Austin v Gonzalez-Nunez
2017 NY Slip Op 31722(U)
July 15, 2017
Supreme Court, Bronx County
Docket Number: 307022/2010
Judge: Alison Y. Tuitt
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 05

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JEWELL R. AUSTIN,

Plaintiff,

Index No: 307022/2010

-against-

DECISION/ORDER

LUIS OSVALDO GONZALEZ-NUNEZ and
AMERICAN UNITED TRANSPORTATION II INC.,

Defendants.

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HON. ALISON Y. TUITT:

This negligence action arises out of a motor vehicle collision that occurred on July 26, 2010, that occurred at the intersection of East 156th Street and Grand Concourse in the Bronx. Defendants seek summary judgment dismissing the complaint on the ground that plaintiff's injuries do not satisfy the serious injury "threshold" requirements as set forth in Insurance Law § 5102(d). The motion is determined as follows:

A defendant seeking summary judgment in an action governed by Insurance Law § 5102 must demonstrate that the plaintiff did not sustain a "serious injury" or that the plaintiff's injuries were not causually related to the accident at issue (*see Baez v Rahamatali,* 6 NY3d 868 [2006]; *Pommells v Perez,* 4 NY3d 566 [2005]). In the event defendant meets this burden, plaintiff must come forward with evidence demonstrating the existence of a triable issue of fact (*see Gaddy v Eyler,* 79 NY2d 955 [1992]). A plaintiff's subjective claim of pain and limitation of motion must be corroborated by verified objective medical findings (*see Stevens v Bolton,* 135 AD3d 647 [1st Dept 2016]; *see also Toure v Avis Rent A Car Sus.,* 98 NY2d 345 [2002]; *Bent v Jackson,* 15 AD3d 46 [1st Dept 2005]).

Defendants met their prima facie burden of showing that plaintiff did not sustain a serious

injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see *Westerband v Buitraso,* 146 AD3d 486 [1st Dept 2017]). Defendants submit a copy of the pleadings, the bills of particulars, the deposition transcript of plaintiff, the radiological report of Dr. Menachem Gold, and the affirmed IME reports of Dr. David A. Fisher, a radiologist, Dr. Alan M. Crystal, an orthopedist, and Dr. Michael J. Carciente, a neurologist.

Dr. Fisher reviewed an MRI of plaintiff's right knee, performed a month after the subject accident and dated August 26, 2010, noting no evidence of a meniscal or ligament tear, and further, that as to the positive finding of a lesion, such "reflects a preexisting condition." As to the MRI of plaintiff's cervical spine, Dr. Fisher noted that he reviewed this MRI along with a CT scan of the cervical spine and found that "both of these studies demonstrate diffuse degenerative changes in this 51-year-old." Dr. Fisher also noted that there were no herniations. As to the MRI of plaintiff's lumbar spine dated August 17, 2010, Dr. Fisher noted "[d]iffuse degenerative changes, most pronounced at L1/2, L4/5 and L5/S1," and found "no herniations. The mild disc bulges noted are compatible with the amount of degenerative change present." According to Dr. Fisher's affirmed reports, "[t]here is no radiographic evidence of traumatic or causally related injury" to plaintiff's right knee, and cervical and lumbar spines.

Dr. Crystal reviewed the bill of particulars, as well as what he described as plaintiff's "significant records," such as the July 26, 2010 Lincoln ER report by Dr. Menachem Gold, indicating trauma to plaintiff's cervical spine but also finding "degenerative changes." Also reviewed was plaintiff's August 2, 2010 cervical CT scan report and the MRI of plaintiff's cervical spine dated August 17, 2010. Dr. Fischer reviewed plaintiff's cervical, lumbar and right knee MRIs along with

the original findings of plaintiff's radiologist, Dr. Mark Shapiro. Also reviewed was the unsigned operative report of Dr. David Neuman, of Synergyfirst Medical, with regard to plaintiff's arthroscopic right knee surgery. Said report noted that plaintiff had an "[a]nterior horn lateral meniscus tear right knee with meniscal cyst and midbody posterior root lateral meniscus tear right knee."

