Jallow v Siri
2014 NY Slip Op 32147(U)
August 11, 2014
Supreme Court, New York County
Docket Number: 156160/12
Judge: Arlene P. Bluth

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

Index No.: 156160/12
Motion Seq 01

Modou Jallow,

Plaintiff,

-against-

Luis Siri and M&M Car Inc.,

Defendant.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendants' 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 granted, and the action is hereby dismissed.

In this action, plaintiff alleges that on May 2, 2012 he sustained personal injuries when he was involved in an accident with a vehicle owned by defendant M&M Car Inc. and operated by defendant Siri.

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 his verified bill of particulars, plaintiff claims he sustained a herniation at L5-S1 and a left knee tear that required surgical repair on September 24, 2012.

In support of their motion, defendants submits, inter alia, the affirmed report of Dr. Montalbano, an orthopedist who examined plaintiff and found no range of motion restrictions in either his lumbar/thoracic spine or left knee. Based on his review of the EMS and emergency room records, the fact that plaintiff did not seek further medical attention for either his knee or

back until approximately 1 month after the accident and other medical reports pertaining to the left knee in his file, Dr. Montalbano opined that plaintiff may have sustained a sprain of his left knee, which has since resolved, and sustained no permanent injury to his back.

Defendants also submit the affirmed reports of Dr. Setton, a radiologist, who reviewed an MRI taken of plaintiff's left knee approximately 8 weeks after the accident. Dr. Setton noted minor degeneration but no tear, soft tissue injury or evidence of a recent trauma to the area. Additionally, he indicated that plaintiff had a congenital condition (elongation of the patellar tendon) which might have predisposed him to "patellar maltracking disorders". Dr. Setton also reviewed the lumbar spine MRI taken 12 weeks after the accident; he stated he saw dessication and degeneration but no evidence of recent trauma or any disc herniation.

Finally, defendants met their initial burden with respect to plaintiff's 90/180-day claim by submitting plaintiff's deposition testimony wherein he stated that he was confined to bed for 10-11 days and to home for approximately two months after the 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 Bellevue Emergency Room records (uncertified but relied on by Dr. Montalbano) and the affirmed report of Dr. Goldenberg, a pain management specialist, who examined plaintiff shortly after the accident, and treated him several times thereafter, most recently on November 4, 2013. Although Dr. Goldenberg said that she disagreed "with any opinion that [plaintiff's] injuries are degenerative and/or resolved", she did not set forth any specific basis for her disagreement; nor did she address Dr. Setton's finding of a congenital condition, elongation of the patellar tendon. Thus, her affirmation fails to raise a

triable issue of fact. *See Soho v Konate,* 85 AD3d 522, 523, 925 NYS2d 456, 457 (1st Dept 2011).

Further, as defendants point out in their reply, Dr. Goldenberg measured a normal left knee extension at her first exam of plaintiff on May 30, 2012, and thereafter on 6/21/12, 8/23/12, 12/13/12, 1/18/13 and 2/6/13; she measured a mere 3 degree deficit in flexion at the most recent exam on 4/11/13. Because Dr. Goldenberg measured normal range of motion in plaintiff's knee at several examinations months after the accident and offered no explanation for the slight decline of plaintiff's left knee range of motion at the most recent examination, her affirmation fails to raise a triable factual question with respect to plaintiff's left knee. *See Dorrian v Cantalicio,* 101 AD3d 578, 957 NYS2d 47 (1st Dept 2012).

Although Dr. Goldenberg referred to MRI reports of plaintiff's back and knee, she did not state that she herself read the films. Dr. McMahon states in his affirmed report that he disagrees with defendants' doctors, noting that "there is no indication in either the MRI reports or the operative report of wear and tear due to degeneration", but he does not state he read the films either, does not address Dr. Setton's finding, and does not set forth any other basis for his blanket disagreement. A doctor's affirmation may not recite the findings set in unaffirmed and unattached MRI reports; neither of these doctors' affirmations raise an issue of fact sufficient to defeat this motion. *See Malupa v Oppong*, 106 AD3d 538, 966 NYS2d 9 (1st Dept 2013).

Finally, plaintiff did not oppose the branch of defendants' motion seeking dismissal of his 90/180-day claim. Thus, plaintiff failed to submit any evidence that raises a triable issue of fact sufficient to defeat summary judgment.

Accordingly, it is

ORDERED that defendants' 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 granted, and the action is hereby dismissed.

This is the Decision and Order of the Court.

Dated: August 11, 2014
New York, New York

HON. ARLENE P. BLUTH, JSC