Ferrara v Campana
2019 NY Slip Op 34168(U)
June 3, 2019
Supreme Court, Ulster County
Docket Number: 17-2480
Judge: Lisa M. Fisher

STATE OF NEW YORK
SUPREME COURT ULSTER COUNTY

CAROL V. FERRARA,
Plaintiff,

- against -

VERENA M. CAMPANA,
Defendant.

DECISION & ORDER

Index No.: 17-2480
RJI No.: 55-17-1835

PRESENT: HON. LISA M. FISHER:

APPEARANCES:

Derek J. Spada, Esq.
Counsel for Plaintiff
Basch & Keegan, LLP
307 Clinton Avenue
P.O. Box 4235
Kingston, New York 12402

Patrick T. Finnegan, Esq.
Counsel for Defendant, movant
Law Offices of John Trop
94 New Karner Road, Suite 209
Albany, New York 12203

FILED
11:22 AM
JUN 13 2019
Nina Postupack
Ulster County Clerk

FISHER, J.:

This matter involves a motor vehicle accident occurring on July 18, 2017, wherein Defendant allegedly made a left-hand turn into the rear of Plaintiff's passing motor vehicle. Plaintiff commenced this personal injury action seeking damages for her personal injuries allegedly sustained in the subject accident. Plaintiff reported to her physician several days after the accident and complained of a variety of ailments, including aggravated wrist pain, back and hip pain, and other injuries. Subsequent x-rays revealed a fractured left wrist. Previously, Plaintiff had fractured her left wrist on May 23, 2017 but was able to take her splint off at the time of the subject accident.

Now, Defendant moves for summary judgment on the grounds that Plaintiff has not sustained a serious injury pursuant to the insurance law. The gravamen of Defendant's motion is that Plaintiff had a pre-existing wrist fracture from a prior fall that was still in the active healing process at the time of the subject accident. Notwithstanding the fact that the fracture became symptomatic again, the fracture was present on x-ray imaging before and after the subject accident.

Defendant arrives at this by presenting analysis of three x-rays for the fall, during a follow-up, and after the subject accident. Defendant argues that a radiological review by Jessica F. Berkowitz, M.D. compared this series of x-rays, specifically from the fall on May 23, 2017 and after the subject incident on July 27, 2017. Ultimately, Dr. Berkowitz opined there was a normal healing progression of the fracture depicted in the x-rays before the accident and after the accident, and not a new fracture.

Plaintiff refutes this with two expert reviews, one from Luis A. Mendoza, Jr., M.D. (who also became a treating physician) and Sathish R. Modugu, M.D., both whom opine that there is a new fracture from the subject accident. Plaintiff further argues that Defendant has not met his burden on the other allegations of serious injuries, or alternatively that Plaintiff has raised a question of fact as to the remaining injuries alleged in the complaint and bill of particulars. Defendant does not submit a reply.

Legal Analysis

It is well-settled by the Court of Appeals that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *accord Hollis v Charlew Const. Co., Inc.*, 302 AD2d 700 [3d Dept 2003]). To establish a *prima facie* entitlement to judgment as a matter of law, a moving party must present proof in admissible form to demonstrate the absence of any triable issues of fact as to each and every allegation in the complaint and bill of particulars. (*See Alvarez*, 68 NY2d at 320; *Hollis*, 302 AD2d at 700.) Such "burden may not be met by pointing to gaps in plaintiff's proof" (*DiBartolomeo v St. Peter's Hosp. of City of Albany*, 73 AD3d 1326 [3d Dept 2010]; *accord Dow v Schenectady County Dept. of Social Servs.*, 46 AD3d 1084, 1084 [3d Dept 2007].)

More specifically, "[o]n a motion for summary judgment dismissing a complaint that alleges a serious injury under Insurance Law § 5102[d], the defendant bears the initial 'burden of establishing by competent medical evidence that plaintiff did not sustain a serious injury caused by the accident'" (*Howard v Espinosa*, 70 AD3d 1091, 1091–92 [3d Dept 2010], quoting *Haddadnia v Saville*, 29 AD3d 1211, 1211 [3d Dept 2006]; *see Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [noting that the defendants have the "initial burden to establish a

prima facie case that plaintiff's alleged injuries do not meet the serious injury threshold under the No-Fault Law"]; *see also Nowak v Breen*, 55 AD3d 1186, 1187 [3d Dept 2008] ["In support of a motion for summary judgment, a defendant must submit competent medical evidence that the plaintiff did not sustain a serious injury."] [citations omitted]).

Under New York's no-fault system of automobile insurance, a person injured in a motor vehicle accident may only recover damages through a court action if he or she sustained a serious injury. (*See* Insurance Law § 5104 [a] ["in any action . . . for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss."].) A "[s]erious injury" is defined as the following:

> [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.

(Insurance Law § 5102 [d].)

