Williams v Diaz
2019 NY Slip Op 33155(U)
October 8, 2019
Supreme Court, Kings County
Docket Number: 506562/2016
Judge: Paul Wooten

SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PRESENT: HON. PAUL WOOTEN **PART** 97
Justice

TREVOR WILLIAMS and LOREN WILLIAMS,

Plaintiffs,

- against -

LESLIE DIAZ,

Defendant.

INDEX NO. 506562/2016

SEQ NOs. 1, 2

In accordance with CPLR 2219(a), the following papers were read on these motions for summary judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1, 2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4
Transcript of Oral Argument	5

Motion sequence numbers 1 and 2 are consolidated for disposition.

This personal injury action arises from a motor vehicle accident that occurred on August 16, 2014 on Flatlands Avenue near its intersection with Pennsylvania Avenue in Kings County, New York (the 2014 accident). Loren Williams (Loren) alleges that on the date of the accident, she was a passenger in a vehicle operated by Trevor Williams (Trevor) (collectively, plaintiffs), who turned left from Pennsylvania Avenue onto Flatlands Avenue when his vehicle was struck by a vehicle owned and operated by Leslie Diaz (Diaz). Plaintiffs commenced this action via Summons and Verified Complaint on April 22, 2016, alleging two causes of action for monetary damages for injuries sustained by Trevor and Loren, respectively, as a result of the 2014

accident. Issue was joined with the filing of Diaz's answer on June 2, 2016, in which Diaz asserts a counterclaim against Trevor for contribution.

Before the Court is a motion by Diaz, pursuant to CPLR 3212, for an Order granting Diaz summary judgment dismissing the second cause of action in the Verified Complaint on the grounds that the injuries claimed by Loren do not satisfy the "serious injury" threshold requirement of New York Insurance Law §§ 5102 and 5104 (motion sequence one). Loren filed papers in opposition to Diaz's motion and Diaz filed a reply.

Also before the Court is a cross-motion by Trevor for summary judgment dismissing the Complaint on the grounds that Loren did not sustain a "serious injury" under Insurance Law § 5102(d) (motion sequence two). Trevor also adopted Diaz's arguments during oral argument on the record. Loren did not oppose Trevor's cross-motion.

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Alvarez*, 68 NY2d at 324; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Qlisanr, LLC v Hollis Park Manor Nursing Home, Inc.*, 51 AD3d 651, 652 [2d Dept 2008]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2d Dept 1974]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81

[2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921 [2d Dept 2005]; *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY 2d 223, 231 [1978]; CPLR 3212[b]).

SERIOUS INJURY THRESHOLD

A party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has sustained at least one of the nine categories of "serious injury" as set forth in Insurance Law § 5102(d) (*see Licari v Elliott*, 57 NY2d 230 [1982]). Insurance Law § 5102(d) 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 loss]; permanent consequential limitation of use of a body organ or member [permanent consequential limitation]; significant limitation of use of a body function or system [significant limitation]; 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."

The Court must determine whether, as a matter of law, plaintiff has sustained a "serious injury" under at least one of the claimed categories. "Serious injury" is a threshold issue, and

thus, a necessary element of a plaintiff's prima facie case (*Licari*, 57 NY2d at 235; Insurance Law § 5104[a]). The serious injury requirement is in accord with the legislative intent underlying the No-Fault Law, which was enacted to "'weed out frivolous claims and limit recovery to significant injuries'" (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]). As such, to satisfy the statutory threshold, the plaintiff is required to submit competent objective medical proof of his or her injuries (*id.* at 350). Subjective complaints alone are insufficient to establish a prima facie case of a serious injury (*id.*).

BURDEN OF PROOF

The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the Court, which may be decided on a motion for summary judgment (*see Licari*, 57 NY2d at 237). Where a defendant is the movant, the defendant, bears the initial burden of establishing, by the submission of evidentiary proof in admissible form, a prima facie case that plaintiff has not suffered a "serious injury" as defined in section 5102(d) (*see Toure*, 98 NY2d at 352; *Gaddy v Eyler*, 79 NY2d 955, 956-57 [1992]). Once the defendant has made such a showing, the burden shifts to the plaintiff to submit prima facie evidence, in admissible form, rebutting the presumption that there is no issue of fact as to the threshold question (*see Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Rubensccastro v Alfaro*, 29 AD3d 436, 437 [1st Dept 2006]).

