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

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Terrell Brannon,

Plaintiff,

-against-

Thomas O'Neill,

Defendant.

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Motion Seq 04

Index No. 157048/12

DECISION AND ORDER

Hon. ARLENE P. BLUTH, JSC

Defendant's cross-motion for summary judgment dismissing the complaint on the grounds that plaintiff has not demonstrated that his injuries meet the serious injury threshold pursuant to Insurance Law § 5102(d) is granted, and the case is dismissed. Plaintiff's cross-motion for summary judgment on the issue of liability is denied as moot.

In his bill of particulars, plaintiff claims that on 3/29/12 he injured his cervical and lumbar spine and left knee in the subject 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 medical reports of Dr. Varriale, an orthopedist, who examined plaintiff on October 22, 2103 and July 15, 2014, and found normal range of motion in plaintiff's cervical and lumbar spine, and left knee.

He opined that plaintiff's sprains had resolved and that he had no orthopedic disability.

With regard to the 90/180 claim, defendant cites to plaintiff's deposition testimony and bill of particulars wherein plaintiff stated that he missed 3-4 days of work after the subject accident.

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

In opposition, plaintiff submits two exhibits containing medical reports: Exhibit 1, the affirmed report of Dr. Reyfman, who states that plaintiff first came into his office for treatment on 8/23/12, approximately 5 months after the subject accident, and Exhibit 2, an unaffirmed MRI report of plaintiff's lumbar spine taken 10 days after the accident, unaffirmed letter reports written by Dr. Elbaz to Dr. Delman and Dr. Reyfman's unaffirmed 2/25/14 operative report. None of the reports contained in Exhibit 2 were in admissible form, and thus were not considered by the Court.

Significantly, plaintiff has not submitted any affirmed report from any doctor who examined him shortly after the accident. "Absent admissible contemporaneous evidence of alleged limitations, plaintiff cannot raise an inference that his injuries were caused by the accident" *Shu Chi Lam v Wang Dong*, 84 AD3d 515, 922 NYS2d 381 (1st Dept 2011). Because there is nothing in plaintiff's opposition papers to establish that any of plaintiff's physical conditions were caused by the subject accident, he has failed to raise an issue of fact sufficient to defeat defendant's motion. Finally, plaintiff has not opposed dismissal of his 90/180-day claim.

Accordingly, it is

ORDERED that defendant's motion is granted, and the case is dismissed; plaintiff's cross-motion for summary judgment on the issue of liability is denied as moot.

This is the Decision and Order of the Court.

Dated: March 25, 2015
New York, New York

HON. ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH, J.S.C.