Manoly v Davis
2014 NY Slip Op 31315(U)
May 18, 2014
Supreme Court, New York County
Docket Number: 114243/10
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
HON. ARLENE P. BLUTH NEW YORK COUNTY

Index Number : 114243/2010
MANOLY, LOUDY
VS
DAVIS, EARL D.
Sequence Number : 001
SUMMARY JUDGMENT

PART 22

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

The following papers, numbered 1 to 3, were read on this motion to/for MSJ - 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

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

FILED
MAY 22 2014
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/16/14

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.: 114243/10
Motion Seq 01

Loudy Manoly,

Plaintiff,

-against-

Earl Davis.,.

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendant's motion for summary judgment dismissing this action on the grounds that plaintiff did not sustain a "serious injury" is denied.

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 his bill of particulars, plaintiff claims that on April 4, 2010 he was involved in a motor vehicle accident and sustained a tear of his left shoulder (and underwent arthroscopic surgery on 6/21/10), and bulging and herniated discs in his lumbar spine.

In support of this motion, defendant submits the affirmed reports of an orthopedist who found full range of motion in plaintiff's cervical and lumbar spine and left shoulder, and a neurologist who found that plaintiff had no neurological disability. Finally, defendant met his initial burden with respect to plaintiff's 90/180-day claim by submitting plaintiff's deposition testimony wherein he stated that he missed only 2 days of work after the subject accident (exh D at 13, 96-97).

Based on the foregoing, defendant satisfied his 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 the affidavit of his treating chiropractor, Dr. Leist, who examined plaintiff on April 6, 2010, two days after the accident. Dr. Leist states that the plaintiff told him that he had recovered from the injuries he sustained in two prior accidents (in 2001 and 2009) by the date of the subject accident. Dr. Leist treated plaintiff's cervical and lumbar spine for approximately 2 years (until June 6, 2010), and examined plaintiff most recently on April 8, 2013 at which time he found restrictions in numerous planes (most significantly cervical left rotation measured 30 degrees/75 degrees normal and lumbar flexion measured 60 degrees/90 degrees normal). Dr. Leist opined that these injuries were causally related to the subject accident and are permanent in nature.

Plaintiff also submits the affirmed orthopedic report of Dr. Senat who states that he examined plaintiff's cervical and lumbar spine and left shoulder on April 14, 2010. Dr. Senat states that the plaintiff told him that he had recovered from the injuries he sustained in two prior accidents (in 2001 and 2009) by the date of the subject accident. Dr. Senat re-examined plaintiff on May 13, 2010 and June 15, 2010; thereafter, he performed a left shoulder arthroscopy on plaintiff on June 21, 2010. Dr. Senat treated plaintiff on 8 more occasions, and most recently on April 8, 2013, at which time he found range of motion restrictions in plaintiff's cervical, lumbar and left shoulder. Dr. Senat opined that plaintiff's injuries were permanent and directly caused by the subject accident.

In reply, defendant's counsel asserts that because plaintiff testified at his deposition that he treated with Dr. Leist and Dr. Senat for several months after the 2001 accident, and neither doctor made any reference to their prior treatment, plaintiff has not presented a triable issue sufficient to defeat the motion. This Court disagrees. There was no reason for either doctor to discuss their prior treatment of plaintiff because there was no allegation in the moving papers that

plaintiff's current condition was caused by the 2001 accident. Had defendant, in the moving affirmation, based on the report of one of his doctors, taken such a position, then Drs. Leist and Senat would have had to address this. To hold otherwise would be penalizing plaintiff for not "responding" to an argument that defendant never made, which is fundamentally unfair.

Defendant's second assertion, that "(e)ven more damaging to the plaintiff's position is the fact that he admitted to being involved in another accident in 2009, wherein he treated with an entirely different set of doctors than those who treated him in connection with either his prior 2001 accident or subject 2010 occurrences (sic)" (reply, para. 14), is puzzling. If defendant is attempting to attack plaintiff's credibility by implying that he tried to conceal his medical history by switching doctors, then such a credibility determination is, of course, for the jury.

Finally, the Court did not consider the three medical reports annexed to the reply; defendant did not submit these unaffirmed reports with the moving papers.

Here, plaintiff has demonstrated that there are issues of fact which require a jury to decide. Quite simply, the doctors disagree on, inter alia, plaintiff's range of motion and permanency, and it is up to the jury, not this Court, to evaluate the medical testimony and decide who and what to believe.

Accordingly, defendant's 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: May 18, 2014
New York, New York

HON. ARLENE P. BLUTH, JSC