Here, Plaintiff has asserted in her bill of particulars that she sustained, among other injuries, a fractured wrist, aggravation of lumbar spine degenerative changes, back and right hip injuries, aggravation of pre-existing asymptomatic degenerative changes in her back, and a medically determined impairment that has kept her from performing substantially all of her usual and customary daily activities in excess of 90 days out of the first 180 days immediately following this collision.

Defendant's Moving Papers

The only ground that Defendant does not meet his burden is the main argument regarding the fractured wrist. Even though Plaintiff concedes that Defendant met his burden for the fractured wrist, the Court disagrees. The letter-report dated October 12, 2018 from Dr. Berkowitz reviews a radiology report from "Mount Kisco Medical Group." This is not a medical group that Plaintiff

treated with. These records are not attached to Dr. Berkowitz' letter-report, Defendant's motion, or are even referenced by other providers in the medical record. (*See* CPLR R. 2214 [b]; CPLR R. 3212 [b].) It appears Dr. Berkowitz may have been referencing Caremount Medical. However, Dr. Berkowitz letter-report also cites to the x-rays being performed on July 12, 2017, which the medical record before the Court does not demonstrate any imaging studies on this date. The imaging study or report is also not attached to Dr. Berkowitz' letter-report, not annexed to Defendant's moving papers, and further also not in the medical record. (*Id.*) Plaintiff had an office visit on July 12, 2017, but this was not an x-ray service.

Even though the Court need not turn to Plaintiff's opposition, Plaintiff attaches an x-ray report from June 29, 2017 which may be the x-ray report that Dr. Berkowitz is referencing. However, the Court is unable to confirm this suspicion because the Court is not a medical expert and is unable to match the medical terminology and language in the x-ray report from June 29, 2017 with the medical terminology and description used in Dr. Berkowitz's letter-report dated October 12, 2018.

Inasmuch as summary judgment is a drastic remedy and the Court cannot confirm what Dr. Berkowitz actually considered as she has the wrong practice group, date, and did not attach her records which were also not annexed to the other moving papers, this Court will not grant summary judgment when the benefit of every reasonable inference is to be weighed in favor of the non-movant Plaintiff.

This warrants denial of Defendant's entire motion, as the "serious injury" threshold requirement of the Insurance Law serves a "gatekeeper function" and once "plaintiff established that at least some of [the plaintiff's] injuries meet the 'No Fault' threshold, it is unnecessary to address whether [the plaintiff's] proof with respect to other injuries [the plaintiff's] allegedly sustained would have been sufficient to withstand defendants' motion for summary judgment" (*See Linton v Nawaz*, 14 NY3d 821, 822 [2010]; *see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549–50 [1st Dept 2010] ["Accordingly, once an alleged claim meets at least one of the serious injury thresholds, the statute's gatekeeping function, to reduce caseloads by limiting what the courts adjudicate, is satisfied."]).

However, the Court will attempt to narrow some of the issues for trial. (*See* CPLR R. 3212 [e], [g].) Defendant's moving papers did meet his burden on that the other injuries (back and wrist) as to a permanent loss of use of a body organ, member, function or system, and permanent

consequential limitation of use of a body organ or member, and the 90/180 category. This is by and through the medical record which failed to provide any objective evidence as to the permanency and substantive nature of the injuries alleged by Plaintiff. Defendant also highlights that some of Plaintiff's alleged injuries were preexisting, especially the wrist injury, but also the alleged back injuries and restless leg syndrome. Defendant also meets his burden by and through the deposition testimony that reveals Plaintiff returned to work two or three days after the subject accident, she had some limitations from "pain" but she was able to engage in substantially all of her customary activities for significantly less than 90 days out of the first 180 days following the subject accident.

Plaintiff's Opposition

Only once the defendant has met his burden does it shift "to the plaintiff to submit objective medical evidence sufficient to raise a triable issue of fact regarding the existence of a serious injury" (*Nowak, supra*, 55 AD3d at 1187; *Toure, supra*, 98 NY2d at 350–51; *see also Zuckerman, supra*, 49 NY2d at 562 ["mere conclusions, expressions of hope or unsubstantiated allegations or asserts are insufficient."]). "[I]n deciding a motion for summary judgment, the trial court must view all evidence in the light most favorable to the party against whom such judgment is sought and, where there is any doubt as to the existence of a triable issue of fact, it should deny the motion since the goal is issue finding rather than issue determination" (*Swartout v Consolidated Rail Corp.*, 294 AD2d 785, 786 [3d Dept 2002] [citations omitted]; *see also Oritz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]; *Greco v Boyce*, 262 AD2d 734, 734 [3d Dept 1999] [holding courts are "to view the evidence in light most favorable to the nonmoving party, affording that party the benefit of all reasonable inferences, and to ascertain whether a material, triable issue of fact exists."]).

