

Deliso v Jet Air Trans., Inc.

2017 NY Slip Op 31948(U)

September 13, 2017

Supreme Court, Kings County

Docket Number: 505113/14

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

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 13th day of September, 2017

P R E S E N T :

HON. DEBRA SILBER,

Justice.

_____ X

ANTOINETTE DELISO and ANTHONY DELISO,

Plaintiffs,

-against-

JET AIR TRANS., INC., and JOHN DOE (First and last name being fictitious and unknown at this time)

Defendants.

_____ X

DECISION / ORDER

Index No. 505113/14
Mot. Seq. # 6
Submitted: 8/17/17

Papers numbered 1 to 17 were read on this motion:

Papers Numbered:

Notice of Motion/Order to Show Cause/Exhibits _____

1-12

Affirmation in Opposition/Exhibits _____

13-16

Reply Affirmation/Exhibits _____

17

Defendant Jet Air Trans., Inc., moves for summary judgment and dismissal of plaintiffs' (Antoinette and Anthony Deliso) action, pursuant to CPLR Rule 3212, on the

ground that plaintiff Antoinette Deliso (the claims of plaintiff Anthony Deliso, her spouse, are purely derivative) has failed to sustain a “serious injury,” pursuant to Insurance Law § 5102(d). The subject motor vehicle accident took place on May 6, 2013. On that date, plaintiff was 78 years old. She was a passenger in a vehicle driven by her husband. The passenger side of their car was in a collision at an intersection with a vehicle clearly identifiable as defendant’s, but the driver left the scene and has not been identified.

Plaintiff’s Bill of Particulars alleges that she sustained injuries to her right shoulder, her right elbow and her cervical spine. Although plaintiff’s Bill of Particulars includes a boilerplate recitation of every possible category of injury under Insurance Law 5102(d), the only applicable categories for the injuries she’s claimed are “a permanent consequential limitation of use of a body organ or member,” “a significant limitation of use of a body function or system”, and “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 must first note that one of defendant’s exhibits is a report from an alleged expert, James C. Otis, Ph.D, who seems to be a biomechanical engineer of some sort, although his curriculum vital is not provided. However, his report is not in affidavit form and is therefore not admissible and cannot be considered. *Patel v Gill*, 2013 N.Y. Misc. LEXIS 951, 6 [Sup Ct Qns Cty]; *Daniels v. S.R.M. Mgt. Corp.*, 2011 N.Y. Misc. LEXIS 7134, 4-5 [Sup Ct Brx Cty]; *aff’d*, 100 AD3d 440 [1st Dept 2012].

Movant has 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; or
- 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.

Defendant submits a report of an Independent radiologist, Dr. Audrey Eisenstadt, with regard to the plaintiff's MRI of her right shoulder. Dr. Eisenstadt finds that all of the positive findings are attributable to pre-existing injuries.

Defendant's IME from Dr. Lisa Nason, an orthopedist, states that she examined plaintiff on August 13, 2015, approximately two years after the accident. Her range of motion testing of plaintiff's right shoulder is significantly abnormal. However, she states that plaintiff had a pre-existing problem and rotator cuff surgery prior to this accident, so "the decreased range of motion in the right shoulder" is due to pre-existing conditions. Otherwise, with regard to plaintiff's cervical spine and wrist, the testing was normal. The defendant's neurological IME from Dr. Vladimir Zlatnik states that he examined plaintiff on July 29, 2015 and found significant restrictions in the range of motion of plaintiff's cervical spine, which is not what Dr. Nason found. However, Dr. Zlatnick states that the alleged injuries to her cervical spine have resolved, and "there were no neurological reasons or exam findings that would account for any remaining decreased range of motion and, therefore, they are clinically insignificant."

The papers submitted by the defendant fail to adequately address plaintiff's claim, set forth in her Bill of Particulars, that she sustained "a medically determined injury or impairment of a nonpermanent nature which prevented her from performing

substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident." See *Che Hong Kim v Kossoff*, 90 AD3d 969, 934 [2d Dept 2011]; *Rouach v Betts*, 71 AD3d 977 [2d Dept 2010]. In arguing for dismissal of this claim, movant relies solely on the inadmissible report of an expert. The two IME doctors examined plaintiff more than two years after the accident.

The defendant has thus failed to meet its prima facie burden of showing that the plaintiff Antoinette Deliso did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. See, *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992].

Defendant does provide plaintiff's EBT at Exhibit E to the motion. It was held on June 25, 2015. It does nothing to support the defendant's motion. She testified that the surgery to her right shoulder was performed in 1990 at the Hospital for Special Surgery and she fully recovered afterwards (Page 44 Lines 6-13) and was able to resume all of her activities. After this accident, plaintiff testified she went for physical therapy for more than a year (Page 48 Line 18-20). Plaintiff testified that after the accident she couldn't bathe, brush her hair, wash her hair, use a pen, hook her bra, raise her right arm, put on clothes, brush her teeth, clean, mop, vacuum, hang up clothes, fold clothes, lift pots, or sleep well, and that these problems continued to the day of the EBT. She testified that her neck and right shoulder were painful while she was sitting at the EBT.

Since the defendant has failed to meet its prima facie burden as to all of the applicable categories of injury in Ins. Law § 5102(d), it is unnecessary to determine whether the papers submitted by the plaintiff in opposition are sufficient to raise a

triable issue of fact. See, *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; *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].

Therefore, the motion for summary judgment is denied.

This constitutes the decision and order of the court.

ENTER:



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court