

Campbell v Fischetti

2013 NY Slip Op 31241(U)

June 11, 2013

Supreme Court, NY County

Docket Number: 100606/10

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ARLENE P. BLUTH

PRESENT: _____
Justice

PART 22

Index Number : 100606/2010
CAMPBELL, SANDRA
vs.
FISCHETTI, MABEL M.
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 MST on Ser Tu

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER**

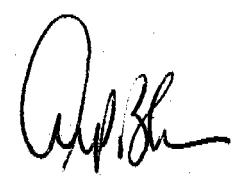
FILED

JUN 13 2013

NEW YORK
CLERK'S OFFICE

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

Dated: 6/11/13



_____, J.S.C.

HON. ARLENE P. BLUTH

- 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.:100606/10
Motion Seq. 02

Sandra Campbell,

Plaintiff,

-against-

Mabel Fischetti,

Defendant

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

FILED

JUN 13 2013

NEW YORK
COUNTY CLERK'S OFFICE

Defendant's motion for summary judgment dismissing this action on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) is granted and the action is hereby dismissed.

In this action, plaintiff alleges that on September 17, 2008 she sustained personal injuries when she was struck by defendant's car. In her bill of particulars, she states that the accident caused the aggravation of her "pre-existing left knee arthritis necessitating total left knee replacement on 6/16/09" (exh C to moving papers, para. 10).

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 initial burden, the plaintiff must 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]).

Defendant's showing

Defendant claims that plaintiff did not sustain a permanent consequential limitation of a body organ, member, function or system, a significant limitation of use of a body part or system, or a 90/180 curtailment of activities. In support of her motion, defendant submits the affirmed report of Dr. Unis (moving papers, exh F), an orthopedist who examined plaintiff on 4/12/11 and

reviewed her records; these records included an x-ray of plaintiff's left knee taken right after the accident showing chronic degenerative changes with severe point space narrowing (exh E). Dr. Unis performed range of motion testing on plaintiff's left knee with a goniometer and found that this measurement (105 degrees) was within the stated normal range; he concluded that her total knee replacement was necessary due to pre-existing degenerative disease, not the contusion (which had resolved) that she sustained in the subject accident.

Additionally, defendant's attorney's points out that although plaintiff indicated in her bill of particulars that the amount of time she was confined to bed/home would be provided, the bill was never supplemented (aff. in supp., para. 11).

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

Plaintiff's showing

In opposition, plaintiff submits various records of Riverside Orthopaedic & Sports Medicine Associates, PC (opp., exh A). These uncertified and unaffirmed medical reports submitted by plaintiff can not be used to raise an issue of fact. *See Luetto v Abreu*, 105 AD3d 558, 963 NYS2d 112 (1st Dept 2013).

Additionally, plaintiff submits the unaffirmed report of Dr. Kassapidis dated 4/25/12 (exh B) and an unsigned operative report from Lenox Hill Hospital of plaintiff's 6/16/09 knee replacement (exh C); neither of these reports are admissible. Plaintiff submits Dr. Kassapidis's August 1, 2012 affirmation (exh D), which is admissible. Therein he states that the subject accident was "the causative event for necessitating a left knee replacement" which he performed

9 months after the accident. He states that a decision was made to perform the knee replacement because plaintiff said she had no discernible pain in her knee before the accident, her pain was not diminished, and she had advanced osteoarthritis. Dr. Kassapidis, who performed the surgery, never once said that he found any evidence of trauma to the knee; rather, he bases his conclusion of causation solely on what plaintiff told him. Moreover, although Dr. Kassapidis states that the surgery improved her condition, and she "remains with decreased range of motion as of the last time I examined her" (para. 6), he does not set forth any range of motion measurements of plaintiff's left knee. Therefore, there is nothing to contradict Dr. Unis', defendant's doctor's, affirmed report stating plaintiff's range of motion was within the normal range and that pre-existing degenerative disease, not the resolved contusion, was the reason for the knee replacement surgery. Based on the foregoing, Dr. Kassapidis fails to raise an issue of fact sufficient to defeat defendant's motion.

Finally, plaintiff admitted at her deposition that during the period after the accident (9/17/08) and before her surgery (6/16/09) she "was not really confined" (exh D to moving papers, T at 102). As such, plaintiff has failed to raise a triable issue of fact regarding her 90/180-day claim.

FILED

JUN 13 2013

**NEW YORK
COUNTY CLERKS OFFICE**

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing this action on the grounds that plaintiff has not sustained a "serious injury" within the meaning of Insurance Law §5012(d) is granted, and the complaint is dismissed.

This is the Decision and Order of the Court.



**Dated: June 11, 2013
New York, New York**

HON. ARLENE P. BLUTH, JSC