Floyd v Thomas
2017 NY Slip Op 31452(U)
July 5, 2017
Supreme Court, Kings County
Docket Number: 505014/13
Judge: Debra Silber

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of July, 2017

P R E S E N T :

HON. DEBRA SILBER

Justice.

SUSAN FLOYD and KRYSTAL TAYLOR,

Plaintiffs,

-against-

PATRICIA THOMAS, NEIL THOMAS, ANDREW C. HAMILTON and ANDREW A. HAMILTON,

Defendants.

DECISION / ORDER
Index No. 505014/13
Mot. Seq. # 6
Submitted: 5/11/17

Papers numbered 1 to 13 were read on this motion:	Papers Numbered:
Notice of Motion/Order to Show Cause/Exhibits	1-7
Affirmation in Opposition/Exhibits	8-11, 12-13
Reply Affirmation/Exhibits	

Defendants Hamilton and Hamilton move for summary judgment and dismissal of plaintiff Krystal Taylor's complaint, pursuant to CPLR Rule 3212, alleging that plaintiff has failed to sustain a "serious injury" pursuant to Insurance Law § 5102(d). There is no mention in the motion of the other plaintiff. The subject motor vehicle accident took place on September 24, 2010. Summary judgment was granted to the other (Thomas) defendants on the issue of liability, and thus these moving defendants are the only

defendants remaining in the case. Plaintiffs were passengers in the Thomas vehicle, which was rear-ended by the Hamilton defendants. Krystal Taylor was twenty-four years of age at the time; the other plaintiff is her mother. They were in a cemetery leaving a funeral when the accident took place.

Movants have made a *prima facie* case with objective medical findings with regard to the following categories of injury:

- ☒ a permanent consequential limitation of use of a body organ or member.
- ☒ a significant limitation of use of a body function or system.
- ☒ a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident.

The court notes that, in finding that movants made a prima face case with regard to "a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident," that plaintiff has no claim for lost earnings in her bill of particulars, and testified that (at her EBT) she was a student at the time of the accident. She also testified that as part of the GED program she was in she was with the Urban League in Ft. Lauderdale, FL, she was "partnered with the Housing Authority and I do construction with them on Thursday and Friday. I was doing that from [the date of the accident] all the way up until the first or second week of June, when the school year ended." [EBT Pages 36-37]. There were no other questions asked with regard to the six months after

the accident, other than for the names of the doctors she went to see. Plaintiff testified that after the school year ended in June, 2011, she worked as a hairdresser, then as a security guard for concerts and tournaments, and then, a year before her EBT was held in February 2016, she began a new full time job as a landscaper for a company that maintains properties in Florida which have been foreclosed on and are vacant.

Defendants provide an Independent Medical Exam from both a neurologist and an orthopedist and both conclude that plaintiff has recovered from the accident and has neither a neurological nor an orthopedic disability. The orthopedist, Dr. Jeffrey Passick, examined plaintiff on February 3, 2016, almost six years after the accident, and tested the range of motion of her neck, back, shoulders and knees, and reports that all of the testing produced normal results. He concludes that plaintiff's cervical and lumbar sprains have resolved and that her left knee contusion has resolved. Once the moving party makes a prima facie case as to all of the applicable categories of injury in Insurance Law Section 5102(d), the burden of proof shifts to the plaintiff to overcome the motion and raise a triable issue of fact. See, *Fils-Aime v Colombo*, 2017 N.Y. App. Div. LEXIS 5257 [2d Dept 2017]; *Yampolskiy v Baron*, 2017 NY App Div Lexis 3492 [2d Dept]; *Valerio v Terrific Yellow Taxi Corp.*, 2017 NY App Div Lexis 3141 [2d Dept]; *Koutsoumbis v Pacciocco*, 2017 NY App Div Lexis 3121 [2d Dept]; *Aharonoff-Arakanchi v Maselli*, 2017 NY App Div Lexis 2898 [2d Dept]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept

2011].

Plaintiff Krystal Taylor, in opposition, has not presented objective medical findings which demonstrate that plaintiff sustained a "serious injury" pursuant to Insurance Law § 5102(d) with regard to the above categories of injury.

Plaintiff's bill of particulars claims she sustained injuries to her cervical and lumbar spine, and injuries to her left knee. There is reference to a supplemental bill of particulars, but it is not in defendant's motion papers nor in plaintiff's. Plaintiff resided in Florida on the date of the accident, and all of her treatment took place in Florida. She testified that she moved from Ft. Lauderdale to Miami a few months after the accident, which resulted in her treatment with Dr. Fishman being very sporadic as he was forty-five minutes away. She testified that she last saw him in 2011.

