Redmond v Smiley
2018 NY Slip Op 30044(U)
January 9, 2018
Supreme Court, New York County
Docket Number: 451299/2014
Judge: Paul A. Goetz

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

Plaintiff,

Index Number:

-against-

451299/2014

Lloyd Smiley, Kenny Davis and
New York City Housing Authority,

Defendants.
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Paul Goetz, J.:

Defendants New York City Housing Authority (NYCHA) and Kenny Davis (Davis, together, the NYCHA Defendants) move for summary judgment, pursuant to CPLR 3212, to dismiss plaintiff's complaint for failure to meet the serious injury threshold of Insurance Law § 5102 (the No-Fault Law). Defendant Lloyd Smiley (Smiley) also moves for summary judgment on the same grounds. The motions are consolidated for disposition and decided as follows:

Underlying Allegations

Plaintiff alleges that, on May 5, 2013, at approximately 8:00 a.m., she was a passenger in a car driven by her father, Smiley, in light traffic on Highland Boulevard, Brooklyn, New York (bill of particulars, items 5-6; plaintiff General Municipal Law § 50-h hearing [plaintiff 50-h Hearing] at 10, 18, 20; plaintiff EBT at 13-14, 27, 98). She states that at the intersection of Highland Boulevard and Miller Avenue, a truck

owned by NYCHA and driven by Davis, turned from Miller Avenue onto Highland Boulevard and struck her car (bill of particulars, item 9; plaintiff 50-h Hearing at 16, 26; plaintiff EBT at 21, 24, 29).

Plaintiff contends that, as a result of the accident, both of her knees struck the dashboard, causing her to suffer a lateral meniscus tear in the right knee and a medial meniscus tear in the left knee, that was repaired by arthroscopic surgery on August 29, 2013 (bill of particulars, item 15; plaintiff 50-h Hearing at 35, 54; plaintiff EBT at 29, 31, 43-46). She avers that her injuries meet the following Insurance Law § 5102 (d) criteria: permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constitue plaintiff's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident (bill of particulars, item 22). Plaintiff states that she went to physical therapy for six months until the no-fault insurer ceased paying her medical bills, that the orthopedic surgeon who performed the surgery on her left knee, Dr. Barry Katzman, recommended surgery on her

right knee, but that she has not had this surgery and that she has continuing pain in both knees (plaintiff affidavit, ¶¶ 6-10; plaintiff 50-h Hearing at 52-53; plaintiff EBT at 40-43, 49-50, 53-57, 97).

Plaintiff has presented Dr. Katzman's affidavit, which states that his initial examination of both knees indicates limitation of flexion to 90 degrees, 135 degrees being normal and that the MRIs indicated meniscus tears in both knees (Katzman affidavit, ¶¶ 4-5). Dr. Katzman states that he performed arthroscopic surgery to repair plaintiff's left knee on August 29, 2013, that the surgery improved flexion in the left knee, but that there was continuing restriction of motion in her left knee (*id.*, ¶¶ 9-11). He further states that after examining plaintiff's right knee, he found restriction of motion to 100 degrees of flexion, that he recommended surgery to repair the meniscus tear in her right knee and that he attributed both of the knee injuries to plaintiff's accident (*id.*, ¶¶ 15-17).

The NYCHA Defendants have presented the affirmed report of Dr. Edward Crane, an orthopedic surgeon, (the Crane Report) and Dr. Sondra Pfeffer, a radiologist (the Pfeffer Report, together, the NYCHA Defendants' Medical Reports). The NYCHA Defendants note that plaintiff had no fracture, no bleeding or swelling immediately after the accident, when she was examined at Wyckoff Heights Hospital (plaintiff 50-h Hearing at 44; plaintiff EBT at

32, 37). The Crane Report found flexion in both knees to 122 degrees, normal being a range between 120 and 150 degrees of motion, and that, aside from two small scars on the left knee, there was "no objective evidence of any orthopedic residuals" (Crane Report at 2). The Pfeffer Report pointed to "preexisting left knee symptomatology" and opined that there was no "trauma-related pathology [to plaintiff's knees]" (Pfeffer Report at 5-6). The NYCHA Defendants further point to the gap in plaintiff's treatment to support their claim that she lacks a serious injury.

Defendant Smiley "adopts and incorporates" the NYCHA Defendants' arguments in his separate motion for summary judgment (Koirala affirmation, ¶ 4).[1]

Summary Judgment Standard

"To prevail on a [threshold] motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a serious injury" (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept

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[1]The Court notes that Smiley's motion was made well beyond the sixty days permitted after the filing of the note of issue pursuant to the Rules of this Part. Smiley does not acknowledge that his motion is untimely and thus fails to establish good cause for not making his motion within sixty days of the filing of the note of issue (*Farrell v Herzog*, 123 AD3d 655 [1st Dept 2014] [holding Supreme Court properly denied the defendant's cross motion for summary judgment since he failed to establish 'good cause' for his failure to cross-move within the 60-day time limit set by the Supreme Court for the making of motions or cross motion for summary judgment."]; *Doe v Madison Third Building Companies, LLC*, 121 AD3d 631 [1st Dept 2014] [same]).