In addition to reviewing plaintiff's relevant medical records, Dr. Fischer performed a medical examination of plaintiff's lumbar and cervical spines. As to plaintiff's lumbar spine, Dr. Fischer noted measurements but failed to provide comparisons to normal ranges of motion. As to plaintiff's right knee, cervical spine and shoulders, Dr. Fischer used a goniometer to take range-of-motion measurements, drawing comparisons to normal, and found full range of motion, no tears, tenderness or limitation in movement. He also remarked that plaintiff had "absolutely no objective findings of a symptomatic herniated disc at a lumbar or cervical level causing nerve root impingement. [Plaintiff's] subjective complaints of occasional right sided neck pain with numbness is consistent with cervical spine degeneration."

As to plaintiff's right shoulder, Dr. Fischer opined that "the claimant does not have any subjective complaints. Both of the shoulders have the same decreased range of motion. Bilateral involvement of decreased motion indicates a degenerative etiology." As to plaintiff's right knee, "the issue involved is not one of diagnosis of chondromalacia and meniscus tears, but one of causation. . . . The claimant's medicals do not have any objective medical evidence that the operative findings were causally related." Further, Dr. Fischer explained that "[t]he lack of bone edema in the arthritic (chondromalacic) areas is 100% proof that the arthritic areas were pre-existing and not affected by

the MVA. When a knee has arthritis there is co-existing meniscus degeneration." Dr. Fischer states that proof of his findings is based on the existence of a meniscal cyst as documented by plaintiff's surgery report and MRI, and that the formation of such cysts is due to "degenerative tearing of the meniscus." Dr. Fischer concluded his report by finding no causal relationship existed between the accident and the injuries complained of since the MRI of plaintiff's right knee was not consistent with allegations of trauma.

Dr. Carciente reviewed plaintiff's medical records, performed a neurological examination and found only degenerative changes in plaintiff's lumbar spine, no evidence of radiculopathy to the cervical spine, and nothing that could be causally related to the subject accident. Although Dr. Carciente provided the results of his examination, he did not document what objective means of measurement (if any) he used nor did he provide comparisons to any purported normal ranges of motion.

In opposition, plaintiff raises triable issues of fact with regard to the nature and severity of the injuries she alleges were sustained as the result of the subject accident. Plaintiff submits affirmed and unaffirmed (see *Shapiro v Spain Taxi, Inc.*, 146 AD3d 451 [1st Dept 2017]; *Francis v Nelson*, 140 AD3d 467 [1st Dept 2016]) reports of her treating medical providers that contradict defendants' IME reports. "Although plaintiff's physicians did not expressly address [defendants'] expert's conclusion that the injuries were degenerative in origin, by relying on the same MRI report as [defendants'] expert, and attributing plaintiff's injuries to a different, yet equally plausible cause, [plaintiff] raised a triable issue of fact (see *Lee Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [2011]; *Linton v Nawaz*, 62 AD3d 434, 440 [2009], affd 14 NY3d 821 [2010]). Although [a]

factfinder could of course reject this opinion (*Perl v Meher*, 18 NY3d 208 [2011]), [this court] cannot say on this record, as a matter of law, that plaintiff's injuries had no causal connection to the accident" (*Grant v United Pavers Co.*, 91 AD3d 499 [1st Dept 2012]; *Jacobs v Rolon*, 76 AD3d 905 [2d Dept 2010]). Based on the foregoing, the court finds that plaintiff has raised issues of fact warranting denial of defendants' motion with regard to the permanency of injuries to her right shoulder, right knee and cervical spine (see *Encarnacion v Castillo*, 146 AD3d 600 [1st Dept 2017]).

With respect to the 90/180-day category, defendants rely solely on plaintiff's deposition testimony that she was restricted to home and bed for less than 90 days. However, plaintiff, in opposition, sufficiently raises questions of fact as to whether her injuries do meet the requirements of the 90/180-day category, submitting the medical reports of her treating chiropractor, who advised plaintiff to refrain from work duties and stated that she was disabled from returning to work beyond the first 90 days after the date of the accident (see *Gaddy v Eyler*, supra; *Stevens v Bolton*, 135 AD3d 647 [1st Dept 2016]).

Accordingly, is it hereby ordered that defendants' motion is denied.

Dated: 7/5/17

ALISON Y. TUITT, J.S.C.