Dallas v Orbit Agami Cab, LLC
2016 NY Slip Op 30980(U)
March 30, 2016
Supreme Court, New York County
Docket Number: 150246/13
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22

Antanesha Dallas and Patricia Dallas
Plaintiffs,

-against-

Orbit Agami Cab, LLC, MD A. Rayhan, Sharon Pope and Tywan Pope,
Defendants.

Index No.: 150246/13
Mot. Seq: 02

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendants Orbit Agami Cab LLC and Rayhan's motion and defendants Sharon and Tywan Pope's cross-motion for summary judgment dismissing this action on the grounds that neither of the plaintiffs sustained a "serious injury" within the meaning of Insurance Law §5012(d) are denied as to both plaintiffs.

Plaintiffs allege that on October 15, 2011 they sustained personal injuries when they were passengers in a car owned by defendant Sharon Pope and operated by defendant Tywan Pope which was involved in a motor vehicle accident with a vehicle owned by Orbit Agami Cab and operated by Rayhan.

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]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]).

Plaintiff Antanesha Dallas

In the bill of particulars, Antanesha Dallas claims she sustained left hip injuries (which

required surgery) and lumbar spine disc bulges.

In support of their motions, defendants submit the affirmed report of Dr. Montalbano, an orthopedist, who examined plaintiff more than 2 years after the subject accident. Dr. Montalbano measured a significant restriction in plaintiff's range of motion (flexion of left hip). He opined that plaintiff Antanesha Dallas may or may not have sustained a permanent injury to the left hip as a result of the accident (noting a possible pre-existing condition) (exh D, para. 4). Defendants also the submit the affirmed 7/15/13 report of Dr. Tantleff, a radiologist, who read the MRI of plaintiff's left hip taken 2 weeks after the subject accident. Dr. Tantleff stated that she had a normal hip MRI with no evidence of recent trauma or injury. Although Dr. Tantleff saw no recent trauma on the film, Dr. Montalbano measured rage of motion restrictions and opined that the accident could have caused this permanent injury. Accordingly, defendants failed to set forth a prima facie case and the burden never shifted to plaintiff to oppose; defendants' motion and cross-motion for summary judgment are denied as to plaintiff Antanesha Dallas.

Plaintiff Patricia Dallas

In the bill of particulars, plaintiff Patricia Dallas claims she sustained 3 lumbar spine disc bulges and injured her right elbow and cervical spine.

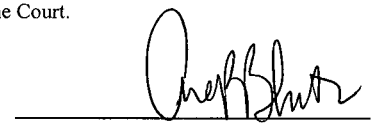
In support of their motions, defendants submit the affirmed report Dr. Montalbano who examined plaintiff Patricia Dallas more than 2 years after the subject accident and measured range of motion restrictions in her cervical and lumbar spine. Dr. Montalbano attributed the limitations in plaintiff's lumbar spine to degeneration and cited to the detailed findings of Dr Tantleff's 8/19/13 affirmed report, specifically dessication and spondylitic spurring in plaintiff's

lower thoracic and lumbar spine.

However, with regard to plaintiff's cervical spine, Dr. Montalbano acknowledged deficits in plaintiff's ranges of motion (right and left lateral bending 30 degrees measured in both, normal 40 degrees) without adequately explaining these findings. Although he conclusorily stated that plaintiff's restrictions were due to degeneration, he did not set forth any objective evidence of this finding– he did not review any cervical MRI or another doctor's affirmed report of any cervical MRI. (Dr. Tantleff reviewed only plaintiff's lumbar spine and her left hip MRIs - exh F). Thus, defendants failed to set forth a prima facie burden and the burden never shifted to plaintiff to oppose; *see Collazo v Anderson*, 103 AD3d 527, 960 NYS2d 35 (1st Dept 2013). Accordingly, defendants' motion and cross-motion for summary judgment are also denied as to plaintiff Patricia Dallas.

This is the Decision and Order of the Court.

Dated: March 30, 2016
New York, New York



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