Thompson v Bronx Merchant Funding Servs., LLC
2016 NY Slip Op 32751(U)
November 23, 2016
Supreme Court, Bronx County
Docket Number: 23050/2012E
Judge: Donald A. Miles
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 8

Index No. **23050/2012E**

JUANITA TERRY THOMPSON,

Plaintiff(s),

-against-

BRONX MERCHANT FUNDING SERVICES, LLC, SHAJAHAN ALI, JASON SAMUELS and EDWARD J. SAMUELS

Defendant(s).

DECISION/ ORDER
Present:
Hon. Donald A. Miles
Justice Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of the defendants' motion for summary judgment on threshold.

Papers	Numbered
Notice of Motion by defts, Bronx Merchant & Ali, Aff in Support, and Exhibits Thereto	1
Notice of Motion by Samuels defts, Affirmation in Support, and Exhibits thereto & Memo of Law	2
Plaintiff's Affirmation in Opposition to Motions	3
Defendants' Reply Affirmation	4
Defendants' Reply Affirmation	5

The motion by defendants BRONX MERCHANT FUNDING SERVICES, LLC and SHAJAHAN ALI ("Bronx Merchant") and the motion by co-defendants JASON SAMUELS and EDWARD J. SAMUELS ("Samuels"), pursuant to CPLR § 3212, seeking summary judgment on the basis that plaintiff did not sustain a serious injury in accordance with Insurance Law § 5102(d) are consolidated and decided as follows:

In her verified and supplemental bill of particulars, plaintiff claims injuries to her cervical spine, lumbar spine, right shoulder and right knee (for which she underwent surgery) as a result of the subject May 21, 2012 motor vehicle accident.

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that plaintiff has not suffered a "serious injury"

(*see Rodriguez v Goldstein*, 182 AD2d 396 [1st Dept. 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 . Catanzaro*, 1AD3d 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 the 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*, 58 AD3d 434 [1st Dept. 2009]. However, a defendant can establish *prima facie* entitlement to summary judgment on this category without medical evidence by citing other evidence, such as a plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily life 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*, 1AD3d 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]).

Bronx Merchant has made a *prima facie* showing that plaintiff did not sustain a

serious injury, by offering, *inter alia*, the affirmed report of Dr. Hillman, an orthopedic surgeon, Dr. Agrawal, a neurologist, and Dr. Springer, a radiologist. Dr. Springer reviewed MRIs of the right shoulder, right knee, cervical spine and lumbar spine, all taken between five and twelve weeks after the accident. He affirms that each show degeneration and none show any evidence of recent trauma. Specifically regarding the right knee, for which plaintiff had a prior arthroscopic surgery,[1] Dr. Springer states that there was no fracture, dislocation or joint effusion; that the anterior cruciate and posterior cruciate ligaments were intact; that the medial meniscus and lateral meniscus were intact and that there was no evidence of recent trauma causally related to the subject accident.

Defendants' orthopedist and neurologist found full range of motion in all of the areas in which plaintiff complained of injury and concluded that the alleged injuries to the cervical spine, lumbar spine, right shoulder and right knee were resolved. Both Dr. Hillman's and Dr. Agrawal's reports indicate that plaintiff had a normal orthopedic and neurologic exam, respectively, with no evidence of any residual or permanent disability and that plaintiff was not disabled from working or from performing her activities of daily living.

Additionally, the defendants met their initial burden with respect to plaintiff's 90/180 claim by pointing to plaintiff's deposition testimony that she was not confined to her bed and home for more than one week and had returned to work within the first 90 days following the accident.

Defendants further highlight the plaintiff's testimony that plaintiff had a prior knee replacement surgery performed on her left knee in 2000 and also a right knee arthroscopy in 2001. Furthermore, plaintiff testified that when she had the subsequent right knee replacement surgery on 10/2/14 and was out of work for three months as a result of the surgery, plaintiff had already been back at work for approximately two years and four

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[1]Plaintiff's right knee replacement surgery was performed on 10/2/14 and subsequent to Dr. Springer's examination of plaintiff.

months following the accident.

In support of their motion, the Samuels defendants have also made a *prima facie* showing that plaintiff did not sustain a serious injury by submitting the affirmed reports of Dr. Hershon, an orthopedic surgeon, Dr. Feuer, a neurologist, and Dr. Coyne, a radiologist. Dr. Coyne reviewed the aforesaid MRIs of the plaintiff's right shoulder, right knee, cervical spine and lumbar spine and noted degenerative changes which he opined were chronic, longstanding, pre-existent and not causally related to the subject accident of May 21, 2012. As to the plaintiff's right knee replacement, Dr. Coyne states that the surgical arthroplasty addressed very longstanding and severe tri-compartmental degenerative osteoarthritis, which was not causally related to the subject accident.

Similarly, the defendants' orthopedist and neurologist found full range of motion in all of the areas in which plaintiff complained of injury and concluded that the alleged injuries to the cervical spine, lumbar spine, right shoulder and right knee were resolved. Both Dr. Hershon's and Dr. Feuer's reports indicate that plaintiff had a normal orthopedic and neurologic exam, respectively, (with the exception of diabetic peripheral neuropathy) with no evidence of any residual or permanent disability and that plaintiff was not disabled from working or from performing her activities of daily living.

