

Herrera v Assila

2015 NY Slip Op 30028(U)

January 13, 2015

Supreme Court, New York County

Docket Number: 154372/12

Judge: Arlene P. Bluth

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

Index No.: 154372/12
 Motion Seq 02

ALBERTO HERRERA and MARIA JAVIER,

Plaintiffs,

-against-

RIAD ASSILA and GRAND YELLOW TAXI
 LTD.,

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendants' motion for summary judgment dismissing this action on the ground that plaintiffs Alberto Herrera (Herrera) and Maria Javier (Javier) did not sustain "serious injuries" within the meaning of Insurance Law § 5012 (d) is granted. Plaintiffs' cross motion for summary judgment on liability is denied as moot.

In this action, plaintiffs allege that, on August 10, 2011, they sustained serious personal injuries when a taxicab owned by defendant Grand Yellow Taxi, Ltd. and operated by defendant Riad Assila (collectively, defendants) collided with the rear of the motor vehicle owned and operated by Herrera and occupied by passenger Javier.

Serious Injury

Under New York Insurance Law § 5102 (d), a "serious injury" is defined as:

"a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily

activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment” (90/180 claim).

Standard of Proof

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, 396-397 [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 [1st Dept 2003], quoting *Grossman v Wright*, 268 AD2d 79, 84 [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 the plaintiff’s injury was caused by a pre-existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818, 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’ (*see e.g. Elias v Mahlah*, 58 AD3d 434, 435 [1st Dept 2009]). 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 the 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 the plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Where the defendant has established a pre-existing condition, the plaintiff's expert must address causation (*see Valentin v Pomilla*, 59 AD3d 184, 186 [1st Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]).

Herrera

In the verified bill of particulars, plaintiff Herrera claims he suffered posterior disc herniations at C4 through C7; cervical radiculopathy at C5; disc bulges at L4 though S1; and right knee derangement (exhibit B to moving papers, ¶ 11). As a result of these injuries Herrera claims that he has suffered one or more of the following: a permanent loss of the use of a body, organ, member, function or system; permanent consequential limitation of use of a body organ or member; and/or significant limitation of use of a body function or system. Herrera also makes a 90/180 claim (*id.* ¶ 20)

Defendants made a prima facie showing that the Herrera did not sustain a permanent consequential or significant limitation to his spine and knee by offering the affirmed report of their orthopedist Dr. Edward M. Decter, dated July 16, 2013, who examined Herrera and reviewed, among other things, the August 10, 2011 emergency room records from Beth Israel Hospital; unaffirmed records from Dr. Nir, Herrera's treating physician; and MRIs dated September 20, 2011 and October 15, 2011. Based on his examination of Herrera and review of the records, Dr. Decter found normal ranges of motion in Herrera's cervical and lumbar spine and, based on his findings, Dr. Decter opined that, although Herrera may have sustained some

temporary soft tissue injury to his cervical and lumbar spine, Herrera did not suffer a permanent injury, disability or limitation as a result of the subject accident. According to Dr. Dector, Herrera has subjective complaints without objective findings and he is fully capable of performing all his normal activities, including occupational duties, without any restrictions (exhibit C to the moving papers).

In addition, defendants submitted the affirmed report of a radiologist, Dr. Michael Setton, dated January 20, 2013, who reviewed Herrera's October 15, 2011 cervical and lumbar spine MRIs and his September 20, 2011 lumbar spine and right knee MRIs and found preexisting degenerative changes with no evidence of recent traumatic injury in Herrera's cervical and lumbar spine and/or right knee (exhibit D to the moving papers).

In further support of their motion for summary judgment, defendants submitted a February 15, 2013 affirmed report from Dr. Jay Walshon, a physician specializing in emergency medicine, who opined that, based on his review of the police report, EMS report, and the emergency department records from Beth Israel Hospital, there is no indication that Herrera sustained any significant injury as a result of the subject accident other than a muscle strain to his back (exhibit E to the moving papers).

Moreover, defendants met their initial burden with respect to Herrera's 90/180-day claim by submitting Herrera's deposition testimony, wherein he stated that the only activities he was unable to perform after the accident, that he was able to perform before the accident, was to play basketball and ride his bike (exhibit F to the moving papers at 63-64).

