

Burns v Smith

2015 NY Slip Op 32602(U)

June 30, 2015

Supreme Court, Bronx County

Docket Number: 20365/2013E

Judge: Mary Ann Brigantti

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**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15**

PRESENT: Honorable Mary Ann Brigantti

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TENYA T. BURNS,

Plaintiff,

-against-

DECISION / ORDER
Index No. 20365/2013E

JOHNNIE SMITH and DARRELL SINKLER,

Defendants
-----X

The following papers numbered 1 to 5 read on the below motion noticed on February 18, 2015 and duly submitted on the Part IA15 Motion calendar of **April 8, 2015**:

<u>Papers Submitted</u>	<u>Numbered</u>
Defendants' Notice of Motion, Exhibits	1,2
Pl.'s Aff. In Opp., Exhibits	4,5
Def's Aff. In Reply	5

Upon the foregoing papers, defendants Johnnie Smith and Darrell Sinkler (collectively, "Defendants"), move for summary judgment, dismissing the complaint of the plaintiff Tenya T. Burns ("Plaintiff"), for failure to satisfy the "serious injury" threshold as required by New York Insurance Law §5102(d). Plaintiff opposes the motion.

I. Background

This matter arises out of an alleged motor vehicle accident that occurred on October 27, 2011, on 154th Street and 107th Avenue in Queens County, New York. According to Plaintiff's bill of particulars, she sustained several injuries as a result of this accident, including: (1) left shoulder myofascial derangement, and rotator cuff tear, with pain and loss of range of motion, (2) disc herniation and bulging of the lumbar spine, with associated lower back pain, (3) cervical disc herniation and bulging with pain and loss of range of motion. Defendants now moves for summary judgment, contending that these injuries do not satisfy the "serious injury" threshold under New York Insurance Law.

In support of the motion, Defendants submit a sworn report from Dr. Jean-Robert Desrouleaux, who conducted an independent neurological examination of Plaintiff on September

15, 2014. Plaintiff complained of lower back pain at the time of the examination. She related to Dr. Desrouleaux that she was is not currently working. Dr. Desrouleaux performed an examination of, among other things, Plaintiff's reflexes, mental status, motor abilities, cranial nerves, and gait, and found no abnormalities. Plaintiff exhibited full range of motion in the cervical and lumbar spine in all directions. Straight leg raising was a normal 90 degrees. Dr. Desrouleaux ultimately opined that Plaintiff was "status post cervical and lumbar myofascitis, resolved" and was not disabled.

Defendants also submit affirmed reports from radiologist Dr. Jonathan Lerner. Dr. Lerner reviewed MRI studies of Plaintiff's left shoulder, lumbar spine, and cervical spine. With respect to the left shoulder, Dr. Lerner concluded that there was no evidence of a tear, and rather, evidence of tendinosis and rotator cuff impingement. He opined that these findings can result from repetitive movements, muscle overdevelopment, as well as degenerative changes of the acromioclavicular joint space. Dr. Lerner concluded that the MRI showed no causal relationship between this accident and the condition of the shoulder. With respect to the lumbar and cervical spine MRIs, Dr. Lerner likewise found that the bulging in the lumbar spine and condition of the cervical spine was suggestive of a "chronic degenerative process as opposed to an acute traumatic event."

Defendant also notes that, upon review of Plaintiff's entire medical file, it appears that she last treated for any injuries in June of 2012, seven months after this accident. Defendant argues that this unexplained cessation of treatment warrants dismissal of the complaint. Further, at deposition, Plaintiff testified that as a result of this accident, she only missed "maybe a week" of work. Accordingly, Defendant argues that Plaintiff has not suffered a "90/180 day" injury.