"In cases such as the present one, a defendant can establish that the 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, 83-84 [2d Dept 2000]). "This established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious

injury was sustained within the meaning of the Insurance Law" (*id.*; *see Gaddy v Eyler*, 79 NY 2d 955 [1992]). The plaintiff must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (*see Grossman*, 268 AD2d at 84). Further, a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings, which shall be based on a recent examination of the plaintiff (*see id.*; *Kauderer v Penta*, 261 AD2d 365 [2d Dept 1999]).

The 90/180 category requires a demonstration that plaintiff has been unable to perform substantially all of his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the injury (*see Licari*, 57 NY2d at 236). The words "substantially all" mean that the person has been "curtailed from performing his usual activities to a great extent rather than some slight curtailment" (*id.*).

DISCUSSION

I. Diaz's Motion for Summary Judgment

After a review of the record, the Court finds that Diaz has sustained her burden of establishing *prima facie* that Loren did not suffer a "serious injury" within the meaning of Insurance Law § 5102(d) as a result of the 2014 accident (*see Jean-Pierre v Park*, 138 AD3d 1064 [2d Dept 2016]; *Olagunju v Anna & Diane Cab Corp.*, 139 AD3d 924 [2d Dept 2016]). In opposition, Loren's medical submissions raise triable issues of fact with regard to her right shoulder, right knee, and lumbar spine.

The Court notes that Loren submitted both certified medical records from John Hemelfarb, radiologist (*see* Loren's Opp, Exhibit D) and New York Orthopedic Surgery & Rehabilitation (*see id.*, Exhibit C), and uncertified medical submissions from the Emergency Room Records from SUNY Downstate Hospital (*see id.*, Exhibit A). None of these medical records address the causation of her injuries. Additionally, in absence of an amended Bill of

Particulars, the Court may not consider evidence of injury to Loren's right wrist and left knee (*see* CPLR §§ 3043, 3025).

However, Loren also submitted medical reports of her recent examinations from Dr. David Capiola, an orthopedic surgeon, dated May 3, 2018, and Dr. Leonid Reyfman, dated February 14, 2018, which show objective findings of an orthopedic disability and causally relate her injuries to the 2014 accident (*see id.*, Exhibits E and F). Dr. Capiola's examination of Loren on May 3, 2018 resulted in finding the following: (1) right shoulder: significant loss of range of motion (110°/150°, *i.e.* 26% loss); 3/5 rotator cuff strength; and, positive O'Brien, Yergason, and Speed tests; (2) right knee: significant loss of range of motion (105°/120°, *i.e.* 12.5%); significant tenderness at the anterior, mid aspects of both the medial and the lateral joint line; inability to squat due to pain; and, ambulation with the aid of a cane due to the right knee. Dr. Capiola measured Loren's range of motion limitations with the use of goniometer. Dr. Reyfman's examination of Loren on February 14, 2018 resulted in finding significant loss or range of motion in Loren's lumbar spine: (1) flexion: 65°/90°, *i.e.* 28% loss; (2) extension 15°/30°, *i.e.* 50% loss; (3) RT lateral bending 20°/30°, *i.e.* 33% loss; and, (4) LT lateral bending 20°/30°, *i.e.* 33% loss. Dr. Reyfman performed the range of motion testing of Loren's lumbar spine with the use of goniometer.

In his report, Dr. Capiola noted further that Loren had brain surgery in 2017, and during her deposition, Loren testified that her cognitive faculties have been impaired as a result (*see id.*, Exhibit I, Loren Williams Tr. p. 29). However, Loren testified further that more than ten (10) years prior to the 2014 accident she had another car accident, as a result of which she sustained injuries to her back and her leg (*see id.* at p. 37-40). She did not know whether she claimed serious injuries in the prior accident case, which settled (*see id.*). Loren also testified that she did not have any surgeries to treat the prior injuries (*see id.*). While none of the recent or past medical reports of Loren's physicians expressly address her prior back and leg injuries

from the prior accident, Dr. Reyfman opined that with regard to Loren's physical activities of daily living, such as "standing, sitting, walking, bending, lifting, exercising, [or] climbing stairs . . . she performed them prior to the accident without pain and symptom free" (*see id.* at pp. 37-39). Furthermore, with regard to Loren's lower back and both knees, Dr. Reyfman opined that "[s]he did not have these complains prior to the date of this accident," essentially concluding that Loren had been asymptomatic prior to the 2014 accident and did not require treatment for the prior injuries (*see* Loren's Opp, Exhibit F; Exhibit I, Loren Williams Tr. pp. 37-39). Thus, Dr. Reyfman sufficiently addressed prior injuries to Loren's lumbar spine and knees (*see Harris v Boudart*, 70 AD3d 643, 645 [2d Dept 2010]).

