

Williams v Laura Livery Corp.
2019 NY Slip Op 32529(U)
July 24, 2019
Supreme Court, Bronx County
Docket Number: 25778/2014E
Judge: John R. Higgitt
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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CLARENCE WILLIAMS,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 25778/2014E

LAURA LIVERY CORPORATION and RAMON
PICHARDO,

Defendants.
-----X

John R. Higgitt, J.

Upon plaintiff's May 14, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; defendants' June 21, 2019 affirmation in opposition and the exhibits submitted therewith; plaintiff's July 8, 2019 affirmation in reply; and due deliberation; plaintiff's motion for leave to reargue the motion of defendants that resulted in an order of this court dismissing the complaint is denied.

Plaintiff moves for leave to reargue this court's April 15, 2019 decision and order, and upon granting reargument, an order denying summary judgment to defendants. Plaintiff asserts that the court misapprehended and/or misconstrued the relevant facts and law by granting summary judgment to defendants on the ground that plaintiff did not sustain "serious injuries" as defined in Insurance Law § 5102(d).

Leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion (CPLR 2221[d][2]). Because plaintiff fails to show that the court overlooked or misapprehended any matters of fact or law in determining the prior motion, plaintiff's motion for reargument is denied (*see Oparaji v Yablon*, 159 AD3d 539, 540 [1st Dept 2018]; CPLR 2221[d]).

The April 15, 2019 decision and order of this court determined that defendants presented

evidence that plaintiff suffered limitations; however, defendant established, prima facie, that such injuries and limitations were not causally related to the subject accident, but related to preexisting degenerative conditions.

Plaintiff asserts that this court overlooked facts that would change the court's prior determination. First, plaintiff points out that defendants' orthopedic surgeon, Dr. Katz, in a March 22, 2018 IME report, concluded that plaintiff suffered a "Lumbar spine sprain/fracture – resolved." Plaintiff argues that this evidence demonstrated that he sustained a "serious injury" under the fracture category, regardless of whether such injury was resolved. The court did not consider Dr. Katz's finding of a fracture because plaintiff's verified bill of particulars, dated February 3, 2016, alleged specific injuries to plaintiff's right knee, right shoulder, cervical spine and lumbosacral spine, none of which included a fracture.¹ While plaintiff generally references the "fracture" category of "serious injury" in paragraph 20 of his verified bill of particulars, he also claims death, dismemberment, significant disfigurement and loss of fetus. Defendants' demand for a bill of particulars demanded the nature, extent, location and duration of each and every injury alleged to have been sustained by plaintiff (*see* CPLR 3013). Plaintiff's failure to include a lumbar spine fracture in his bill of particulars precluded the court from considering the fracture, because it had not been pled (*see Boone v Elizabeth Taxi, Inc.*, 120 AD3d 1143, 1144 [1st Dept 2014]; *cf. Raymond Babtkis Assocs. v Tarazi Realty Corp.*, 34 AD2d 754 [1st Dept 1970] [summary judgment may not be avoided on the basis of claims not alleged]).

Moreover, Dr. Katz's findings were based upon his physical examination of plaintiff four years following the accident, his review of the bill of particulars that did not allege a lumbar spine fracture and a verbal medical history provided by plaintiff that he did not sustain any fractures or

¹ Plaintiff references a "Supplemental Bill of Particulars" that is not part of the record before this court.

lacerations. In addition, defendants' radiologist, Dr. Decker, reviewed plaintiff's July 14, 2014 lumbar spine X ray, finding no fractures. Accordingly, Dr. Katz's conclusion that plaintiff sustained a lumbar spine "fracture" was completely unsupported by the record and, therefore, did not warrant consideration by the court (*see Lowe v Bennett*, 122 AD2d 728, 730 [1st Dept 1986]).

In opposition to this motion, defendants submitted an amended report of Dr. Katz, dated June 19, 2019, demonstrating that Dr. Katz's prior impression of "Lumbar spine sprain/fracture – resolved" contained in his March 22, 2018 report was a typographical error and should have read "Lumbar spine sprain/strain – resolved."

Plaintiff asserts that the court overlooked defendants' expert's finding of an L2-L3 disc herniation. Although Dr. Decker could not identify the age of the L2-L3 disc herniation, he concluded that there was degenerative disc disease at such level. Dr. Decker also reviewed plaintiff's lumbar spine X ray, finding no evidence to suggest an acute traumatic injury, but finding multilevel loss of disc height compatible with degenerative disc disease that is longstanding and not causally related to the subject accident. The court did not overlook evidence of the L2-L3 disc herniation; rather, the herniation, alone, was insufficient in view of evidence that it was caused by a preexisting degenerative condition and not the subject accident.

Plaintiff asserts that the court improperly considered the opinion of defendants' expert, Dr. Krishnamurthy. However, plaintiff fails to cite any controlling case law that this court misapplied or misconstrued in considering the sworn expert report of Dr. Krishnamurthy, notwithstanding his reliance upon plaintiff's unsworn MRI reports in reaching his conclusions (*see Pommells v Perez*, 4 NY3d 566, 577 n 5 [2005]; *Mitchell v Calle*, 90 AD3d 584, 584 [1st Dept 2011]).

Finally, plaintiff asserts that the court overlooked plaintiff's objective medical evidence of injuries to his cervical and lumbar spine, including an EMG/NCV study and defendants' experts'

IME findings. However, such argument is misplaced to the extent that the court did not preclude plaintiff's unsworn medical records. Assuming that the records demonstrated "permanent consequential" or "significant" limitations of use, plaintiff failed to demonstrate that the court misapprehended the facts or law in finding plaintiff's experts' opinions failed to raise a triable issue of fact as to whether plaintiff's injuries were causally related to the subject accident. "[E]ven where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury--such as a gap in treatment, an intervening medical problem or a preexisting condition--summary dismissal of the complaint may be appropriate" (*Pommells v Perez*, 4 NY3d at 572). Moreover, because defendants demonstrated evidence of preexisting conditions present in plaintiff's own medical records, the burden shifted to plaintiff to submit objective expert evidence specifically addressing such evidence of degeneration (*see Sanchez v Oxcin*, 157 AD3d 561, 562 [1st Dept 2018]; *Cattouse v Smith*, 146 AD3d 670, 671 [1st Dept 2017]) through an expert opinion explaining why the preexisting condition can be ruled out as the cause of plaintiff's injuries or providing an objective basis to support the expert's findings of aggravation of such preexisting condition (*cf. Thompson v Bronx Merchant Funding Servs., LLC*, 166 AD3d 542, 544 [1st Dept 2018]; *Sosa-Sanchez v Reyes*, 162 AD3d 414, 414-415 [1st Dept 2018]; *Khanfour v Nayem*, 148 AD3d 426, 427 [1st Dept 2017]; *Cattouse v Smith*, 146 AD3d at 671; *Montgomery v Pena*, 19 AD3d 288, 290 [1st Dept 2005]). In opposition, plaintiff was required to submit "objective proof" as to whether his alleged injuries were caused by the subject motor vehicle accident (*see Montgomery v Pena*, 19 AD3d at 289). Plaintiff failed to do this.

Accordingly, it is

ORDERED, that the motion of plaintiff for leave to reargue the April 15, 2019 decision

and order of the court is denied.

This constitutes the decision and order of the court.

Dated: 07/24/19



John R. Higgins, A.J.S.C.