Willis v Odejimi
2018 NY Slip Op 33375(U)
December 17, 2018
Supreme Court, Kings County
Docket Number: 502510/2017
Judge: Carl J. Landicino

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17th day of December, 2018.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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CHRISTOPHER WILLIS,

Plaintiff,

- against -

OLUWASEGUM ODEJIMI AND YORK TAXI, INC.,

Defendants.

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Index No.: 502510/2017

DECISION AND ORDER

Motion Sequence #1

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2,
Opposing Affidavits (Affirmations).....	3,
Reply Affidavits (Affirmations).....	4,

After a review of the papers the Court finds as follows:

This action concerns a motor vehicle incident that occurred on August 8, 2016. The Plaintiff Christopher Willis (hereinafter "the Plaintiff") was operating a vehicle that was involved in a motor vehicle collision with a vehicle operated by Defendant Oluwasegum Odejimi (hereinafter "Defendant Odejimi") and owned by Defendant York Taxi, Inc. (hereinafter "Defendant York"). By way of a summons and verified complaint, the Plaintiff asserts causes of action against the Defendants alleging the negligent operation of the Defendants' vehicle. The Plaintiff claims in his Verified Bill of Particulars (Defendants' Motion Exhibit B, Paragraph 11), that as a result of the accident he sustained a number of serious injuries including but not limited to injuries to his head, neck and back. The Plaintiffs alleges (Defendant's Motion Exhibit B, Paragraph 20) that he was prevented from "performing substantially all the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the within occurrence."

The Defendants move (motion sequence #1) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint of the Plaintiff on the ground that none of the injuries allegedly sustained by the Plaintiff meet the "serious injury" threshold requirement of Insurance Law § 5102(d).

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action"*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Insurance Law § 5102(d)

The Defendants contend that the affirmed reports of Dr. Chandra M. Sharma and Dr. Jessica F. Berkowitz, support their contention that Plaintiff did not suffer a serious injury as

defined under Insurance Law § 5102(d). In making a motion for summary judgment on threshold grounds a defendant has the initial burden of demonstrating that the Plaintiff did not sustain a "serious injury", as that term is defined by Insurance Law § 5102.

Dr. Chandra M. Sharma, a neurologist conducted a medical examination of Plaintiff on February 3, 2018. In her report, which was duly affirmed on February 21, 2018, Dr. Sharma detailed her findings based upon her review of Plaintiff's medical records, her personal observations and objective testing. In summary and conclusion, Dr. Sharma found limitation of motion in both the Plaintiff's cervical and lumbar spine. However, Dr. Sharma opined that "[t]hese are subjective mechanical limitations due to perception of pain not confirmed on objective examination and do not represent neurological problems." Dr. Sharma also stated that "[i]t is my opinion, with a reasonable degree of medical certainty that despite Mr. Willis's subjective complaints, there were no objective findings to support them." (See Defendants' Motion, Examination of Dr. Sharma, Attached as Exhibit E).

Dr. Jessica F. Berkowitz, a radiologist, did not conduct a medical examination but instead reviewed an MRI (9/02/2016) of the Plaintiff. "The examination consists of sagittal T1, T2 and axial gradient echo and T2 weighted images of the cervical spine." As part of her findings Dr. Berkowitz concluded that "[s]imilar disc herniations are common findings in the general population and unlikely to be related to an acute traumatic injury." Dr. Berkowitz also found that "[t]here is no evidence of acute traumatic injury to the cervical spine such as vertebral fracture, asymmetry of the disc spaces, spinal cord contusion or epidural hematoma." (See Defendants' Motion, Examination of Dr. Berkowitz, Attached as Exhibit F).

Turning to the merits of the motion for summary judgment, the Court is of the opinion that based upon the foregoing submissions, the Defendants have met their initial burden of proof. This is because the reports listed above provided a range of motion and did " compare those findings to the normal range of motion..." *Manceri v. Bowe*, 19 A.D.3d 462, 463, 798 N.Y.S.2d

441, 442 [2nd Dept, 2005]. Although Dr. Sharma found limited range of motion, she opined that such findings, did not represent neurological problems and were subjective. Moreover, the reports reflect that none of the injuries alleged were related to the incident. The Defendants have met their initial *prima facie* burden. In order to rebut that showing, the Plaintiff must prove that there are triable issues of fact as to whether the Plaintiff suffered serious injuries. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2nd Dept, 1994]; *Bryan v Brancato*, 213 AD2d 577 [2nd Dept, 1995]. In this regard, the Plaintiff must submit quantitative objective findings, as well as opinions relative to the significance of the Plaintiff's injuries as defined by statute. *See Shamsoodeen v. Kibong*, 41 A.D.3d 577, 578, 839 N.Y.S.2d 765, 766 [2nd Dept, 2007]; *Grossman v Wright*, 268 AD2d 79 [2nd Dept, 2000].

