

Scott v Estevez

2015 NY Slip Op 30449(U)

March 27, 2015

Supreme Court, New York County

Docket Number: 152745/2013

Judge: Arlene P. Bluth

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

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Irene Scott,

Plaintiff,

-against-

Rafael Estevez,

Defendant.
-----X

Arlene M. Bluth, J.:

Defendant moves for summary judgment, pursuant to CPLR 3212, to dismiss plaintiff's complaint for failure to meet the serious injury threshold of Insurance Law § 5102 (the No Fault Law).

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

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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]).

Underlying Allegations

Plaintiff alleges that, on February 5, 2013, while she was crossing the street at 148th Street and Amsterdam Avenue she was struck by a taxi driven by defendant. As a result of that accident, she states that she suffered a torn rotator cuff in her left shoulder which required

surgical repair, a torn medial meniscus in her left knee that also required surgical repair, and spine derangements throughout her neck and back. She also states that she was unable to leave her home for four months after the accident except to see doctors and, while she returned to work for two days, she was unable to perform her job as a bindery operator due to the pain and restriction of motion that she suffered due to the accident.

Defendant's proofs

Dr. Gregory Montelbano, an orthopedic surgeon, performed a physical examination of plaintiff at defendant's request. Dr. Montelbano performed various tests and reviewed records and opined that plaintiff had no permanent injury and he attributed her reported pain to osteoarthritis and degenerative disease and not due to the accident or any traumatic injury. Doctor Audrey Eisenstadt, a radiologist, viewed MRIs of plaintiff's left shoulder, left knee, cervical and lumbar spine, all taken within three weeks of the accident. While she found a tear in plaintiff's left knee's medial meniscus, a tendon tear in plaintiff's left shoulder, and various disc bulges and osteophytes, she attributed these conditions to longstanding degenerative disease and not due to the accident or any traumatic injury.

Regarding plaintiff's 90/180 claim, defendant has failed to meet its burden. Plaintiff claims, in her bill or particulars, that she has been confined to home since the accident; as the accident happened on February 5, 2013 and the Bill of Particulars is dated June 7, 2013, over four months later, plaintiff did allege a 90/180 claim. Defendant's moving papers, however, fail to rebut it; in support of the motion to dismiss the 90/180 claim, defendant only points to paragraph 93 of plaintiff's deposition transcript (affirmation in support, paragraph 26).

Defendant asked if plaintiff was confined to bed, and she responded that she was confined to home for four months, not bed, because she had to move around or else she'd get stiff. Defendant never asked plaintiff if her confinement was on doctor's orders, or which doctor told her to stay home. Therefore, defendant failed to show that plaintiff's home confinement for four months fails to meet the 90/180 threshold.

Even if defendant had met his burden, plaintiff has, in opposition, presented issues of fact. A trial is necessary.

Plaintiff's proofs

On March 14, 2013, plaintiff had arthroscopic surgery on her left knee medial and lateral meniscus tears, according to her orthopedic surgeon, Dr. Kenneth McCulloch. Dr. McCulloch attributes the meniscus tears to the trauma of the accident, rather than degenerative disease, and found that, while the operation resulted in significant improvement, there were continuing restrictions of motion and the potential requirement in the future for a knee replacement.

On April 3, 2013, Dr. McCulloch performed arthroscopic surgery on plaintiff's left shoulder to repair "a massive rotator cuff tear." He attributed this condition to plaintiff's accident, rather than to degenerative disease. He also found that, while the surgery caused significant improvement, plaintiff had a permanent loss of range of motion in her left shoulder, as well as restrictions in the range of motion in her cervical and lumbar spine.

Plaintiff also presented the affirmed reports of Doctor Douglas Schottenstein, a neurologist, and Doctor Karl Hussman, a radiologist who took MRIs of plaintiff, and these doctors also attribute plaintiff's condition to her accident, rather than to degenerative disease.

Plaintiff's doctors contest the findings of defendant's doctors. Plaintiff's doctors assert that plaintiff has suffered a significant injury attributable to her accident and their findings are "entitled to the same weight as defendant[']s expert[s'] opinion and are sufficient to raise an issue of fact" (*Mulligan v City of New York*, 120 AD3d 1155, 1156 [1st Dept 2014]; *see also Windham v New York City Tr. Auth.*, 115 AD3d 597, 598 [1st Dept 2014]; *Vaughan v Leon*, 94 AD3d 646, 648 [1st Dept 2012]).

it is ordered that

Accordingly, defendant's motion for summary judgment dismissing plaintiff's complaint for failure to meet the serious injury threshold of the No Fault Law is denied.

Dated: March 27, 2015
New York, New York

ENTER:

ARLENE P. BLUTH, J.S.C.