"It is well established that to satisfy the statutory serious injury threshold, plaintiff must have sustained an injury that is identifiable by objective proof; plaintiff's subjective complaints of pain do not qualify as a serious injury within the meaning of Insurance Law § 5102(d)" (*Tuna v Babenderende*, 32 AD3d 574, 575 [3d Dept 2006] [citations omitted]). Where the alleged serious injuries are claimed to be a preexisting, the "[p]laintiffs were thus required to provide objective medical proof and quantitative or qualitative evidence establishing plaintiff's claimed condition and distinguishing [his] preexisting conditions from the claimed injury" (*MacMillan v Cleveland*, 82 AD3d 1388, 1389 [3d Dept 2011]; *Pommells v Perez*, 4 NY3d 566, 580 [2005] ["In this case,

with persuasive evidence that plaintiff's alleged pain and injuries were related to a preexisting condition, plaintiff had the burden to come forward with evidence addressing defendant's claimed lack of causation."]; *see also Shelley v McCutcheon*, 121 AD3d 1243, 1244 [3d Dept 2014]; *Thomas v Ku*, 112 AD3d 1200 [3d Dept 2013]; *Cole v Roberts-Bonville*, 99 AD3d 1145, 1147 [3d Dept 2012] *Falkner v Hand*, 61 AD3d 1153, 1154 [3d Dept 2009]).

Here, Plaintiff has raised a question of fact and credibility warranting denial of summary judgment as to her injuries (back and wrist) under the grounds of permanent loss of use of a body organ, member, function or system, and permanent consequential limitation of use of a body organ or member. This is achieved by and through Plaintiff's treating physician Luis Mendoza, M.D., who opined that Plaintiff's injuries are causally related to the subject accident and permanent. As to Plaintiff's back injuries, upon his physical examination revealed a 42% restricted range of motion in the neck, 43% restricted range of motion in the back, and 20% loss of strength to the left upper extremity. Inasmuch as the relevant case law has found limitations above 20% to defeat a motion for summary judgment (*see Garner v Tong*, 27 AD3d 401 [1st Dept 2006] [finding 25% in lumbar range sufficient]; *Ferguson v Budget Rent-A-Car*, 21 AD3d 730 [1st Dept 2005] [finding range of motion loss percentages ranging between 25 and 50% sufficient]; *Mazo v Wolofsky*, 9 AD3d 452 [2d Dept 2004] [finding 20% restriction to range of motion sufficient]), it is clear that issues of fact and credibility warrant preclusion of summary judgment. Thus, even if Defendant had the proper imaging studies provided of Dr. Berkowitz for the fractured wrist, the fact that Plaintiff has raised a question of fact and credibility as to these injuries would also satisfy the gatekeeper function of the Insurance Law. (*See Linton, supra*, 14 NY3d at 822.)

However, Plaintiff does *not* raise a question of fact or credibility as to the 90 out of 180 day claim for a serious injury. To successfully create a triable issue of fact with respect to the 90/180-day category, plaintiffs' evidence must establish the existence of a nonpermanent medically determined injury or impairment that prevents [the plaintiff] from performing substantially all of [her] usual and customary daily activities for not less than 90 days during the 180 days immediately following the injury" (*Clements, supra*, 15 AD at 713; Insurance Law § 5102 [d]; *see Toure, supra*, 98 NY2d at 357). Here, Plaintiff argued only that Defendant did not meet his burden—which he did. Plaintiff does not rebut that she has been prevented from performing substantially all of her usual and customary daily activities. Her deposition testimony provided only a few days of "pain," which is insufficient to satisfy the statute and decisional law

under the 90/180 category. As such, in an effort to narrow issues for trial, the Court finds that Defendant is entitled to summary judgment as to this claim. (*See* CPLR R. 3212 [e], [g].)

To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit or rendered academic.

Thereby. it is hereby

ORDERED that the branch of Defendant's motion on serious as to Plaintiff's 90/180 day claim is **GRANTED**, and this claim and only this claim is **DISMISSED**; and it is further

ORDERED that the remainder of Defendant's motion on serious injury is **DENIED**, in its entirety, and all other relief requested therein is denied in its entirety.

This constitutes the Decision and Order of the Court. Please note that a copy of this Decision and Order along with the original motion papers are being filed by Chambers with the County Clerk. The original Decision and Order is being returned to the prevailing party, to comply with CPLR R. 2220. Counsel is not relieved from the applicable provisions of this Rule with regard to filing, entry and Notice of Entry.

IT IS SO ORDERED.

DATED: June 3, 2019
Catskill, New York

ENTER:

HON. LISA M. FISHER
SUPREME COURT JUSTICE

Papers Considered:

1) Notice of motion for summary judgment, dated March 6, 2019; affirmation in support, of Patrick T. Finnegan, Esq., with annexed exhibits, dated March 6, 2019; and
2) Affirmation in opposition, of Derek. J. Spada, Esq., with annexed exhibits, dated April 26, 2019.

FILED
11 12 M
JUN 13 2019
Nina Postupack
Ulster County Clerk