Platel v Adler
2020 NY Slip Op 34937(U)
February 26, 2020
Supreme Court, Rockland County
Docket Number: Index No. 32487/2018
Judge: Thomas P. Zugibe
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To commence the statutory period for appeals as of right under CPLR § 5513(a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
ROCKLAND COUNTY

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MARIE JOSE PLATEL Index No. 32487/2018

Plaintiff,

-against- DECISION AND ORDER

COLE TYLER ADLER and JONATHAN R. ADLER,

Defendants.

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Zugibe, J.

Upon considering the papers filed in this case (Motion Sequence 001, Documents 10-30) the court denies defendants' "threshold" motion for summary judgment dismissing the complaint in this personal injury case. The Court finds that defendants' submissions do not set forth a prima facie case of entitlement to summary judgment. In the alternative, the Court finds that plaintiff has rebutted any prima facie case with objective evidence demonstrating sufficient limitations of movement and activities.

In 2018, plaintiff filed this lawsuit alleging personal injuries from an accident that occurred on July 13, 2015. Unfortunately for plaintiff she suffered further injuries from an accident on December 15, 2015. Plaintiff continued treating for both until July 2016, when her treating professional determined that she had reached maximum medical benefit.

To begin, the Court finds that defendants' expert Affirmation does not support defendants' claim that they have established a prima facie case. Defendants' expert examined plaintiff on June 13, 2019, many years after the accident and only a few months before they

moved for summary judgment. The expert reviewed several medical documents, most importantly MRI's performed on plaintiff within about a year after the instant accident. The MRI's showed cervical and lumbar bulges and herniations, and a shoulder rotator cuff tear.

Defendants' expert states in his affirmation he found plaintiff to have limited range of motion in the cervical and lumbar spines when he examined her. In the Second Department, "a decrease in certain aspects of [a plaintiff's] cervical and lumbar range of motion of *20% or more*" is sufficient to sustain that party's burden in a threshold motion. *Mazo v. Wolofsky*, 9 A.D.3d 452, 453 (2d Dep't 2004) (emphasis supplied), *cited in Grigore v. Kourounis*, 112 A.D.3d 579, 580 (2d Dept 2013). Defendants' expert's examination found at least some range of motion limitations in all five aspects of the cervical spine, but only one met the twenty percent threshold. However, the lumbar spine demonstrated a twenty percent limitation in three of four aspects. While just at this threshold, it is "20% or more" as the Second Department requires. Thus, absent more, the expert's finding supports denial for failure to establish a prima facie case.

The inquiry does not end there, however. Defendants claim that, despite the prima facie evidence of impairment, their expert found that plaintiff's "[r]ange of motion on examination was self-limited," i.e., that, in the vernacular, she was "faking it." While this may be a valid ground to discount range-of-motion limitations, it is patently insufficient where the expert "failed to explain or substantiate, with objective medical evidence, the basis for [the expert's] conclusion that the limitation was voluntary." *Hi Ock Park-Lee v. Voleriaperia*, 67 A.D.3d 734, 734-735 (2d Dep't 2009); *Cuevas v. Compote Cab Corp.*, 61 A.D.3d 812, 812 (2d Dep't 2009). Here, the expert's bald-faced eight-word conclusion remains woefully inadequate to demonstrate plaintiff's alleged lack of veracity.

Defendants' further claimed that plaintiff's case suffered from a gap in treatment. Under the law, testimony from a plaintiff that treatment stopped due to an end to insurance coverage suffices, without more, to explain a gap in coverage. *Ramkumar v. Grand Style Transp. Enters. Inc.*, 22 N.Y.3d 905, 906 (2013). Here, in response to a direct question during her deposition (attached to defendants' motion papers), plaintiff stated that her insurance had ceased. As a result, the Court finds that defendant failed to establish its prima facie entitlement to summary judgment.

