Gilliard v Massari
2018 NY Slip Op 30214(U)
February 7, 2018
Supreme Court, New York County
Docket Number: 157155/15
Judge: Adam Silvera

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Adam Silvera Part 22

CHARISSE GILLIARD,

Plaintiff,

-against-

DEAN A. MASSARI and DIANE C. MASSARI,

Defendants.

DECISION/ORDER

INDEX NO. 157155/15
MOTION SEQ. NO. 002 & 003

SILVERA, J.:

Plaintiff moves for summary judgment on liability seeking to hold defendants 100% liable for the accident. Defendants oppose only to the extent of reserving their right to make a motion for summary judgment as to plaintiff's claim of serious injury. Plaintiff replies.

Defendants move for summary judgment seeking to dismiss the case on the grounds that plaintiff did not sustain a serious injury. Plaintiff opposes and defendants reply. Both motions are decided herein.

BACKGROUND

Plaintiff Charisse Gilliard commenced this action to recover damages for personal injuries she allegedly sustained in a motor vehicle accident on November 14, 2014. During the accident, plaintiff alleges that her motor vehicle was struck from behind by a motor vehicle owned and operated by defendants Dean A. Massari and Diane C. Massari. Plaintiff alleges that she sustained serious injuries as a result of the accident due to defendants' negligence in that she suffered from lower back pain, neck pain, and left knee pain.

DISCUSSION

Defendant now brings the instant motion for summary judgment, pursuant to CPLR §3212, seeking dismissal of plaintiff's complaint on the basis that plaintiff has failed to make out a prima facie case of serious injury pursuant to Insurance Law § 5102(d). "[I]n any action by...a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle...there shall be no right of recovery for non-economic loss, except in the case of a serious injury". Insurance Law § 5104. Accordingly, the court must consider the threshold inquiry of whether plaintiff suffered serious injuries within the meaning of Insurance Law § 5102(d). Such statute defines serious injury as:

> "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."
>
> Insurance Law § 5102(d).

The standards of summary judgment are well settled. To grant summary judgment, it must be clear that no material or triable issues of fact are presented. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case". *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the

action or tender an acceptable excuse for his failure...to do [so]". *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980).

In support of its motion, defendants proffer, *inter alia*, plaintiff's deposition transcript and the independent medical examination report of Dr. Arnold Berman dated June 4, 2016. Such report reveals normal ranges of motion in plaintiff's cervical spine on all planes, on cervical flexion, lateral flexion, and extension, as well as right and left rotation. Dr. Berman also found full lumbar flexion, and normal ranges of motion in plaintiff's lumbar spine, on extension, and right and left lateral flexion. Normal ranges of motion were also found in plaintiff's knees bilaterally. Dr. Berman opined that no further treatment was required. Defendants argue that plaintiff's injuries did not prevent her from her customary daily activities, and that plaintiff was able to return to her seasonal employment once the season resumed in the Spring of 2015.

In opposition, plaintiff proffers medical reports from late 2014 and January 2015. Plaintiff also proffers a more recent report from a chiropractor, Mark Heyligers, MPS, DC, dated November 7, 2016, in which Dr. Heyligers opined that, after a final examination on November 7, 2016, plaintiff suffered from permanent weakening of her cervical and lumbosacral spine. Plaintiff further argues that she has satisfied the 90/180 day threshold as she testified to limitations to daily living.

In reply, defendants contend that there is a gap in treatment with Dr. Heyligers which neither Dr. Heyligers nor plaintiff explains.

Here, defendants met their burden in establishing prima facie entitlement to summary judgment on the issue of serious injury as defined by Insurance Law § 5102(d). Thus, the burden shifts to plaintiff to raise a genuine issue of triable fact. Preliminarily, the Court notes that plaintiff proffered only an attorney's affirmation in opposition. "[A] bare affirmation of . . . [an]

attorney who demonstrated no personal knowledge . . . is without evidentiary value and thus unavailing." *Zuckerman v City of New York*, 49 NY2d 557, 563 (1980). Furthermore, an affirmation by an attorney who is without the requisite knowledge of the facts has no probative value. *Di Falco, Field & Lomenzo v Newburgh Dyeing Corp.*, 81 AD2d 560, 561 (1 Dept 1981), aff'd 54 NY2d 715 (1981). Thus, plaintiff's attorney's conclusory and speculative affirmation, is insufficient to raise any factual issues to warrant a denial of the within motion. *See GTF Marketing Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 968 (1985). The Court of Appeals has made clear that bare allegations or conclusory assertions are insufficient to create genuine, bona fide issues of fact necessary to defeat a motion for summary judgment. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978). Thus, defendant's attorney's bare affirmation is insufficient to raise a genuine issue of fact sufficient to preclude summary judgment.

Furthermore, defendants correctly argue that plaintiff must explain her gap in treatment with Dr. Heyligers. Dr. Heyligers' report states that plaintiff had an initial examination on December 2, 2014 and a final examination of November 7, 2016. However, such report is entirely silent as to any other examinations, or any treatment plaintiff received from Dr. Heyligers in between her first examination and her final examination. It appears that plaintiff sought treatment from Dr. Heyligers but only saw him on two occasions. The Court of Appeals has held that "[w]hile a cessation of treatment is not dispositive…a plaintiff who terminates…[treatment] following the accident, while claiming 'serious injury' must offer some reasonable explanation for having done so." *Pommells v Perez*, 4 NY3d 566, 574 (2005). As plaintiff has failed to proffer an affidavit in support of her opposition, she has failed to provide the court with any explanation regarding her gap in treatment. Likewise, plaintiff's chiropractor,

Dr. Heyligers, fails to provide any explanation as to why he saw plaintiff on only two occasions almost two years apart, and has failed to provide the Court with any information as to treatment he provided to plaintiff in between the 2014 examination and the 2016 examination.

As to plaintiff's argument that she has satisfied the 90/180 threshold for a serious injury pursuant to Insurance Law § 5102(d), the Court notes that plaintiff testified during her deposition that, after the accident she was in bed for approximately three days. Plaintiff further testified that there are no activities that she did prior to the accident that she can no longer do since the accident. Plaintiff has failed to raise a triable issue of fact sufficient to preclude summary judgment. Thus, defendants' motion for summary judgment is granted.

As defendants' motion for summary judgment dismissing this action is granted, plaintiff's motion for summary judgment seeking to hold defendants 100% liable for the accident is denied as moot.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants' motion for summary judgment is granted and this action is dismissed; and it is further

ORDERED that, within thirty days of entry, defendants shall serve a copy of this order upon plaintiff, together with notice of entry.

Dated: February 7, 2018

ENTER:

Hon. Adam Silvera, J.S.C.