Nace v Darden
2018 NY Slip Op 34322(U)
April 30, 2018
Supreme Court, Dutchess County
Docket Number: Index No. 50263/16
Judge: Maria G. Rosa
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa

Justice

THERESA NACE,

Plaintiff,

-against-

NICOLE C. DARDEN,

Defendant.

DECISION AND ORDER

Index No. 50263/16

The following papers were read on defendant's motion for summary judgment:

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A - N

AFFIRMATION IN OPPOSITION
AFFIDAVIT IN OPPOSITION
EXHIBITS A - E

AFFIRMATION IN REPLY
EXHIBIT A

This is a negligence action in which plaintiff seeks to recover damages for injuries allegedly sustained in an August 11, 2015 motor vehicle accident. Defendant moves for summary judgment asserting that plaintiff did not sustain a serious injury within the meaning of New York Insurance Law §5102(d). That statute defines a "serious injury" in relevant part as:

> [A] personal injury which results in...permanent loss of use of a body organ or 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 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. NY Ins. Law §5102(d).

A defendant moving for summary judgment alleging a lack of serious injury has the initial burden of putting forth evidence showing that the plaintiff has not sustained a serious injury within the meaning of the No-Fault Law. If the defendant makes such a *prima facie* showing, the burden shifts to the plaintiff to defeat the motion through the submission of sworn affidavits or physician affirmations that support the claim of serious injury.

To demonstrate a "serious injury" a plaintiff must provide "objective proof of her injury" as "subjective complaints alone are not sufficient." Toure v. Avis Rent a Car Systems, Inc., 98 NY2d 345 (2002). However, even where a plaintiff offers objective medical proof of a serious injury, when additional contributory factors interrupt the chain of causation between the accident and claimed injury, such as a pre-existing condition, summary dismissal of the complaint may be appropriate. Pommells v. Perez, 4 NY3d 566, 572 (2005).

Defendant has made a *prima facie* showing that plaintiff did not sustain a serious injury to her back, neck and left knee within the meaning of the No-Fault Law through the submission of plaintiff's medical records, deposition testimony, pleadings filed in this and another action and the detailed expert reports prepared after orthopedic and neurological independent medical examinations. Plaintiff was in prior car accidents in 2010 and 2013 in which she alleges she sustained neck and back injuries. Plaintiff was undergoing medical treatment for such injuries since the 2010 accident and was taking Percoset at the time of the August 11, 2015 motor vehicle accident. Following the accident she was treated at Vassar Brothers Medical Center for complaints of trauma to her left knee. X-rays of the left knee revealed no evidence of an acute fracture, dislocation or acute bony pathology. She was advised to treat the area with a cold compress and discharged. In 2016 plaintiff commenced a negligence action in Ulster County seeking damages for injuries allegedly sustained in an October 24, 2013 motor vehicle accident. A verified bill of particulars from that action identifies the identical injuries as plaintiff asserts in her bill of particulars in this action. Plaintiff claims the exact same neck, back and left knee injuries. Magnetic resonance imaging ("MRI") of her cervical spine on October 12, 2015 found anterior and posterior spondylosis and mild to moderate central canal stenosis at C5-C6, and anterior spondylosis and mild bulging at C6-C7 with borderline central canal stenosis. However, the report of that MRI specifically indicates that no change was observed compared to a prior MRI performed in November 2013. Plaintiff testified at her deposition that her left knee was no longer swollen, she only suffered intermittent pain a couple of times a week and that her knee was not affected by walking. Defendant has further submitted treatment records from Dr. Luis Mendoza memorializing physical examinations performed between September 2015 and June 2017. These reports state that plaintiff continues to make complaints of moderate to severe pain to her neck, right and left shoulders and upper back and right upper extremities as a direct result of her October 2013 motor vehicle accident. Finally, the report of defendant's orthopedic surgeon who conducted an independent medical examination of the plaintiff in conjunction with a review of her medical records dating back to 2011 found a mild limitation of motion in the cervical, thoracic and lumbar spine and the left knee but concluded that plaintiff was suffering from a cervical, thoracic and lumbar spine sprain which were superimposed upon a pre-existing injury but had resolved. He similarly concluded that plaintiff sustained a left

knee sprain that was superimposed upon a pre-existing degenerative change based upon his review of an x-ray and MRI report but that such condition had also resolved. He found no objective findings of cervical or lumbar radiculopathy and that any ongoing symptoms to her left knee were due to a pre–existing degenerative condition and not attributable to the 2015 motor vehicle accident.

