Pupko v Hassan
2015 NY Slip Op 30945(U)
May 20, 2015
Supreme Court, Kings County
Docket Number: 500918/13
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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YEVGENIY PUPKO,

Plaintiff,

-against-

KHALED EISSA HASSAN and KING SAL TAXI INC. d/b/a KING SAL CAB CORP.,

Defendants.

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DECISION/ORDER

Index No. 500918/13
Submitted: 4/23/15
Mot. Seq. # 2

HON. DEBRA SILBER, A.J.S.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment dismissing the complaint.

Papers	Numbered
Notice of Motion, Affirmation in Support, and Exhibits Annexed	1-6
Affirmation in Opposition and Exhibits Annexed	7-12
Reply	13

Upon the foregoing cited papers, the decision/order on this motion is as follows:

Defendant moves for summary judgment dismissing the plaintiff's action on the grounds that he did not suffer a "serious injury" as defined by § 5102(d) of the NYS Insurance Law. Plaintiff opposes the motion. For the reasons set forth herein, the defendant's motion is granted.

Plaintiff claims he sustained personal injuries as a result of an automobile accident on November 27, 2012 on West Street in Manhattan, when the vehicle he was driving was rear ended by a vehicle owned and operated by defendants. Summary

judgment has already been granted on the issue of liability.

Plaintiff left the scene in his car after refusing medical treatment at the scene. He later came under the care of a doctor and subsequently commenced the within negligence action against defendants.

At the time of the accident, plaintiff was 58 years old. Plaintiff claims (Bill of Particulars) he has suffered injuries to his back and his left shoulder.

Defendant contends the complaint must be dismissed because plaintiff has not sustained a "serious injury" within the meaning of Insurance Law § 5102(d).

Where a motion for summary judgment is predicated on a determination of "serious injury," the moving party has the initial burden of submitting sufficient evidentiary proof in admissible form to warrant a finding that the plaintiff has not suffered a "serious injury," *Lowe v Bennett*, 122 AD2d 728 [1st Dept], *affirmed* 69 NY2d 701 [1986].

Defendants' evidence consists of two doctor's affirmations, plaintiff's Bill of Particulars and plaintiff's deposition testimony. The motion makes out a prima facie case for the relief requested.

As regards the category of "a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following accident," defendant has made out a prima facie case for dismissal. In Plaintiff's EBT he states that he was working as a home health aide at the time of the accident, and plaintiff testified that he did not miss any days from work after the accident [Page 55].

As regards the other categories of injury that plaintiff claims are applicable to this case in his Bill of Particulars, that is, "a permanent loss of use of a body organ, member, function or system," a "permanent consequential limitation of use of a body organ or member" and "a significant limitation of use of a body function or system," defendants have also made a prima facie case for dismissal.

Defendants' radiologist reviewed the MRIs of plaintiff's left shoulder and concludes that the films show "complete tear in an atrophied supraspinatus muscle and tendon with retraction of the tendon fibers noted." He states this injury could not have occurred in the month between the accident and the MRI and also notes there is no bruising or swelling on the films. As regards plaintiff's lumbar spine MRI, the defendant's radiologist states that the findings are all pre-existing and degenerative and greater than six months in origin and could not have developed in the month between the date of the accident and the MRI.

Defendants' orthopedist and neurologist both conducted IMEs and both report normal exams. Dr. Alan Crystal, an orthopedist, conducted his exam on June 11, 2014, almost two years after the accident. He said plaintiff's only complaint was left shoulder pain. The plaintiff reported to him that he has diabetes, and Dr. Crystal notes that plaintiff is obese, weighing 260 pounds and being five feet six inches tall. He tested plaintiff's range of motion in his spine and reports a normal exam. He tested plaintiff's shoulder and found restrictions in his range of motion, but describes it as "atrophy of the rotator cuff muscles, left side." The doctor then states that "in a rear end collision . . . the shoulder does not have any forces on it that could produce an acute rotator cuff tear or labral tear." In addition, he states "the clinical examination of the claimant's shoulders

shows a decreased range of motion of both the left and right shoulders. This is consistent with a degenerative process." Finally, he concludes "it is my firm opinion and conclusion that there is no basis to causally relate the alleged injuries of record to the accident of 11/27/12 because the MRI shows chronic changes and does not show any findings consistent with an acute injury."

Dr. Arkady Voloshin, a Ph.D, provides an 18-page single spaced report dated July 2, 2014, with charts, graphs and his curriculum vitae, which is not in admissible form and could not be considered. As a Ph.D., he cannot affirm pursuant to CPLR 2106. Presumably, were the court to read his report, it would conclude that the plaintiff's injuries could not have occurred in the accident.

