

Degore v Paramount Agami Tr. Corp.

2017 NY Slip Op 32254(U)

October 19, 2017

Supreme Court, New York County

Docket Number: 153117/2014

Judge: Paul A. Goetz

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

-----X
ANGELINA DEGORE,

Plaintiff,

-against-

PARAMOUNT AGAMI TRANSIT CORP. and
MOHAMMAD A. HOSSAIN,

Defendants.
-----X

153117/2014

Index No. ~~153117~~
DECISION/ORDER

HON. PAUL A. GOETZ, J.S.C. :

In this personal injury/automobile accident case, defendants Paramount Agami Transit Corp. (Paramount) and Mohammad A. Hossain (Hossain) move for summary judgment pursuant to CPLR 3212 to dismiss the complaint on the grounds that the injuries allegedly sustained by plaintiff Angelina Degore, fail to establish serious injury thresholds as defined by Insurance Law 5102 (d).

Plaintiff's bill of particulars alleges injuries to her right knee, right ankle and cervical and lumbar spine. Plaintiff alleges she was diagnosed with a tear of the posterior aspect of her right medial meniscus; disc herniations at the C3 through C6 intervertebral levels, coupled with cord impingement and C5 radiculopathy; disc herniations at the L2 through L5 intervertebral levels, coupled with cord impingement and L4 radiculopathy; and tears of the anterior and posterior talo fibular ligaments of the right ankle with bimalleolar edema. Plaintiff brings this action, claiming that her injuries are serious within the meaning of section 5102 (d) of the Insurance Law, in that the accident resulted in the loss of a body function or system; caused a significant limitation in use of a body function or system; caused the permanent, consequential limitation of use of a body function or system; and prevented her from performing substantially all of the ordinary acts and

responsibilities constituting her typical or usual daily activities for a period of more than 90 out of 180 days following the accident.

BACKGROUND

The complaint alleges the following: The accident occurred on August 21, 2013 on a public roadway near the intersection of East 40th Street and Lexington Avenue in New York City. Plaintiff was attempting to disembark from a taxi cab owned by Paramount and driven by Hossain. The cab stopped at the roadway to allow plaintiff to leave the cab after paying the fare. While plaintiff was partially out of the cab, Hossain drove the cab for approximately one-quarter of a block before stopping. During that time, plaintiff had placed her right leg out while the remainder of her body remained inside. Before the cab stopped, plaintiff twisted her right knee and ankle and her body, experiencing pain and discomfort, which is the basis of this suit.

Plaintiff alleges that within days of the accident, she came under the care of Dr. Joyce Goldenberg, receiving physical therapy for about a year and underwent a series of diagnostic tests.

PARTIES' CONTENTIONS

Defendants move for summary judgment to dismiss the complaint, arguing that plaintiff's subsequent physical condition is not serious within the meaning of section 5102 (d). As support for their motion, defendants submit plaintiff's deposition testimony as well as affirmations from Dr. Edward Toriello, a board certified orthopedic surgeon who examined plaintiff, and Dr. Mark Decker, a board certified radiologist who reviewed plaintiff's MRI records.

In her deposition, plaintiff testified that the accident occurred while she was exiting the cab. She stated that she was not bleeding following this incident. She testified that she was

examined by EMS at the scene of the accident and then went to work.

Plaintiff testified that she commenced treatment with Dr. Elisabeth Lachman, who previously treated her for a back injury in a 2002 accident. Defendants submit a review of a September 3, 2013 examination report of Dr. Lachman, which shows the diagnosis was right knee medial sprain and thoracic pain.

Plaintiff presented for evaluation a report by Dr. Goldenberg which referred to complaints of injury to her neck, upper, middle and lower back, right shoulder, right knee and right ankle. Plaintiff stated that she sustained said injuries as a result of a cab running over her right foot. Plaintiff also reported a car accident in 2002 that resulted in neck and back injuries.

Plaintiff also presented for evaluation a report by orthopedic surgeon Dr. David Newman which referred to complaints of injury to her right knee, right ankle and lumbar spine. Dr. Newman's impression was that the accident aggravated a latent condition of right knee osteoarthritis.