In opposition, plaintiff submits the affirmation of Dr. Cohen, an orthopedic surgeon, with whom plaintiff began treating on July 9, 2012 for the injuries to her right shoulder and right knee, having been referred by her physiatrist, Dr. Cruz-Banting, and upon whose affirmation plaintiff also relies. Dr. Cohen noted restricted range of motion in plaintiff's right shoulder and right knee, diagnosed plaintiff with traumatic synovitis and concluded that a total right knee replacement was necessary and directly related to the injuries sustained in the subject motor vehicle accident. Dr. Cohen's affirmation incorporates the operative report of Dr. Kramer, his partner with whom he practices, concerning plaintiff's 10/2/14 right knee surgery, as well as follow up office notes after the surgery. As regards plaintiff's right shoulder, Dr. Cohen opines that plaintiff is likely

to require surgery in the future. Dr. Cohen concludes that although some of plaintiff's conditions were affected by pre-existing conditions, the severity of her symptoms was a direct result of the subject accident and her disabilities are permanent in nature. Dr. Cohen states that plaintiff has sustained a partial but significant permanent impairment of the right shoulder and loss of the right knee, causally related to her accident and that her condition is likely to worsen as she ages.

Dr. Cruz-Banting notes in her affirmation, and in which she incorporates the office notes, that on her initial visit on June 4, 2012, plaintiff complained of radiating neck pain, shoulder pain and low back pain. After noting plaintiff's prior left knee replacement in 2000, Dr. Cruz-Banting states that no other body part injured in the subject accident was involved in prior trauma or medical care. Her report goes on to detail restricted range of motion in plaintiff's cervical spine, lumbar spine, right shoulder and right knee, which she causally related to the accident with a recommended treatment plan including physical therapy, acupuncture and an orthopedic consultation and MRIs. As recent as January 3, 2017, plaintiff still complained of pain in the right arm, back , neck, right shoulder and both knees. Dr. Cruz-Banting measured restricted range of motion, tenderness and spasm in all the affected areas and opined that plaintiff's neck and back injuries are permanent and causally related to the accident.

Neither Dr. Cohen nor Dr. Cruz-Banting disputes the defendants' contention that plaintiff had long-standing chronic degenerative changes to her right and left knees prior to the subject accident. It is clear that plaintiff had a long history of knee related ailments and severe osteoarthritis for many years prior to the accident. In fact, both the pre-operative and post-operative diagnosis was "osteoarthritis right knee." Noticeably absent are the medical records regarding plaintiff's prior surgery to her right knee in 2001. None of plaintiff's doctors have addressed her prior history of degenerative and chronic conditions. Plaintiff does not even offer an affirmation from a radiologist who reviewed plaintiff's MRI films.

A physician may not rely upon unsworn medical findings of other doctors. *Concepcion v Walsh*, 38 AD3d 317 (1st Dept. 2007). Once a defendant has presented evidence of degenerative disc disease, it is incumbent upon plaintiff in a serious injury case to present proof to meet the defendant's assertion of lack of causation. *Santiago v Nimbus Serv. Corp.* 18 Misc.3d 126(a), 2008 N.Y. Slip Op. 50253(U) [1st Dept. 2008].

Defendants' radiologists who did reviews of the plaintiff's MRI films stated that the changes to plaintiff's cervical spine, lumbar spine, right shoulder and right knee were degenerative. Plaintiff also testified that she had prior surgeries to her left and right knees. Plaintiff's medical evidence failed to raise a triable issue of fact as plaintiff's physicians failed to address the non-conclusory opinions of defendants' experts that the disc bulges and disc herniations as well as the condition of plaintiff's right shoulder and right knee were degenerative in nature. The failure of the plaintiff's doctors to address the findings of degenerative changes set forth by the defendants' expert is fatal to the opposition.

In *Pommells v Perez*, 4 N.Y.3d 566, the Court of Appeals held that even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury, such as a gap in treatment, an intervening medical problem or a pre-existing condition, summary dismissal of the complaint may be appropriate unless such is adequately explained by the plaintiff.

In *Franchini v Palmieri*, 1 N.Y.3d 536, the Court of Appeals held that summary judgment was properly granted to the defendants, stating that "plaintiff's submissions were insufficient to defeat summary judgment because her experts failed to adequately address plaintiff's pre-existing back condition and other medical problems, and did not provide any foundation or objective medical basis supporting the conclusions they reached."

While plaintiff's doctors' reports regarding bulges and herniations, coupled with restrictions in range of motion, raise a triable question of fact as to whether plaintiff's injuries are serious (*Byong Vol Yi v Canela*, 70 AD3d 584 [1st Dept. 2010]) they do not

raise a triable question of fact as to causation given that plaintiff's physicians failed to address the opinion of defendants' experts that the conditions revealed in the plaintiff's MRIs were degenerative in nature. *Torres v Triboro Servs. Inc.*, 2011 NY Slip Op. 3189 (1st Dept. 2011).

As to the 90/180 day claim, the fact that plaintiff missed three months from work following her right knee replacement surgery, is not enough to raise a triable issue of fact. The fact is, there is no report contemporaneous with the accident, in admissible form that indicates that plaintiff was disabled from her employment for longer than one weeks post-accident or within the first 90 days following the accident.

Considered in the light most favorable to the plaintiff, the evidence adduced is sufficient to demonstrate, *prima facie*, the absence of a statutory serious injury and the plaintiff has not submitted evidence in admissible form sufficient to raise a material issue of fact as to whether the plaintiff sustained a serious injury as defined in the Insurance Law as a result of the subject accident. Therefore, summary judgment is hereby granted to the defendants as against the plaintiff and her action is hereby dismissed.[2]

This constitutes the decision and Order of the Court.

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DATE

HON. DONALD MILES, J.S.C.

[2] Plaintiff's motion, pursuant to CPLR § 3212, seeking summary judgment on the issue of liability (¶ 3 Aff in Opp of Jeffrey J. Belovin, Esq.) although not on submission before this court, is now academic and should be denied as moot.