

Elisirafy v Quirke

2014 NY Slip Op 31343(U)

May 22, 2014

Sup Ct, New York County

Docket Number: 150643/11

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22**

Index No.: 150643/11
Seq 004

Kareem Elisirafy,

Plaintiff,

-against-

Patrick Quirke and Rosita Ann Quirke,

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 granted only to the extent that his 90/180 day claim is dismissed, and otherwise 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]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]).

In paragraph 5 of the bill of particulars, plaintiff alleges that he sustained a cervical herniation, two lumbar herniations, and bulging cervical discs as a result of the subject accident which took place on August 20, 2009.

In support, defendants submit the affirmed reports of Dr. Israel, an orthopedist, Dr. Singh, a neurologist, and Dr. Hershon (no-fault orthopedist) who examined plaintiff, found full ranges of motion in his lumbar spine and cervical spine, and concluded that any claimed sprains were resolved.

Additionally, defendants indicates that plaintiff was not incapacitated from his customary daily activities for at least 90 days during the 180 days following the accident because at his

deposition he testified that he missed only three weeks from work and two weeks of school after the subject accident.

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.

In opposition, plaintiff submits the affirmed report of Dr. Hausknecht's neurologic examination of plaintiff's three weeks after the accident which constitutes proof of a contemporaneous exam to support causation (exh B).

Plaintiff also submits the affirmed reports of an orthopedist, Dr. Lattuga, who first examined plaintiff on April 27, 2012 and found significant range of motion restrictions (*e.g.*, cervical flexion measured 15 degrees/70 degrees normal, lumbar flexion measured at 25 degrees/90 degrees normal). Dr. Lattuga also personally reviewed the MRI films of plaintiff's cervical and lumbar spine and stated they showed spinal cord compression and a lumbar disc herniation. Dr. Lattuga further noted that plaintiff was scheduled to begin epidural injections in his cervical and lumbar spine. At the followup visit on November 18, 2013, Dr. Lattuga found numerous range of motion restrictions, decreased sensation and decreased muscle strength. In his affirmation dated February 12, 2014, Dr. Lattuga opined that plaintiff's cervical and lumbar injuries were causally related to the subject motor vehicle accident, and that plaintiff's condition is permanent because he did not shown significant improvement from April 2012 until November 18, 2013. Plaintiff also submits Dr. Neuwirth's affirmed operative report of plaintiff's October 9, 2012 diskectomy.

Quite simply, Dr. Lattuga disagrees with Drs. Israel, Singh and Hershon, and it is up

to the jury, not this Court, to evaluate the medical testimony and decide who and what to believe.

However, plaintiff failed to raise an issue of fact as to whether his claimed injuries prevented him from “performing substantially all of the material acts which constitute[d his] usual and customary daily activities” (Insurance Law § 5102 [d]; *Merrick v Lopez-Garcia*, 100 AD3d 456, 457 [1st Dept 2012]). Therefore, defendants are granted partial summary judgment dismissing plaintiff’s 90/180-day claim only.

This is the Decision and Order of the Court.

Dated: May 22, 2014
New York, New York



HON. ARLENE P. BLUTH, JSC