

Helena v Zahn

2015 NY Slip Op 30780(U)

May 11, 2015

Supreme Court, Suffolk County

Docket Number: 13-20424

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 10-23-14 (#001)
MOTION DATE 11-20-14 (#002)
ADJ. DATE 12-4-14
Mot. Seq. # 001 - MD
002 - MD

-----X
JANYLL HELENA,

Plaintiff,

- against -

JENNIFER ZAHN, KRZYSZTOF
WTORKOWSKI, and AUTOMOTIVE SUPPLY
and SALES CORP.,

Defendants.
-----X

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Upon the following papers numbered 1 to 52 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; 24 - 43; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 17 - 23; 44 - 50; Replying Affidavits and supporting papers 50 - 52; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Jennifer Zahn and the motion by defendants Krzystof Wtorkowski and Automotive Supply and Sales Corp. are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Jennifer Zahn for summary judgment in her favor is denied; and it is further

ORDERED that the motion by defendants Krzystof Wtorkowski and Automotive Supply and Sales Corp., improperly denominated as a cross motion, for summary judgment in their favor is denied.

Plaintiff Janyll Helena commenced this action to recover damages for personal injuries she alleged suffered in a multi-vehicle accident that occurred on Sunrise Highway in the Town of Babylon on March 25, 2013. The accident allegedly happened when a vehicle owned by defendant Automotive Supply and Sales Corp. and driven by defendant Krzysztof Wtorkowski and a vehicle driven by defendant Jennifer Zahn both collided into a vehicle driven by plaintiff as it was traveling westbound on Sunrise Highway. Plaintiff, in her bill of particulars, alleges the accident caused or exacerbated injuries in her spine, namely cervical, thoracic and lumbar disc bulges and a thoracic disc herniation, and caused injury to her brain. She alleges that due to such injuries she was confined to bed for one month and to home for three months. Plaintiff further alleges that the subject accident caused her to sustain a permanent consequential limitation of use of a body organ or member, a significant limitation of use of a body function or system, and a medically determined nonpermanent injury or impairment which prevented her from performing substantially all of her usual daily activities for at least 90 of the 180 days immediately following the accident.

Defendant Zahn now moves for an order dismissing the complaint, arguing plaintiff is precluded under N.Y.S. Insurance Law § 5104 from recovering for non-economic loss, as she did not suffer a “serious injury” within the meaning of Insurance Law § 5102 (d). In support of the motion, defendant submits copies of the pleadings and the bill of particulars, the transcript of plaintiff’s deposition testimony, and sworn medical reports prepared by Dr. Isaac Cohen and Dr. Sumeer Sathi. At defendant’s request, Dr. Cohen, an orthopedist, conducted a physical examination of plaintiff in July 2014 and reviewed numerous medical records and reports relating to the injuries plaintiff allegedly sustained in this accident and in two previous motor vehicle accidents, one which occurred in August 2011 and the other which occurred in January 2012. Also on defendant’s behalf, Dr. Sathi, a neurologist, conducted an examination of plaintiff in August 2014, and reviewed medical records and reports related to plaintiff’s treatment after the subject accident and the two earlier motor vehicle accidents. Defendant Zahn argues, in part, that Dr. Cohen’s report establishes that plaintiff does not suffer from any significant limitations of use in her musculoskeletal system, and that Dr. Sathi’s report establishes that plaintiff, though she complained of pain during her examination, does not suffer from any neurological disability. Moreover, defendant Zahn argues plaintiff is unable to establish that her alleged spinal injuries are causally related to the subject accident.

Defendants Wtorkowski and Automotive Supply and Sales also move for summary judgment in their favor, arguing the findings in the reports of Dr. Cohen and Dr. Sathi are sufficient to establish that plaintiff did not suffer an injury within the significant limitation of use categories. They further argue plaintiff cannot establish her alleged spinal injuries are causally related to the subject accident. According to defendants, the reports prepared in connection with MRI examinations performed following plaintiff’s 2012 motor vehicle accident indicate the presence of disc bulges in plaintiff’s cervical, thoracic and lumbar regions, as well as a disc herniation in plaintiff’s cervical region, and that Dr. Cohen, upon reviewing plaintiff’s records, concluded the MRI examinations performed after the subject accident showed no new injuries. Defendants also assert a medical record prepared by plaintiff’s treating physician, Dr. Qadeer, shows plaintiff was receiving treatment for severe neck and back pain in May 2012. In addition, defendants Wtorkowski and Automotive Supply and Sales argue that plaintiff, who was not working at the time of the accident, “cannot support her claim of a substantial limitation or curtailment in performing her usual or customary activities with any competent medical or other objective proof.”

In support of their motion, they submit copies of the pleadings, the bill of particulars, the transcript of plaintiff's deposition testimony, the sworn reports of Dr. Cohen and Dr. Sathi, and the report of Dr. Qadeer, which is dated May 18, 2012. They also submit copies of an MRI report concerning plaintiff's brain prepared in June 2013, and copies of MRI reports concerning the cervical, thoracic and lumbar regions of plaintiff's spine prepared in February and June 2012.

It is for the court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established a prima facie case that he or she sustained "serious injury" and may maintain a common law tort action (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Tippling-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). Insurance Law § 5102 (d) defines "serious injury" 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."

