

Quinones v Sunset Airport Trans. Corp.

2014 NY Slip Op 30141(U)

January 16, 2014

Supreme Court, New York County

Docket Number: 108394/2011

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Index Number : 108394/2011
QUINONES, CARMEN
vs.
SUNSET AIRPORT TRANS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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

The following papers, numbered 1 to 1 were read on this motion to/for ST (Quinones summary judgment) granted

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 1
(in cross-motion in seq 02)
Answering Affidavits — Exhibits _____ No(s) 3
in 6-1-14 at 10:50 AM
Replying Affidavits _____ No(s) 1

Upon the foregoing papers, it is ordered that this motion is decided jointly
with mot seq. 02

~~IN~~ ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED
JAN 22 2014
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/16/14

[Signature], 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**

Carmen Quinones and Josefa Pardo,

Plaintiffs,

-against-

**Sunset Airport Trans Corp. and Walter
Freidewald,**

Defendants.

and a third-party action,

Index No. 590893/11

Index No.: 108394/11

Mot. Seq 01 and 02

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Motion sequences 01 and 02 are consolidated for joint disposition.

Defendants/third-party plaintiffs Sunset Airport Trans Corp. and Walter Freidewald's motion for summary judgment dismissing this action on the grounds that neither of the plaintiffs sustained a "serious injury" within the meaning of Insurance Law §5012(d) is granted, and the action and third-party action are hereby dismissed. Plaintiffs' cross-motion for summary judgment on liability is denied as moot.

In this action, plaintiffs allege that on October 5, 2010 they sustained personal injuries when they were passengers in a cab owned and operated by the moving defendants, which struck the vehicle owned by third-party defendant Michael McStay and operated by third-party defendant Cindy McStay in the rear.

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 Quinones

In the bill of particulars¹, counsel claims, upon information and belief, that plaintiff Quinones sustained a knee injury and underwent an arthroscopy two months later (exh B to moving papers, para. 11).

In support, defendants submit the affirmed reports of Dr. Eisenstadt, a radiologist, who reviewed the MRI of Quinones' right knee taken 20 days after the accident and the 10/29/10 MRI of her right foot. Dr. Eisenstadt found long-standing degenerative changes and arthritic disease in the knee and no traumatic injury to the right foot. Dr. Eisenstadt detailed what she saw on the MRI (tri-compartmental bony growth, hypoplasia and mucoid intrasubstance grade II signal change, loss of substance, out-pouching of the synovial lining), and stated that these findings evidenced degenerative changes in Quinones' knee (exh D to moving papers). Specifically, Dr. Eisenstadt concluded in clear terms that Quinones' knee condition was "a longstanding process which did not develop in the three week interval" between the motor vehicle accident and taking the MRI. Finally, Dr. Eisenstadt reviewed the MRI of Quinones' foot and stated that it showed calcaneal spurs (which are degenerative in nature) and that Quinones is flat-footed, but no post-traumatic abnormality.

Defendants also submit the affirmed report Dr. Nason, an orthopedist (exh C), who examined Quinones on July 16, 2012, measured normal range of motion in her right knee and concluded that her knee had healed from arthroscopic surgery. Significantly, defendants annex

¹Although entitled a "verified" bill of particulars, there is no signed verification from with the plaintiffs themselves or their attorney submitted as part of Exhibit B. The Court notes that this bill was later supplemented only to add special damages, and still was not verified.

the operative report of Dr. Struhl, who performed the arthroscopy on December 2, 2010 (exh F) and noted in his findings reveal degenerative changes in that he found there was “severe erosive arthritis of the patellofemoral joint with significant wear of the patella as well as on the trochlea involving most of the surfaces”.

Defendants’ counsel pointed out that in the bill of particulars Quinones stated that she missed 10 days of work as a result of the accident, and that she also stated this at her deposition. Based on the foregoing, defendants met their prima facie burden of showing that Quinones did not sustain a serious injury as a result of the subject accident, and the burden shifts to Quinones to raise a triable factual question.

In her opposition (annexed to the cross-motion for summary judgment on liability), Quinones submits a February 10, 2013 affirmed “narrative summary” from Dr. Struhl, who states that he examined Quinones’s knee on November 2, 2010 (less than one month after the accident) and noted tenderness and a restricted range of motion. However, while Dr. Struhl states that the injury Quinones sustained in the accident was “super-imposed on a pre-existing arthritic knee”, he does not say that she was asymptomatic before the accident and he does not address Dr. Eisenstadt’s lengthy finding of extensive degeneration in the knee; thus, his affirmed letter does not constitute proof of a recent examination (although the letter is dated February 10, 2013, he did not see Quinones after December 2, 2010) and does not raise a triable factual question as to causation.

