Matos v Rahman
2013 NY Slip Op 34044(U)
September 18, 2013
Supreme Court, New York County
Docket Number: 105901/10
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

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Maribel Matos,

Plaintiff,

-against-

Shahinoor Rahman, Mist Hacking Corp. and
Yvis Custodio Rodriguez,

Defendants.

---x

Motion Seq 01

Index No. 105901/10

DECISION AND ORDER

Hon. ARLENE P. BLUTH, JSC

FILED
SEP 24 2013
COUNTY CLERK'S OFFICE
NEW YORK

Defendants' motion for summary judgment dismissing the complaint on the grounds that plaintiff has not demonstrated that her injuries meet the serious injury threshold pursuant to Insurance Law § 5102(d) is granted.

Plaintiff was a passenger in a car that was involved in a car accident on August 21, 2009. In her verified bill of particulars, plaintiff claims various injuries to her left shoulder, including surgery performed on March 25, 2010 (seven months after the accident), depression, nervousness, cervical spine injury and loss of range of motion (C4-5 disc bulge, positive MRI of cervical spine), impaired mobility, difficulty walking, sitting, standing and climbing stairs, and various left knee injuries (sprain, instability, locking, buckling, stiffness, burning, clicking).

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]).

Defendants' Showing

In support of their motions, defendants Rahman and Mist Hacking annex two affirmed medical reports. The first is from a radiologist, David Fisher, MD. He reviewed the MRI of plaintiff's left shoulder taken on January 23, 2010, more than five months after the accident. He saw moderate hypertrophy at the acromioclavicular joint and "no evidence of traumatic or causally related injury to the left shoulder".

Rahman and Mist Hacking also submit the affirmed orthopedic IME report of Edward Decter, MD dated March 27, 2012. In a comprehensive report, he discusses both plaintiff's records and the results of his findings on examination. Regarding her shoulder surgery, Dr. Decter reports that the records and intraoperative photographs provided to him only showed degeneration and no traumatic injury; he concludes that the surgery was elective and that her condition was not related to the accident or any trauma. To support this, Dr. Decter notes that there was no need to repair the labrum; the surgeon merely did a debridement and subacromial decompression – all related to degeneration and nothing related to any trauma. He reviewed an MRI of plaintiff's cervical spine taken on 10/7/09 and found it normal, as he did after his review of a CT scan of the cervical spine taken on 9/22/09.

As for plaintiff's actual examination, Dr. Decter opined that plaintiff "exhibited symptom magnification by saying "ouch" to certain movements while still having full,

unrestricted range of motion with no evidence of muscle spasm or guarding" and that she had "subjective complaints and symptom magnification by saying "ouch" when she was touched in areas that were totally nonanatomical". In any event, at the time of the IME, plaintiff complained of right shoulder and left knee pain. Range of motion testing of the cervical spine, both shoulders and both knees, using a goniometer, showed full range of motion in all planes. And manual muscle testing of the upper extremities were all normal, too.

In his opinion and conclusions, Dr. Decter affirms, all with a reasonable degree of medical certainty, that (1) plaintiff's left shoulder surgery was not causally related to the accident and the surgery findings were "merely some degeneration" and that the surgery itself was an elective procedure, (2) plaintiff's complaints were subjective and she engaged in symptom magnification which had no anatomical basis, (3) plaintiff is capable of full unrestricted work and all activities of daily living and (4) plaintiff did not sustain any permanent orthopedic injury to her cervical spine, right shoulder, left shoulder or left knee.

As for any 90/180 claim, plaintiff testified at her deposition that she returned to work one week after the accident (deposition, page 58).

In support of his cross-motion, co-defendant Rodriguez submits the affirmed IME report dated April 16, 2012 from Daniel Feuer, a neurologist. He found normal ranges of motion in plaintiff's cervical and lumbrosacral spine and a normal neurological exam. He concluded that plaintiff is neurologically stable and can engage in all work activities and activities of daily living. Also annexed is the affirmed report of an IME conducted on April 17, 2012 by J. Serge Parisien, MD, an orthopedist. Dr. Parisien found all

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normal ranges of motion, no orthopedic disability or permanent impairment and he concludes that plaintiff's strains and sprains were resolved.

Finally, Rodriguez also submits the affirmed report Richard A. Heiden, MD, a radiologist, who reviewed the MRI of plaintiff's left shoulder taken on 1/23/10, more than five months after the accident. He reports that the MRI shows degeneration, specifically, "degenerative osteoarthritis...consistent with patient's age [and] was likely pre-existing at the time of the accident five months earlier. Significantly, no post-traumatic changes attributable to the accident are identified".

Defendants, by submitting the affirmed reports of two radiologists indicating degeneration of plaintiff's left shoulder, the affirmed reports of two orthopedists indicating full range of motion and no orthopedic disability and an affirmed report of a neurologist indicating a normal neurological examination, have met their prima facie burden that plaintiff has not suffered a serious injury pursuant to the insurance law.

<u>Plaintiff's showing/argument</u>

Plaintiff's opposition to the motion is limited to the left shoulder injury/surgery. Therefore, plaintiff conceded that the other injuries contained in the bill of particulars do not rise to the level of serious injury pursuant to the insurance law.

Regarding the left shoulder, plaintiff first argues that Dr. Fisher's finding of moderate hypertrophy at the acromioclavicular joint requires denial of the motion. This argument fails for several reasons. Plaintiff does not show that hypertrophy was caused by trauma (as opposed to a degenerative condition). And plaintiff ignores Dr. Fisher's finding of "no evidence of traumatic or causally related injury to the left

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shoulder". There is no issue of fact or inconsistency in Dr. Fisher's report.

