Rajusam v PTM Mgt. Corp.
2017 NY Slip Op 31838(U)
July 25, 2017
Supreme Court, Queens County
Docket Number: 367/14
Judge: Robert J. McDonald

05

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : **HON. ROBERT J. McDONALD** **IAS PART 34**
Justice

- x

ANNAMMA RAJUSAM,	Index No.:	367/14
Plaintiff(s),	Motion Date:	6/22/17
- against -	Motion No.:	134
PTM MANAGEMENT CORP. d/b/a ACCESS-A-RIDE and NIKKIA CABINESS,	Motion Seq.:	1
Defendant(s).		

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The following papers numbered 1 to 4 were read on this unopposed motion by defendants for an order granting summary judgment and dismissing the complaint on the issue of liability, on the ground that defendants were not the cause of the alleged accident and; dismissing the complaint as the alleged injuries of plaintiff do not satisfy the serious injury threshold of New York Insurance Law § 5102(d).

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JUL 31 2017
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	Papers Numbered
Notice of Motion-Affirmation-Affidavit(s)-Service-Exhibit(s)	1-4

The plaintiff in this action seeks to recover damages for injuries allegedly sustained as a result of a motor vehicle accident in which plaintiff was a passenger in an Access-A-Ride van on January 10, 2011 when the van was side-swiped by an unidentified vehicle.

No opposition has been filed.

Defendants have established good cause for filing a late summary judgment motion.

In support of the motion defendants submit the affirmation of Jamie R. Prisco, Esq.; a copy of the pleadings; the March 24, 2011 50-H testimony of plaintiff; the examination before trial of plaintiff taken on June 23, 2016; the examination before trial of

Nikkia Cabiness taken on June 23, 2016; the independent medical examination report of J. Mervyn Lloyd, M.D., orthopaedist, dated October 14, 2016; the examination report of Daniel J. Feuer, M.D., neurologist dated October 11, 2016; the report of Carl Hardy, DC, chiropractor, dated May 23, 2011; and, the IME report of Jacquelin Emmanuel, orthopaedist, dated May 23, 2011.

The plaintiff commenced this action by filing a summons and verified complaint on or about January 9, 2014. Defendants interposed an answer on or about March 6, 2014. Plaintiff served a bill of particulars on June 5, 2014.

Pursuant to plaintiff's testimony during the 50-H hearing held on March 24, 2011, on the date of the accident, January 10, 2011, plaintiff was a back seat passenger in an Access-A-Ride van. Plaintiff couldn't recall if she was wearing a seat belt. Plaintiff testified at p. 13-14, 21-22 that the van was exiting the Brooklyn Queens Expressway when the van was sideswiped by another vehicle. Plaintiff maintains that the accident occurred upon exiting the Brooklyn Queens Expressway when the front right side a dark grey vehicle came into contact with the left side of Access-A-Ride van. The accident caused plaintiff to be pushed from the left hand side to the right hand side of the van. Plaintiff states that the Access-A-Ride van was traveling at an excessive amount of speed, however plaintiff maintains that the accident was not the Access-A-Ride driver's fault. Plaintiff states that as a result of the accident she injured her neck, right shoulder, and right leg. The police were called and an ambulance arrived. Plaintiff was taken to Elmhurst Hospital. Thereafter, plaintiff was released that evening with a neck brace and five to seven stitches to her right leg.

Subsequent to the accident, plaintiff saw her primary care physician, Dr. Kavita Reddy. Plaintiff was thereafter referred to Dr. Surendrana Reddy, an orthopaedist. Dr. Surendrana Reddy referred plaintiff for a CAT scan and xrays, as well as acupuncture, chiropractic and physical therapy. On January 30, 2011, plaintiff began physical therapy on her neck and right shoulder, and eventually her right leg for approximately three times a week for approximately one year until her no fault benefits ceased.

Plaintiff's examination before trial was conducted on June 23, 2016. Plaintiff maintains that she was a passenger in the back seat of an Access-A-Ride van. The van was in the right hand lane on the Brooklyn Queens Expressway. When the accident occurred the van was exiting the Brooklyn Queens Expressway at Northern Boulevard. Plaintiff states that upon exiting there was a rail to

the left and that the Access-A-Ride van hit the rail and the van began to spin. Pursuant to plaintiff's deposition testimony plaintiff stated that defendant driver was traveling too fast and that she did not think the van came into contact with another vehicle before losing control and hitting the guardrail. Plaintiff further testified that she did not know if there was any contact between the van and another vehicle.

Plaintiff eventually stated that she did not know whether there was any contact between the van and another vehicle and that when addressed with her 50-H hearing testimony regarding her seeing a dark colored vehicle impact the van, plaintiff stated that the dark colored vehicle may have been "a vision from god."

It is apparent from plaintiff's 50-H testimony in March of 2011 and her examination before trial taken on June 23, 2016 that there are discrepancies in her testimonies. In March of 2011 plaintiff stated that a dark-colored car came into contact with the Access-A-Rise vehicle plaintiff was traveling in. At her examination before trial plaintiff indicated that she doesn't remember if there was any contact between another vehicle and she was not sure whether she saw another vehicle.