However, plaintiff doesn't claim he injured his shoulder as a result of the impact with the other car, he testified at his EBT that "my left window was open and my arm was resting when - - so when I got hit, I – got scared and took the arm out of the window into um – to be inside the car." "Question: So, by pulling your arm in quickly, you injured your left arm? A: Yes. Yes." [EBT Page 39 lines 8 to 16.] Therefore, as plaintiff doesn't claim the impact was the cause of his left shoulder injury, Dr. Crystal's opinion that a rear end collision wouldn't cause the injury is not relevant to plaintiff's claims.

When asked what activities plaintiff engaged in before the accident that he could not do after the accident, he testified that there were none [Page 57]. However, when his attorney questioned him subsequently, he said he could not help his wife shop, wash windows, climb up on a ladder and dust the chandelier, or do things with his left arm that required motion with his shoulder. However, he testified that for his job as a home attendant, he shopped, cooked and cleaned, and that he was caring for the same

patient on the date of the EBT whom he was caring for on the date of the accident. In addition, plaintiff did not state at his EBT that his daily activities, such as he described the curtailments he was experiencing, were curtailed on the advice of his doctor.

As such, defendant has made out a prima facie case for dismissal of the categories of injury "a permanent loss of use of a body organ, member, function or system," a "permanent consequential limitation of use of a body organ or member" and "a significant limitation of use of a body function or system."

The plaintiff then has the burden of overcoming the motion. *Grossman v Wright* 288 AD2d 79 [2nd Dept 2000]. Plaintiff opposes the motion.

First, the plaintiff incorrectly argues that the motion was made one day late. The date it was served is the date used for the calculation, not the date filed, so it is not late.

Plaintiff submits the affirmation of Dr. Dmitriy Grinshpun, dated January 20, 2014, which comprises 72 numbered paragraphs and refers to an exam on November 29, 2014, which leads to the conclusion that he really signed the affirmation on January 20, 2015. Plaintiff also provides inadmissible medical records from Dr. Victor Katz of Advanced Pain Care Medical, P.C., inadmissible records from Dr. Boris Dudelzak and plaintiff's inadmissible MRI reports. These medical records and MRI reports, as they were not submitted in admissible form, could not be considered. Finally, plaintiff submits an affidavit of his own.

Dr. Grinshpun proceeds to summarize the plaintiff's medical records, including those of Dr. Victor Katz of Advanced Pain Care, Dr. Boris Dudelzak's records, and the MRI reports. These records are deemed to be inadmissible hearsay and cannot be considered by the court. As Dr. Grinshpun was retained two years after the accident as an expert and not a treating doctor, even though he claims he examined plaintiff for

"possible further treatment" it cannot be said that he relied on the plaintiff's prior treatment records for his diagnosis and treatment. In fact, he states at paragraph 9 "I stress that I did not use the reviewed materials to formulate my opinion or my diagnoses." He does not in fact describe any treatment. Thus, the discussion of the medical records he reviewed are inadmissible hearsay to the extent he attempts to put their content before the court without any personal knowledge on his part.

At his EBT, plaintiff testified that he was "checked out by the EMTs at the scene, and then got back in his car and went home. He later went to see a doctor whose name he could not remember and whom he never saw again. He was later treated by Dr. Boris Dudelzak, whose name he couldn't remember either, and he referred to him at his EBT as "fat Boris." Plaintiff was quite difficult at the EBT, despite being given a Russian interpreter, at one point telling defendant's attorney that his question was "stupid." Subsequently he went to see Dr. Victor Katz, an orthopedist. He was told by Dr. Katz he needed shoulder surgery, but he did not want to have it. He then testified that his neck and back only hurt him when he gets up in the morning, but his shoulder hurts all the time [Page 45]. He repeats this in his affidavit.

Dr. Grinshpun then describes his examination of plaintiff, which starts at paragraph 54 of his affirmation. Dr. Grinshpun found that plaintiff has frozen shoulder syndrome on his left side, with "at least a 50% restriction on passive and active movement." He also performed range of motion testing. He states that he did the testing with the use of a goniometer. He found significant restrictions in the plaintiff's range of motion of plaintiff's left shoulder, cervical spine and lumbar spine. He concludes that plaintiff "suffers from post-traumatic, left-sided cervical and bilateral lumbar radiculopathy with superimposed left shoulder pain with signs of internal

derangement causing marked disabilities with activities of daily living." He recommended that plaintiff return to Dr. Katz "for a surgical intervention." He also recommended a return to physical therapy, and steroid injections. Finally, he states that he "affirms with a reasonable degree of medical certainty that the above-referenced injuries are a result of the accident of 11/27/12 and the patient is currently disabled." It would seem plaintiff did not act on any of his suggestions.

Plaintiff's affidavit is considered to be self-serving and of no probative value. *Strenk v Rodas*, 111 AD3d 920 (2d Dept 2013).