Defendant's neurologist examined plaintiff in September 2017 and reported a normal neurological examination. He found no objective evidence of cervical or lumbar radiculopathy, noting that electromyography ("EMG") from November 20, 2015 was normal in contrast to an earlier EMG from December 2013 which revealed evidence of a cervical radiculopathy stemming from plaintiff's 2013 motor vehicle accident. He concludes that any exacerbation that may have occurred from the 2015 accident was temporary and found no objective evidence or limitations from a neurological standpoint. The foregoing evidence in conjunction with plaintiff's deposition testimony stating that her only limitation following the accident was an inability to lift her grandchildren, clean as much as she used to and vacuum is sufficient to demonstrate a *prima facie* showing that plaintiff did not suffer a serious physical injury from the subject motor vehicle accident under the permanent or significant consequential limitation or 90/180 day categories of Insurance Law §5102.

Plaintiff's submissions are insufficient to create a material issue of fact as to whether she suffered a serious injury. Plaintiff's opposition to the motion relies upon her affidavit, medical records and records of treatment with Dr. Luis Mendoza commencing August 18, 2015 through the present, including a March 2018 narrative report as to her current condition. While plaintiff asserts that she is suffering from neck and back injuries causally related to the accident and Dr. Mendoza's reports reflect a limitation in range of motion for her neck, back and upper extremities which he attributes to the August 11, 2015 motor vehicle accident, Dr. Mendoza fails to adequately address plaintiff's pre-existing neck and back condition and other medical problems. Significantly, his March 2018 report, prepared after defendant filed its summary judgment motion, fails to include any discussion of plaintiff's two prior motor vehicle accidents and his history of treatment for neck and back injuries attributed to those accidents. At the end of the report, in entirely conclusory fashion, Dr. Mendoza apportions twenty percent of plaintiff's neck injuries to the 2010 motor vehicle accident, fifty percent to the 2013 motor vehicle accident and thirty percent to the 2015 motor vehicle accident, twenty percent of her back injuries to the 2010 accident, sixty percent to the 2013 accident and twenty percent to the 2015 accident. He then attributes one hundred percent of her left knee injury to the August 2015 accident. Assuming the range of findings and Dr. Mendoza's reported records are sufficient to show an objective degree of limitations on the neck and back, he fails to proffer sufficient evidence to counter the defendant's persuasive evidence concerning causation and pre-existing injuries. Dr. Mendoza's statement apportioning various percentages to the three different motor vehicle accidents is not supported by any substantive analysis. He fails to reference or acknowledge the numerous treatment records for plaintiff's neck and back injuries dating from August 2015 to the present that do not attribute any causation to the 2015 motor vehicle accident. Instead, these records attribute the injuries exclusively to the 2013 motor vehicle accident. A conclusory statement as to causation is insufficient to defeat a *prima facie* showing that a plaintiff's alleged injuries are degenerative or pre-existing. See Franchini v. Palmieri, 1 NY3d 536 (2003).

Plaintiff also fails to establish a material issue of fact as to whether her alleged left knee injury constitutes a serious injury or was causally related to the 2015 motor vehicle accident. Plaintiff's assertion that she did not have left knee injuries prior to the 2015 motor vehicle accident is in direct contradiction to a verified bill of particulars dated February 2, 2017 filed in connection with her personal injury action in Ulster County deriving from her October 24, 2013 motor vehicle accident. That verified bill of particulars expressly states that in that accident she sustained a meniscus injury, pain and swelling, instability and loss of range of motion to her left knee. As her affidavit submitted in opposition to defendant's summary judgment motion is in direct contradiction to her previously filed verified statement, the court finds that it is a feigned attempt to avoid summary judgment and does not constitute competent evidence to raise a material issue of fact. Moreover, at her deposition plaintiff testified that her knee injury had largely resolved and that she only suffered intermittent pain. Intermittent knee pain is insufficient to establish a serious injury within the meaning of the Insurance Law. See McHaffie v. Antieri, 190 AD2d 780 (2nd Dept 1993). Particularly, as here, where there is no evidence that her new condition resulted in an objective measured or quantified limitation on her ability to walk or bend. Every one of Dr. Mendoza's records dating from his examination of her knee approximately one week after the subject motor vehicle accident found a normal range of motion to all joints of the lower extremities. Plaintiff further fails to demonstrate a lack of consistent treatment for her knee since the 2015 accident. As plaintiff has failed to offer anything other than a conclusory assertion that her undisputed pre-existing neck and back injuries were exasperated by the 2015 motor vehicle accident and fails to establish that her left knee injury constitutes a serious injury within the meaning of the Insurance Law, it is

ORDERED that defendant's motion for summary judgment is granted and this action is dismissed.

The foregoing constitutes the decision and order of the Court.

Date: April 30, 2018
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C.

Basch & Keegan, LLP
307 Clinton Avenue
Kingston, NY 12402

Keane & Bernheimer, PLLC
400 Columbus Avenue, Suite 100S
Valhalla, NY 10595

Scanned to the E-File System only

Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.