In opposition to the motion, Plaintiff submits various sworn reports from Dr. Thomas Pobre, dated November 4, 2011 through March 27, 2012. At his initial examination, Dr. Pobre noted that Plaintiff was involved in a motor vehicle accident and complained of neck, back, and left shoulder pain. Upon a physical examination, Plaintiff exhibited quantified limitations in range of motion in the cervical and lumbar spine, as well as the left shoulder. Dr. Pobre prescribed a physical therapy regimen and ordered x-rays and MRIs, along with trigger point injection of the left upper trapezius muscles. Dr. Pobre opined that Plaintiff was partially

incapacitated, and opined that there was causality between the injuries and the motor vehicle accident. Plaintiff's limited ranges of motion persisted in a follow-up visit. At that visit, Dr. Pobre reviewed MRIs of Plaintiff's left shoulder, cervical spine, and lumbar spine. The left shoulder MRI revealed "early osteoarthritis of the acromioclavicular joint." The cervical spine MRI revealed broad-based central disc herniation and bulging, with anterior thecal sac impingement. Plaintiff's lumbar spine MRI revealed "central disc herniation with central annular tear at L5-S1, disc bulge and right foraminal herniation at L4-5." He prescribed continued physical therapy treatment. Plaintiff submits affirmations of radiologists Narayan Paruchuri, M.D. and Robert Diamond, M.D., which annex copies of Plaintiff's MRI exam results. A March 27, 2012 examination by Dr. Pobre reviewed electrodiagnostic studies of Plaintiff's lumbar spine, and revealed "findings consistent with left L5 lumbar radiculopathy." Another March 2012 examination, this time performed by Dr. Vijay Sidhwani, revealed continued range of motion restrictions in the cervical and lumbar spine.

In an affirmation, Dr. Pobre states that on February 27, 2015, he performed a follow-up examination of the Plaintiff. Upon range of motion examination of the left shoulder, lumbar spine, and cervical spine, Dr. Pobre found persisting quantified limitations. He reviewed the MRI examinations, and opined that the cervical spine injuries, and lumbar spine injuries, were traumatically induced and caused by this accident. Notably, Dr. Pobre states that while there may be some clinically insignificant degenerative changes in those body parts, they do not explain the disc herniations in the cervical and lumbar spine, which were traumatically induced. Dr. Pobre also states that after treatment, he determined that Plaintiff had reached maximum medical improvement from conservative treatment, and further conservative treatment would be only palliative. Dr. Pobre states that Plaintiff has also suffered "permanent and significant limitations of motion of her left shoulder..." Plaintiff has also submitted various unsworn records allegedly detailing her physical therapy treatment.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient

evidence to demonstrate the absence of any material issues of fact from the case.” (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire’s Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

When a defendant seeks summary judgment alleging that a plaintiff does not meet the threshold required to maintain a lawsuit, the burden is on the defendant to first establish that plaintiff’s injuries are not serious (*Franchini v. Plameri*, 1 N.Y.3d 536 [2003]; *Brown v. Achy*, 9 A.D.3d 30 [1st Dept. 2004]). To meet their burden, defendants’ medical evidence must not be conclusory and must be based on objective testing (*See Nix v. Xiang*, 19 A.D.3d 227 [1st Dept. 2005]). With regard to range-of-motion issues, defendant’s medical doctor is required to specify the degree of plaintiff’s range of motion and what constitutes normal range of motion (*Webb v. Johnson*, 13 A.D.3d 54 [1st Dept. 2004]). Where defendant’s medical expert finds restricted range-of-motion, and a doctor believes they are self-imposed, the doctor must explain the reasons for the restricted range of motion and why the same are not related to the accident (*Style v. Joseph*, 32 A.D.3d 212 [1st Dept. 2006]). A defendant may also meet his or her initial burden with sufficient, objective medical evidence demonstrating that the plaintiff’s injuries are not causally related to the accident (*see Tuberman v. Hall*, 61 A.D.3d 441 [1st Dept. 2009]; *Boone v.*

Elizabeth Taxi, Inc., 117 A.D.3d 515 [1st Dept. 2014]).

