst, who never states who she works for, what her title is, or how she came into possession of the records. Additionally, those records contained unaffirmed reports from other doctors. Moreover, only hospital records, and not physician office records, are admissible by certification. *See Bronstein-Becher v. Becher,* 25 AD3d 796, 809 NYS2d 140 (2d Dept 2006). Dr. Drakos could have affirmed those records, but he did not. Thus, Dr. Drakos's affirmation, in which he opines that plaintiff's injury is causally related to the subject accident, constitutes proof of a contemporaneous exam. However, it does not contradict any range of motion findings made by defendants' doctors at their 2013 examinations.

Plaintiff also submits the affirmed report of Dr. Lubliner, an orthopedist, (exh C) who examined plaintiff on 9/30/14, more than two years after the accident. Dr. Lubliner measured range of motion restrictions in plaintiff's right ankle and opines that the restrictions are due to the accident. In reply, defendants point out that Dr. Lubliner relied on several unaffirmed and unattached records including records from Dr. Drakos, Dr. Brisson and x-ray and MRI reports. Notably, Dr. Lubliner stated that plaintiff "had no previous history of injury or symptomatology to his right ankle prior to [the subject accident]" despite the fact that Dr. Drakos specifically mentioned that plaintiff suffered from a pre-existing condition in his right foot/ankle. (See Drakos letter dated 10/23/13, last page of plaintiff's exhibit D). Defendants argue that Dr. Lubliner ignored this preexisting condition and conclusorily opined that the accident was the competent cause for the "permanent deformities/condition as described".

Finally, plaintiff has not submitted any medical proof of any alleged curtailment of his activities within the first 180 days after the accident. Accordingly, he has not raised an issue of fact to defeat dismissal of his 90/180 claim.

And so the Court has affirmations from defendants' doctors, who claim that plaintiff's right ankle reduced range of motion is age-related, and plaintiff's doctors, who claim the accident, in which plaintiff claims the cab ran over his right foot, caused and/or exacerbated his right ankle problems. It is up to the jury, not this Court, to decide which doctor(s) to believe.

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted only to the extent that the 90/180 claim is dismissed, and otherwise denied.

This is the Decision and Order of the Court.

Dated: February 16, 2016
New York, NY

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