Mayo v Kim
2014 NY Slip Op 32078(U)
August 5, 2014
Sup Ct, NY County
Docket Number: :154064/2012E
Judge: Arlene P. Bluth

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

Index No.:154064/2012E
Motion Seq: 001

Lynn Mayo,

Plaintiff,

-against-

Joshua Kim,

Defendant.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendant's motion for summary judgment dismissing the complaint on the grounds that plaintiff failed to satisfy the serious injury threshold is granted, and the action 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, 582 N.Y.S.2d [1st Dept 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, 761 N.Y.S.2d (1st Dept 2003), quoting *Grossman v Wright*, 268 AD2d 79, 84, 707 N.Y.S. 2d 233 (2d 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, 907 N.Y.S. 479 (1st Dept 2010), citing *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 (2005).

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, 746 N.Y.S.2d 865 (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, 873 N.Y.S.2d [1st Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214, 820 N.Y.S.2d [1st Dept 2006]).

In her verified bill of particulars, plaintiff claims "Post laminectomy syndrome with exacerbation of her Post Lumbar diskectomy of 9/7/09, causing radiation of pain into her shoulders and her lower extremities, bilateral myofacial neck pain with cervical radiculitis into her left shoulders and her lower extremities and insomnia".

In support of his motion, defendant asserts plaintiff's claimed injuries (pain) are entirely subjective and were not caused by the subject accident which occurred on October 23, 2010. Rather, defendant asserts that plaintiff's pain is due to a long-standing, degenerative condition that she first sought treatment for in 2006, and/or her subsequent lumbar diskectomy and fusion performed on September 18, 2009.

In support, defendant submits the 7-page affirmation of Adam Bender, MD, a neurologist. He examined plaintiff on August 12, 2013, reported that plaintiff had a normal neurological exam and full ranges of motion in her cervical and lumbar spine. He referred to plaintiff's doctors' records which reported that plaintiff first complained of back pain in 2006, underwent a lumbar diskectomy and fusion at L5-S1 in September 2009, had physical therapy after the surgery, and continued to complain about radiating pain shortly before the subject October 23, 2010 accident. In short, plaintiff complaints are entirely subjective; she is claiming that the subject accident aggravated the pain she was already experiencing.

As for the 90/180 day category, defendant's counsel cites to plaintiff's verified bill wherein she states she missed only 1½ days of work after the subject incident. Based on the foregoing, defendant has 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.

The only relevant admissible evidence plaintiff submitted in opposition is the affirmation of Dr. Carol DeCosta and her attached undated narrative report which she states she wrote in July 2013. The MRI reports from the Hospital for Special Surgery of plaintiff's left knee and lumbar spine dated 1/8/13 are unaffirmed and were not considered by the Court.

Dr. DeCosta states that she first examined plaintiff a few days after the accident and most recently on 6/4/13. She stated that she directed plaintiff to undergo physical therapy, acupuncture and trigger point injections. She notes that plaintiff had back surgery in September 2009, and asserts that this accident "severely exacerbated" the previously sustained permanent injury to her spine, and also caused "new and different injuries"; she did not elaborate. She reports measurements of plaintiff's lumbar, cervical and shoulder ranges of motion throughout her narrative report, but does not compare them to normal. Dr. DeCosta did not state that she read any of plaintiff's films; thus her recitation of the findings in the unaffirmed reports does not put the findings of those of inadmissible reports before the Court. *See Malupa v Oppong*, 106 AD3d 538, 966 NYS2d 9 (1st Dept 2013). Significantly, Dr. DeCosta could have personally reviewed plaintiff's films from before and after the accident, and could have commented on the comparison; but she did not. Nowhere does she provide any support for her conclusion that the 2010 accident--and not her chronic, degenerative conditions, or the 2009 surgery--caused plaintiff's pain. As plaintiff failed to rebut defendant's prima facie showing that her subjective complaint of pain was not a medically determined injury, or that she suffered a causally related

serious injury in any other category, plaintiff has failed to raise an issue of fact sufficient to defeat this motion. *See Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 (2005).

Accordingly, it is

ORDERED that defendant's motion to dismiss this action is granted, and the action is hereby dismissed.

This is the Decision and Order of the Court.

Dated: August 5, 2014
New York, New York

ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH