Corporan v Erichsen
2016 NY Slip Op 30634(U)
April 13, 2016
Supreme Court, New York County
Docket Number: 158253/13
Judge: Arlene P. Bluth

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

Index No.: 158253/13
Motion Seq 001

Jesus Corporan,

Plaintiff,

-against-

Anita and Frank Erichsen,

Defendants.

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 granted, and the complaint is dismissed.

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 AD2d 396 [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 [1st 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*, 2009 NY Slip Op 43 [1st Dept]). 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.*).

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]).

In his bill of particulars, plaintiff claims injuries to his shoulder (he did not specify right or left) and to his cervical, thoracic and lumbar spine as a result of the subject 5/31/13 accident.

In support of their motion, defendants submit the affirmed report of Dr. Tantleff, a radiologist, who reviewed the MRI of plaintiff's cervical spine taken 4½ month after the accident, and stated that he saw longstanding degenerative disc disease consistent with plaintiff's age which are unrelated to the accident. Dr. Tantleff did not review any film of plaintiff's thoracic or lumbar spine.

Defendants also submit the affirmed report of Dr. Nason, an orthopedist who measured full range of motion in plaintiff's cervical, thoracic and lumbar spine and left shoulder on May 22, 2014. Dr. Nason opined that plaintiff's back strains/sprains and his left shoulder contusion

had all resolved.

Additionally, defendants submit the affirmed report of Dr. Desrouleaux, a neurologist, who examined plaintiff on May 22, 2014. However, defendants efiled only the first two pages of this report; therefore the Court did not consider this unsigned, partial report in support of the motion.

Finally, defendants met their initial burden with respect to plaintiff's 90/180-day claim by referring to plaintiff's bill of particulars wherein he stated he was not confined to bed or home after the accident, and did not miss any time from work. Based on the foregoing, defendants satisfied their burden of establishing prima facie that plaintiff did not suffer a serious injury, and the burden shifts to plaintiff to raise a triable factual question.

In opposition, plaintiff submits the affidavit of Dr. Heyligers, a chiropractor, who first examined plaintiff less than 2 weeks after the subject accident at which time plaintiff complained of neck pain, shoulder pain, wrist pain, ankle pain and headaches. (Wrist and ankle injuries and headaches were not claimed in the bill of particulars.) After that exam, Dr. Heyligers sent plaintiff for cervical ***and*** lumbar MRIs even though plaintiff made no complaints, and Dr. Heyligers made no observations, regarding plaintiff's lumbar spine at the initial exam. Dr. Heyligers states that his office treated plaintiff several times a week with manipulation, hot packs, etc. from June 10, 2013 until August 14, 2014.

Dr. Heyligers mentions that plaintiff was evaluated by Dr. McMahon for his shoulder injury, but plaintiff did not submit any report from Dr. McMahon. Even if Dr Heyligers's statement that plaintiff had a shoulder tear was admissible, evidence of such tear, standing alone, without any evidence of limitation, would be insufficient to raise an issue of fact as to whether a serious injury exists in his shoulder. *See Clementson v Price*, 107 AD3d 533 (1st Dept 2013).

Plaintiff has not submitted any range of motion testing results for his left shoulder.

Dr. Heyligers states that on March 20, 2015, almost 2 years after the accident[1], he measured significant restrictions in the range of motion of plaintiff's lumbar spine; he opines these restrictions are causally related to the subject accident and permanent. However, because there is no evidence that plaintiff made any complaints about his lumbar spine at his initial exam with Dr. Heyligers (or to any other medical provider), plaintiff did not submit any proof of a lumbar injury contemporaneous with the subject accident to support causation. Thus, Dr. Heyligers's opinion regarding a lumbar spine injury does not raise an issue of fact sufficient to defeat summary judgment.

Dr. Heyligers further opines that restrictions in plaintiff's cervical range of motion are causally related to the accident and significant and permanent "as diagnosed by MRI" and "consistent with the clinical presentation in my office". However, Dr. Heyligers only performed range of motion testing on plaintiff's cervical spine at the initial June 10, 2013 exam, 12 days after the accident. Therefore, although plaintiff submits the affirmed report of Dr. Schlusselberg who found some cervical disc bulges and narrowing in plaintiff's cervical MRI taken 41/2 months after the accident (the same film that defendants' Dr. Tantleff reviewed), "bulging or herniated discs are not, in and of themselves, evidence of serious injury without competent objective evidence of the limitations and duration of the disc injury." *See Levinson v Mollah*, 105 AD3d 644, 644, 963 NYS2d 653, 654 (1st Dept 2013). Had Dr. Heyligers measured cervical range of motion restrictions 6 months after the subject accident, that might have qualified as "competent objective evidence of the limitations and duration of the disc injury"; but he did not.

---

[1]Dr. Heyligers's statement that plaintiff exhibited "the same symptoms some three years post-accident" is incorrect. The accident was 5/31/13.

Thus, Dr. Heyligers's opinion regarding a cervical spine injury does not raise an issue of fact sufficient to defeat summary judgment.

Finally, plaintiff did not oppose dismissal of the 90/180 claim.

Accordingly, it is

ORDERED that 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 granted, and the complaint is dismissed.

This is the Decision and Order of the Court.

Dated: April 13, 2016
New York, New York

HON. ARLENE P. BLUTH, JSC