Santiago v PTM Mgt. Corp.
2014 NY Slip Op 31166(U)
May 5, 2014
Supreme Court, New York County
Docket Number: 111618/11
Judge: Arlene P. Bluth
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
HON. ARLENE P. BLUTH
Justice

PART 22

Index Number : 111618/2011
SANTIAGO, MARY
vs.
PTM MANAGEMENT CORP.
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

The following papers, numbered 1 to 3, were read on this motion to/for Serious injury

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER

FILED
MAY 06 2014
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/5/14

______, 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 NY
COUNTY OF NEW YORK: PART 22

Index No.: 111618/11
Motion Seq 04

Mary Santiago and Rosetta Washington,

Plaintiff,

-against-

PTM Management Corp. Alias M. Varkey and Carlos Alvarado,

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

FILED
MAY 06 2014
NEW YORK
COUNTY CLERK'S OFFICE

Defendants' motions (defendant Alvarado's motion was improperly denominated as a cross-motion) for summary judgment dismissing this action on the grounds that plaintiff Rosetta Washington ("plaintiff") did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) are granted, and her claims are hereby dismissed.

In this action, plaintiff alleges that on July 23, 2011 she sustained personal injuries when she was a passenger in a van that was struck 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]).

In her bill of particulars, plaintiff claims she sustained a chest injury, post-concussion syndrome, and cervical and thoracolumbar displacement (exh C to motion papers, para. 9).

At the outset, defendants point out that at her deposition, plaintiff testified that on 12/27/11, 5 months after the subject accident when she was 75 years old, she fell outside a Key Food Supermarket, hit the back of her head and was hospitalized for 3 days.

Defendants also submit the affirmed MRI report of Dr. Cantos, a neuroradiologist (exh G). Dr. Cantos reviewed the MRI of plaintiff s brain taken in October 2011 and stated that it

showed no acute abnormalities. Dr. Cantos also reviewed plaintiff's cervical spine MRI taken in November 2011and stated that the film showed longstanding degenerative disc disease of many years duration. Both of these MRIs were taken before the Key Food accident.

Additionally, defendants submit the affirmed report of Dr. Katz, an orthopedist who examined plaintiff's chest and back on December 13, 2012. He measured normal ranges of motion in those areas, and opined that plaintiff's chest contusion and sprains had resolved.

Finally, defendants met their initial burden with respect to plaintiff's 90/180-day claim by submitting plaintiff's deposition testimony wherein she stated that was confined to home for one week after the accident (exh E at 75). Based on the foregoing, defendants 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.

In opposition, plaintiff submits only one medical report: the affirmed report of Dr. Hausknecht (exh A) who first examined plaintiff approximately 3 months after the subject accident and treated her several times thereafter, most recently on June 18, 2013. With respect to her claim of post-concussion syndrome, Dr. Hausknect stated "(t)he patient has persistent headaches and dizziness. These are expected medical consequences of a head injury of this nature. With a reasonably degree of medical certainty, [plaintiff] has sustained a significant limitation of function of her neurologic system." However, Dr. Hausknecht did not say a single word about plaintiff's December 27, 2011 Key Food accident when she hit her head (five months after the subject accident and two months after her brain scan) for which she was hospitalized for three days. Therefore, his opinion that "[plaintiff's] condition is causally related to the motor vehicle accident that occurred on 7/23/11", and that she "is a reliable historian" is unsupported and conclusory.

Additionally, with respect to plaintiff's alleged back injury, Dr. Hausknecht failed to address Dr. Cantos's finding that this elderly plaintiff had extensive, pre-existing, degenerative cervical disc disease. Accordingly, Dr. Hausknect's conclusion that this accident caused plaintiff's cervical range of motion restrictions is conclusory, and insufficient to create a triable issue. *See Kendig v Kendig*, 115 AD3d 438, 981 NYS2d 411 (1st Dept 2014).

Finally, in opposition to the dismissal of her 90/180-day claim, plaintiff did not submit any evidence that she suffered a medically-determined injury that prevented her from performing her usual and customary activities for more than 90 days after the accident

Accordingly, it is

ORDERED that defendants' motions for summary judgment dismissing the claims of Rosetta Washington on the grounds that she did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) are granted, and plaintiff Rosetta Washington's claim are hereby dismissed. The balance of the action shall continue.

This is the Decision and Order of the Court.

Dated: May 5, 2014
New York, New York

HON. ARLENE P. BLUTH, JSC

FILED

MAY 06 2014

NEW YORK
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