In order to prove that the Plaintiff suffered a permanent consequential limitation of use of a body organ or member, and/or a significant limitation of use of a body function or system, the Plaintiff has the burden to show more than "a mild, minor or slight limitation of use." The Plaintiff must provide objective medical evidence in addition to medical opinions of the extent or degree of the limitation alleged, and its duration. *See Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]; *Candia v. Omonia Cab Corp.*, 6 A.D.3d 641, 642, 775 N.Y.S.2d 546, 547 [2nd Dept, 2004]; *Burnett v Miller*, 255 AD2d 541 [2nd Dept, 1998]; *Beckett v Conte*, 176 AD2d 774 [2nd Dept, 1991].

The issue of whether a serious injury was sustained involves a comparative determination of the degree or qualitative nature of an injury based upon the otherwise normal function, purpose and use of the body part. *See Toure v Avis Rent-a-Car Sys.*, Inc., 98 NY2d 345, 353 [2002]; *Paul v. Allstar Rentals, Inc.*, 22 A.D.3d 476, 476, 802 N.Y.S.2d 185, 186 [2nd Dept, 2005]. In the alternative, the Plaintiff must establish that she sustained a medically-determined injury or impairment which prevented her from conducting substantially all of the material acts

which constituted her usual and customary daily activities for 90 out of the 180 days immediately following the accident. *See Licari v Elliott*, 57 NY2d 230 [1982].

Dr. Yolande Bernard, examined the Plaintiff on August 7, 2018 and cites a history of the Plaintiff's examinations (8/29/2016, 12/14/2016) and referrals. Dr. Bernard states in her report that she conducted a musculoskeletal examination of the Plaintiff's cervical and lumbar spine and found limitations in his range of motion. As part of Dr. Bernard's prognosis she opined that "[b]ased on today's evaluation, with ongoing symptomolology and up to 25% loss of range of motion of the cervical spine and 25% loss of range of motion of the lumbar spine, it is my opinion within a reasonable degree of medical certainty that the patient has sustained a significant and permanent injury to the cervical and lumbosacral spine." Dr. Bernard also states that "[b]ased on the patient's ongoing symptoms, loss of range of motion, and impairment of function greater than 2 years post his motor vehicle accident, it is evident that these injuries are permanent and his prognosis for a full and complete recovery is poor." Dr. Bernard also found that the accident had a causal relationship to the Plaintiff's injuries. (See Affirmation in Opposition, Dr. Bernard, Attached as Exhibit B).

Both the reports of Dr. Lifschutz and Dr. Reyfman are not affirmed and the Physicians' Certifications annexed to the reports are insufficient. Although the Defendants do not raise this issue, and do reference the reports in their Affirmation in Reply, the Court will not consider them in making its determination. *See Choi Ping Wong v. Innocent*, 54 A.D.3d 384, 385, 864 N.Y.S.2d 435, 436 [2nd Dept, 2008].

While the affirmations of Drs. Berkowitz and Sharma were arguably sufficient to meet the Defendants' *prima facie* burden, Plaintiff's evidence, namely the affirmed reports of Dr. Bernard, raises triable issues of fact with regard to the Plaintiff's claim that he sustained a serious injury. *See McNeil v. New York City Transit Auth.*, 60 A.D.3d 1018, 1019, 877 N.Y.S.2d 351,

351 [2nd Dept, 2009]. "An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." *Toure v Avis Rent A Car Systems Inc.*, 98 N.Y.2d 345, 774 N.E.2d 1197 [2002]; *see Dufel v. Green,* 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995].

Additionally, there is also an issue of fact regarding the Plaintiff's claim, raised in his Verified Bill of Particulars, and supported in his deposition testimony (Defendants' Motion, Exhibit D, Pages 52-53), that he sustained a medically determined injury or impairment of a nonpermanent nature which prevented him 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 accident. This claim was not rebutted by Dr. Sharma's report which related to her examination of the Plaintiff some approximately 18 months after the accident. *See Faun Thai v. Butt*, 34 A.D.3d 447, 448, 824 N.Y.S.2d 131, 132 [2nd Dept, 2006].

Based on the foregoing, it is hereby ORDERED as follows:

Defendants' motion (motion sequence #1) for summary judgment is denied.

This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.