

Defreece v Patel

2019 NY Slip Op 34502(U)

September 17, 2019

Supreme Court, Orange County

Docket Number: Index No. EF006582-2018

Judge: Catherine M. Bartlett

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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

LORRAINE T. DEFREECE,

Plaintiff,

-against-

MAHENDRA C. PATEL and A&M CONSTRUCTION
VIP, INC.,

Defendants.

To commence the statutory time
period for appeals as of right
(CPLR 5513 [a]), you are
advised to serve a copy of this
order, with notice of entry,
upon all parties.

Index No. EF006582-2018
Motion Date: August 7, 2019

The following papers numbered 1 to 7 were read on Defendants' motion for summary
judgment based upon the absence of a "serious injury" per Insurance Law §5102(d):

Notice of Motion - Affirmation / Exhibits - Physician Affirmations (2) / Exhibits 1-4
Affirmation in Opposition / Exhibits - Physician Affirmation 5-6
Reply Affirmation 7

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is an action for personal injuries arising out of a motor vehicle accident that occurred
on August 23, 2017, in the City of Newburgh, New York. Plaintiff, then 66 years of age, parked
on Dubois Street and opened her driver's side door. As she was attempted to exit her vehicle,
the side view mirror of Defendants' van struck the door and Plaintiff fell back into her car. No
injuries were reported at the scene, but on the following day Plaintiff went to the St. Luke's
Cornwall emergency room with complaints of left knee pain.

So far as is relevant for purposes of Defendants' motion, Plaintiff's September 25, 2018 Bill of Particulars asserted that as a result of the August 23, 2017 accident she sustained an array of traumatic injuries to her left knee for which surgical intervention was required on May 30, 2018. However, when it was subsequently discovered (via a pre-accident left knee MRI) that these conditions pre-existed the August 2017 motor vehicle accident, Plaintiff was forced to serve a Supplemental Bill of Particulars claiming that these pre-existing injuries were only exacerbated by the subject accident. Defendants move for summary judgment, asserting that Plaintiff did not sustain a threshold "serious injury" causally related to the August 23, 2017 motor vehicle accident as required by Insurance Law §5102(d).

A. Defendants' Evidence

Plaintiff acknowledged at her examination before trial that she had sustained injury to her left knee prior to the August 23, 2017 motor vehicle accident. St. Luke's Cornwall ER records reveal that Plaintiff had chronic knee pain for which she was taking pain medication and performing physical therapy exercises up to the date of the accident. Emergency room x-rays of Plaintiff's left knee showed no evidence of acute fracture or malalignment and no obvious joint effusion; surrounding soft tissues were deemed "grossly unremarkable."

Approximately three months after the accident, on November 30, 2017, Plaintiff was evaluated by Barry S. Hyman, M.D. of Orthopedics & Sports Medicine, P.C. Concerning Plaintiff's left knee, his report states:

There is no edema, ecchymosis, erythema or visible swelling. Skin is intact. There is good strength to extension and flexion against resistance. Sensation is normal. There is tenderness at the medial joint. There is no tenderness at the lateral joint. Active ROM: 0-100 [degrees]. Passive ROM: 0-110 [degrees]. There is stability to varus and valgus stress. Maximal flexion: Positive with medial joint pain.

Defendants' expert radiologist, Audrey Eisenstadt, M.D., evaluated left knee MRI scans performed (1) on June 24, 2016, prior to Plaintiff's August 2017 motor vehicle accident, and (2) December 7, 2017, following the accident. Her affirmation states:

