

Yun Sook Pak v Iqbac
2015 NY Slip Op 30448(U)
March 28, 2015
Supreme Court, New York County
Docket Number: 150778/12
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22
YUN SOOK PAK,

Plaintiff,

-against-

HAROON IQBAC,

Defendants.

Index No.: 150778/12
Motion Seq: 002

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 denied.

In this action, plaintiff alleges that, on March 13, 2011, she sustained personal injuries when she was the driver of a vehicle, which she owned, that was hit in the rear by defendant, at the entrance to the parking lot of the Empire Casino in Yonkers, New York.

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 A.D.2d 396 [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 [2nd 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*, 58 AD3d 434 [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.*). This the defendant has attempted to do by referring to the plaintiff's deposition testimony, which established that she was able to return to work after only a week of sick leave.

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 the verified bill of particulars, plaintiff claims, inter alia: joint effusion; grade I meniscal capsular separation in the region of the medial meniscus of the left knee; reversal of cervical lordosis; central herniated discs at C3-4, C5-6; C6-7 levels (exhibit E to the moving papers).

In support of his motion, defendant submits the affirmed report of Dr. Arnold T. Berman who conducted an orthopedic examination at defendants' request. Defendant made a prima facie showing that the plaintiff did not sustain a permanent consequential or significant limitation to her cervical spine, lumbar spine or left knee by offering Dr. Berman's affirmed reports. Dr. Berman found normal ranges of motion in those body parts complained of in plaintiff's bill of particulars. Dr. Berman also conducted neurologic tests on many of plaintiff's muscles as well as her knees and found everything to be normal.

Dr. Berman concluded that, based on pre- and post- accident radiologic studies and plaintiff's prior medical history, such complaints as plaintiff had regarding her cervical and lumbar spine and right knee were due to degenerative disease that predated the accident complained of herein, and "did not correlate with the normal clinical examination." Curiously, Dr. Berman's report made no mention at all of predated injuries or degenerative disease regarding the left knee, about which plaintiff complained both to Dr. Berman and in the Bill of Particulars. It has been held that, "where an adversary withholds evidence in his possession or control that would be likely to support his version of the case, the strongest inferences may be drawn against him which the opposing evidence in the record permits (citation omitted)" (*Noce v Kaufman*, 2 NY2d 347 [1957]).

In opposition, plaintiff raised issues of fact with respect to her claimed spine and knee injuries by submitting the affidavit of her treating physician, Dr. Sun, who found continuing deficits in range of motion, which he states were caused, and/or exacerbated, by the subject accident.

Dr. Sun first examined plaintiff on February 4, 2012 and treated her consistently until approximately June 11, 2012. Dr. Sun's affidavit (exhibit A in opposition to the motion), discussed plaintiff's prior automobile accident on October 2, 2010, and found that no injury was sustained to her left knee at that time. He found her left knee to be newly injured in the subject accident, and plaintiff's neck and spine injuries to have been aggravated by the subject accident. He examined her again on March 19, 2014, found no improvement in her condition and, therefore, provided evidence of contemporaneous and recent findings of limitations, which supplied the requisite proof of limitations and duration of the spine and knee injury to raise an issue of fact as to a significant or permanent consequential limitation (see *Perl v Meher*, 18 NY3d 208, 217-218[2011], *Duran v Kabir*, 93 AD3d 566 [1st Dept 2012]), *Torres v Ndongo*, 105 AD3d 480 (1st Dept 2013).

Dr. Sun conducted range of motion tests on plaintiff's cervical spine using a goniometer and found restrictions on flexion, extension, left flexion, right flexion, right rotation and left rotation. His view of the MRI of her cervical spine revealed reversal of the cervical lordosis and herniated discs at C3-4, C5-6 and C6-7. He opined that the herniation at C3-4 was an aggravation of the injury caused in a prior accident on October 2, 2010.

Dr. Sun, in addition, found restricted range of motion in plaintiff's left knee assessed by use of a goniometer. Positive findings of injury to the left knee were also found using the McMurray and the Lachman Tests. He opined that an MRI of the left knee on December 14, 2011 disclosed joint effusion and grade I meniscal capsular separation in the region of the medial meniscus which were consistent with his physical examination of the patient. He concluded that the plaintiff's knee injuries were permanent and caused by the subject accident on November 13, 2011.

Because plaintiff raised a triable issue with respect to the injuries to her spine and left knee, the Court need not determine whether her other claimed injuries met the threshold. See *Lee v Cornell University*, 112 AD3d 466 (1st Dept 2013). The jury will have to decide which doctors to believe.

Accordingly, defendant's 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 denied.

This is the Decision and Order of the Court.

Dated: March 28, 2015
New York, New York



Hon. Arlene P. Bluth, JSC

HON. ARLENE P. BLUTH