Konner v Sanandres
2014 NY Slip Op 30914(U)
April 8, 2014
Supreme Court, New York County
Docket Number: 100445/11
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 : 100445/2011
KONNER, RANDI
vs.
SANANDRES, EDGARDO M.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for SJ

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

addition submission 4, 5

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED

APR 10 2014

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/8/14

_____, 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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

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Randi Konner,

Plaintiff,

-against-

Edgardo Sanandres and Kornos Taxi, Inc.,

Defendants.

Index No. 100445/11
Motion Seq 01

DECISION AND ORDER

Hon. ARLENE P. BLUTH, JSC

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

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 her verified bill and supplemental bill of particulars, plaintiff alleges that on May 1, 2010 her knee was injured by the door of a taxi operated by defendant Sanandres and owned by defendant Kornos Taxi, Inc. and she subsequently underwent arthroscopic surgery on her knee (both annexed as exh B to moving papers). Plaintiff expressly stated that she "is not claiming any aggravation to any pre-existing injuries or

conditions" (para. 21, bill of particulars). She did not include a claim of aggravation in her supplemental bill.

In support of their motion, defendants annex two affirmed medical reports. The first (exh H) is from Dr. Eisenstadt, a radiologist, who reviewed the MRI film of plaintiff's right knee taken four months after the subject accident, and found evidence of long-standing degenerative abnormalities involving the posterior horn of the medial meniscus and osseous structures. Dr. Eisenstadt supported her conclusion that plaintiff's tear was not caused by the subject accident by specifically noting the absence of loss of meniscal substance without bone contusions, ligamentous and/or tendinous disruptions or inflammation (which would indicate trauma) and the fact that she did see a parameniscal cyst in the posterior soft tissue (which evidences a degenerative condition).

The second affirmed report (exh I) is from Dr. Montalbano, an orthopedist, who examined plaintiff on April 27, 2012, found restricted ranges of motion in her right knee, and also opined, in great detail, that plaintiff's limitations were due to a degenerative condition that pre-dated the subject accident.

As for the 90/180-day category, defendants cite to plaintiff's bill of particulars wherein she stated that she was confined to bed and home for only one month after the accident (exh B, para.13).

Thus, defendants have met their prima facie burden of showing that plaintiff has not suffered a serious injury, and the burden shifts to plaintiff to raise a triable factual question sufficient to defeat the motion.

In opposition, plaintiff submits the sworn records of Dr. Meese, who examined

plaintiff on 6/21/10, several weeks after the accident, noted that plaintiff stated she injured her right knee in an accident, and found range of motion restrictions. Dr. Meese recommended that she have an MRI and examined plaintiff again on 7/26/10 and 9/17/10. These records constitute proof of a contemporaneous medical exam.

Exhibit B is the sworn narrative report of Dr. Decter, an orthopedist, who performed two procedures on plaintiff's right knee. Dr. Decter states that he first saw plaintiff on 6/6/11, performed arthroscopic surgery on her right knee on 9/7/11, at which time he found "post traumatic chondral lesion medial femoral condyle, traumatic tear posterior horn of the medial meniscus and traumatic chondral fissuring of the patella". Dr. Decter simply concluded that the findings were traumatic but does not state the basis for these conclusions in his report.

He further states that plaintiff had increased knee pain in February 2012 and had a second MRI on 3/16/12 which showed that she had re-torn her right meniscus. Again, without setting forth any explanation, Dr. Decter states that this "re-tear" and the resulting second surgery that he performed on April 11, 2012 were causally related to the subject accident. Curiously, although Dr. Decter, in his second operative report, specifically noted "grade 3 osteoarthritis of the medial femoral condyle and a degenerative tear of the body of the medial meniscus" he does not explain why he concluded the "re-tear" was caused by the accident, and was not due to degeneration.

Dr. Decter examined plaintiff most recently on August 13, 2012 and opined that her knee injury is permanent and that she has sustained a significant partial loss of use of her right knee. Additionally, he states that she has and will continue to have pain and she "has a permanent impairment and disability solely due to the injuries sustained

in the subject accident" (aff., para. 12). Solely? Didn't he note degenerative changes in his second operative report? Moreover, Dr. Decter did not provide any measurements, much less recent measurements, of plaintiff's range of motion in her right knee and did not compare these findings to "normal".

Exhibit C is a radiologist's sworn report of the 3/16/12 MRI of plaintiff's right knee; Dr. Sherwood states that it shows a complex meniscal tear; he does not opine as to causation (exh C), and thus does not raise an issue of fact to contest defendants' doctors' findings of degenerative changes.

Finally, exhibit D is another radiologist's affidavit; Dr. Amoroso states that he read the 9/1/10 MRI of plaintiff's knee taken four months after the accident (the one that Dr. Eisenstadt read), and observed a tear "that is post traumatic with a reasonable degree of medical certainty" (exh D). However, his annexed MRI report notes a parameniscal cyst, no osseous injury, and no effusion, the very same findings that led Dr. Eisenstadt to opine that the tear was due to a degenerative condition.

With the Court's permission, plaintiff's counsel submitted additional exhibits which he claimed had inadvertently been left out of the moving papers: these turned out to be Dr. Decter's unsworn typed office notes, his two operative reports (previously submitted but not signed) and the certified emergency room record. Dr. Decter's notes were unsworn and were simply duplicative of the information in his narrative report. As for the emergency room record, the Court is not even sure why it was necessary; Dr. Meese's records served as proof of a contemporaneous exam.

Significantly, because Dr. Decter did not address defendants' doctors' findings of degenerative changes in plaintiff's knee, Dr. Decter has not set forth a basis for his

conclusion that plaintiff's knee injury was caused by the subject accident. Plaintiff cannot simply ignore findings of degeneration. *See Lopez v American United Transp., Inc.*, 886 NYS2dd 157,158 (1st Dept. 2009) (plaintiff's expert failed to satisfactorily rebut this conclusion, neglecting even to mention, let alone explain, why he ruled out degenerative changes, thus rendering his opinion speculative). Therefore, as pointed out by defendants' reply, Dr. Decter's affidavit fails to raise a triable factual question. *See Soho v Konate*, 925 NYS2d 456, 457 (1st Dept 2011). Additionally, Dr. Decter did not include any objective proof of range of motion restrictions; his findings based on plaintiff's subjective complaints of pain are insufficient to raise a triable issue of fact. *See Arenas v Guaman,* 98 AD3d 461 (1st Dept 2012). Finally, because plaintiff failed to raise an issue of fact as to the 90/180-day category, this claim is dismissed.

For the foregoing reasons, plaintiff has failed to raise an issue of fact requiring denial of defendants' motion; summary judgment is granted to defendants.

Accordingly, it is

ORDERED that 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; and it is further

ORDERED that this case is dismissed.

This is the Decision and Order of the Court.

Dated: April 8, 2014
New York, New York

HON. ARLENE P. BLUTH, JSC