In opposition to the motion for summary judgment dismissing the complaint, Herrera submitted a report from his treating physician, Dr. Jacob Nir, dated May 19, 2014 who

“performed a comprehensive history and evaluation” of Herrera¹ and, based on his observations and the May 14, 2014 results of goniometric exams on Herrera’s cervical and lumbar spine and Herrera’s subjective complaints, concluded that Herrera’s continuing cervical and lumbar spine pain were substantially caused by the subject accident. Dr. Nir also opined that Herrera had sustained a significant limitation of the function of his musculoskeletal system and that he suffers from a permanent partial disability that has caused problems with his standing, bending and lifting. Dr. Nir noted, in his report, that in a prior (unidentified) report he had deemed Herrera unable to work for approximately one and one half years. However, Dr. Nir did not discuss, or even acknowledge, Dr. Setton’s findings regarding the degenerative changes to Herrera’s cervical and lumbar spine and knee and Dr. Nir did not identify any of the documents he relied upon in making his determinations (Yablon affirmation in opposition, exhibit 1).

Discussion

“To recover damages for noneconomic loss related to personal injury allegedly sustained in a motor vehicle accident, the plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is ‘serious’ within the meaning of insurance law § 5102 (d), but also that the injury was causally related to the accident” (*Diaz v Anasco*, 38 AD3d 295, 295-296) [1st Dept 2007], citing *Franchini v Palmieri*, 1 NY3d 536 [2003]). If the expert fails to explain the basis for his conclusion that the injury is causally related to the accident as opposed to other possibilities established in the record, then that expert’s conclusion is mere speculation (*id.*). Moreover, as to serious injury, herniated or bulging discs, by themselves, are insufficient to constitute a “serious injury”. Rather, to

¹ Dr Nir does not state that he examined Herrera or that he personally conducted the goniometric exams.

constitute a serious injury, “a herniated disc must be accompanied by objective evidence of the extent of the alleged physical limitations resulting from the [injury]” (*Onishi v N & B Taxi, Inc.*, 51 AD3d 594, 595 [1st Dept 2008]). Indeed, a plaintiff must present a physician’s affirmation based on examinations conducted both shortly after the accident and a recent examination, and the examinations must reflect the results of objective testing (*Bandoian v Bernstein*, 254 AD2d 205 [1st Dept 1998]). This Herrera did not do.

The only medical records submitted by Herrera was an affirmation from Dr. Nir dated May 19, 2014, wherein Dr. Nir affirms that he relied on Herrera’s relevant hospital and medical records’ but he does not identify what records he relied upon and he does not attach those medical records to his report. Thus, there is no way for the court to determine if the records he relied upon were contemporaneous with the accident, whether contemporaneous quantitative limitations were shown after the accident and/or whether those medical reports were affirmed (*see Valentin*, 59 AD2d at 185). Thus, Dr. Nir’s affirmation is not probative and not admissible to raise a question of fact as to whether Herrera suffered a serious injury under the Insurance Law (*id.*; *Lazu v Harlem Group, Inc.*, 89 AD3d 435, 435-436 [1st Dept 2011]; *Clemmer v Drah Cab Corp.*, 74 AD3d 660, 661 [1st Dept 2010]; *see also Hernandez v Almanzar*, 32 AD3d 360, 361 [1st Dept 2006]).

Moreover, by not refuting defendants’ evidence of a preexisting degenerative condition of the spine, Herrera has failed to raise an inference that his alleged injuries were caused by the accident (*id.*). Missing from all of Herrera’s submissions is any mention of the degenerative conditions in Herrera’s lumbar and cervical spine and right knee reported by Dr. Setton in his evaluation of the MRIs taken shortly after the accident (*see Pommells*, 4 NY3d at 580).

Herrera failure to address causation is fatal to his claim. “Absent an explanation of [Dr.

Nir's] basis for concluding that the injury was caused by the accident, as opposed to other possibilities evidenced in the record, an expert's conclusion that plaintiff's condition is causally related to the subject accident is mere speculation, insufficient to support a finding that such a causal link exists" (*Diaz v Anasco*, 38 AD3d at 295-296 [internal quotation marks and citations omitted]).

Here, not only did Dr. Nir fail to refute defendants' evidence of a preexisting degenerative condition of the spine and knee, but his failure to even mention, let alone explain, why he ruled out degenerative changes as the cause of Herrera's spine and knee injuries rendered his opinion that they were caused by the accident speculative (*see Gorden v Tibulcio*, 50 AD3d 460, 464 [1st Dept 2008]). As a result, there is no objective basis for concluding that Herrera's present alleged limitations and pain are attributable to the subject accident rather than the degenerative condition.

In addition, without any objective medical evidence that his injuries were caused by the accident, Herrera's claim that he was unable to perform his usual daily activities or work and that he was confined to bed and home from the date of the accident to the present date and Dr. Nir's finding that Herrera was deemed disabled from work for a period of one and one half years are insufficient to establish "that he could not perform substantially all [of] his daily activities for 90 of the first 180 days following the accident because of an injury or impairment caused by the accident" (*Valentin*, 59 AD3d at 186-187 [1st Dept 2009]; *Rossi v Alhassan*, 48 AD3d 270, 271 [1st Dept 2008]).

In *Pommells v Perez* (4 NY3d at 580), the Court of Appeals held that where, as here, there was persuasive evidence that the plaintiff's alleged pain and injuries were related to a preexisting degenerative condition, the "plaintiff had the burden of coming forward with

evidence addressing [the] defendants claimed lack of causation. In the absence of any such evidence, [the defendants are] entitled to summary dismissal of the complaint” (*see also Franchini*, 1 NY3d at 537; *Licari v Elliott*, 57 NY2d 230, 237 [1982]).

Javier

In the verified bill of particulars, plaintiff Javier claims that she suffered posterior disc bulge at L5-S1; lumbar radiculopathy; cervical radiculopathy at C6; cervical spine root irritation at C6; left knee derangement and patella alta (exhibit B to moving papers, ¶ 11). As a result of these injuries, Javier claims that she has suffered one or more of the following: a permanent loss of the use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; and/or significant limitation of use of a body function or system. Javier also makes a 90/180 claim (*id.* ¶ 20)

Defendants made a prima facie showing that Javier did not sustain a permanent consequential or significant limitation to her spine and knee by offering the affirmed report of their orthopedist, Dr. Edward M. Decter, dated July 16, 2013, who examined Javier and reviewed, among other things, unaffirmed records from Dr. Nir, Javier’s treating physician, including electrodiagnostic studies and MRIs dated September 20, 2011. Based on his examination of Javier and review of the records, Dr. Decter found normal ranges of motion in Javier’s cervical and lumbar spine and no signs of internal derangement of her left knee. Dr. Decter opined that, although Javier may have sustained some temporary soft tissue injury to her cervical and lumbar spine and left knee, there was no permanent injury, disability or limitation as a result of the subject accident. According to Dr. Decter, Javier has subjective complaints without objective findings and she is fully capable of performing all her normal activities without any restrictions (exhibit G to the moving papers).

In addition, defendants submitted the affirmed report of a radiologist, Dr. Michael Setton, dated January 13, 2013, who reviewed Javier's September 20, 2011 lumbar spine and left knee MRIs and her September 27, 2011 cervical spine MRI and found preexisting degenerative changes with no evidence of recent traumatic injury in Javier's cervical and lumbar spine. In addition, Dr. Setton opined that the elongation of Javier's patellar tendon (patella alta) was a congenital anomaly present from birth (exhibit H to the moving papers).

Moreover, defendants met their initial burden with respect to Javier's 90/180-day claim by submitting Javier's deposition testimony, wherein she states that the only activity she finds more difficult to perform after the accident, than before the accident, is heavy lifting (exhibit I to the moving papers, at 32-33).

