Arroyo v Metropolitan Transp. Auth.
2016 NY Slip Op 30182(U)
February 2, 2016
Supreme Court, New York County
Docket Number: 156047/2012
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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OSCAR ANGULO ARROYO,

Plaintiff,

- against -

Index No. 156047/2012

METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, VERIZON OF NEW YORK, INC. and GORDON B. BARBEE,

Decision and Order

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

In this personal injury action, defendants Verizon of New York, Inc. ("Verizon") and Gordon B. Barbee ("Barbee;" together with Verizon, "Verizon") move, pursuant to CPLR 3212, for summary judgment. In the alternative, they move, pursuant to CPLR 602 and 1003, for an order severing the action into two separate actions.

In his first cause of action, plaintiff Oscar Angulo Arroyo ("Arroyo" or "plaintiff") seeks damages from defendants Metropolitan Transportation Authority ("MTA") and New York City Transit Authority (together with MTA, "MTA"), alleging that he suffered injuries as a result of a fall on subway

station stairs on October 19, 2011. Complaint, ¶ 18. In his second cause of action, Arroyo seeks damages from Verizon, alleging that he suffered injuries as a result of being struck by a vehicle owned by Verizon and operated by Barbee on February 7, 2012. Complaint, ¶ 39. In his third cause of action, Arroyo alleges that the injuries he suffered in the 2011 accident were "aggravated and exacerbated" by the 2012 accident, and "[t]hat these aggravations and exacerbations constitute serious injuries as described by § 5102 and § 5104 of the Insurance Law." Complaint, ¶¶ 47-48. In his Verified Bill of Particulars, plaintiff alleges that, as a result of the 2011 and 2012 accidents, he suffered cervical and lumbar spinal injuries, or exacerbations of preexisting injuries. His alleged cervical injuries include disc bulging and protrusion, thecal sac deformity, stenosis, narrowing space heights and osteophyte formations. His alleged lumbar injuries include disc bulging, disc degeneration, stenosis, arthropathy and herniation. McEvoy affirmation, exhibit B.

Legal standard

> "Every car owner must carry automobile insurance, which will compensate injured parties for 'basic economic loss' occasioned by the use or operation of that vehicle in New York State, irrespective of fault (Insurance Law § 5102[a]; § 5103). Only in the event of 'serious injury' as defined in the statute,

> can a person initiate suit against the car owner or driver for damages caused by the accident (Insurance Law § 5104[a])."

Pommells v Perez, 4 NY3d 566, 571 (2005).

Insurance Law § 5102(d) provides that:

> "'[s]erious injury' means 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."

On a motion for summary judgment in a case involving serious injury pursuant to Insurance Law §§ 5102 and 5104, it is the "defendants' burden to present evidence, in competent form, sufficient to establish that plaintiff did not sustain a serious injury." Cosovic v Term Leasing, 234 AD2d 79, 80 (1st Dept 1996). Similarly, when a plaintiff alleges the exacerbation of previously existing injuries, the defendant must demonstrate, prima facie, that such exacerbation did not occur. Pero v Transervice Logistic, Inc., 83 AD3d 681, 682-83 (2d Dept 2011). In Style v Joseph, where the plaintiff allegedly had suffered injuries from two separate accidents, the

defendant's expert affirmed that the plaintiff had normal ranges of motion in her back and shoulders, and "also affirmed that plaintiff suffered no disabilities as a result of the subject accident. Therefore, defendant satisfied his initial burden on the motion, notwithstanding the existence of MRI reports indicating that plaintiff had herniated or bulging discs." 32 AD3d 212, 214 (1st Dept 2006). "[A] finding of bulging and herniated discs, by itself, does not establish a prima facie case of serious injury." Toulson v Young Han Pae, 13 AD3d 317, 319 (1st Dept 2004).

With respect to preexisting injuries, in Kendig v Kendig, a defendant demonstrated prima facie entitlement to summary judgment where its "expert found no deficits in range of motion of the claimed body parts, and opined that the conditions shown in the MRI reports of the lumbar and cervical spine were preexisting degenerative conditions unrelated to trauma." 115 AD3d 438, 439 (1st Dept 2014); see also Nova v Fontanez, 112 AD3d 435, 435 (1st Dept 2013) (same); Mitrotti v Elia, 91 AD3d 449, 449-50 (1st Dept 2012) (same). Defendants in other cases also demonstrated prima facie entitlement to summary judgment where the expert stated that the plaintiff's cervical and lumbar condition were the result of preexisting degenerative disc disease, and the plaintiff missed

only six to eight days of work following the accident (Kabir v Vanderhost, 105 AD3d 811, 811 [2d Dept 2013]), and where the defendant's expert stated that the plaintiff's thoracolumbar condition was the result of preexisting disc disease, and "slight limitations in the range of motion were . . . insignificant" (Pryce v Nelson, 124 AD3d 859, 860 [2d Dept 2015]).

Once the defendant has met its burden, to defeat the motion the plaintiff must "submit competent medical evidence sufficient to raise an issue of fact." Giuffre v Bulgues, 134 AD3d 477 (1st Dept 2015). He must "come forward with objective medical evidence that the subject . . . accident aggravated his preexisting . . . condition so severely as to produce a statutory serious injury above and beyond the preexisting condition." Suarez v Abe, 4 AD3d 288, 289 (1st Dept 2004). "Plaintiff's expert must adequately address how plaintiff's current medical problems, in light of her past medical history, are causally related to the subject accident." Style, 32 AD3d at 214.

Verizon's motion for summary judgment

Plaintiff alleges that in the Verizon incident he suffered exacerbations to preexisting injuries incurred in the MTA incident. Verizon contends that Arroyo has failed to show any additional injury or exacerbation of

preexisting injuries following either the October 19, 2011 incident or the February 7, 2012 incident. In support of its motion, Verizon submits the affidavit of its expert physician, Dr. Jerry A. Lubliner, M.D., a selection of the plaintiff's medical records, and deposition testimony.

Based on his review of plaintiff's medical history, Dr. Lubliner states that plaintiff went to the emergency room at New York Presbyterian Hospital on October 19, 2011, following the MTA incident on that date, complaining of neck and shoulder pain. Lubliner aff, ¶ 8. He was given a CT scan and MRI at that time, which Dr. Lubliner states revealed no acute pathology and which showed degenerative disc disease. Id. Dr. Lubliner makes the same finding with respect to an October 29, 2011 cervical MRI, which plaintiff received after going to the emergency room at South Nassau Communities Hospital with the same neck and shoulder complaints, and also complaining of numbness in his right arm and leg. Id., ¶ 9. He received an MRI of the lumbar spine on November 4, 2011, which Dr. Lubliner states revealed only degenerative disc disease and pre-existing arthritis. Id. On November 1, December 13 and December 27, 2011, plaintiff received epidural steroid injections to his cervical spine. Id., ¶ 10.

The physician's diagnosis for the latter two procedures was degenerative disc disease of the cervical spine. Id.

In its reply affirmation, Verizon emphasizes that plaintiff's treating physician, Dr. Rick Madhok, recommended cervical fusion surgery six days prior to the February 7, 2012 incident. 9/15/15 McEvoy affirmation, ¶ 15.

On February 7, 2012, following the Verizon incident, plaintiff went to Winthrop University Hospital complaining of lumbar pain and leg numbness, and underwent an MRI of the lumbar spine, which, according to Dr. Lubliner, revealed mild degenerative changes and no evidence of acute injury. Id., ¶ 11. On February 13, 2012, plaintiff underwent an MRI of the cervical spine, with similar findings. Id., ¶ 12. On March 12, 2012, plaintiff underwent a cervical discectomy and fusion on two levels of his cervical spine. Id., ¶ 13. The treating physician's diagnosis was degenerative disc disease. Id. On May 31, 2012, plaintiff underwent a discectomy and fusion on one level of his lumbar spine, again with a diagnosis of degenerative disc disease. Id., ¶ 17.