Next plaintiff claims Dr. Decter could not determine plaintiff had a pre-existing degenerative condition by only looking at the intraoperative photographs without looking at the MRI itself. This is unsupported - Dr. Decter wrote that the "most telltale findings" were the interoperative photos - unless plaintiff submitted a doctor's affirmation contradicting the ability to determine degeneration from the photos, there is no issue of fact. And counsel has not submitted any medical contraindication to Dr. Decter's reliance on the photos.

Next plaintiff's counsel argues that Dr. Heiden's radiological interpretation of the left shoulder MRI is "laughable and contrived". Counsel argues it, but does not present a doctor's affirmation to support it, and so there is no issue of fact there, either.

Moreover, plaintiff has failed to submit any evidence of any treatment or complaints about her left shoulder before her initial consultation with Dr. Glassman on December 16, 2009. According to Dr. Decter's report, he reviewed CT scans of the right shoulder, brain, lumbar and cervical spine from 2009. It appears the first study of the left shoulder was the one Dr. Heigen and Dr. Fisher said showed degeneration and no trauma, and was the study ordered by Dr. Glassman after he already tentatively scheduled plaintiff's shoulder surgery. If there were any records of plaintiff's complaints of shoulder pain or CT scans/MRIs of her left shoulder before she saw Dr. Glassman four months after the accident, then it was plaintiff's burden to produce them; nothing was produced.

Analysis

Plaintiff has not shown a causal connection between her shoulder surgery and the accident and has not shown that her left shoulder pain commenced with the accident. "Absent admissible contemporaneous evidence of alleged limitations, plaintiff cannot raise an inference that his injuries were caused by the accident" *Shu Chi Lam v Wang Dong*, 84 AD3d 515, 922 NYS2d 381 (1st Dept 2011). Dr. Glassman's notes of the initial consultation is not contemporaneous because he did not examine the plaintiff until four months after the accident. *See Soho v Konate* 85 AD3d 522, 523, 925 NYS2d 456, 457 (1st Dept 2011) (must show contemporaneous limitations as a result of the accident even where plaintiff has undergone surgery; five months after accident is too long), *Cabrera v Gilpin*, 72 AD3d 552, 899 NYS2d 211 (1st Dept 2010) (six months is too long); *Toulson v Young Han Pae*, 13 AD3d 317, 788 NYS2d 334 (1st Dept 2004) (five months is too long).

In *Rosa v Mejia,* 95 AD3d 402 (1st Dept 2012), a case where the plaintiff did not present any admissible proof that she was evaluated for the injuries which she tried to attribute to the accident until five months after the accident, the Court found plaintiff did not prove causation. The Court held:

> The recent Court of Appeals decision in Perl v Meher (18 NY3d 208 [2011]) does not require a different result. Perl did not abrogate the need for at least a qualitative assessment of injuries soon after an accident (see Salman v Rosario, 87 AD3d 482, 484 [2011]). In fact, the Court noted with approval the comment in a legal article that "a contemporaneous doctor's report is important to proof of causation; an examination by a doctor years later cannot reliably connect the symptoms with the accident. But where causation is proved, it is not unreasonable to measure the *severity* of the injuries at a later time" (18 NY3d at 217-218).

Especially where, as here, the moving papers so obviously claim that the reason for the shoulder surgery had nothing to do with the accident, that even though plaintiff had a plethora of CT scans taken of many parts of her body shortly after the accident, there was no test to her left shoulder mentioned in the moving papers until five months after the accident, it was plaintiff's burden to show this Court that she complained of left shoulder pain shortly after the accident and because of the accident. Plaintiff has not done so. "While the Court of Appeals in Perl "reject[ed] a rule that would make contemporaneous quantitative measurements a prerequisite to recovery" (*Perl v Meher* 18 NY3d 208 at 218), it confirmed the necessity of some type of contemporaneous treatment to establish that a plaintiff's injuries were causally related to the incident in question." *Rosa v Mejia,* 95 AD3d 402 at 404.

Finally, plaintiff's counsel argues that Drs. Glassman and Berkowitz (both are in the same practice) claim the left shoulder injury was traumatic and caused by the subject accident. They do not, and plaintiff does not point to any specific language in any affirmation which directly says that what was found on the MRI or in surgery was traumatic and not degenerative in nature. In fact, plaintiff's doctor does not address at all the defendants' showing that the shoulder injury was degenerative in nature. The failure of plaintiff's doctor to address defendants' doctors' finding of degeneration is a failure of plaintiff' to raise an issue of fact. "Plaintiff's expert merely noted the degeneration without contesting defendant's expert's opinion that it was a preexisting condition and not causally related to the accident. Thus, no issue of fact was raised." *Rosa v Mejia,* 95 AD3d 402 at 405.

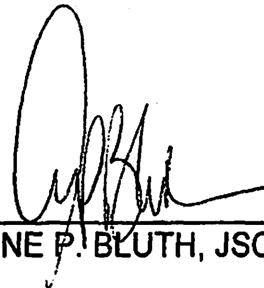
For the foregoing reasons, plaintiff has failed to raise an issue of fact and summary judgment is granted to defendants. The complaint is dismissed.

Accordingly, it is

ORDERED that defendants' motion and cross-motion are granted. The case is dismissed.

This is the Decision and Order of the Court.

Dated: September 18, 2013
New York, NY



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