Stephens v Kumar
2016 NY Slip Op 30305(U)
February 23, 2016
Supreme Court, New York County
Docket Number: 155433/12
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22

Index No.: 155433/12
Motion Seq 01

Stachelle Stephens,

Plaintiff,

-against-

Ashok Kumar and VSOP Taxi, Inc.

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendants' 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 granted, and the action is dismissed.

In her Verified Bill of Particulars, plaintiff alleged that the subject 10/5/11 accident exacerbated her "prior asymptomatic resolved left knee condition" and that she had knee surgery on 10/8/12. She also claimed that she sustained a left shoulder injury as a result of the accident.

In her Supplemental Verified Bill of Particulars, plaintiff withdrew her claim that she injured her left shoulder as a result of the subject accident.

Defendants' Prima Facie Case

In support of their motion, defendants submit the affirmed report of Dr. Mark Decker a radiologist who reviewed MRI films of plaintiff's left knee taken approximately one month after the subject accident. Dr. Decker stated that the film showed a degenerative tear in the lateral meniscus, as well as other degenerative changes and no evidence to suggest a traumatic injury.

Defendants also submit the affirmed report of Dr. Edward Decter, an orthopedist, who examined plaintiff on 6/17/14, reviewed numerous medical records and opined that plaintiff sustained a contusion on her left knee as a result of the subject accident "superimposed on preexisting osteoarthritis". Dr. Decter stated that plaintiff's osteoarthritis was not caused or

exacerbated by the subject accident.

As for the 90/180 category, defendants cite to plaintiff's verified bill of particulars that she was confined to bed for one day after the subject accident and to home for 3 days after the accident. Thus, defendants set forth a prima facie case to dismiss, and the burden shifts to plaintiff to raise a triable issue of fact.

Plaintiff's Opposition

In opposition, plaintiff submits the affirmed report of Dr. Silver, a pain management doctor, who examined plaintiff for the first time on January 9, 2013, 15 months after the subject accident (exh 1). Plaintiff offers the affirmation of Dr. Silver as the only admissible evidence of a medical exam after she was examined by defendants' Dr. Decter in June 2014. Dr. Silver states that his office treated plaintiff through April 2013, and that copies of his office records of plaintiff's examinations and treatment are annexed to his affirmation (para. 2). However, his office records are in fact not annexed to the opposition papers. Dr. Silver states that he reviewed the records of Dr. Ziets, the orthopedist who referred plaintiff to his office for pain management, and based on his review of Dr. Ziets's records, he "made a clinical diagnosis of an acute exacerbation of an underlying osteoarthritis condition, which concurred with the diagnosis of her previous physicians".

Significantly, Dr. Silver does not state that he personally compared any of plaintiff's medical records from before the subject accident to those after the subject accident. Instead, Dr. Silver simply states that he relied on the unaffirmed records of Dr. Ziets to support his opinion that the subject accident exacerbated and aggravated plaintiff's pre-existing left knee condition. Dr. Silver's affirmation, especially because it is unsupported by any description whatsoever of

his examination of plaintiff, is conclusory and may not be used to "bootstrap" Dr. Ziets's unaffirmed records. *See Malupa v Oppong*, 106 AD3d 538, 966 NYS2d 9 (1st Dept 2013).

Moreover, plaintiff offered no evidence of any injuries different from her undisputed preexisting arthritic condition in her left knee, and Dr. Silver failed to otherwise explain why that preexisting condition was ruled out as the cause of her current alleged limitations; *see Farmer v Ventkate Inc.*, 986 NYS2d 98, 99 (1st Dept 2014). For these reasons, Dr. Silver's affirmation does not raise an issue of fact sufficient to defeat this motion.

Exhibit 2 is Dr. Deyer's affirmed radiology report of plaintiff's left knee MRI taken approximately one month after the subject accident; he noted moderate to severe wear of cartilage, changes likely due to plaintiff's prior surgery, no evidence of re-tear of the lateral meniscus and mild chondral wear over the inferior patella; Dr. Deyer said nothing about a recent exacerbation of a prior condition.

Exhibits 3 through 7 are not admissible for the reasons stated below. Exhibit 3 contains a certification of the records of East Manhattan Diagnostic Imaging by Jill Vincente, who never states who she works for, what her title is, or how she came into possession of the records, and an unaffirmed 11/27/12 report from Dr. Singson. Only hospital records are admissible by certification. *See Bronstein-Becher v. Becher,* 25 AD3d 796, 809 NYS2d 140 (2d Dept 2006). Even if these records were admissible, Dr. Singson, a radiologist, stated that he compared plaintiff's left knee MRI from 10/16/08 (pre-accident) to her October 2012 post-accident MRI and found no tear; and no change in the plaintiff's left knee.

Exhibit 4 is only a portion of the Harlem Hospital Center ER records; there is no certification attached.

Exhibit 5 are records of Manhattan Orthopedics and Sports Medicine Group, PC, (which

include unaffirmed progress notes from Dr. Mark Klion) purportedly certified by Michelle Rojas, "custodian". Exhibit 6 are unaffirmed notes from Physiocare Physical Therapy, PC; these were not considered by the Court.

Plaintiff submitted Dr. Ziets's unsigned office reports dated 11/15/12, 12/11/12, 5/7/13 and 8/13/13 (exh 7). Dr. Ziets certified that these are true copies of his records, but did not affirm the truth of these reports. As previously stated, only hospital records, and not physician or physical therapy office records, are admissible by certification. *See Bronstein-Becher v. Becher,* 25 AD3d 796, 809 NYS2d 140 (2d Dept 2006). Even if these records had been admissible, Dr. Ziets measured full ROM (limited by guarding) in plaintiff's left knee on 12/11/12, and "near full" range of motion in that knee on 5/7/13.

Exhibit 8 is a certified copy of plaintiff's Clinic Notes from the Hospital for Special Surgery on October 5, 2013, approximately 2 years after the subject accident. On page 2, Dr. Hyams noted that plaintiff had chronic knee pain since 2006; he did not opine that the subject accident caused or exacerbated her left knee condition.

Exhibit 9 contains the affirmed reports of two no-fault orthopedists: Dr. Michaels and Dr. Katz.

Dr. Michaels examined plaintiff 3 months after the subject accident, and determined that plaintiff needed 8 additional weeks of physical therapy. Dr. Michaels noted that plaintiff was on Social Security Disability at the time of the accident "for her left knee" ; he diagnosed her with left knee osteoarthritis preexisting and left knee contusion/sprain.

Dr. Katz examined plaintiff on April 8, 2013, 18 months after the subject accident and stated that there was no need for any further physical therapy for her left knee because therapy was not helping. Neither no-fault orthopedist opined about that the subject accident exacerbated

plaintiff's left knee problems.

Finally, plaintiff has not raised a triable question of fact regarding her 90/180-day claim. In her affidavit (exh 10), plaintiff states that after the accident she was forced to miss classes, but she does not give any dates; nor does she submit any proof that a doctor told her that she could not enroll the following semester. *See Shu Chi Lam v Wang Dong*, 84 AD3d 515, 516, 922 NYS2d 381 (1st Dept 2011).

Accordingly, defendants' motion for summary judgment dismissing this action on the grounds that plaintiff has not demonstrated that she sustained a "serious injury" within the meaning of Insurance Law §5012(d) is granted, and the action is dismissed.

This is the Decision and Order of the Court.

Dated: February 23, 2016
New York, New York

HON. ARLENE P. BLUTH, JSC