Defendants submit the deposition testimony of Nikkia Cabiness taken on June 23, 2016.

Ms. Cabiness testified that on the date of the accident she had picked up plaintiff in the scope of her employment with Access-A-Ride and was heading north on the Van Wyck Expressway, to the Grand Central Parkway West, to the Brooklyn Queens Expressway with the intention of traveling to Manhattan. Using her GPS she exited onto Northern Boulevard. Defendant maintains that to the left there was a guardrail and to the right was a wall.

The police report which was read into the record and to Ms. Cabiness stated as follows:

"At t/p/o [which means the place of occurrence], Vehicle No. 1 [which is the vehicle you were driving, is identified as Vehicle No. 1] was traveling eastbound on BQE, exiting at Northern Boulevard, when Vehicle No. 2 did sideswipe Vehicle No. 1, causing Vehicle No. 1 to go into the barrier. Vehicle No. 2 did flee location without exchanging info. Driver and passenger of Vehicle No. 1 didn't see the make, model or plate of the Vehicle No. 2, complaint report prepared."

Is that a fair description of what you said to the police?

A. Yes.

Q. You stated to the police that another vehicle sideswiped you?

A. Yes [p. 22, ln. 2-20].

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his position (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

Here, Ms. Rajusam's testimony from her 50-H hearing on March 24, 2011 corroborates Ms. Cabiness examination before trial testimony taken on June 23, 2016 as well as the police report taken and that the Access-A-Ride was sideswiped by an unknown vehicle upon exiting the Brooklyn Queens Expressway on January 10, 2011.

Accordingly, defendants PTM Management Corp. d/b/a Access-A-Ride and Nikkia Cabiness' motion is granted and the complaint is dismissed on the issue of liability.

Defendants PTM Management Corp. d/b/a Access-A-Ride also move for an order pursuant to CPLR 3212, granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In plaintiff's bill of particulars she alleges that as a result of the subject accident she sustained to the right shoulder a mass effect on the rotator cuff from AC Joint Hyperthrophy and irregularity of the rotator cuff - a partial tear not excluded as well as reversal of the normal curvature of the cervical spine compatible with spasm, central dis herniation at C2-3 and C3-4 and bulging disc at C4-5. Plaintiff also sustained a 6 to 8 inch laceration requiring stitches, a right eyelid abrasion and soft tissue swelling to the head within the frontal supraorbital scalp. Plaintiff maintains that these injuries meet the following categories of "serious injury" threshold defined by New York Insurance Law § 5102(d) in that she sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or 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 of a nonpermanent nature

which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

Plaintiff was examined by J. Mervyn Lloyd, M.D., orthopaedic surgeon, on October 14, 2016. At the time of the examination plaintiff presented with complaints of headaches, neck pain and right shoulder pain with difficulty lifting. Plaintiff also complained of pain in her right leg and right knee.

Upon completion of the examination Dr. Lloyd diagnosed plaintiff with a cervical sprain of which was objectively resolved, a laceration on the right lower leg with a scar; and right shoulder pain which was objectively resolved.

Dr. Lloyd also stated that the findings on the MRI of the cervical spine are consistent with age related degenerative disk disease. Dr. Lloyd's findings on the CT of the right shoulder are consistent with pre-existing degenerative changes in the acromioclavicular joint with mass effect on the rotator cuff. It is Dr. Lloyd's opinion that all injuries have been resolved.

Defendants submit the report dated October 11, 2016 of Dr. Daniel Feur, neurologist. Plaintiff presented to Dr. Feur that she felt somewhat better. Plaintiff mounted and dismounted the examination table without assistance. Range of motion was tested by goniometer and was remarkable for subjective tenderness at the cervical spine and right shoulder. It is of Dr. Feur's opinion that the neurological examination was normal.

On May 23, 2011, plaintiff was examined by Dr. Jacquelin Emmanuel for an independent orthopedic examination. It is Dr. Emmanuel diagnosis that the sprain/strain of the cervical and lumbar spine are resolved; the sprain of bilateral shoulder is resolved; the contusion of bilateral legs and sprain/contusion of bilateral knees are resolved.

Dr. Emmanuel impression was that there was no necessity for further treatment including physical therapy and that maximum medical improvement had been reached. Dr. Emmanuel further stated that the claimant has no disability and may work and conduct her activities of daily living with no restrictions.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting

competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendants, including the affirmed medical reports of Drs. Lloyd, Feur and Emmanuel were sufficient to meet defendants' prima facie burden by demonstrating that the plaintiff 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 [1992]).

Accordingly, defendants' motion is granted without opposition from plaintiff and the complaint is dismissed as there are no triable issues of fact.

The Clerk is directed to enter judgment accordingly.

Dated: Long Island City, N.Y.
7/25, 2017

ROBERT J. McDONALD
J.S.C.

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