In the alternative, plaintiff's submission demonstrates that plaintiff's limitations, both soon after the accident and recently, were sufficient to defeat this threshold motion. Plaintiff's treating professional, relying on the *affirmed* MRIs that defendants' expert relied upon, notes the same injuries to plaintiff's cervical and lumbar spinal areas. He noted his opinion that plaintiff has a permanent partial disability from those injuries. He opined that these injuries would render it more likely to suffer trauma and injury from any subsequent event. He ties all this to the accident and supports this conclusion with the MRI findings.

Soon after the accident, plaintiff's treating professional found, using objective testing with an inclinometer, motion limitations that well exceeded the twenty percent threshold in the Second Department, with some exceeding fifty percent. The testing revealed numerous compressions and other named conditions. Recent testing, admittedly in response to the instant motion, revealed similar limitations, many well over the twenty percent threshold this department demands to defeat a threshold motion.

It is true that the treating professional does not appear to note that treatment was ceased only after reaching "maximum medical benefit." Khavosov v Castillo, 81 A.D.3d 903, 904 (2d Dep't 2011), although he does opine the limitations are permanent. Helpfully, defendant's

expert has supplied the necessary averment in his affirmation: "The claimant has reached maximum medical improvement." In any event, plaintiff explained the gap in treatment, as noted above.

Defendant argues that plaintiff's expert's examination was conducted "solely for the purposes of litigation." That may be true. Of course, the IME that defendants' experts conducted was hardly done out of the goodness of their hearts: "the term independent medical examination, particularly the 'independent' prong of the term, has long been winked at by the bench and bar." *Rowe v. Wahnow*, 26 Misc. 3d 8, 11 (App. Term 1st Dep't 2009) (McKeon, J. dissenting). That dissent noted a Second Department panel's view that "[i]t is beyond cavil that a statutory medical examination is an adversarial process." *Bazakos v. Lewis*, 56 A.D.3d 15, 18 (2d Dept 2008), *rev'd on other grounds* 12 N.Y.3d 631 (2009) (statute of limitations issue). Rather, it was done for litigation purposes. Certainly, defendants are not suggesting that a plaintiff ought to be required to pay for examinations before a defendant even forces the issue by way of a dispositive motion.

Defendants' claims regarding unsworn records are completely meritless.

> A defendant may submit unsworn medical reports and records of the injured plaintiff's physicians in support of a motion for summary judgment in order to demonstrate the lack of a serious injury. In so doing, however, the defendant opens the door for the plaintiff to rely upon these same unsworn or unaffirmed reports and records in opposition to the motion.

Kearse v. N.Y. City Tr. Auth., 16 A.D.3d 45, 47, n. 1 (2d Dep't 2005) (citations omitted). There appears to be no difference when the defense references those reports even without attaching them to the papers. *See Siemucha v. Garrison*, 111 A.D.3d 1398, 1399 (4th Dep't 2013); *Ayzen v. Melendez*, 299 A.D.2d 381 (2d Dept 2002). Here, defendants' examining doctor noted he received numerous records in relation to this matter. He summarized and/or discussed many of

them in his affirmation. As a result, plaintiff was well within her rights to have her treating professional utilize those very same records.

Defendants' claim regarding tailored language are either meritless or properly a subject for cross examination at trial. Any alleged deficiencies in plaintiff's treating professional's affidavit as to the MRIs are cured via the sworn testimony form the radiologist who reviewed those records and submitted his own affirmation.

Ultimately, the sworn MRIs and other testimony submitted supports the conclusion that a trial is required. On this summary judgment motion, the Court acts merely as the arbiter of whether the submissions warrant summary disposition. The Court finds that plaintiff has sustained the burden to allow this matter to proceed to trial. The court therefore denies summary judgment.

The foregoing constitutes the Decision and Order of the Court.

Dated: February 26, 2020
New City, New York

ENTER

THOMAS P. ZUGIBE
J.S.C.

To: All Attorneys via EFILE