

Vezina v Kroon Serv. Corp.

2014 NY Slip Op 30425(U)

February 19, 2014

Sup Ct, New York County

Docket Number: 104190/11

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ARLENE P. BLUTH

PRESENT: _____
Justice

PART **22**

Index Number : 104190/2011
VEZINA, BRIDGET J.
vs.
KROON SERVICE CORP.
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 SJ (ser. inj)

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

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED

FEB 24 2014

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/19/14

APB 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.: 104190/11
Motion Seq 01

Bridget Vezina,

Plaintiff,

-against-

**Kroon Service Corp., Ruben Giacomozzi,
Abdul Mumuni and Amin Abdul,**

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendants' motion for summary judgment dismissing plaintiff's claims on the grounds that she did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) is granted only with respect to her 90/180-day claim, and otherwise denied.

In this action, plaintiff alleges that on May 3, 2010 she sustained personal injuries when she was riding her bicycle and was struck by the door of defendants' taxi.

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 the verified bill of particulars (exh. D to moving papers), plaintiff claims she sustained, inter alia, injuries to her left wrist, right shoulder, right ankle and left knee.

Defendants' showing

In support of their motion, defendants submit the affirmed medical reports of Dr. Desrouleaux, a neurologist (exh E) and Dr. Nason, an orthopedist (exh F), and who both state

that plaintiff had normal examinations within their specialty and full ranges of motion.

Defendants also submit the affirmed report of Dr. Fcitt, a radiologist (exh G) who found some slight disastis (separation) in her right shoulder joint but no evidence of any fractures. With respect to the 90/180-day category, defendants' counsel refers to plaintiff's deposition testimony where she stated that she missed only 2 days of work after the accident (exh H, page 49).

Based on the foregoing, defendants have satisfied their burden of establishing prima facie that plaintiff did not suffer a serious injury, and the burden shifts to plaintiff to raise a triable factual question as to whether she sustained a serious injury.

Plaintiff's showing

In opposition, plaintiff submits the affirmation of Dr. Villafuerte, her treating physician, who details plaintiff's examinations, treatment and diagnostic testing. Dr. Villafuerte first examined plaintiff two weeks after the accident, then on July 26, 2010, August 30, 2010 and October 11, 2010. Most recently, on December 28, 2012 Dr. Villafuerte examined plaintiff and found restrictions in the range of motion of her right shoulder (flexion 150 degrees out of a normal 180 degrees) and her left wrist (flexion 60 degrees out of a normal 80 degrees) which he casually relates to the subject accident; he opines that these restrictions, which began on the date of the accident, are permanent. As (defendants') Dr. Nason affirms that plaintiff has full range of motion in her right shoulder and left wrist and (plaintiff's) Dr. Villafuerte found restrictions in these areas, the jury must decide which expert they believe. Thus, plaintiff has raised an issue of fact as to whether she sustained a serious injury as a result of the subject accident.

However, the Court notes that in opposition plaintiff has not demonstrated that she has a medically determined injury which restricted her from performing "substantially all" of her daily

activities to a greater extent rather than some slight curtailment in the first 90 of the 180 days after the accident. *See Thompson v Abbasi*, 15 AD3d 95, 788 NYS2d 48 (1st Dept 2005).

Therefore, as plaintiff's injuries do not fall under the "90/180" category of serious injury as defined by the Insurance Law, defendants' motion for summary judgment is granted as to any serious injury claim premised upon that 90/180 category only.

Accordingly, it is hereby

ORDERED that summary judgment is granted only with respect to her 90/180-day claim, and otherwise denied.

This is the Decision and Order of the Court.

Dated: February 19, 2014
New York, New York



HON. ARLENE P. BLUTH, JSC