Review of serial left knee MRI examinations performed one year, three months prior to the incident correlated with an MRI scan performed two-and-a-half months following the incident reveals **no posttraumatic changes associated with the event of 09/23/17.**¹ Prior to the incident on the examination of 06/24/16, there is an extensive bone contusion seen in the medial femoral condyle. Widespread marrow edema is noted with an osteochondral defect identified along the articular surface of the distal medial femur. **These changes are acute in origin and predate the incident.** Also seen prior to the incident is a sprain and partial tear of the proximal medial collateral ligament. **These changes are seen over one year prior to the incident and are resolved on the post incident MRI.** There is a suggestion of a prior arthroscopic procedure with linear signal change seen in the inferior Hoffa fat pad on the MRI scan dated 06/24/16. **This indicates a previous surgical intervention and longstanding symptomology, which has no association to the subsequent [08]/23/17 incident.** Hypoplasia or loss of substance is seen in the posterior horn of the meniscus on both studies. **This is likely related to the bone contusion and medial collateral ligament injury, all of which predate the incident and are frequently associated.** On both studies, there is a parameniscal cyst seen in the posterior soft tissues. **This is an indication of the chronicity to the meniscal tear seen on the study prior to the incident.** A parameniscal cyst is a classic radiographic finding of lining and extension of the lining through a weakening in the joint capsule. It is likely the etiology for the significant joint effusion seen on the 06/24/16 examination. **On the subsequent MRI scan, the parameniscal cyst is reduced in size.** This indicates a possible intervening arthroscopic procedure or improving inflammation of the joint space lining. A stable tear and likely postsurgical changes are again seen on the post-incident MRI scan involving the body and posterior horn of the medial meniscus, unchanged in appearance between the examinations. **The joint effusion has decreased in size on the post incident MRI scan. The medial collateral ligament is now normal in appearance. The osteochondral defect identified on the pre-incident MRI scan is again seen with no progression identified. There is no evidence of any recent or post-traumatic bony, meniscal, ligamentous or tendinous changes causally related to the incident. The meniscal and ligamentous changes were all present prior to the incident with no acute or recent posttraumatic changes seen.**

¹Dr. Eisenstadt mistakenly gives the date of the subject accident as September (not August) 23, 2017. However, as both dates fall after the first MRI and before the second, her mistake as to the exact date of the accident is immaterial and does not affect the analysis.

Defendants' expert orthopaedist, Robert C. Hendler, M.D., conducted an orthopaedic IME on April 23, 2019. Dr. Hendler noted that Plaintiff had "a significant, well-documented prior history of left knee problems." Concerning the left knee arthroscopic surgery performed by Gabriel Dassa, M.D. on May 30, 2018, Dr. Hendler found:

From my review of Dr. Dassa's operative report, he essentially performed a debridement for degenerative changes in the knee joint. Based on my review of the submitted medical records, including a prior MRI, **the need for the surgical procedure is secondary to her age and obesity, and normal degenerative change. There were no posttraumatic findings documented at the time of the MRI testing or Dr. Dassa's surgery.**

Concerning his own examination of Plaintiff's knees, Dr. Hendler wrote:

Range of motion was full with normal values of 0-140 degrees bilaterally. Neither knee had any joint line tenderness. There was no effusion present in either knee. There was no ligamentous laxity to valgus or varus stress testing bilaterally. Anterior and poster drawer and Lachman's tests were negative bilaterally. There was no atrophy of either thigh or calf musculature. There was a negative McMurray's test bilaterally. There was no pain on palpation of either patella. There was no crepitus on range of motion. She walked with a normal gait.

Dr. Hendler concluded:

With regard to her left knee, it is uncertain as to what type of injury she sustained to her knee at the time of the accident of record. She did complain of knee pain when seen in the emergency room one day following the accident of record; however, **no significant findings were reported on physical examination, such as a significant ecchymosis or effusion.** From Dr. Hyman's submitted records, one can also see that x-rays were taken shortly after the accident of record that reportedly showed osteoarthritis. **On 11/30/17 Dr. Hyman did establish a diagnosis of osteoarthritis of the left knee, which would be a pre-existing condition.** Based on my review of the submitted medical file, **the need for the surgical procedure performed by Dr. Dassa is entirely due to a pre-existing condition, and is not causally related to the accident of 8/23/17.**

B. Plaintiff's Evidence

Plaintiff's surgeon, Gabriel L. Dassa, M.D., originally opined – without benefit of the June 24, 2016 pre-accident MRI – that Plaintiff's knee condition was causally related to the

August 23, 2017 motor vehicle accident. Faced with overwhelming evidence of Plaintiff's pre-existing knee injuries, Dr. Dassa modified his opinion and, without addressing the Defendants' experts opinions, asserted in wholly conclusory terms and without explanation that "the accident of August 23, 2017 is competent cause of an exacerbation of a prior left knee injury and orthopedic impairments." Unlike Dr. Hender, Dr. Dassa found "objective evidence of persistent orthopedic impairment to the patient's left knee," but he did not even attempt to differentiate between the well documented pre-existing injuries and impairments and the purported post-accident exacerbation thereof.