2011] [internal quotation marks and citations omitted]). Once defendant meets its initial burden, plaintiff must then demonstrate a triable issue of fact as to whether s/he sustained a serious injury within the meaning of Insurance Law § 5102 [d] (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). "[I]ssues as to witness credibility are not appropriately resolved on a motion for summary judgment" (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]; *see also Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013]).

The No-Fault Law

The No-Fault Law provides, in pertinent part:

> "'Serious injury' means a personal injury which results in . . . a fracture; . . . permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially

> all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

"[T]he 'legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries' . . . [by] requir[ing] objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002] [internal citations omitted]). Objective proof sufficient to sustain a claim is "[a]n expert's designation of a numeric percentage of a plaintiff's loss of range of motion . . . [or] [a]n expert's *qualitative* assessment . . ., provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*id.* at 350 [italics in original]; *Gorden v Tibulcio*, 50 AD3d 460, 463 [1st Dept 2008]). Minor limitations of movement in a plaintiff's neck and back are insufficient to be considered a serious injury (*Gaddy v Eyler*, 79 NY2d 955, 957 [1992]). Rather, plaintiff must present "objective evidence" in the form of tests indicating a significant limitation to satisfy the No-Fault Law (*Toure*, 98 NY2d at 350-351; *Reyes v Esquilin*, 54 AD3d 615, 615-616 [1st Dept 2008]; *Brown v Achy*, 9 AD3d 30, 31-32 [1st Dept 2004]).

Discussion

The NYCHA Defendants have proffered the NYCHA Defendants' Medical Reports. "[T]he affirmed reports of medical experts who, upon examination, found that plaintiff had full range of motion in h[er knees] and that the MRIs . . . showed degenerative changes" meet defendants' burden of establishing a prima facie case that plaintiff did not suffer a serious injury under the No-Fault Law (*Williams v Perez*, 92 AD3d 528, 528 [1st Dept 2012]; *see also Santana v Centeno*, 140 AD3d 230, 231 [1st Dept 2016]; *Jallow v Siri*, 133 AD3d 1391, 1391 [1st Dept 2015]). The Crane Report indicates that plaintiff had flexion to 122 degrees in both knees, within the normal range.

In contrast, Dr. Katzman asserts that plaintiff had flexion of 100 degrees in her left knee and 90 degrees in her right knee. Dr. Katzman's affidavit constitutes "contrary evidence . . . [and is] sufficient to raise an issue of fact" (*Perl v Meher*, 18 NY3d 208, 218-219 [2011]). The conflict between the findings of plaintiff's expert witness and defendants' expert witnesses as to the degree of limitation of plaintiff's range of motion "is one of credibility" (*id.* at 219; *see also Williams*, 92 AD3d at 529). Put another way, plaintiff's doctor contests the findings of defendants' doctors and he asserts that plaintiff has suffered a significant injury attributable to her accident. These findings are "entitled to the same weight as defendants' expert[s']

opinion and are sufficient to raise an issue of fact" (*Mulligan v City of New York*, 120 AD3d 1155, 1156 [1st Dept 2014]; *see also Windham v New York City Tr. Auth.*, 115 AD3d 597, 598 [1st Dept 2014]; *Vaughan v Leon*, 94 AD3d 646, 648 [1st Dept 2012]). "Plaintiff's orthopedic surgeon, who performed arthroscopic surgery on h[er] . . . , observed the relevant musculature with his own eyes, and opined that plaintiff suffered from a torn [meniscus in each knee] and impingement causally related to the accident . . . [and thus, raised an issue of fact as to a] causal connection to the accident" (*Calcano v Rodriguez*, 103 AD3d 490, 490-491 [1st Dept 2013]; *see also Jallow*, 133 AD3d at 1392). "Plaintiff adequately addressed the gap in [her] treatment by [pointing to her] deposition testimony and an affidavit in which [she] attested that [she] stopped treatment because [she] could not afford to pay for it after [her] no-fault benefits had expired" (*Santana*, 140 AD3d at 437).

Moreover, the NYCHA Defendants' motion does not address plaintiff's 90/180-day claim. Accordingly, the NYCHA Defendants' motion for summary judgment dismissing plaintiff's complaint for failure to meet the No-Fault Law's serious injury threshold must be denied. Smiley's motion, for the same relief, must also be denied.

Order

It is, therefore,

ORDERED that the motion of defendants New York City Housing Authority and Kenny Davis for summary judgment, pursuant to CPLR 3212, to dismiss plaintiff's complaint, based upon the failure to meet the serious injury threshold of Insurance Law § 5102, is DENIED; and it is further

ORDERED that the motion of defendant Lloyd Smiley for summary judgment, pursuant to CPLR 3212, to dismiss plaintiff's complaint, based upon the failure to meet the serious injury threshold of Insurance Law § 5102, is DENIED; and it is further

ORDERED that the parties are directed to appear for a settlement conference in Part 22 at 80 Centre Street, Room 136 on February 20, 2018, at 9:30 a.m.

Dated: New York, New York
January 9, 2018

ENTER:

J.S.C.

HON. PAUL A. GOETZ
J.S.C.