Plaintiff opposes the motion with an affirmation of counsel, a copy of plaintiff's EBT, plaintiff's emergency room records which were not submitted in admissible form and could not be considered, and two medical affidavits.

Dr. Dean Fishman, plaintiff's chiropractor, provides an affidavit dated April 28, 2017. Unfortunately, he refers to plaintiff Krystal Taylor as "Ms. Floyd," which is the name of the other plaintiff, her mother. Further, he clearly states that he last examined Ms. Floyd on August 29, 2012, four years before defendants served this motion. Plaintiff's counsel adjourned the motion four or more times to prepare opposition, and then, when the motion was marked final in April 2017, adjourned it again to replace this chiropractor's affidavit with one that was notarized, claiming he did not realize he was an out of state doctor. However, even a New York chiropractor must provide an affidavit, as CPLR 2106 only allows physicians to provide an affirmation. Even if the

court could conclude that a certificate of conformity for an out of state notary was unnecessary herein, and that the chiropractor is describing this plaintiff and not her mother, (Ms. Floyd), an exam which took place five years ago cannot overcome the defendants' prima facie case for dismissal.

This is a major deficiency. There is no recent exam. The case law requires the court to find the plaintiff's opposition papers to be totally insufficient in the absence of any medical exam within the last five years. In opposition to a motion for summary judgment, plaintiff must provide evidence of her injuries, such as specific and documented restrictions in her range of motion, both from a recent examination by a doctor and from medical records which are contemporaneous with the subject accident. With regard to the plaintiff herein, the chiropractor's affidavit [if he is referring to this plaintiff] would be satisfactory with regard to the requirement of a medical exam contemporaneous with the accident, but, as there is no range of motion testing indicated in his affidavit, and his last exam of plaintiff was five years ago, this affidavit cannot raise a triable issue of fact and overcome the prima facie case for dismissal set forth in movants' papers. The only conclusion the court can reach is that plaintiff refused to be re-examined by Dr. Fishman so he could prepare a proper response to this motion, despite her attorney's seeking and obtaining almost a full year of adjournments.

To overcome a motion for summary judgment with regard to the categories "a permanent consequential limitation of use of a body organ or member" and "a significant limitation of use of a body function or system," plaintiff must provide evidence of her injuries, such as specific and documented restrictions in her range of motion,

both from a recent examination by a doctor and from medical records which are contemporaneous with the subject accident. With regard to the plaintiff herein, the last medical exam described in her papers was conducted in 2012, five years ago. Defendants' doctors claim that all of plaintiff's injuries, which were solely strains and sprains, have resolved, and that her orthopedic and neurological exams were completely normal. Plaintiff has failed to overcome the defendants' motion and raise a triable issue of fact. See, *Nisanov v Kiriyenko*, 66 AD3d 655 [2nd Dept 2009].

While in *Perl v Meher,* 18 NY3d 208 [2011], the Court of Appeals substantially reduced what is required for a plaintiff to overcome a "threshold" motion, the court did not eliminate the requirement that plaintiff demonstrate causation and provide objective and recent evidence of his or her injuries. In *Perl,* the Court of Appeals held that there is no requirement of quantitative measurements "contemporaneous" with the accident, and that there is nothing wrong or illogical about observing and recording a patient's symptoms in qualitative terms shortly after the accident, and later doing more specific, quantitative measurements in preparation for litigation. As the Court of Appeals notes, a contemporaneous doctor's report is important to proof of *causation*; but where causation is proved, it is not unreasonable to measure the *severity* of the injuries at a later time.

The plaintiff's second affidavit is from the radiologist who read the MRIs. He certifies the accuracy of his MRI reports and annexes them. The lumbar and cervical MRIs indicate bulging discs, which are not, in and of themselves, a serious injury as defined by Insurance Law §5102(d). The knee MRI indicates "a partial tear of the

medial collateral ligament and a synovial cyst extending from the medial joint space and distally, for an approximate 3.0 cm length." This could be a serious injury. However, a radiologist alone, who does not examine the plaintiff, cannot provide the necessary evidence to overcome a motion for summary judgment.

The plaintiff has not overcome the defendants' prima facie case and raised a triable issue of fact as to whether or not she sustained a serious injury in the accident. Accordingly, the motion is granted and the complaint dismissed with regard to plaintiff Krystal Taylor.

This shall constitute the decision and order of the court.

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court