C. Summary Judgment Standard

While Plaintiff ultimately bears the burden of proving serious injury, Defendants, as proponents of a summary judgment motion, must establish that Plaintiff's injuries were not "serious" within the meaning of Insurance Law §5102(d), via "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). If the defendant establishes *prima facie* entitlement to summary judgment, the plaintiff must overcome the defendant's showing with "evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). *See, Pommells v. Perez*, 4 NY3d 566 (2005).

D. Serious Injury

The No-Fault Law precludes recovery by Plaintiff from Defendant for pain and suffering and other non-monetary detriment unless Plaintiff sustained a "serious injury" causally related to the motor vehicle accident at issue. Insurance Law §5104(a).

The chain of causation between the accident and the claimed injury may be broken by, e.g., “a pre-existing condition.” *Pommells v. Perez, supra*, 4 NY3d at 572. Therefore, where there is persuasive, non-conclusory evidence that the plaintiff’s alleged pain and injuries were related to a pre-existing condition or to a prior accident, the plaintiff must present competent, non-conclusory expert evidence that the claimed injury was proximately caused by the accident in issue, and not by a different accident or by a pre-existing condition. *See, Pommells v. Perez, supra*, 4 NY3d at 580; *Donoso v. MVAIC*, 118 AD3d 461 (1st Dept. 2014). In such circumstances, the plaintiff’s physician’s failure to address prior accidents and/or pre-existing degenerative conditions affecting the same area of the body renders his conclusions regarding causation as speculative and insufficient to raise a triable issue of fact. *See, Varveris v. Franco*, 71 AD3d 1128, 1129 (2d Dept. 2010); *Maffei v. Santiago*, 63 AD3d 1011, 1012 (2d Dept. 2009); *Jules v. Calderon*, 62 AD3d 958 (2d Dept. 2009); *Joseph v. A and H Livery*, 58 AD3d 688, 688-689 (2d Dept. 2009); *Sapienza v. Ruggiero*, 57 AD3d 643, 644 (2d Dept. 2008); *Tudisco v. James*, 28 AD3d 536, 537 (2d Dept. 2006); *Barnes v. Cisneros*, 15 AD3d 514, 515 (2d Dept. 2005); *Allen v. Hanley*, 2 AD3d 470, 471 (2d Dept. 2003); *Finkelshteyn v. Harris*, 280 AD2d 579, 579-580 (2d Dept. 2001).

The Defendants presented detailed, compelling evidence (outlined above) which established *prima facie* that Plaintiff had serious pre-existing left knee injuries and impairments which were symptomatic up to the date of the August 23, 2017 motor vehicle accident at issue in this case, and that she sustained no “serious injury” within the meaning of Insurance Law §5102(d) that was causally related to the subject accident. Accordingly, the burden shifted to Plaintiff to create with non-speculative evidence a triable issue of fact with respect to the

existence of a causally related threshold “serious injury”. Plaintiff utterly failed to meet her burden of proof. Her expert, Dr. Dassa, did not confront the opinions of the Defendants’ expert radiologist and orthopaedist; he did not meaningfully address Plaintiff’s well-documented prior accidents and pre-existing left knee injuries; and he made no effort to differentiate between pre-existing injuries and impairments and the purported post-accident exacerbation thereof. Under the circumstances, his wholly conclusory opinion on causation was speculative and insufficient to raise a triable issue of fact. *See, Pommells v. Perez, supra.*

E. Conclusion

Defendants established *prima facie* that Plaintiff did not sustain a “serious injury” causally related to the August 23, 2017 motor vehicle accident at issue in this case. In response, Plaintiff has failed to demonstrate the existence of any triable issue of fact precluding judgment as a matter of law for the Defendants. Therefore, Defendants’ motion for summary judgment is granted, and the Complaint is dismissed.

It is therefore

ORDERED, that Defendants’ motion for summary judgment is granted, and Plaintiff’s Complaint is dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: September 17, 2019 ENTER
Goshen, New York


HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE