Galeto v Rodriguez
2015 NY Slip Op 30721(U)
May 4, 2015
Supreme Court, New York County
Docket Number: 157882/12
Judge: Arlene P. Bluth
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A non-WCB workers comp related issue	Defines "Serious" injury in terms of all the medical evidence given.

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

Index No.: 157882/12
Motion Seq 01

Todd Galeto,

Plaintiff,

-against-

Antonio Rodriguez,

Defendant.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendant's motion for summary judgment dismissing this action on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) is granted, and the action is hereby dismissed.

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Rodriguez v Goldstein*, 182 AD2d 396 [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 v Catanzaro*, 1 AD3d 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 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*, 2009 NY Slip Op 43 [1st Dept]). However, a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by

citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily 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*, 1 AD3d 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]).

In his verified bill and supplemental bill of particulars, plaintiff claims he sustained, inter alia, injuries to his right knee, left shoulder and lumbar spine, and an exacerbation of a pre-existing left ankle injury as a result of the subject August 9, 2012 motor vehicle accident.

In support of his motion, defendant submits the affirmed report of Dr. Crystal, an orthopedist who examined plaintiff's knee, shoulders, ankles and cervical, thoracic and lumbar spine. Dr. Crystal found that plaintiff had normal range of motion in his lumbar spine and normal motor strength in both ankles. He noted restrictions in plaintiff's range of motion in his right knee and left shoulder which he attributed to degeneration, likely caused by pre-existing sarcoidosis, which plaintiff had for approximately 16 years.

Defendant also submits the affirmed reports of Dr. Tantleff, a radiologist, who reviewed

MRI films of plaintiff's right knee (taken 6 days after accident) and left shoulder (taken approximately 6 weeks after the accident). Dr. Tantleff found evidence of osteoarthritic, degenerative changes in both areas with no evidence of trauma.

Additionally, defendant met his initial burden with respect to plaintiff's 90/180-day claim by submitting plaintiff's deposition testimony and bill of particulars wherein he stated that he was confined to home for 3 weeks and missed 5 weeks of work after the accident.

Based on the foregoing, defendant has satisfied his burden of establishing prima facie that plaintiff did not suffer a serious injury, and the burden shifts to plaintiff to raise a triable factual question.

In opposition, plaintiff submits the affirmed report of his treating doctor, Dr. Farakh, who saw plaintiff 11 days after the accident and on approximately 10 dates thereafter, prescribed physical therapy, performed a right knee arthroscopy on 1/7/13 and examined plaintiff most recently on 6/27/14. While Dr. Farakh opines that the accident made a previously asymptomatic osteoarthritic condition related to his pre-existing sarcoidosis symptomatic, plaintiff did not assert this theory in his bill or supplemental bill of particulars; he did not allege that any of his claimed injuries were due to an exacerbation of any pre-existing medical condition. In his bill and supplemental bill of particulars, plaintiff only alleged that the accident exacerbated a pre-existing left ankle *injury*; he said nothing about sarcoidosis. Additionally, because Dr. Farakh did not explain what plaintiff's condition was before the accident, how it was exacerbated by the subject accident, and how he made this determination, his affirmation is conclusory. Moreover, Dr. Farakh relied on unaffirmed MRI reports (aff., p. 2) and other unidentified medical records and diagnostic studies (aff., p. 10); thus his opinion is insufficient to raise an issue of fact. *See Malupa v Oppong*, 106 AD3d 538, 966 NYS2d 9 (1st Dept 2013).

Additionally, plaintiff submits the affirmed report of Dr. Kupersmith who examined plaintiff on behalf of the Workers' Compensation Board on 6/24/14 and measured (1) normal ranges of motion in 6 out of 8 planes in plaintiff's left shoulder and only a 5½% limitation in the other two planes, and (2) a limitation of range of motion in plaintiff's right knee of only 7½%. Dr. Kupersmith opined that plaintiff required no further diagnostic testing or physical therapy as of the date of his exam, and noted that plaintiff had a pre-existing history of osteoarthritis. Thus, Dr. Kupersmith's affirmed report does not raise an issue of fact.

Plaintiff also submits the affirmed reports of Dr. Setton, a radiologist, who reviewed the MRI of plaintiff's right knee taken a few days after the accident; he notes a tear but does not opine further. Dr. Setton also reviewed the MRI of plaintiff's left shoulder taken 6 weeks after the accident; he noted a small tear and degenerative changes. Significantly, Dr. Setton's affirmed reports do not raise an issue of fact sufficient to defeat summary judgment because he did not address the degenerative findings that defendant's Dr. Tantleff found in plaintiff's right knee, and in fact agreed with Dr. Tantleff's finding of degenerative changes in plaintiff's left shoulder. Because plaintiff did not submit any other medical evidence to address Dr. Tantleff's findings of degeneration in plaintiff's right knee and left shoulder, he has not raised an issue of fact. *See Arroyo v Morris*, 85 AD3d 679, 680, 926 NYS2d 488, 489 (1st Dept 2011).

Finally, plaintiff did not raise an issue of fact on the 90/180 category. Plaintiff had been back at work for approximately 4 months (120 days) when he had knee surgery on 1/7/13, thereby precluding him from reaching threshold based on the 90/180 category. Thus, plaintiff failed to submit any evidence that raises a triable issue of fact sufficient to defeat summary judgment.

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing this action on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) is granted, and the action is hereby dismissed.

This is the Decision and Order of the Court.

Dated: May 4, 2015
New York, New York

HON. ARLENE P. BLUTH, JSC