Davis v Bestway Carting, Inc.
2014 NY Slip Op 30543(U)
March 3, 2014
Sup Ct, New York County
Docket Number: 105641/11
Judge: Arlene P. Bluth

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH Justice

PART 22

Index Number : 105641/2011
DAVIS, TASHEEN
vs.
BESTWAY CARTING
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 / Serious 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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER

FILED
MAR 07 2014
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3/3/14

HON. ARLENE P. BLUTH, J.S.C.

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.: 105641/11
Motion Seq 01

Tasheen Davis,

Plaintiffs,

-against-

Bestway Carting, Inc. And Charles Virgilio,

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendants' motion for summary judgment dismissing this action claims on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) is denied.

In this action, plaintiff alleges that on April 15, 2010 she sustained personal injuries when her vehicle was in an accident with defendants' vehicle.

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 original and supplemental verified bill of particulars (exhs. C and D to moving papers), plaintiff claims cervical and lumbar spine injuries, right shoulder sprain, right knee strain, headaches and dizziness.

Defendants' showing

In support of their motion, defendants devote an inordinate amount of space detailing plaintiff's treatment in the days after the accident (paras. 17–41, 47-48). Specifically,

defendants submit the medical records of Dr. Ushyarov of M.U. Medical, P.C. (exh I) who examined plaintiff 5 days after the accident and continued to treat her thereafter; thus, defendants provided proof of plaintiff's contemporaneous exam in support of causation. Additionally, defendants submits plaintiff's MRI reports from IDF Medical Diagnostic, P.C. (exh J), records from Hudson Valley Acupuncture (exh K) and records from Melrose Chiropractic P.C. (exh L). Defendants also submit the affirmed report of Dr. Bonomo, a neurologist who examined plaintiff at defendants' request on July 23, 2012 (exh G). Dr. Bonomo stated that he reviewed plaintiff's medical records; he noted that plaintiff had degenerative changes in her right knee, resolved muscles strains in other areas and no neurologic disability. Additionally, defendants submit the report of Dr. Naidich, a radiologist (exh F) who read MRIs of plaintiff's right knee, neck and cervical spine taken within a month of the accident; he stated that plaintiff had degenerative, not traumatic changes in her right knee and no post traumatic abnormalities in her head/neck areas. Finally, defendants cite to plaintiff's deposition testimony that she missed 30 days of work after the subject accident and that no doctor advised her that she could not return to work or that any restrictions would have to be placed on her ability to work.

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. Kotelskiy who examined plaintiff on January 28, 2013 and found restrictions in the range of motion of her cervical spine (most significantly extension 25 degrees out of a normal 60 degrees) and in her lumbar spine (most

significantly in flexion, 40 degrees out of a normal 60). Dr. Kotelskiy opines that based on his exam, the medical history provided by plaintiff and the medical records he relied on (which include Dr. Ushyarov's records which were submitted by defendants), plaintiff's limitations were casually related to the subject accident and are permanent.

Plaintiff also submits the affirmed report of Dr. Leadon, the radiologist who reviewed plaintiff's cervical spine MRI at IDF on 5/9/10 (exh C to opp). This report, which notes a disc protrusion at C7-T1, does not raise an issue of fact because Dr. Leadon does not opine as to causation. Moreover, Dr. Leadon's report of plaintiff's right knee MRI, referenced in paragraph 2 of his affirmation, was not attached.

In reply, defendants claim that Dr. Kotelskiy improperly relied on Dr. Ushyarov's records because plaintiff did not "supply sworn copies of the MU Medical records" (aff., para 8). However, it was defendants who submitted Dr. Ushyarov's records in support of the motion, and thus plaintiff can certainly refer to records that defendants have put before the Court.

Second, defendants argue that Dr. Kotelskiy's failure to address the right knee requires that the motion must be granted; this is without merit. Because plaintiff raised a triable issue with respect to the injuries to her cervical and lumbar spine, the Court need not determine whether her other claimed injuries met the threshold. *See Lee v Cornell University*, 112 AD3d 466, 976 NYS2d 85 (1st Dept 2013).

As defendants' neurologist affirms that as a result of the accident plaintiff at most incurred sprains that have healed, and plaintiff's neurologist affirms that plaintiff has range of motion restrictions as a result of the accident which he opines are permanent, the jury must decide which expert to believe.

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.

This is the Decision and Order of the Court.

Dated: March 3, 2014
New York, New York

HON. ARLENE P. BLUTH, JSC