

Gerrity v Gerard Taxi Inc.
2019 NY Slip Op 33571(U)
December 5, 2019
Supreme Court, New York County
Docket Number: 151642/2018
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

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KATHERINE GERRITY,

Plaintiff,

- v -

GERARD TAXI INC, JOSEPH COMPERE

Defendant.

INDEX NO. 151642/2018

MOTION DATE 05/21/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

Before the court is defendants' motion for an Order granting summary judgment in favor of defendants to dismiss the Complaint of plaintiff on the grounds that plaintiff has failed to meet the serious injury threshold requirement pursuant to the New York Insurance Law § 5102(d). Plaintiff opposes the motion and cross-moves for an Order pursuant to Article 31, CPLR § 3126, and CPLR § 3212 to preclude defendants from testifying at the time of trial; strike the answer of defendants; grant plaintiff summary judgment on the issue of liability; and set this matter down for an inquest on damages.

This matter stems from a motor vehicle accident which occurred on January 11, 2016, at the intersection of Park Avenue and East 36th Street in the County, City, and State of New York, when plaintiff Katherine Gerrity was a pedestrian within the crosswalk and was struck and allegedly seriously injured by a right turning taxi owned by defendant Gerard Taxi Inc. and operated by defendant Joseph Compere.

Summary Judgment (Serious Injury)

"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”]).

Defendants allege that plaintiff has failed to demonstrate the existence of a “serious injury” as defined under Section 5102(d) of the Insurance Law. Defendants allege that the injuries plaintiff is seeking relief for are not causally related to the underlying accident and are a result of degenerative disc disease. Defendants attach the May 7, 2019 report of Dr. Barbara Freeman who examined plaintiff on February 1, 2019 and reviewed plaintiff’s medical records (Mot, Exh G). In her report, Dr. Freeman opined that plaintiff’s alleged injuries to the lumbar spine are consistent with pre-existing degenerative changes and not an acute traumatic injury. (*id.*). Defendants also attach the report of Dr. David Fisher who performed a radiological evaluation on the MRI film of plaintiff’s lumbar spine dated February 24, 2016 (*id.*, Exh D). Dr. Fisher found plaintiff’s MRI to the lumbar spine to reveal degenerative changes throughout the lumbar spine and no radiographic evidence of traumatic or casually related injury (*id.*). Thus, defendant has made a prima facie showing of entitlement to summary judgment on the issue of serious injury and the burden now shifts to plaintiff.

In opposition, plaintiff's responding medical submissions raise a triable issue of fact as to plaintiff's alleged degenerative injuries. In *Rosa v Delacruz*, 32 NY3d 1060, 2018 N.Y. Slip Op. 07040 [2018], the Court of Appeals found that where a plaintiff's doctor opined that tears were causally related to the accident, but did not address findings of degeneration or explain why the tears and physical deficits found were not caused by the preexisting degenerative conditions, plaintiff failed to raise a triable issue of fact as it "failed to acknowledge, much less explain or contradict, the radiologist's finding. Instead, plaintiff relied on the purely conclusory assertion of his orthopedist that there was a causal relationship between the accident" (*See id.*)

Here, plaintiff, in contrast to the plaintiff in *Rosa*, submits an opinion from her doctors which address findings of degeneration. Plaintiff submits the narrative report and affirmation of Dr. David Gamburg, who found that plaintiff's injuries to the lower back directly correlate to the accident at issue (Aff in Op, Exh C & D). Dr. Gamburg opines that plaintiff has suffered a permanent injury that has involved over 15 procedures, has significantly limited plaintiff's range of motion, and that plaintiff was completely asymptomatic prior to the accident at issue which exacerbated her lumbar spine condition (*id.* Exh D at 13-14, ¶ 40). Dr. Gamburg explicitly states that he disagrees with Dr. Fisher's findings that plaintiff's injuries are degenerative in nature (*id.* at 12, ¶ 36). Dr. Gamburg notes that Dr. Freeman made no mention that plaintiff was completely asymptomatic prior to the accident, and found that "Dr. Freeman's conclusions finding 'pre-existing degenerative condition and not acute traumatic injury', lack any degree of medical certainty and are patently false" (*id.*, ¶ 34). Thus, plaintiff has raised an issue of fact precluding summary judgment on the issue of "serious injury" as defined in 5102 of the Insurance Law.

Penalties and Sanctions

Penalties and Sanctions

The branch of plaintiff's cross-motion to strike defendants' answer and preclude defendants from testifying at the time of trial is denied. The Court notes that "[i]t is well settled that a court should not resort to striking an answer for failure to comply with discovery directives unless noncompliance is clearly established to be both deliberate and contumacious. Moreover, even where the proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on their merits." *Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 (1st Dep't 2002)(internal citations omitted).

Plaintiff has failed to establish that defendants' alleged failure to comply with discovery was both deliberate and contumacious. Thus, the branch of plaintiff's motion seeking to strike defendants' Answer is denied. As to the preclusion of defendants, the Court notes that relief plaintiff seeks to preclude defendants from testifying at the time of trial has already been granted. Pursuant to this Court's Order dated May 13, 2019, defendant Compere was to appear for deposition on June 12, 2019, failure to appear for the deposition to result in preclusion "from testifying at trial or submitting his own affidavit in motion practice" (Cross-Mot, Exh I). The May 13, 2019 Order is a self-executing Order; thus, the branch of plaintiff's motion to preclude defendant Compere is denied as moot. As to defendant Gerard Taxi Inc., the Court notes that plaintiff never requested the deposition of the taxi company since the inception of this matter. Thus, the motion to preclude defendant Gerard Taxi Inc. is denied.

Liability

The branch of plaintiff's motion for summary judgment on the issue of liability in favor of plaintiff as against defendants and to set this matter down for an inquest on damages is granted in part and denied in part. Violation of the Vehicle and Traffic Law ("VTL") constitutes negligence

per se (*See Flores v City of New York*, 66 AD3d 599 [1st Dep't 2009]). VTL 1146 places a duty upon motorists to exercise due care in their operation of a motor vehicle and avoid colliding into any pedestrian.

Here, plaintiff testified that she had the pedestrian traffic light in her favor when she walked into the crosswalk and took five steps before she was struck by defendants' vehicle (Cross-Mot, Exh D at 29 & 33). Plaintiff has demonstrated that defendant struck a pedestrian in violation of the VTL. Plaintiff has made a prima facie showing of defendants' negligence and the burden shifts to defendants to raise an issue of fact. Defendant driver Compere has been precluded from testifying at the time of trial and from submitting any affidavit as to substantive motion practice. Defendants have failed to proffer any other evidence or affidavits from defendant Gerard Taxi Inc. as to liability. Thus, defendant has failed to raise a triable issue of fact and the branch of plaintiff's motion for summary judgment is granted as to defendant's liability. The branch of plaintiff's motion for an inquest for damages is denied as damages will be assessed by the jury at the time of trial.

Accordingly, it is

ORDERED that defendants' motion to dismiss plaintiff's Complaint for failure to demonstrate a serious injury is denied; and it is further

ORDERED that the branch of plaintiff's cross-motion to strike defendants answer and to preclude defendants is denied; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment on the issue of liability as against defendants is granted; and it is further

ORDERED that the branch of plaintiff's motion for an inquest on damages is denied as an inquest is not the proper vehicle to determine damages which will be addressed by the jury at the time of trial.

This constitutes the Decision/Order of the Court.

12/5/2019
DATE


HON. ADAM SILVERA

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	J.S.C.
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE