Giuliano v Radwan
2014 NY Slip Op 30292(U)
January 28, 2014
Sup Ct, New York County
Docket Number: 113065/10
Judge: Arlene P. Bluth

[* 1]
SCANNED ON 2/3/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH **PART** 22
Justice

Index Number : 113065/2010
GIULIANO, ANTHONY
vs.
RADWAN, AHMED
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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

The following papers, numbered 1 to 5 **, were read on this motion to/for** SJ (serious injury/liab) + cross-motion

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1
Answering Affidavits — Exhibits Notice of X-Motion **No(s).** 2, 3, 4
Replying Affidavits _____ **No(s).** 5

Upon the foregoing papers, it is ordered that this motion is and cross-motion are

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED
FEB 03 2014
NEW YORK
COUNTY CLERK'S OFFICE

FOR THE FOLLOWING REASON(S): _____

Dated: 1/28/14

_____, 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

Anthony Giuliano,

Plaintiff,

-against-

Ahmed Radwan, Creole Taxi, Inc., Louis Quattrocchi and Eileen Quattrocchi,

Defendants.

Index No.: 113065/10
Motion Seq: 01

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

The Quattrocchi defendants' 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; plaintiff's cross-motion for summary judgment on the issue of liability is denied as untimely.

In this action, plaintiff alleges that on February 18, 2010 he sustained personal injuries when he was a passenger in a taxi owned by Creole Taxi, Inc. and operated by Ahmed Radwan which was hit in the rear by a vehicle owned and operated by Louis and Eileen Quattrocchi.

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 his verified bill of particulars, plaintiff claims neck and back injuries, and aggravation of pre-existing conditions (exh D to moving papers, paras. 9-10).

Defendants' showing

Defendants met their prima facie burden of showing that plaintiff did not sustain a serious

injury by submitting the November 3, 2011 affirmed report of their neurologist (Dr. De Jesus, exh H) who stated that after examining plaintiff, she found, inter alia, a full range of motion in plaintiff's cervical and lumbar spine and that he had no objective evidence of a neurologic disability. Dr. De Jesus noted plaintiff's history of chronic back pain and that he had a lumbar MRI in July 2009.

Defendants also submitted the November 4, 2011 affirmed report of their orthopedist (Dr. Unis, exh I) who stated that after examining plaintiff, and measuring the range of motion in his cervical and thoracolumbar spine (normal in both areas), plaintiff had no objective orthopedic residuals relating the subject accident. Dr. Unis also noted that plaintiff had a back injury in 2009.

Finally, in her affirmation in support, defendants' attorney addresses the 90/180 category. She asserts that plaintiff has not demonstrated that he had a medically-determined injury requiring him to be out of work, and that his affidavit claiming that he missed 96 days of work was unaccompanied by substantiating documentation. Thus plaintiff has not met the 90/180-day category requirements. Because defendants made a prima facie showing of entitlement to judgment as a matter of law, the burden shifts to plaintiff to oppose the motion.

Plaintiff's showing

In opposition, plaintiff submits an affidavit from his chiropractor (exh A) who examined plaintiff one day after the accident, found limitations in his cervical and lumbosacral range of motion, and placed him on a course of chiropractic care. The chiropractor states that he subsequently reviewed the MRI films of plaintiff's cervical and lumbar spine taken six months after the accident which show, inter alia, bulges and a herniation, and concludes that the injuries

plaintiff sustained are permanent and causally related to the subject accident. Significantly, because he did not address plaintiff's prior back injury, including the July 2009 MRI films, his affidavit is conclusory and is insufficient to raise an issue of fact as to causation.

Plaintiff also submits the affirmation of Dr. Libfeld, a radiologist (exh B), who affirms the contents of plaintiff's August 2010 lumbar and cervical MRI reports in which he saw bulges and a herniation. In his report on plaintiff's lumbar MRI, Dr. Libfeld states that he compared this film to the one taken several months before the accident (plaintiff's July 2009 lumbosacral spine MRI) and noted "there is a very mild concentric disc bulge at L1-L2, which is new as compared to the prior MRI examination from 7/26/09". It is well-settled that herniations and bulges are not, in and of themselves, evidence of serious injury without competent objective evidence of the physical limitations resulting from the injury, and their duration (*Hospedales v "John Doe"*, 79 AD3d 536 [1st Dept 2010]). However, Dr. Goldenberg, plaintiff's treating physiatrist, provides this competent evidence.

In her affirmation, EMG nerve conduction report and 10/16/12 exam notes (exhs C-E), Dr. Goldenberg states, inter alia, that she reviewed plaintiff's MRI films and Dr. Libfeld's report, measured continuing, quantified range of motion limitations in plaintiff's cervical and lumbar spine, found that plaintiff has sustained a permanent loss of mobility, and opined that plaintiff's limitations are causally related to the subject accident; this provides the requisite proof of limitations (*Pietropinto v Benjamin*, 104 AD3d 617 [1st Dept 2013]). Dr. Goldenberg's report, read together with Dr. Libfeld's report, raise a triable factual question sufficient to defeat summary judgment.

Finally, Dr. Flood's report (exh F) was not affirmed and thus not considered by the Court

Plaintiff's cross-motion for summary judgment on the issue of liability is denied as

untimely; it was made on April 29, 2013, more than 9 months after the Note of Issue was filed. The Case Scheduling Order (para. 13) directed that all summary judgment motions be made within 60 days of the filing of the Note of Issue; labeling it a cross-motion, especially when it is unrelated to the serious injury motion, does not make the Case Scheduling Order inapplicable.

Accordingly, defendants' 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; plaintiff's cross-motion is denied as untimely.

This is the Decision and Order of the Court.

Dated: January 28, 2014
New York, New York

ARLENE P. BLUTH, JSC