

Fobel v Singh

2013 NY Slip Op 31243(U)

June 11, 2013

Supreme Court, NY County

Docket Number: 112841/10

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 : 112841/2010
FOBEL, JAMES
vs.
SINGH, MALKIT
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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

The following papers, numbered 1 to 3, were read on this motion to/for def's msj

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

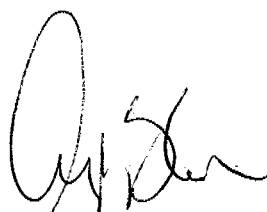
Upon the foregoing papers, it is ordered that this motion is

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

JUN 13 2013
NEW YORK
COUNTY 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.: 112841/10
Motion Seq 01

James Fobel,

-against-

Malkit Singh,

Plaintiff,
FILED
Defendant
JUN 13 2013

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

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 denied; the branch of the motion seeking to dismiss the action on the grounds that defendant is not liable for the accident is also denied.

In this action, plaintiff alleges that on October 28, 2009 he sustained personal injuries when he was struck by a taxi cab owned and operated by defendant.

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]).

Plaintiff alleges in the verified bill of particulars that, as a result of the subject accident, he sustained a serious injury including large hematoma, swelling, bruising and cellulitis on the

top of his right foot, scarring and right ankle contusion (exh D to moving papers, paras. 7-8).

In support of this motion, defendant submits the report of Dr. Singh, a neurologist who saw plaintiff on December 12, 2011 (exh E). However, because Dr. Singh's report is not signed, it cannot be considered in support of defendant's motion. *See* CPLR 2106; *Burgos v Vargas*, 33 AD3d 579, 580, 822 NYS2d 297, 298 (2d Dept 2006) (examining physician's report was without probative value because it was unsigned, and thus not properly subscribed and affirmed by him).

Defendant submits the affirmed report of Dr. Nason, an orthopedist, who saw plaintiff on February 13, 2012 (exh F). Dr. Nason examined plaintiff's right foot and ankle and conducted range of motion testing using a goniometer. She noted that plaintiff had no active range of motion in his right foot, right ankle and right toes, which was evidence of chronic idiopathic neuropathy (not related to this accident). Additionally, Dr. Nason stated that she found evidence of swelling over the top of the right foot with purple discoloration to the proximal leg with some skin changes. Dr. Nason concluded that "there is evidence of permanency" (the Court notes that she *does not* state that there is *no* evidence of permanency), and that plaintiff may perform pre-accident activities of daily living with no restrictions.

Significantly, Dr. Nason makes no mention of the scar claimed by plaintiff in his bill of particulars in support of his claim that he sustained a permanent disfigurement as a result of this accident; as such, defendant has not made a prima facie showing of entitlement to summary judgment. Because the burden never shifted to plaintiff to rebut defendant's showing, it is unnecessary to consider the sufficiency of plaintiff's evidence in opposition (*see Calcano v*

Rodriguez, 103 AD3d 490, 962 NYS2d 37 [1st Dept 2013]). Accordingly, the branch of 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 denied.

The branch of defendant's motion seeking to dismiss the action on the grounds that plaintiff was "the sole and proximate cause of this accident" (aff. in supp., para. 41) is also denied. At his deposition, defendant testified that as he was making a right turn, plaintiff's wheelchair, which was still partially on the sidewalk curb cut but was not within the crosswalk, came into contact with the back of defendant's cab (exh H to moving papers, T at 16-20). In contrast, plaintiff testified that his wheelchair was in the crosswalk of West 15th Street when the accident occurred (exh G, T at 21-23) and that defendant's cab made contact with plaintiff's right foot which was extended into the street.

The parties have presented two versions of the circumstances surrounding their accident. Here, at a minimum the jury will have to decide whether they believe plaintiff, who states that he had just entered the crosswalk in his wheelchair when defendant, coming from his left, made a sharp right turn onto West 15th street and struck him, or defendant, who claims that plaintiff was attempting to cross the street against the light and outside of the pedestrian crosswalk. On this motion, it is the Court's duty to determine whether there are issues of fact; it is up to the jury to determine which witnesses they believe. Because there are issues of fact as to whether plaintiff was in the crosswalk and precisely how the accident occurred, defendant's motion for summary judgment on liability is denied. *See Odikpo v American Transit, Inc.*, 72 AD3d 568, 569, 899

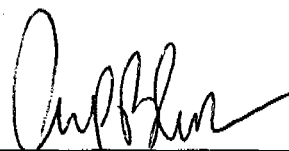
NYS2d 219, 220 (1st Dept 2010) (the parties' testimony as to the manner in which each driver controlled his vehicle, the circumstances surrounding their collision, and the chain of events leading up to the collision involving plaintiff's vehicle raise questions of fact, which are best left for a jury to decide).

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment dismissing this action is denied in its entirety.

This is the Decision and Order of the Court.

Dated: June 11, 2013
New York, New York



HON. ARLENE P. BLUTH, JSC

FILED

JUN 13 2013

**NEW YORK
COUNTY CLERK'S OFFICE**