Dr. Lubliner examined plaintiff on August 5, 2014. In his affidavit he states:

"Mr. Arroyo presented . . . with complaints of pain to his cervical and lumbar spine, decreased sensation from the shoulder to the fingertips of

both arms (more so on the left), and numbness to both legs (more so on the right).

My examination of the plaintiff's cervical spine revealed flexion to 30 degrees (normal is 40 degrees), extension to 30 degrees (normal is 40 degrees), lateral flexion to 30 degrees (normal is 60 degrees) and lateral rotation to 30 degrees (normal is 80 degrees). . . . My examination of the plaintiff's lumbar spine revealed flexion to 50 degrees (normal is 90 degrees), extension to 10 degrees (normal is 40 degrees), lateral flexion to 10 degrees (normal is 60 degrees) and lateral rotation to 10 degrees (normal is 80 degrees)."

Lubliner aff, ¶¶ 3-4. With respect to plaintiff's medical history prior to the October 2011 MTA accident, in his report dated August 5, 2014, Dr. Lubliner states that plaintiff's medical records revealed:

> "that prior to the incident of 10/19/2011 'he had a prior history of seizures; he said that they came on after he was mugged and had head trauma. He had been on dilantin for this in the past; he was also on oxycodone for the pain since his head injury in the past.'"

Id., exhibit 1 at 5. Dr. Lubliner concluded with his opinions that any medical conditions or symptoms regarding Mr. Arroyo's cervical or lumbar spine preexisted the October 19, 2011 incident (id., ¶¶ 16, 17), and that "there is no evidence that the February 7, 2012 incident objectively exacerbated or aggravated Mr: Arroyo's medical condition" (id., ¶ 18).

Although Verizon contends that Arroyo suffered no objectively measurable injuries as a result of either the October 2011 MTA incident or

the April 2012 Verizon incident, its expert fails to provide an explanation for the onset of symptoms following those incidents. Prior to October 2011, plaintiff's medical history reveals only head trauma and seizures, not back-related symptoms. Dr. Lubliner's August 5, 2014 range-of-motion measurements showed significant deficits, as well as reports of complaints of pain and numbness. His opinion that all these symptoms are attributable solely to preexisting conditions is not supported by reference to previous measurements or medical history. Dr. Lubliner does not opine that plaintiff is misrepresenting his symptoms. Dr. Lubliner's implicit conclusions are that plaintiff failed to seek medical attention for his condition until after the October 19, 2011 incident, and that the onset of symptoms was coincidental. Whether either of these conclusions is viable present questions of fact. Accordingly, Verizon's motion is denied because it fails to demonstrate, prima facie, that plaintiff did not suffer "serious injury" as a result of the February 7, 2012 incident. Pero, 83 AD3d at 683 ("[s]ince defendants failed to meet their prima facie burden, it is unnecessary to consider whether the plaintiff's opposition papers were sufficient to raise a triable issue of fact").

In any event, in opposing the motion, plaintiff presents evidence that raises triable issues of fact. Among the documents omitted from the medical records cited by Dr. Lubliner in his affidavit was a report, dated February 22, 2012, from Dr. Madhok, plaintiff's treating physician who had recommended cervical fusion surgery six days prior to the February 7, 2012 incident. Asch affirmation, exhibit B. Dr. Madhok, who was familiar with plaintiff's condition prior to the incident, stated:

> "[Plaintiff] is a gentleman who I have been following for primarily cervical disease, although he had a history of lumbar disease. He was previously scheduled to have surgery for cervical disease this Friday. However, approximately a week ago, [he] was hit by a van while crossing the street. This has caused repeat exacerbation of neck symptoms as well as a new and significant low back and radicular symptoms in his lower extremities. He describes numbness and tingling, especially in the legs, and difficulty walking such that he currently requires a cane to ambulate with. . . . At this point, given his new symptoms, and given his degree of pain, we will proceed with the following plan of care. . . ."