There are two issues before the court. First, there is an issue as to whether plaintiff has established causation without any admissible medical records which are contemporaneous with the accident. Second, there is an issue as to whether Dr. Grinshpun's affirmation, which completely fails to address defendants' doctors' claims of pre-existing and degenerative findings which were not caused by the accident, is fatal.

As regards the first issue, the court finds that the plaintiff has failed to overcome the motion. While in *Perl v Meher* (18 NY3d 208 [2011]), the Court of Appeals substantially reduced what is required for a plaintiff to overcome a "threshold" motion, the court did not eliminate the requirement that plaintiff demonstrate causation and provide objective and contemporaneous evidence of his injuries.

In *Perl,* the Court of Appeals held that there is no requirement of quantitative measurements "contemporaneous" with the accident, and that there is nothing wrong or illogical about observing and recording a patient's symptoms in qualitative terms shortly after the accident, and later doing more specific, quantitative measurements in preparation for litigation.

As the Court of Appeals notes, a contemporaneous doctor's report is important to

the requirement of proof of *causation*; but where causation is proved, it is not unreasonable to measure the *severity* of the injuries at a later time. In the instant case, the only evidence of plaintiff's condition contemporaneous with the accident is his own EBT testimony, which is not sufficient. *Toure v Avis Rent a Car Sys.*, 98 NY2d 345 [2003]. The earliest medical exam in admissible form was on November 29, 2014. Without any admissible medical exam within the two years following the accident, there is no objective basis for concluding that the plaintiff's alleged injuries, are attributable to the subject accident. See *Jimenez v Rojas*, 26 AD3d 256, 257 [1st Dept 2006]. In the absence of such evidence, the defendants are entitled to summary judgment. See *Jimenez v Rojas*, *supra* at 257.

As to the second issue, the court finds that the failure of Dr. Grinshpun to address defendants' doctors claims that all of his alleged injuries are pre-existing and degenerative is fatal to the plaintiff's case as well.

There are a number of recent cases which make clear that in order to overcome a defendant's evidence that a condition is degenerative and/or pre-existing, a plaintiff must present evidence which address the issue in a non-conclusory manner. In *Henry v Hartley*, 119 AD3d 528 [2nd Dept 2014], the defendants were held to have met their prima facie burden of establishing their entitlement to judgment as a matter of law by submitting sufficient evidence in admissible form to establish that the injuries allegedly sustained by the plaintiff were not causally related to the subject accident, as the affirmed reports of the defendants' retained radiologist established that the alleged injuries to the injured plaintiff's left knee and the lumbar region of his spine were degenerative in nature. The Appellate Division, Second Department found the plaintiff failed to raise a triable issue of fact because the plaintiff's doctor failed to address, in a

nonconclusory fashion, the issue of whether the injuries to the plaintiff's spine and his left knee were entirely the result of pre-existing degenerative changes and, thus, not causally related to the subject accident.

In *Irizarry v Lindor*, 110 AD3d 846 [2nd Dept 2013], the Second Department found that the plaintiff's submissions "failed to address the nonconclusory finding of the appellants' radiologist that the disc bulges and herniations observable" in the MRI scans of plaintiff's spine were degenerative in nature, and that this rendered plaintiff's doctor's conclusion as to the cause of the bulges and herniations speculative and, thus, insufficient to raise a triable issue of fact. See, also *Il Chung Lim v Chrabaszcz*, 95 AD3d 950, 951 [2nd Dept 2012]; *Mensah v Badu*, 68 AD3d 945, 945-946 [2nd Dept 2009].

As the Appellate Division Second Department states in *Il Chung Lim v. Chrabaszcz,* 95 AD3d 950:

> "In any event, the plaintiff's submissions were insufficient to raise a triable issue of fact to rebut the finding of the defendant's radiologist that the injuries depicted in the magnetic resonance imaging (hereinafter MRI) films of his left knee were degenerative in nature and unrelated to the subject accident. Neither the plaintiff's radiologist nor Dr. Chang addressed the findings of the defendant's radiologist pertaining to the degenerative nature of the plaintiff's left knee injuries."

The court notes that recent decisions of the Appellate Division, First Department are also in accord with the holdings of these cases. See, e.g., *Mena v White City Car & Limo Inc.,* 117 AD3d 441 [1st Dept 2014]; *McSweeney v Sang,* 115 AD3d 572 [1st Dept 2014]; *Dawkins v Cartwright,* 111 AD3d 559 [1st Dept 2013].

The instant matter contrasts only with these recent cases in that, in the instant matter, plaintiff did not merely fail to address the defendant's doctor's claims that his injuries are either pre-existing, degenerative and non-traumatic in a non-conclusory

manner; he failed to address them at all.

The motion is granted and the complaint is dismissed.

This constitutes the Decision and Order of the Court.

Dated: Brooklyn, New York
May 20, 2015

Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber
Justice Supreme Court

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