In further opposition, Quinones submits the affirmed report of a physiatrist, Dr. Villafuerte, who examined her on February 27, 2013, and measured flexion of her right knee as 105 degrees, noting normal as 130 degrees. Although he concludes that the subject accident

“caused a meniscal tear requiring surgery of a knee”, Dr. Villafuerte did not address Dr. Eisenstadt’s extensive findings of longstanding degeneration in Quinones’ right knee. While he stated that the MRI “revealed” certain findings, he did not say that he personally read the MRI films. Accordingly, Dr. Villafuerte’s affirmation is conclusory and does not raise a triable factual question.

Finally, Quinones has not addressed defendants’ assertion that she has not set forth a claim under the 90/180-day category and therefore as not raised an issue of fact.

Plaintiff Pardo

In the bill of particulars, counsel claims, upon information and belief, that plaintiff Pardo sustained cervical disc herniations (exh B to moving papers, para.11).

In support, defendants submit the affirmed report of Dr. Singh, a neurologist, who examined Pardo on October 8, 2012. Dr. Singh examined her cervical spine, measured normal ranges of motion in that area, concluded that any alleged injuries to her cervical spine had resolved, and that she had no neurological disability (exh C). Defendants also submits the affirmed report Dr. Tantleff, an orthopedist (exh D), who reviewed Pardo’s cervical MRI taken one month after the subject accident. Dr. Tantleff stated that Pardo had age-related and weight-related degenerative disease in the cervical spine, but he found no evidence of acute or recent trauma, and no swelling. Defendants’ counsel pointed out that in the bill of particulars Pardo stated that she was missed 9 days of work as a result of the accident, and that she stated at her deposition that she missed 3 days of work. Based on the foregoing, defendants met their prima facie burden of showing that Pardo did not sustain a serious injury as a result of the subject

accident, and the burden shifts to Pardo to raise a triable factual question.

In opposition, the only admissible evidence that Pardo submits² is the affirmed narrative report of Dr. Unson, a doctor of osteopathy who first saw Pardo approximately three weeks after the accident and most recently on February 12, 2013 (exh 3 to cross-motion). Nowhere in his report does he address Dr. Tantleff's findings that Pardo's condition is due to degeneration due to age or her weight. In fact, it is not clear that Dr. Unson actually examined Pardo; his office notes are not annexed, and he repeatedly uses the passive voice: "Josefa Pardo was initially evaluated in my office" (p. 1, para. 3); "on November 9, 2010 and November 16, 2010 the patient was treated with acupuncture, etc" (p. 2, para. 2); "on February 12, 2013 the patient presented for final evaluation of her injuries" (p. 3, para. 1). Accordingly, Dr. Unson's affirmation is conclusory and does not raise a triable factual question. Finally, Pardo has not addressed defendants' assertion that she has not set forth a claim under the 90/180-day category and therefore as not raised an issue of fact.

Based on the foregoing, neither plaintiff has raised a triable question of fact sufficient to defeat defendants' motion for summary judgment dismissing this action. Plaintiffs' cross-motion for summary judgment on the issue of liability is denied as moot.

Accordingly, it is

ORDERED that defendants/third-party plaintiffs Sunset Airport Trans Corp. and Walter

²Exhibit 2 to plaintiffs' cross-motion, the emergency room records of Nassau University Medical Center are not certified, and thus not admissible (only a blank certification form is included). Exhibit 3, Dr. Sapan's MRI report is not affirmed; her subsequent affirmation, dated August 30, 2013, was an unauthorized submission put in two months after the reply pointed out this defect, and was not considered by the Court.

Freidewald's motion for summary judgment dismissing this action on the grounds that neither of the plaintiffs sustained a "serious injury" within the meaning of Insurance Law §5012(d) is granted, and the action and the third party action (Index No. 590893/11) are hereby dismissed; plaintiffs' cross-motion for summary judgment on the issue of liability is denied as moot.

This is the Decision and Order of the Court.

Dated: January 16, 2014
New York, New York



HON. ARLENE P. BLUTH, JSC

FILED

JAN 22 2014

NEW YORK
COUNTY CLERK'S OFFICE