Id.

Further, Dr. Nizarali Visram, a physician who saw plaintiff on the day following the February 7, 2012 incident, reported that, following the incident "[Arroyo] denies loss of consciousness, but developed headache and dizziness. He was having increasing neck pain and lower back pain, both mostly on the left. He also noticed numbness and tingling in his fingers

and toes. . . . There was no hand/finger numbness prior to this accident." Asch aff, exhibit C at 1. Dr. Visram concluded, "[i]f the history is correct, then there is a causal relationship between the above injury and the patient's motor vehicle accident on February 7, 2012." Id. at 2.

Plaintiff's expert, Dr. Rafael Abramov, D.O., following his examination of plaintiff and after reviewing these and other medical records, opines that Arroyo suffered exacerbated injuries following the February 7, 2012 incident. Abramov aff, ¶ 23.

This evidence raises questions of fact as to whether plaintiff was injured, or suffered exacerbations to previous injuries, constituting a "serious injury" following the February 7, 2012 incident. These factual issues provide further grounds to deny Verizon's motion for summary judgment.

Verizon's motion to sever the action

Verizon further moves, pursuant to CPLR 602 and 1003, to sever this action into two separate cases because of the purported risk of juror confusion, since the two accidents were completely distinct and involved different issues concerning liability. CPLR 603 provides, in relevant part: "[i]n furtherance of convenience or to avoid prejudice the court may order a

severance of claims, or may order a separate trial of any claim, or of any separate issue." CPLR 1003 provides, in relevant part: "[t]he court may order any claim against a party severed and proceeded with separately."

In Richardson v Uess Leasing Corp., the plaintiff allegedly suffered injuries from a slip and fall and, one year later, an automobile accident. 191 AD2d 394 (1st Dept 1993). Although the plaintiff did not claim exacerbated injuries, the court reversed the trial court's denial of plaintiff's motion to consolidate two separate cases. Id. at 395-96. In Gage v Travel Time & Tide, the court reversed the denial of a motion to consolidate in a case where the plaintiff had suffered two separate falls and claimed that the second had exacerbated injuries incurred in the first. 161 AD2d 276 (1st Dept 1990). The court held:

> "Where . . . there is a claim that the injury in a second action aggravated the injuries sustained in the first, and where 'it is apparent that part of the defense with respect to each accident will be that the other defendants are responsible for the plaintiff's injuries' a joint trial is indicated."

Id. at 277. The court reasoned that "[o]ne jury hearing all the evidence can better determine the extent to which each defendant caused plaintiff's injuries and should eliminate the possibility of inconsistent verdicts which might result from different trials." Id.; see also Melendez v Presto Leasing,

161 AD2d 501, 501 (1st Dept 1990) ("[a]lthough plaintiffs do not allege that the injuries sustained in the second action aggravated those sustained in the first, the fact that she complains of essentially the same injuries in each accident is sufficient to warrant a joint trial in order to avoid the possibility of inconsistent verdicts").

Verizon has failed to cite any case involving multiple accidents that supports its position, and it has failed to demonstrate why a jury would be confused by deciding liability issues in connection with two separate incidents that allegedly caused similar injuries to plaintiff. Verizon has failed to demonstrate any other way in which it would suffer prejudice from a single trial. It is within the trial judge's ability to determine the structure of trial and the order of proof so as to minimize any possible juror confusion. Feldsberg v Nitschke, 49 NY2d 636, 643 (1980). Accordingly, Verizon's motion to sever this action into two separate cases is denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion of defendants Verizon of New York, Inc. and Gordon B. Barbee (motion sequence number 001) for summary

judgment, or, alternatively, for an order severing this action into two separate actions, is denied in its entirety.

Dated: February 2, 2016
New York, New York

ENTER:

J.S.C.

MICHAEL D. STALLMAN
J.S.C.