A defendant moving for summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of a serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692; *see generally Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Defendants' submissions are insufficient to establish a prima facie case of entitlement to judgment in their favor as a matter of law. Significantly, while the report of Dr. Cohen states that plaintiff exhibited normal joint function in her cervical, thoracic and lumbar regions, Dr. Sathi's report states that range of motion testing showed significant restrictions in both areas. More particularly, Dr. Sathi's report states that range of motion testing of plaintiff's cervical region showed 72 degrees of flexion (90 degrees normal), 37 degrees of extension (45 degrees normal), 52 degrees of right lateral rotation (70 degrees normal), and 60 degrees of left lateral rotation (70 degrees normal). It states that testing of plaintiff's lumbar spine revealed 30 degrees of flexion (90 degrees normal), 24 degrees of extension (45 degrees normal), 20 degrees of right lateral rotation (45 degrees normal), and 17 degrees of left lateral rotation (45 degrees normal). Noting that

reports from 2012 show plaintiff suffered from spinal disc bulges prior to the subject accident, and that plaintiff was suffering from back pain at the time of the accident, Dr. Sathi concludes that plaintiff suffered cervical and lower myofascial sprain due to the accident, that such conditions have resolved, and that plaintiff “displays no disability related to her motor vehicle collision on March 25, 2013.”

Contrary to the conclusory assertions by defense counsel, Dr. Sathi’s report raises a triable issue as to whether plaintiff suffered significant limitations in spinal joint function due to the subject motor vehicle accident (*see Farrah v Pinos*, 103 AD3d 831, 959 NYS2d 741 [2d Dept 2013]; *Cruz v Advanced Concrete Leasing Corp.*, 101 AD3d 666, 954 NYS2d 491 [2d Dept 2012]; *Uvaydov v Peart*, 99 AD3d 891, 951 NYS2d 912 [2d Dept 2012]; *Raguso v Ubriaco*, 97 AD3d 560, 947 NYS2d 343 [2d Dept 2012]; *Cues v Tavarone*, 85 AD3d 846, 925 NYS2d 346 [2d Dept 2011]; *Smith v Hartman*, 73 AD3d 736, 899 NYS2d 648 [2d Dept 2010]). Although he discusses in his report that plaintiff suffered from pre-existing conditions in her spine, Dr. Sathi failed to address in the diagnostic portion of such report the restrictions in spinal movement measured during his August 2014 examination or to attribute such restrictions to her prior injuries (*see Farrah v Pinos*, 103 AD3d 831, 959 NYS2d 741; *Raguso v Ubriaco*, 97 AD3d 560, 947 NYS2d 343; *Ambroselli v Team Massapequa, Inc.*, 88 AD3d 927, 931 NYS2d 652 [2d Dept 2011]; *Cheour v Pete & Sals Harborview Transp., Inc.*, 76 AD3d 989, 907 NYS2d 517 [2d Dept 2010]; *Smith v Hartman*, 73 AD3d 736, 899 NYS2d 648 [2d Dept 2010]; *see also cf. Wolf v Schweitzer*, 56 AD3d 859, 866 NYS2d 833 [3d Dept 2008]).

While a defendant can meet his or her burden on a summary judgment motion with proof that the plaintiff had preexisting injuries or a degenerative condition causing the same symptoms that are claimed in the action (*see e.g. Pryce v Nelson*, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; *Dudley v Imbesi*, 121 AD3d 1461, 995 NYS2d 810 [3d Dept 2014]; *Russell v Cornell Univ.*, 110 AD3d 1236, 973 NYS2d 407 [3d Dept 2013]), Dr. Sathi does not refer to any objective evidence in plaintiff’s medical records showing she suffered similar limitations in cervical and lumbar movement prior to the May 2013 collision, and plaintiff testified at her deposition that the injuries to her neck and back following the 2012 accident had improved before the subject accident. The Court notes that “[a] preexisting condition does not foreclose a finding that the injuries [at issue] were causally related to the accident” (*Rodgers v Duffy*, 95 AD3d 864, 866, 944 NYS2d 175 [2d Dept 2012]; *see Carr v Macaluso*, 64 AD3d 741, 882 NYS2d 654 [2d Dept 2009]; *see also Germain v Irizarry*, 82 AD3d 833, 918 NYS2d 523 [2d Dept 2011]). It also notes that the MRI reports and report of Dr. Qadeer submitted by defendants Wtorkowski and Automotive Supply and Sales do not demonstrate plaintiff suffered limitations in spinal function similar to the findings contained in Dr. Sahir’s report.

Moreover, despite the allegation in the bill of particulars that she was confined to home for three months after the subject accident, neither Dr. Cohen nor Dr. Sathi addresses the claim that plaintiff suffered injuries that prevented her from performing substantially all of her normal daily activities for at least 90 days of the 180 days immediately after the accident (*see Yanping Xu v Gold Coast Freightways, Inc.*, 107 AD3d 885, 968 NYS2d 111 [2d Dept 2013]; *Cabey v Leon*, 84 AD3d 1295, 923 NYS2d 713 [2d Dept 2011]; *Reynolds v Wai Sang Leung*, 78 AD3d 919, 911 NYS2d 431 [2d Dept 2010]; *Negassi v Royle*, 65 AD3d 1311, 885 NYS2d 760 [2d Dept 2011]; *Hossain v Singh*, 63 AD3d 790, 882 NYS2d 137 [2d Dept 2009]; *cf. Clausi v Hall*, ___ AD3d ___, 2015 NY Slip Op. 02835 [3d Dept, April 2, 2015]; *Frisch v Harris*, 101

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AD3d 941, 957 NYS2d 235 [2d Dept 2012]). Instead, counsel for defendants Wtorkowski and Automotive Supply and Sales attempts to shift the burden to plaintiff, asserting that she lacks competent evidence supporting her 90/180 claim. Similarly, after discussing Dr. Cohen’s finding that plaintiff exhibited normal range of motion in her spine during his examination and Dr. Sathi’s finding that no neurological disability was detected during his recent examination, counsel for defendant Zahn simply asserts plaintiff “does not qualify under the 90/180 category.”

Accordingly, defendants’ motions for summary judgment based on plaintiff’s failure to meet the serious injury threshold are denied.

Dated: May 11, 2015



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION