SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22

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KATHERINE ALTAVILLA,

Plaintiff,

- v -

VENTI TRANSPORT, INC.,VENTI TOWING & TRANSPORT, INC.,PERRY WEST

Defendant.

INDEX NO. 153314/2016

MOTION DATE 08/01/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendants' motion for summary judgment to dismiss plaintiff's complaint is denied. Plaintiff Katherine Altavilla alleges that on April 21, 2014, she suffered a serious injury when a vehicle operated by defendant Perry J. West and owned by defendant Venti Trasport, Inc. came into contact with the rear of a stopped vehicle operated by plaintiff Altavilla on SR 222/Allentown Pike at its intersection wth SR 0073/Lakeshore Drive in the County of Berks and State of Pennsylvania. At the time of the incident plaintiff was domiciled in New Jersey and defendants were domiciled in New York. The incident gave rise to two actions that were filed with this Court. In Action No. 1 Amanda Altavilla filed suit on March 21, 2016, against Perry J. West and Venti Transport, Inc. Plaintiff Katherine Altavilla subsequently filed suit in Action No. 2 on April 19, 2016, against defendants Perry J West and Venti Transport, Inc. in addition to defendant Venti Towing & Transport Inc.

In a Decision/Order dated August 30, 2016, the Honorable Leticia M. Ramirez consolidated the actions for joint discovery and joint trial.

Here, defendants in Action No. 1 move to dismiss the case for failure to show the existence of a serious injury as defined under Insurance Law 5102(d). Plaintiff Cross-Moves pursuant to CPLR 3212 for partial summary judgment on the issue of liability. The decision and order are as follows:

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 order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the "serious injury" threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a "permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system"]).

To demonstrate a "permanent consequential limitation" plaintiff has the burden of establishing that the injury is medically shown to be significant under No-Fault law and "present objective medical proof of a serious injury causally related to the accident in order to survive summary dismissal" (*Pommells v Perez*, 4 NY3d 566, 576 [2005] [finding that proof of a

herniated disc or other soft-tissue injury alone is insufficient to support a finding of a serious injury under no-fault law. Such objective proof must be supported by evidence of the claimed injury compared to the full range of what is normal]).

The Court notes that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dep't 1992], citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1st Dep't 1990]). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence (*See Ugarriza v Schmieder*, 46 NY2d 471, 475-476 [1979]).

Here, Defendants claim that plaintiff Altavilla's injuries stem from prior motor vehicle accidents, that plaintiff has a full range of motion, and that all injuries claimed are either not serious or due to preexisting conditions. In support of their claims, defendants point to the deposition of plaintiff in which she states that she has been involved in four prior motor vehicle accidents, one of which was a few months prior to the subject incident (Exh E, at 85,88-89, & 93). Defendants allege that plaintiff's injury is merely that of a herniated disc and thus not sufficient to support a finding of serious injury under No-Fault law. Further, defendants allege that plaintiff did not miss any time from work following the accident. Defendants provide the examination report of Dr. Ashok Anant which states that plaintiff has a normal range of motion, suffered a mild cervical sprain from the accident at issue, and has a preexisting chronic mild degenerative disc disease (Exh F at 3). Additionally, defendants note that plaintiff proffers the medical report of Dr. Steven Waldman which states that plaintiff has suffered a reduction in

range of motion of the cervical spine. Defendants highlight that Dr. Waldman's treatment of plaintiff began 15 months after the accident immediately after she spoke with her attorney. Pursuant to *Henry v Peguero*, 72 AD3d 600, 603 [1st Dep't 2010], in which the Court citing *Pommells v Perez*, 4 NY3d 566, 572 [2005], found that plaintiff's "fail[ure] to explain the two-week gap between the accident and the commencement of treatment, ... 'interrupt[s] the chain of causation between the accident and the claimed injury." Thus, defendants have satisfied their burden and the burden shifts to plaintiff to demonstrate an issue of fact.

In opposition, plaintiff fails to provide a proper explanation for the 15-month gap in treatment. Plaintiff offer's evidence of said treatment in the form of Dr. Waldman's report. Plaintiff's opposition contests the use of New York's No-Fault law. Plaintiff states that Insurance Law 5104(a) explicitly states that the section applies to "injuries arising out of negligence in the use or operation of a motor vehicle in this state." Further, plaintiff refers to *Neumeier v Kuehner*, 31 NY2d 121, 128 [1972], in which the Court of Appeals addressed motor vehicle cases involving conflicts of choice of law between New York and foreign states and delineated the three following principles:

> 1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.
> '2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.
> '3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants. (Cf. Restatement,

> 2d, Conflict of Laws, P.O.D., pt. II, ss 146, 159 (later adopted and promulgated May 23, 1969).)'

Here, the third principle is applicable to plaintiff's case. Plaintiff and defendants are domiciled in different states and thus the law of Pennsylvania, where the accident occurred, should govern unless it can be shown that "displacing the applicable [New York] rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants" (*id.*) Here, displacing New York law with that of Pennsylvania law would not advance relevant substantive law purposes and would indeed produce great uncertainty for litigants. Allowing for the use of Pennsylvania law runs contrary to the Legislature's intent for enacting New York's no-fault insurance law. One of the law's purposes was to "establish a quick, sure and efficient system for obtaining compensation for economic loss suffered" (*Walton v Lumbermens Mut. Cas. Co.*, 88 NY2d 211, 214 [1996]). In order to prevent the overcompensation for lesser injuries and under compensation for those with more serious injuries, the Legislature enacted the No-Fault law to demarcate "rules easily and readily applied to avoid the expenditure of time and money in investigation and determination on which side of the line each particular claim would fall" (*Montogmery v Daniels*, 38 NY2d 41, 70 [1975]).

The application of Pennsylvania law makes ambiguous to New York litigants who affirmatively choose to commence an action in the State of New York, whether they will benefit from New York threshold law or be held to that of a foreign state. In the instant case, Pennsylvania law would allow for this case, which pursuant to New York law would not meet threshold and is prime for dismissal, to move forward. To burden the court with a motor vehicle case that does not include a serious injury would be a disservice to the litigants who apprise themselves of the New York State Supreme Court. Further, the use of Pennsylvania law would

be contrary to the Legislature's intent and would unnecessarily expend time and money in order to make a determination on which side of the line plaintiff's claim would fall under.

As New York No-Fault law applies to the case at bar, plaintiff must provide a proper explanation for the gap in treatment in order to make use of the medical report of Dr. Waldman and raise an issue of fact to defeat defendants' motion to dismiss. Plaintiff has failed to provide such an explanation. Thus, as defendants have met their burden, plaintiff's Cross-Motion on the issue of liability is denied as moot and defendants' motion to dismiss plaintiff's complaint is granted.

Accordingly, it is

ORDERED that plaintiff's Cross-Motion for summary judgment on the issue of liability against defendants is denied; and it is further

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that within 30 days of entry, defendants shall serve a copy of this decision/order upon plaintiff with notice of entry.

This constitutes the Decision/Order of the Court.

8/30/2018
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE