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

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Wilma Thompson,

Plaintiff,

-against-

Nicholas Santiago and "John Doe",

Defendants.

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Motion Seq 02

Index No. 154185-2012

DECISION AND ORDER

Hon. ARLENE P. BLUTH, JSC

Defendant's motion for summary judgment dismissing the complaint on the grounds that plaintiff has not demonstrated that her injuries meet the serious injury threshold pursuant to Insurance Law § 5102(d) is granted only to the extent that plaintiff's 90/180 claim is dismissed, and otherwise denied.

In her bill of particulars, plaintiff claims that she sustained cervical and lumbosacral injuries as a result of the subject 8/22/11 motor vehicle accident.

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 support of his motion, defendant submits the affirmed report of Dr. Israel who examined plaintiff on 5/21/13, measured full ranges of motion in plaintiff's cervical spine

and lumbar spine, and stated that she had a normal orthopedic exam. Dr. Israel opined that any sprains or strains had resolved.

As for her 90/180 claim, defendant cites to plaintiff's deposition testimony that she was unemployed at the time of the accident and was confined to bed for a month or two (but no doctor specifically directed her to do so). Defendant also asserts that plaintiff's restrictions (she could not wear high heels, walk for a long time, mop or sweep in the relevant time period) did not constitute substantially all of the activities of daily living.

Thus, defendant met his prima facie burden of showing that plaintiff has not suffered a serious injury, and the burden shifts to plaintiff to raise a triable factual question sufficient to defeat the motion[1].

In support plaintiff submits, inter alia, the affirmed report and affirmation of Dr. Mittal (exhibits C and E) who examined plaintiff two days after the accident, and then again on 5/28/14 at which time he found significant range of motion restrictions (from 28-44%) in plaintiff's cervical and lumbar spine. Dr. Mittal noted that plaintiff had not experienced pain in these areas before the accident; he opined that her injuries were a direct result of the accident, and that her injuries are permanent.

Thus, plaintiff has raised an issue of fact and it is up to the jury, not this Court, to

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[1]Plaintiff's position that defendant did not meet his prima facie burden because he cannot rely on Dr. Israel's report is without merit. By Consent Order dated May 31, 2013, Dr. Israel agreed to stop performing any future independent medical examinations as of March 2013 in satisfaction of the professional misconduct charges brought against him. See New York State Board for Professional Medical Conduct (Order No. 13-156). As indicated by defendant in the reply, there is nothing in this order that prohibits Dr. Israel from testifying in this matter, and the fact that Dr. Israel's past practices could lead to his impeachment at trial is, simply put, defendant's problem.

decide which doctor(s) to believe.

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing the action on the grounds that plaintiff has not demonstrated that her injuries meet the serious injury threshold pursuant to Insurance Law § 5102(d) is granted only to the extent that the 90/180 claim is dismissed, and otherwise denied.

The parties are directed to appear for a DCM compliance conference on 4/10/15, 80 Centre Street, Rm. 103 at 9:30am.

This is the Decision and Order of the Court.

Dated: March 10, 2015
New York, NY

HON. ARLENE P. BLUTH, JSC