

Gordon v Metropolitan Transit Auth.

2012 NY Slip Op 31882(U)

July 2, 2012

Sup Ct, Nassau County

Docket Number: 21469/10

Judge: Thomas Feinman

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

GRACE GORDON,

Plaintiff,

- against -

METROPOLITAN TRANSIT AUTHORITY and
MTA LONG ISLAND BUS COMPANY,

Defendants.

TRIAL/IAS, PART 9
NASSAU COUNTY

INDEX NO. 21469/10

X X X

MOTION SUBMISSION
DATE: 5/23/12

MOTION SEQUENCE
NO.1

The following papers read on this motion:

Notice of Motion and Affidavits.....	<u> X </u>
Affirmation in Opposition.....	<u> X </u>
Reply Affirmation.....	<u> X </u>

Relief Requested

The defendants move, pursuant to CPLR §3212, for an order granting summary judgment in their favor and dismissing the plaintiff's complaint on the grounds that the plaintiff did not suffer a "serious injury" as defined by Insurance Law §5102(d), and thus, plaintiff's claim for non-economic loss is barred by §5104(a) of the New York Insurance Law. The defendants also move, pursuant to CPLR §3212 on the grounds that the defendants are not liable as the proximate cause of plaintiff's injuries. The plaintiff submits opposition. The defendants submit a reply affirmation.

Threshold Motion

The plaintiff initiated this action to recover for personal injuries sustained on July 2, 2009. The plaintiff, a passenger on the defendants' bus, slipped and fell on a puddle that formed on the bus floor during a rainstorm. The plaintiff claims that the defendants were negligent in failing to maintain the ventilation hatch causing and allowing it to leak, thereby causing the puddle to form on the bus floor.

The defendants submit that the plaintiff did not sustain a "serious injury" as defined by Insurance Law §5102(d) as a result of the subject accident. The plaintiff alleges injuries including a horizontal tear of the posterior horn of the medial meniscus right knee, a horizontal cleavage tear of the lateral meniscus right knee, a non displaced fracture distal end of the proximal phalanx of the right fifth toe, right knee sprain and internal derangement, and lumbosacral disc dessication with neural foramen stenosis.

"A defendant can establish that the plaintiff's injuries are not serious within the meaning of the Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim." (*Grossman v. Wright*, 268 AD2d 79). The threshold question in determining a summary judgment motion of the issue of serious injury focuses on the sufficiency of the moving papers. The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Alvarez v. Prospect Hospital*, 68 NY2d 320; *Winegrad v. New York University Medical Center*, 64 NY2d 851). In the present action, the burden rests on the defendants to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury." (*Lowe v. Bennett*, 122 AD2d 728, affirmed, 69 NY2d 7010). Once the defendants submit evidence establishing that the plaintiff did not suffer a serious injury within the meaning of Insurance Law §5102(d), the burden shifts to the plaintiff to produce evidence in admissible form demonstrating the existence of a triable issue of fact. (*Gaddy v. Eycler*, 582 NYS2d 990).

The Court in *Pommells v. Perez*, 4 NY3d 566, in stating that proof of a herniated disc, without additional more medical evidence, is not alone sufficient to establish a serious injury, provides that once the defendants make a *prima facie* showing that the plaintiff's injuries do not satisfy the no-fault serious injury threshold, the plaintiff has the burden to present objective medical proof of a serious injury causally related to the accident in order to survive summary judgment dismissal. (*Id.*) The Court in *Pommells* stated that in "the context of soft-tissue injuries involving complaints of pain that may be difficult to observe or quantify, deciding what is a 'serious injury' can be particularly vexing". The Court in *Pommells* concluded that "even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and the claimed injury - such as a gap in treatment, an intervening medical problem or a **pre-existing condition** - summary dismissal of the complaint may be appropriate". (emphasis added).

On this threshold motion, the defendants submit plaintiff's unsworn hospital records, unsworn treating physician medical report from Dr. K. Reddy, plaintiff's treating physician, and plaintiff's unsworn MRI reports. It is well established that "a defendant may rely upon unsworn medical reports and uncertified records of an injured plaintiff's treating medical care providers in order to demonstrate the lack of serious injury" (*Elshaarawy v. U-Haul Co. Of Mississippi*, 72 A.D.3d 878, citing *Hernandez v. Taub*, 19 A.D.3d 368; *Kearse v. New York City Tr. Auth.*, 16 A.D.3d 45; *Itkin v. Devlin*, 286 A.D.2d 477; *Abrahamson v. Premier Car Rental of Smithtown*, 261 A.D.2d 562; *Pagano v. Kingsbury*, 182 A.D.2d 268). However, unsworn reports of the plaintiff's examining physicians are insufficient to defeat a motion for summary judgment. (*Grasso v. Angerami*, 79 N.Y.2d 813).