Dr. Reyfman also concluded that Loren's injuries to her lumbar spine and right knee are permanent and constitute a partial disability. Dr. Reyfman further opined that the 2014 accident was the definite cause of Loren's injuries to her back and knees. Similarly, Dr. Capiola concluded that Loren's injuries to her right shoulder and right knee amount to permanent partial disability and the accident "is the competent producing reason for her continued signs and symptoms".

Additionally, the Court also declines to consider Diaz's new argument in reply that Loren failed to explain the gap in her treatment and any degenerative changes, as "the purpose of a reply affidavit or affirmation is to respond to arguments made in opposition to the movant's motion and not to introduce new arguments or grounds in support of the relief sought," and Loren did not have "an opportunity to respond to [Diaz's] reply papers" (*see Gelaj v Gelaj*, 164 AD3d 878, 879 [2d Dept 2018]). Furthermore, Dr. Reyfman opined that Loren's present symptoms and complains are secondary to the 2014 accident.

Moreover, the Court finds that Diaz has sustained the burden of proof with regard to the 90/180 category. A defendant can establish the nonexistence of a serious injury under 90/180 absent medical proof by citing to evidence, such as plaintiff's own testimony, demonstrating that

plaintiff was not prevented from performing all of the substantial activities constituting his or her usual and customary daily activities for the prescribed period (*see Copeland v Kasalica*, 6 AD3d 253, 254 [1st Dept 2004]). Loren's own testimony establishes that there is no serious injury under 90/180 as there is no testimony that she was confined to bed after the accident and she testified that she missed "one day, two days" of work (*see* Diaz's exhibit I, Loren Williams Tr. at pp. 30-31). Furthermore, there is no evidence to suggest that any medical provider instructed or suggested that she curtail any of her daily activities. Thus, Diaz has demonstrated prima facie that the plaintiff did not sustain a serious injury under the 90/180 category (*see McFarlane v Klein*, 131 AD3d 1139 [2d Dept 2015]; *Lanzarone v Goldman*, 80 AD3d 667, 669 [2d Dept 2011]; *Jean v Labin-Natochenny*, 77 AD3d 623 [2d Dept 2010]). In opposition, Loren failed to raise a triable issue of fact with regard to the 90/180 category. Therefore, given the foregoing, the Court finds that Diaz's motions for summary judgment on the issue of serious injury must be denied; except for the branch of the motion concerning the 90/180 category, which is granted.

II. Trevor's Cross-Motion for Summary Judgment

The Court also finds that co-plaintiff Trevor's purported counterclaim against his co-plaintiff Loren is a nullity as "a counterclaim may only be interposed through service of an answer" (*see generally Newman v Newman*, 245 AD2d 353, 354 [2d Dept 1997]). Furthermore, Trevor's purported cross-motion is not a true cross-motion as it is not against Diaz as the moving party; rather, it is against Loren, the non-moving party (*see Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]). Moreover, Trevor's cross-motion is late and "without any explanation for its untimeliness, let alone good cause" (*see id. at* 82; *Sanchez v Metro Builders Corp.*, 136 AD3d 783 [2d Dept 2016]). Therefore, Trevor's cross-motion for summary judgment must be denied.

CONCLUSION

Accordingly it is hereby,

ORDERED that the defendant Leslie Diaz's motion for summary judgment dismissing the Complaint pursuant to Insurance Law §§ 5102 and 5104 is denied, except for the branch of the motion seeking to dismiss the Complaint with regard to the 90/180 category of serious injury under New York Insurance Law §§ 5102 and 5104, which is dismissed (motion sequence one); and it is further,

ORDERED that co-plaintiff Trevor Williams' cross-motion for summary judgment dismissing the Complaint is denied (motion sequence two); and it is further,

ORDERED that counsel for plaintiff Loren Williams is directed to serve a copy of this Order with Notice of Entry upon her co-plaintiff Trevor Williams and defendant Leslie Diaz.

This constitutes the Decision and Order of the Court.

Dated: 10/18/19

PAUL WOOTEN J.S.C

KINGS COUNTY CLERK
FILED
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