

James v Figueroa

2013 NY Slip Op 30756(U)

March 13, 2013

Sup Ct, New York County

Docket Number: 104425/10

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____
Justice

PART 22

Index Number : 104425/2010
JAMES, GWENDOLYN
vs.
FIGUEROA, AMANDA KELLY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 1
Answering Affidavits — Exhibits _____ No(s) 2
Replying Affidavits _____ No(s) 3

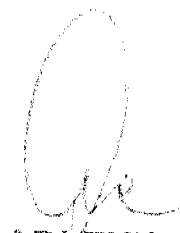
Upon the foregoing papers, it is ordered that this motion is consolidated for joint deposition with seq. 003 and is

LETTER TO BE ACCOMPANIED WITH
CERTIFICATE OF COSTS AND FEE RECEIPT

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
APR 15 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3.13.13


HON. ARLENE P. BLUTH J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22

Index No.: 104425/10
Mot. Seq. 002 and 003

Gwendolyn James and Natasha White,
Plaintiffs,

-against-

Amanda Kelly Figueroa, Enterprise Rent-A-Car
and Enterprise Holdings, Inc.

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Motion sequence 02 and 03 are consolidated for joint disposition.

In motion sequence 02, defendants Enterprise Rent-A-Car and Enterprise Holdings, Inc. (the Enterprise defendants) move for summary judgment dismissing the complaint as against them based on the Federal Transportation Equity Act (Graves Amendment); Figueroa and the Enterprise defendants move for summary judgment dismissing White's action on the ground that she failed to satisfy the serious injury threshold as defined by Insurance Law §5102(d). The first branch of the motion is granted without opposition, and the complaint is dismissed as against the Enterprise defendants; the second branch of the motion is denied as White has raised a triable issue of fact as to whether she sustained a serious injury.

In motion sequence 03, James moves for summary judgment dismissing the counterclaim. This motion is denied as moot; this relief was previously granted in motion sequence 01.

In this two-car parking lot accident, defendant Figueroa, the driver of a Jeep owned by the Enterprise defendants, was backing up out of a parking space and hit James's vehicle, which was stopped in another parking space. Plaintiff White was a passenger in the James vehicle when the accident occurred.

FILED

APR 15 2013

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a “serious injury” (*see Rodriguez v Goldstein*, 182 AD2d 396 [1992]). Such evidence includes “affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim” (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003], *quoting Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert affidavits indicating that plaintiff’s injury was caused by a pre-existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818 [1st Dept 2010], *citing Pommells v Perez*, 4 NY3d 566 [2005]). In order to establish prima facie entitlement to summary judgment under the 90/180 category of the statute, a defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident (*Elias v Mahlah*, 2009 NY Slip Op 43 [1st Dept]). However, a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff’s own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*id.*).

Once the defendant meets his or her initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury (*see Shinn*, 1 AD3d at 197). A plaintiff’s expert may provide a qualitative assessment that has an objective basis and compares plaintiff’s limitations with normal function in the context of the limb or body system’s use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff’s loss

of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Further, where the defendant has established a pre-existing condition, the plaintiff's expert must address causation (*see Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]).

In her bill of particulars, White alleges that she sustained injuries to her left shoulder, neck and back as a result of the subject motor vehicle accident (exh F to moving papers, para.7). In support of their motion, defendants submit White's emergency room records from the day of the accident (exh F) which show that she was diagnosed with para-cervical strain, neck pain/hip pain. Additionally, defendants refer to the records of Dr. Thompson, White's treating orthopedist, who saw first saw White on June 29, 2009 and described White's injuries as "minor concussion and post concussion syndrome, thoracolumbar spine strain and right hip strain" (exh I). Defendants submit the report of Dr. Varriale, an orthopedic surgeon, who examined White on January 11, 2011 and diagnosed her with resolved cervical and lumbosacral strain, resolved strain to the right knee, healed strain to the right hip and resolved left shoulder surgery. Defendants point out that Dr. Varriale opined that White's left shoulder injury and surgery, performed by Dr. Thompson on September 3, 2009, were not causally related to the subject accident because White did not make any complaints about left shoulder pain in the emergency room or to Dr. Thompson at her first visit to him on June 29, 2009. Defendants also submit the reports of Dr. Feuer, a neurologist, who opined that White had a normal neurological examination on January 17, 2011 (exh K), and of Dr. Fisher, a radiologist, who reviewed White's MRIs of her lumbar spine, cervical spine and left shoulder, taken within weeks of the subject accident, and found them all to be normal (exh L).

Based on the foregoing, defendants have satisfied their burden of establishing prima facie that plaintiff did not suffer a serious injury, and the burden shifts to White to raise a triable factual question as to whether she sustained a serious injury.

In opposition, White has submitted, inter alia, her affidavit and the affirmation of Dr. Thompson (exh 4 to opp). Dr. Thompson, who treated White approximately 15 times from June 29, 2009 through January 2, 2012, and who performed arthroscopic surgery on her left shoulder on September 3, 2009, states that based on his examinations, treatment, surgical findings, and review of White's tests and history, the injuries to her left shoulder, cervical and lumbar spine, and right hip are causally related to the subject accident. He supports his findings by stating that plaintiff was completely asymptomatic (with regard to her left shoulder) before the accident, and due to swelling as a result of the accident, her shoulder became symptomatic. *See Lopez v Abayev Tr. Corp.*, 2013 Slip Op 01511 (1st Dcpt 2013) (plaintiff's surgeon more than adequately addressed defendant's expert's opinion by noting the absence of any pre-accident history of symptoms in affected body parts). Additionally, Dr. Thompson stated the basis of his disagreements with Dr. Varriale's characterization of "resolved left shoulder surgery" and Dr. Feuer's neurological finding that White was normal. Finally, Dr. Thompson stated that in his opinion, White's injuries are permanent because she continues to demonstrate deficits in mobility and pain for more than two years after her accident. Accordingly, plaintiff had raised a triable issue of fact as to whether she sustained a serious injury.

Accordingly, it is

ORDERED that the Enterprise defendants' motion for summary judgment dismissing the complaint as against them based on the Federal Transportation Equity Act (Graves Amendment)

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(motion sequence 02) is granted without opposition and the complaint is dismissed with costs and disbursements to these defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and these parties shall be removed from the caption; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly, and it is further

ORDERED that defendants' motion for summary judgment dismissing White's action on the ground that she failed to satisfy the serious injury threshold as defined by Insurance Law §5102(d) (motion sequence 02) is denied; and it is further

ORDERED that James's motion to dismiss the counterclaim against her (motion sequence 03) is denied as this relief was previously granted by this Court in motion sequence 01; and it is further

ORDERED that counsel for White shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of Trial Support (Room 158) who are directed to amend their records to reflect such change in the caption herein.

This is the Decision and Order of the Court.

Dated: March 13, 2013
New York, New York



HON. ARLENE P. BLUTH, JSC

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APR 15 2013

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COUNTY CLERK'S OFFICE