Defendants submit Dr. Toriello's affirmation based on a report he issued after examining plaintiff on November 17, 2015. Dr. Toriello performed several tests and made a qualitative assessment describing the functionality of each body part at issue for its usual use and function in relation to normal daily activities. Dr. Toriello also performed range of motion testing using a goniometer, and found plaintiff's ranges of motion to be within the normal limits for plaintiff. Dr. Toriello observed regarding Plaintiff's right knee, "a positive grind test." In his report and addendum, Dr. Toriello asserted that plaintiff sustained a strain of cervical spine, right ankle and lower back, but that these strains are now resolved. Dr. Toriello concluded that plaintiff had chondromalacia of the patella of her right knee, which is a moderate disability and that her

injuries are causally related to the accident. Defendants contend that the chondromalacia was not alleged in plaintiff's Bill of Particulars and that it is a degenerative condition.

Dr. Decker reviewed the MRI films of plaintiff's cervical and lumbar spine taken on October 3, 2013, concluding that there was an absence of any evidence of trauma and only evidence of chronic and degenerative changes to the pertinent body structures.

Defendants argue that the evidence submitted demonstrate that there is insufficient proof of a serious injury which resulted from the subject accident. They contend that they submitted objective evidence which show that plaintiff's injury allegations did not result from the accident, did not result in trauma or sustained impairment, and did not reach the level of any category specified in the Insurance Law statute. Specifically, defendants aver that the MRI reports are insufficient to establish a serious injury threshold in the absence of proof of causation or an extended recording of resulting physical limitations. Defendants claim that the evidence in the form of doctor's reports and affirmations provides enough evidence to grant summary judgment.

In opposition, plaintiff argues that defendants failed to satisfy their burden of proof when they allegedly failed to address all of plaintiff's injuries as claimed in the Bill of Particulars. She refers to Dr. Toriello's report, which acknowledges plaintiff's moderate disability, a condition which prevents her from performing activities that require stair climbing, squatting or sitting for long periods of time. According to plaintiff, this report found that her injuries were causally related to the accident.

Plaintiff also refers to Dr. Decker's report, contending that he did not review MRI's of her knee and foot injuries or any of her treatment records, therefore providing an insufficient assessment.

Plaintiff discusses her deposition testimony, where she asserted that the knee and ankle injuries related to the accident restricted her work activities as well as leisure activities, such as bike riding and hiking.

In the event that it is decided that defendants sustained their burden of proof, plaintiff contends that the motion should be denied upon her submissions of quantified evidence of range of motion reports provided by Dr. Goldenberg. The reports include ankle and lumber testing which confirm limitations of movement. After a period of physical therapy, Dr. Goldenberg sought an orthopedic consultation for plaintiff, and referred plaintiff to Dr. Newman, who had previously examined her. Dr. Newman arranged for an operation. On July 3, 2014, plaintiff underwent arthroscopic surgery on her right knee. Thereafter, plaintiff returned to Dr. Goldenberg for extended physical therapy.

Dr. Goldenberg examined plaintiff on November 1, 2016, testing range of motion with a goniometer and found musculoskeletal and neurological problems. Plaintiff claims to continue to suffer from significant range of motion deficits. In her latest report, Dr. Goldenberg concludes that the medical conditions experienced by plaintiff were caused by the accident, resulting in a significant limitation and permanent loss of use of her right knee, right ankle, cervical spine and lumber spine.

Plaintiff argues that the evidence submitted by her demonstrates material issues of fact as to a serious injury, compelling a denial of summary judgment.

In reply, defendants argue that the reports of their doctors showed negative objective testing and normal ranges of motions regarding plaintiff's body parts. They also argue that plaintiff's evidence failed to refute the lack of proof with respect to extreme curtailment of

normal activities. In addition, defendants contend that plaintiff has submitted unsworn and unaffirmed records which constitute inadmissible evidence. Specifically, they contend that Dr. Goldenberg relies on inadmissible MRI and medical reports in making her conclusions about plaintiff's injuries. Defendants state that plaintiff failed to address the prior accident and findings of pre-existing degenerate changes as a alternative cause of injuries. Thus, they argue that plaintiff failed to fully resolve the causation issue underlying the injuries claim.

Defendants contend that due to inadmissible evidence or conclusory evidence, plaintiff has not raised a triable issue of fact as to whether her present injuries are serious, pursuant to section 5102 (d) of the Insurance Law.

DISCUSSION

The "damages" component of plaintiff's negligence claim is predicated on the allegation that she suffered a "serious injury," as that term is defined by statute. Insurance Law § 5102 (d) specifically provides as follows:

"'Serious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

"To prevail on a [threshold] motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a serious injury" (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011] [internal quotation marks and citations omitted]). Once defendant meets its initial burden, plaintiff must then demonstrate a

triable issue of fact as to whether s/he sustained a serious injury within the meaning of Insurance Law § 5102 [d] (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003]).

