Mitchell v Smith
2015 NY Slip Op 30989(U)
May 22, 2015
Supreme Court, Bronx County
Docket Number: 306510-12
Judge: Fernando Tapia
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SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: Part 13

JAMES MITCHELL and FRANCES MITCHELL

Plaintiffs,

v. **Index No. 306510-12**

BARRINGTON A. SMITH, EXCEL DEMOLITION RECYCLING and JUAN CAMPUSANO

Defendants.

DECISION

Defendant-Movant, Barrington A. Smith, seeks summary judgment under CPLR 3212(b), claiming that Plaintiff-Ms. Frances Mitchell did not suffer "serious injuries."[1]

After careful review of the motion, this Court **DENIES** Defendant's motion -- material facts exist that defeat its summary judgment motion.

Did Plaintiff sustain "serious injuries" under NY Insurance Law § 5102(d)? This will be decided by fact-finders, should parties not reach a settlement agreement.

Plaintiff was a restrained front-seat passenger in a Camry when she sustained neck, lower back, left shoulder, and right knee injuries from a motor vehicle accident [MVA] on April 8, 2012, approximately 8 a.m.

Summary Judgment And Its High Threshold

One of the recognized purposes of a summary judgment motion is to determine if any material facts exist. *Marshall, Bratter, Greene, Allison & Tucker v. Mechner*, 53 AD2d 537 (App Div, 1st Dept 1976). Under CPLR 3212(b), a motion for summary judgment must be supported by affidavit, a copy of

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[1] There is a companion threshold motion brought by Co-Defendants Excel Demolition [truck] and Juan Campusano [truck driver]. Co-Plaintiffs are siblings. See Mitchell Tr. at p. 53, lines 20-21.

its pleadings, and any other available proof. Regarding the affidavit, not only must it have a recitation of material facts, but it must also show that there is no defense to the action, or that the defense is meritless.

Because a motion for summary judgment has an extremely high burden ["as a matter of law"], it is a drastic remedy for any movant to use. *Rotuba Extruders v. Ceppos*, 46 NY2d 223, 231 (App Ct 1978). It is therefore the movant's burden to produce evidence as would be required in a trial. *Oxford Paper Co. v. S.M. Liquidation Co., Inc.*, 45 Misc2d 612, 614 (Sup Ct, NY Cty 1965); see also *Pirrelli v. Long Island Rail Road*, 226 AD2d 166 (App Div 1st Dept 1996) (the purpose of the motion court is issue-finding, and not issue-determination). Lastly, a summary judgment motion cannot be defeated by a "shadowy semblance of an issue." *Hatzis v. Belliard*, 13 AD3d 106 (App Div, 1st Dept 2004).

Here, this Court finds that there is a material issue of fact regarding the extent of Ms. Mitchell's injuries, based on a simple comparison between competing health care professionals' right knew range of motion [ROM] findings.

Ms. Frances Mitchell, front-seat passenger

Right knee	**Jacquelin Emmanuel, M.D.**[2] **[DOE: 7Oct13]**	**Gabriel L. Dassa, D.O.**[3] **[DOE: 18Jul14]**
Flexion	**150/150**	**125/140**

In *López v. Senatore*, 65 NY2d 1017, 1020 (App Ct 1985), the Court of Appeals denied the defendant's motion for summary judgment on the ground that the plaintiff's physician's affirmation, supported by exhibits setting forth the injuries and course of treatment identifying ROM limitations, is enough of a basis to deny the defendant's motion [cervical limitation of ten degrees found to be enough

[2] See May 13, 2014 Yong Aff. at Exh. F. This is found in the companion case file.

[3] See September 9, 2014 Bokar Opp. at Exh.A. This is found in the companion case file.

significant limitation. Thus, because there are conflicting ROMs for Ms. Mitchell's right knew, Movants' motion based on "serious injury" is denied.

Additionally, this Co-Defendant-Movant contends that causality is at issue because Ms. Mitchell was in a prior MVA in 2000. See May 29, 2014 O'Shaughnessy Aff. at ¶ 22 & Reply at ¶ 9. Despite this contention, Plaintiff raised a triable issue of fact as to whether her neck, lower back, and right knee injuries derived directly from the April 28, 2012 MVA, especially since the two MVAs are twelve [12] years apart from each other, and especially since competing health care professionals' write-ups raise a material fact regarding causality.

The 90/180 Category

According to *Licari*, the words "substantially all" should be construed to mean that the person has been curtailed from performing his/her usual activities to a great extent rather than some slight curtailment. *Licari v. Elliott*, 57 NY2d 230, 236 (App Ct 1985).

Here, regarding the 90/180 rule, Plaintiff's attorney asserts that her injuries caused curtailment of daily activities and work, post-MVA. See Bokar Opp. at ¶ 64. As such, Plaintiff could not perform substantially all the normal activities for 90 out of the first 180 days post-MVA in her assembly line job. As Plaintiff attested at her September 4, 2013 Exam Before Trial [EBT], she missed one [1] week from work immediately after the MVA, but missed two to three months of work to recuperate from her August 8, 2012 right knee arthroscopy. See Mitchell Tr. at p. 16, lines 3-23; p. 89, lines 2-4; p. 90, lines 20-25; p. 100, lines 21-24. In addition, Ms. Mitchell work a knee brace and back brace "practically every day." Id. at p. 86, line 9-20.

Although it may seem as if Ms. Mitchell failed to meet the 90/180 rule, this Court agrees with her attorney that a question of fact exists regarding this rule because Ms. Mitchell was unable to work her same hours at work, post-MVA. See Bokar Opp. at ¶ 64. Accordingly, this branch of the motion is also denied and will be resolved at trial, should the parties not reach a settlement.

WHEREFORE the summary judgment motion raised by Co-Defendant Mr. Barrington A. Smith is **DENIED**.

This constitutes the Decision and Order of this Court.

Dated: May 22, 2015
Bronx, NY

Hon. Fernando Tapia, J.S.C.