In opposition, Javier submitted an affirmed report from her treating physician, Dr. Jacob Nir, dated May 19, 2014, who "performed a comprehensive history and evaluation" of Javier² and, based on his observations and the May 14, 2014 results of goniometric exams on Javier's cervical and lumbar spine and Javier's subjective complaints, concluded that Javier's continuing cervical and lumbar spine and left knee pain were substantially caused by the subject accident. Dr. Nir also opined that Javier has sustained a significant limitation of the function of her musculoskeletal system and that she suffers from a permanent partial disability that has caused problems with her standing, bending and lifting. However, Dr. Nir did not discuss, or even acknowledge, Dr. Setton's findings regarding the degenerative changes to Javier's cervical and lumbar spine and knee, and he did not identify any of the documents he relied upon in making his determination (Yablon affirmation in opposition, exhibit 2).

² Dr. Nir does not state that he examined Javier or that he performed the May 14, 2014 goniometric testing.

Discussion

Like Herrera, the only medical record Javier submitted was an affirmation from Dr. Nir, dated May 19, 2014, wherein Dr. Nir affirmed that he relied on Javier's relevant medical records, but he does not identify what records he relied upon and he does not attach those medical records to his report. Thus, there is no way for the court to determine if the records he relied upon were contemporaneous with the accident, whether contemporaneous quantitative limitations were shown after the accident and/or whether those medical reports were affirmed (*see Valentin*, 59 AD2d at 185). Without such information, Dr. Nir's affirmation is not probative and not admissible to raise a question of fact as to whether Javier suffered a serious injury under the Insurance Law (*id.*; *Lazu*, 89 AD3d at 435-436; *Clemmer*, 74 AD3d at 661; *see also Hernandez*, 32 AD3d at 361).

Moreover, by not refuting defendants' evidence of a preexisting degenerative condition of the spine and a congenital anomaly in her knee, Javier has failed to raise an inference that her alleged injuries were caused by the accident (*id.*). Missing from all of Javier's submissions is any mention of the degenerative conditions in Javier's lumbar and cervical spine and the congenital anomaly in her left knee reported by Dr. Setton in his evaluation of the MRIs taken shortly after the accident (*see Pommells*, 4 NY3d at 580).

With Javier, as with Herrera, Dr. Nir's failure to address the evidence of degenerative changes in Javier's spine and the congenital anomaly in her knee is fatal to her claim. "Absent an explanation of the basis for concluding that the injury was caused by the accident, as opposed to the other possibilities evidenced in the record, an expert's conclusion that plaintiff's condition is causally related to the subject accident is mere speculation, insufficient to support a finding that such a causal link exists" (*Diaz*, 38 AD3d at 296 [internal quotation marks and citations omitted]).

Here, not only did Dr. Nir fail to refute defendants' evidence of a preexisting degenerative condition of the spine and knee, but his failure to even mention, let alone explain, why he ruled out degenerative changes as the cause of Javier's spine and knee injuries rendered his opinion that they were caused by the accident speculative (*see Gordon*, 50 AD3d at 464). As a result, there is no objective basis for concluding that Javier's present limitations and pain are attributable to the subject accident rather than the degenerative condition.

In addition, without any objective medical evidence that her injuries were caused by the accident, Javier's claims that she was unable to perform her usual daily activities, and that she was confined to her home from the date of the accident to the present date, are insufficient to establish that she could not perform substantially all of her daily activities for 90 of the first 180 days following the accident "because of an injury or impairment caused by the accident" (*Valentin*, 59 AD3d at 187 [1st Dept 2009]; *Rossi v Alhassan*, 48 AD3d 270, 271 [1st Dept 2008]).

In *Pommells v Perez* (4 NY3d at 580), the Court of Appeals held that where, as here, there was persuasive evidence that the plaintiff's alleged pain and injuries were related to a preexisting degenerative condition, the plaintiff had the burden of coming forward with evidence addressing the defendants' claimed lack of causation. In the absence of such evidence, the defendants are entitled to summary dismissal of the complaint (*see also Franchini*, 1 NY3d at 537; *Licari*, 57 NY2d at 237).

Accordingly, it is

ORDERED that defendants Riad Assila and Grand Yellow Taxi's motion for summary judgment dismissing the complaint is granted and the action is dismissed.

Plaintiffs' cross-motion for summary judgment on liability is denied as moot.

Dated: _____

1/13/15

New York, NY



ARLENE P. BLUTH, JSC