

Henry v Nidhi

2013 NY Slip Op 31603(U)

July 16, 2013

Supreme Court, New York County

Docket Number: 104337/2009

Judge: Arlene P. Bluth

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Index Number : 104337/2009
HENRY, SHERNETTE
vs.
NIDHI, MADUKKIL
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 MST on serious injury

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

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

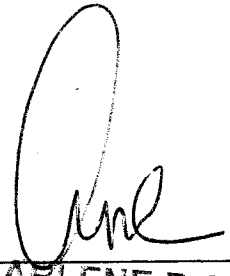
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JUL 19 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/15/13


_____, 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

FILED

JUL 19 2013

COUNTY CLERK'S OFFICE
NEW YORKSUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

SHERNETTE HENRY and LORNA REID,
Plaintiffs,

-against-

MADUKKIVIL NIDHI and ANTHONY NIDHI,
Defendants.

INDEX NO. 104337/2009
Motion Sequence 001
DECISION & ORDER

ARLENE BLUTH, J.:

Defendants' motion for summary judgment dismissing the complaint is denied.

Plaintiff Henry was allegedly injured on December 13, 2006 in a motor vehicle accident on Interstate 87 in Westchester County when the vehicle that she owned and operated collided with the motor vehicle owned by A. Nidhi and operated by M. Nidhi. Plaintiff Reid, a passenger in her daughter Henry's motor vehicle, was also allegedly injured.

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 verified bill of particulars, Henry claims she suffered, *inter alia*, bulging discs at C3-4 and L5-S1, cervical and lumbosacral radiculopathy and sprain/strain, headaches and depression (exh B to moving papers, para. 6). In her verified bill of particulars, Reid claims she suffered, *inter alia*, straightening of the normal cervical curvature, lumbosacral radiculopathy and sprain/strain, headaches and depression (exh B to moving papers, para. 7).

In support of their motion, defendants submit the affirmed reports of Dr. Unis (moving papers, exh. F and G) who conducted orthopedic examinations of Henry and Reid on behalf of

the defendants. In his affirmed statement dated April 19, 2011, Dr. Unis states that he conducted a physical examination of Henry and measured the range of motion in her lumbar and cervical spine, and right wrist “visually” (p. 2). He does not state that he used a goniometer or inclinometer, or any other measuring device. Dr. Unis reports normal findings in all areas but does not state the source of his “normal” values. Dr. Unis concludes that Henry has no objective evidence of orthopedic disability or permanency.

Dr. Unis also examined Reid on behalf of the defendants. In his affirmed statement dated April 19, 2011, Dr. Unis states that he conducted a physical examination of Reid and measured the range of motion in her lumbar and cervical spine, and left wrist “visually” (p. 2). He does not state that he used a goniometer or inclinometer, or any other measuring device. Dr. Unis reports normal findings in all areas but does not state the source of his “normal” values. Dr. Unis concludes that Reid has no objective evidence of orthopedic disability or permanency.

Defendants did not submit an affirmed report from a neurologist, a radiologist, or any other doctor¹.

In opposition, plaintiffs assert that defendants have not met their prima facie burden of entitlement to summary judgment regarding the claim of significant limitation of use of a body function or system or permanent consequential limitation because Dr. Unis failed to state if or how each plaintiff’s ranges of motion were objectively measured. This Court agrees; “the failure to indicate the objective tests used to determine the range of motion in plaintiffs’ lumbar spine precludes the grant of summary judgment” (*Mensah v Salah Enters., Inc.*, 90 AD3d492, 2011

¹Although defendants’ counsel states that annexed to his moving affirmation as exhibit G is an MRI report of plaintiff Reid’s lumbar spine from Lawrence Hospital Center, that exhibit is in fact Dr. Unis’s report (moving aff., para. 21). There are no Lawrence Hospital Center records annexed to the moving papers.

NY Slip Op 08987 [1st Dept 2011].) *See also Baki v Alcourt, et. al.*, 2013 WL 180944 (Supreme Court, New York Co.) (defendants cannot satisfy burden if doctor does not specify which objective tests he performed to arrive at his conclusion); *Soto v Koysor*, 24 Misc.3d 1205(A), 890 NYS2d 371 (Dr. Unis's report failed to identify objective tests he performed to support his finding that plaintiff had full range of motion; defendants failed to make prima facie showing).

Nor did defendants make any prima facie showing regarding dismissal of plaintiffs' 90/180-day claim; the moving papers do not contain any specific reference to this category and no reference is made to the relevant deposition testimony or the bill of particulars.

Accordingly, it is

ORDERED that defendants' motions for summary judgment dismissing plaintiffs' claims on the grounds that neither plaintiff sustained a "serious injury" within the meaning of Insurance Law §5012(d) is denied.

This is the Decision and Order of the Court.

DATED: July 16, 2013
New York, NY



HON. ARLENE P. BLUTH, JSC

FILED
JUL 19 2013
COUNTY CLERK'S OFFICE
NEW YORK