With respect to Plaintiff's cervical and lumbar spine, even assuming that Defendants' have satisfactorily carried their burden of proving entitlement to judgment as a matter of law, in light of the above admissible evidence, Plaintiff has demonstrated an issue of fact as to whether she suffered a permanent, serious injury to those body parts, in accordance with New York Insurance Law §5102(d). "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (*Noble v. Ackerman*, 252 A.D.2d 392 [1st Dept. 1998]). In this matter, there are issues of fact and credibility raised that cannot be resolved on a motion for summary judgment (*Bradley v. Soundview Healthcenter*, 4 A.D.3d 194 [1st Dept. 2004]; *Lewis v. Capalbo*, 280 A.D.2d 257, 258-260, 720 N.Y.S.2d 455 [2001]).

Regarding the cervical and lumbar spine, Plaintiff presented admissible evidence that she had quantified range of motion limitations in the days after the accident, with associated pain. MRI examinations confirmed the existence of, among other things, disc herniations and bulging in the cervical and lumbar spine. The sworn records of Dr. Pobre, along with those MRI examinations, constitutes sufficient proof of causation (*see Rosa v. Mejia*, 95 A.D.3d 402 [1st Dept. 2012], *citing Perl v. Meher*, 18 N.Y.3d 208 [2011]). The disagreement between the Defendants' radiologist and Dr. Pobre regarding the origination of Plaintiff's cervical and lumbar spine injuries only raises issues of credibility to be determined by a jury (*see Lee Yuen v. Akra Memory Cab Corp.*, 80 A.D.3d 481 [1st Dept. 2011]). Alleged discrepancies between the signature on Dr. Diamond's affirmation, and on the report itself, do not render the affirmation or accompanying report inadmissible.

Plaintiff submitted admissible evidence from Dr. Pobre who found continued, quantified restrictions in movement of the cervical and lumbar spine upon a recent examination. He further adequately explained any alleged gap in treatment, by opining that Plaintiff had reached "maximum medical improvement" after conservative treatment and further treatment would have only been palliative (*see Barhak v. Almanzar-Cespedes*, 101 A.D.3d 564 [1st Dept. 2012]). Plaintiff has therefore sufficiently raised an issue of fact as to whether she sustained a "permanent consequential" or "significant limitation" to her cervical or lumbar spine within the

meaning of New York Insurance Law §5102(d) (*see Thompson v. Abbasi*, 15 A.D.3d 95 [1st Dept. 2005]). Although Plaintiff has submitted some unsworn records in opposition to the motion, these records did not constitute the “sole basis” for her opposition (*see Clemmer v. Drah Cab Corp.*, 74 A.D.3d 660 [1st Dept. 2010]).

With respect to the alleged left shoulder injury, however, Plaintiff failed to raise an issue of fact disputing Dr. Decker’s opinion that the injury was degenerative in nature and unrelated to this accident. Notably, Dr. Pobre’s own report found that Plaintiff’s left shoulder MRI revealed “early osteoarthritis of the acromioclavicular joint.” In his affirmation, Dr. Pobre does not address causation with respect to the left shoulder, and therefore failed to raise an issue of fact as to whether that alleged injury was related to this accident (*see Macdelinne F. v. Jimenez*, 126 A.D.3d 549 [1st Dept. 2015]). The shoulder MRI report from Dr. Diamond makes no mention of causation.

Defendants are also entitled to dismissal of Plaintiff’s “90/180” day injury claim. Plaintiff conceded at deposition that she only missed a week of work as a result of the accident. This evidence demonstrates that Plaintiff has no viable “90/180” claim (*see Valdez v. Benjamin*, 101 A.D.3d 622 [1st Dept. 2012]; *Martin v. Portexit Corp.*, 98 A.D.3d 63 [1st Dept. 2012]).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Defendants’ motion for summary judgment is granted only to the extent of dismissing Plaintiff’s “90/180” day injury claim, and dismissing any claims relating to her alleged left shoulder injury, and it is further,

ORDERED, that the remaining branches of Defendants’ motion for summary judgment are denied.

This constitutes the Decision and Order of this Court.

Dated: 6/30, 2015



Hon. Mary Ann Brigantti, J.S.C.