Here, the plaintiff's medical records reveal that plaintiff injured her right knee as a result of a fall in May of 2000, prior to the subject incident, and received a partial medial neurosectomy and chondroplasty of her right knee. Plaintiff was diagnosed with a complex tear of the body of the lateral meniscus following the arthroscopic surgery. The meniscus tissue that was extracted during the prior surgery revealed "synovial and degenerating cartilaginous tissue" in plaintiff's right knee joint.

The defendants also refer to Dr. K. Reddy's report dated February 25, 2000, approximately three months prior to May of 2000 fall. Dr. K. Reddy was plaintiff's then treating physician. Dr. K. Reddy's report provides that plaintiff was involved in a motor vehicle accident causing severe right knee injuries. Additionally, the defendants refer to the plaintiff's own MRI reports taken immediately after the subject accident which reveal "degenerative changes of the right knee as manifested by small osteophyte formation" and "degenerative changes of the right knee" Thereafter, a second MRI report dated October 16, 2009 revealed "[f]indings consistent with degenerative joint disease involving the right knee joint." The defendants have demonstrated that the plaintiff's deposition transcript, and plaintiff's own medical records, reveal that plaintiff's injury to her right knee was pre-existing, and that plaintiff sustained an injury to her right knee prior to the subject accident, and that subsequent to the subject accident, the plaintiff only treated for her right knee.

Here, the defendants have made a *prima facie* showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) as a result of the subject accident. As the defendants have met their initial burden of proof, the burden shifts to the plaintiff to provide evidence in admissible form to demonstrate the existence of a triable issue of fact. (*Gaddy v. Eyles*, 582 NYS2d 990). Once the defendants establish that plaintiff's injury is a pre-existing condition or a prior injury, the burden shifts to the plaintiff who must demonstrate, by objective medical evidence, that her alleged injuries are causally related to the subject accident. (*Pommels v. Perez*, supra).

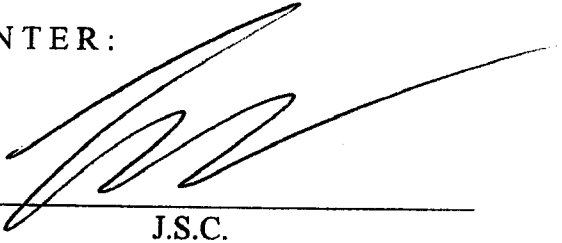
The plaintiff, in opposition to the motion, has failed to present objective medical proof of a serious injury causally related to the subject accident in order to survive summary judgment dismissal. The plaintiff submits the report by Dr. Laxmidhar Diwan, M.D. who affirms that he examined the plaintiff on August 17, 2009 for the first time, whereby he found tenderness over the medial and lateral joint lines, and the McMurray's test was positive for medial and lateral meniscus tear. Dr. Diwan refers to unsworn MRI reports which found tears of the medial and lateral meniscus. Dr. Diwan opines that the tear of the medial and lateral meniscus, and the medial collateral ligament are caused by the plaintiff's subject fall. However, plaintiff's physician failed to address or acknowledge plaintiff's prior injury, or plaintiff's own MRI's which revealed degenerative

conditions of the right knee. Under these circumstances, the plaintiff's physician's conclusion that the plaintiff's injuries were causally related to the subject accident were speculative. (*Tudisco v. James*, 28 AD3d 536; *Baksh v. Shabi*, 32 AD3d 525; *Zinger v. Zylberberg*, 35 AD3d 851). Additionally, the plaintiff failed to submit competent medical evidence that she was unable to perform substantially all the daily activities for not less than 90 days of the first 180 days subsequent to the subject accident. (*D'Alba v. Yong-Ae Choi*, 33 AD3d 650; *Sainte-Aime v. Ho*, *supra*; *Zinger v. Zylberberg*, *supra*, *Baksh v. Shabi*, *supra*).

Conclusion

The defendants have met their initial burden of establishing that the plaintiff has not sustained a serious injury as set forth in the insurance law. The plaintiff has failed to shift the burden by presenting objective medical proof of a serious injury causally related to the subject accident. Accordingly, this court need not address defendants' remaining contentions.

In light of the foregoing, the defendants' motion is granted, and therefore, the plaintiff's action is hereby dismissed.

ENTER:


J.S.C.

Dated: July 2, 2012

cc: Law Offices of Mark J. Fox
Zaklukiewicz, Puzo & Morrissey, LLP

ENTERED
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NASSAU COUNTY
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