In *Toure v Avis Rent A Car Sys.* (98 NY2d 345 [2002]), the Court of Appeals held that the:

“plaintiff’s proffered evidence raises issues of material fact as to whether he sustained a ‘permanent consequential limitation of use of a body organ or member’ or a ‘significant limitation of use of a body function or system.’

“For these two statutory categories, we have held that ‘[w]hether a limitation of use or function is “significant” or “consequential” (i.e., important ...) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part.’ While [plaintiff’s doctor’s] affirmation does not ascribe a specific percentage to the loss of range of motion in plaintiff’s spine, he sufficiently describes the ‘qualitative nature’ of plaintiff’s limitations ‘based on the normal function, purpose and use of the body part.’ [Plaintiff’s doctor] further attributes the limitations in plaintiff’s physical activities to the nature of the injuries sustained by opining that plaintiff’s ‘difficulty in sitting, standing or walking for any extended period of time and his inability to lift heavy boxes at work are a natural and expected medical consequence of his injuries.’

“We cannot say that the alleged limitations of plaintiff’s back and neck are so ‘minor, mild or slight’ as to be considered insignificant within the meaning of Insurance Law § 5102 (d). As our case law further requires, [plaintiff’s doctor’s] opinion is supported by objective medical evidence, including MRI and CT scan tests and reports, paired with his observations of muscle spasms during his physical examination of plaintiff. Considered in the light most favorable to plaintiff, this evidence was sufficient to defeat defendants’ motion for summary judgment.”

98 NY2d at 352-353 (internal citations omitted).

Defendants submissions fail to eliminate triable issue of fact as to whether plaintiff sustained a serious injury to her cervical and lumbar spine. Dr. Toriello found that plaintiff’s causally related cervical and lumbar spine strains are resolved. Dr. Decker found an absence of any evidence of trauma and evidence of degeneration not causally related to the accident. These

contradictory findings concerning plaintiff's cervical and lumbar spine - causally related but resolved (Dr. Toriello) versus no causation and degeneration (Dr. Decker) - raise triable issue of fact for the jury to resolve regarding plaintiff's cervical and lumbar spine (*Martinez v Pioneer Trans. Corp.*, 48 Ad3d 306 [1st Dept 2008]).

Defendants also fail to meet their prima facie burden as to whether plaintiff sustained a serious injury to her right knee. Dr. Toriello found that plaintiff is moderately disabled as a result of chondromalacia. To the extent that this diagnosis is somewhat different from the pathology alleged in plaintiff's bill of particulars concerning her right knee, there remains a triable issue of fact for the jury to resolve (*Cf Id.*).

Defendants also fail to meet their prima facie burden as to plaintiff's 98/180-day claim. Defendants submit plaintiff's deposition testimony in an effort to show that plaintiff's resultant injuries did not physically confine her in her normal activities. While plaintiff indicates that she was not restrained from carrying out her work, plaintiff testified that her leisure activities, biking and hiking, had been largely curtailed due to her injuries. Indeed, Dr. Toriello concludes that plaintiff is "unable to perform activities that require stair climbing, squatting or sitting for long periods of time."

Defendants met their prima facie burden on whether plaintiff sustained a serious injury to her right ankle through Dr. Toriello's findings of normal ranges of motion for plaintiff's right ankle and his conclusion that plaintiff's right ankle sprain is resolved. (*Fernandez v Hernandez*, 151 AD3d 5821 [1st Dept June 20, 2017] [holding "[d]efendants made a prima facie showing that plaintiff did not suffer significant or permanent limitations to her lumbar spine or knees as a result of the accident" through orthopedic surgeon's report "who found normal ranges of motion, negative

objective test results, and resolved sprains, strains and contusions . . .”]). Plaintiff created an issue of fact through Dr. Goldenberg’s report who found decreased range of motion and opines that the accident caused these deficiencies (*Martinez*, 48 Ad3d at 306).


Accordingly, it is hereby

ORDERED that defendants Paramount Agami Transit Corp. and Mohammad A. Hossain’s motion for summary judgment is DENIED in its entirety; and it is further

ORDERED that the parties are directed to appear for settlement conference on November 9, 2017, at 9:30 AM at 80 Centre Street, Room 136.

Dated: New York, New York
October 19, 2017

ENTER:



Hon. Paul A. Goetz, J.S.C.