

Stickney v Akhar

2016 NY Slip Op 31054(U)

March 21, 2016

Supreme Court, New York County

Docket Number: 158912/12

Judge: Arlene P. Bluth

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

Phyllis Yvonne Stickney ,

Index No.: 158912/12

Motion Seq: 01

Plaintiff,

-against-

**Muhammad Akhar, Exodus Operating, Ahmed
Ghowen, Andover Transportation, Jane and John
Does 1-10,**

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendants Akhar and Exodus Operating's motion for summary judgment dismissing this action on the grounds that plaintiff has not demonstrated that she sustained a serious injury within the meaning of Insurance Law §5012(d) is granted, and the action is dismissed.

In this action, plaintiff alleges she sustained personal injuries when she was a passenger in a taxi that was involved in an accident on May 19, 2012.

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]).

In her bill of particulars, plaintiff claims she injured her cervical and lumbar spine in this accident, and she had pain in her shoulder blade (not specified), lower back, ankle foot and knee.

Defendants' showing

Defendants met their prima facie burden of showing that plaintiff did not sustain a serious injury causally connected to this accident by submitting, inter alia, the affirmed report of Dr.

Desrouleaux who examined plaintiff on May 15, 2014, measured full ranges of motion in her cervical and lumbar spine, found she had a normal neurological exam and opined that any alleged injury to her cervical and lumbar spine had resolved.

Regarding her 90/180 claim, plaintiff stated in her bill of particulars and testified at her deposition that she was confined to her home for only six weeks after this accident.

Based on the foregoing, defendants sustained their burden of showing a lack of serious injury as defined by the Insurance Law, and the burden shifts to plaintiff to demonstrate that a triable issue of fact exists.

Plaintiff's showing

In opposition, plaintiff submits the affirmation of Dr. Hausknecht who examined plaintiff on May 22, 2012, 3 days after the accident and again on January 23, 2015 (after defendants served this motion) when he measured range of motion restrictions in plaintiff's cervical and lumbar spine. Dr. Hausknecht opines plaintiff's limitations are causally related to the subject accident and are permanent. He notes that he reviewed the MRI reports of Dr. Corrente and the records from Apollo Physical Therapy.

However, as indicated by defendants in their reply, Dr. Corrente's affirmed reports (exh E) do not support Dr. Hausknecht's conclusion that plaintiff's range of motion limitations are causally related to this accident, and even if admissible, the Apollo Physical Therapy daily notes do not raise any issue of fact.

Dr. Corrente's affirmed report of plaintiff's cervical MRI taken several weeks after the accident states that plaintiff's had multilevel deformities (C3-7) that were old and mild; Dr. Corrente did not state that plaintiff's cervical MRI showed any evidence of trauma and she did not causally relate any of the findings on the MRI to the subject accident. Dr. Corrente also reviewed

plaintiff's lumbar MRI taken several weeks after the accident and noted a congenital disc space at S1-2, minimal disc dessication at L4-5 and L5-S1; she did not state that the lumbar MRI showed any evidence of trauma and she did not causally relate any of the findings on the MRI to the subject accident. Thus, Dr. Corrente's affirmed reports do not raise an issue of fact sufficient to deny defendants' motion, and do not support Dr. Hausknecht's conclusion that plaintiff's cervical and lumbar injuries are causally related to the accident.

Plaintiff also submits a certification with the daily notes of Apollo Physical Therapy (exh F). However, only hospital records are admissible by certification. See *Bronstein-Becher v. Becher* 25 A.D.3d 796, 809 NYS2d 140 (2d Dept 2006). Additionally, Carmen Marrero who signed the purported certification as custodian of the records, never states who she works for, what her title is, or how she came into possession of the records. Even if admissible, these unsigned physical therapy daily notes for the period June 14, 2012 until August 2, 2012 (less than 3 months after the subject accident) do not raise an issue of fact sufficient to defeat this motion, and do not support Dr. Hausknecht's conclusion that plaintiff's cervical and lumbar injuries are causally related to the accident.

Dr. Hausknecht measured range of motion restrictions in plaintiff's cervical spine ranging from 19%-25% and lumbosacral ranging from 20% -40% at plaintiff's January 23, 2015 exam. At his initial exam of plaintiff on May 22, 2012 (which report was submitted by defendants, but not by plaintiff), Dr. Hausknecht listed as his impression "cervical and lumbosacral derangement and aggravation of underlying degenerative joint disease"¹ (exh H to the moving papers). Thus, Dr. Hausknecht opined that plaintiff's injuries were caused by the accident without addressing the

¹Plaintiff did not plead aggravation/exacerbation of any pre-existing condition in her bill of particulars, and did not supplement or amend her bill of particulars to assert this.

pre-existing degenerative condition documented in his own May 22, 2012 report and in Dr. Corrente's MRI reports, and without explaining why plaintiff's restrictions were not related to this pre-existing condition. Thus, Dr. Hausknecht's affirmation is conclusory and does not raise an issue of fact. *See Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509, 510, 999 NYS2d 37 (1st Dept 2014), *aff'd* 25 NY3d 1222, 16 NYS3d 51 (2015).

Finally, plaintiff's subjective complaints of pain are insufficient to raise a triable issue of fact (*see Levinson v Mollah*, 105 AD3d 644, 644, 963 NYS2d 653, 654 [1st Dept 2013]), and plaintiff did not raise any triable issue regarding 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 case is dismissed.

This is the Decision and Order of the Court.

Dated: March 21, 2016
New York, New York



HON. ARLENE P. BLUTH, JSC