

Derito v GEICO Direct
2007 NY Slip Op 30348(U)
March 8, 2007
Supreme Court, New York County
Docket Number: 0104813
Judge: Deborah A. Kaplan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

HOLLY DERITO

INDEX NO. 104813/06

- v -

MOTION DATE 1-31-07

MOTION SEQ. NO. 001

GEICO DIRECT, et. al.

MOTION CAL. NO. 33

The following papers, numbered 1 to 3 were read on this motion by the plaintiff for partial summary judgment and other relief.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

PAPERS NUMBERED

1

2

3

FILED

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I. Factual and Procedural Background

As she was riding her bicycle westbound on East Houston Street in Manhattan at 10:00 a.m. on November 1, 2004, the plaintiff was struck by a yellow taxi which left the scene of the accident. The plaintiff sustained a fractured wrist and other injuries. The defendants, plaintiff's uninsured/underinsured motorist carriers, refused to pay her claims. The plaintiff commenced the instant action, *inter alia*, to recover damages for breach of the insurance contract. She now moves (1) pursuant to CPLR 3212, for summary judgment on the issue of liability, (2) summary judgment on the issue of whether she sustained a "serious injury" as defined by Insurance Law 5102(d), (3) leave to amend her complaint pursuant to CPLR 3025(b) to add a cause of action alleging bad faith, and (4) to compel the defendants to produce their claims examiner for a deposition.

II. Summary Judgment

It is well settled that 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. See Alvaraz v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d

557 (1980). In support of her liability motion, the plaintiff proffers her complaint, her own affidavit and her deposition testimony. By this proof, she establishes that she was riding in the far right-hand lane of Houston Street just east of Avenue A. She was fully familiar with the area since she lived there and traveled that roadway many times. The road conditions were ideal as it was a sunny and clear day. She had not taken any substance that may have impaired her ability to ride the bicycle. As she reached the intersection, a yellow taxi "clipped" her from behind on the left side as he veered to the right or turned toward Avenue A. The taxi struck the left side of the bicycle and her left hand, knocking her and the bicycle to the ground. She testified that the taxi driver pulled over, got out of the taxi, yelled obscenities at her and told her he had been driving for 24 hours without sleep. He told her he was going to get his card from the taxi, but then got in the taxi and drove away. The driver gave her no identifying information and she was unable to see the license plate or medallion number. The plaintiff picked herself up from the roadway, walked home, which was one block away, and called her doctor.

Vehicle and Traffic Law §1231 subjects bicyclists to all of the duties applicable to motorists, but also gives them the same rights and privileges as motorists. See Aiello v City of New York, 32 AD3d 361 (1st Dept. 2006); Redcross v State, 241 AD2d 787 (3rd Dept. 1997); Secor v Kohl, 67 AD2d 358 (2nd Dept. 1979). Vehicle and Traffic Law §1234 requires bicyclists to ride "near the right hand curb or edge of the roadway... in such a manner as to prevent undue interference with the flow of traffic." Motorists, however, are required to "exercise due care to avoid colliding with any bicyclist." Vehicle and Traffic Law §1146.

The plaintiff's proof satisfies her burden on this motion in that it shows that she was not negligent and did not contribute to the accident in any way. Nothing in the proof submitted indicates any violation of a traffic rule by the plaintiff. Indeed, it shows that she complied with the rules, and that the taxi driver simply failed to exercise due care to avoid colliding with her.

In opposition to the motion, the defendants challenge the plaintiff's credibility and her comparative fault in the collision. However, they have failed to come forward with evidentiary proof in admissible form that would raise a triable issue of fact as to those or any other issues. See Alvaraz v Prospect Hospital, supra; Zuckerman v City of New York, supra. Specifically, they have failed to identify any inconsistency in her testimony or other proof to create a triable issue as to her credibility. See McFadden v Bruno, —AD3d ---, 2007 Slip.Op. 00989 (1st Dept. February 6, 2007); Natale v Woodstock, 35 AD3d 1128 (3rd Dept. 2006); Silverman v Clark, 35 AD3d 1 (1st Dept. 2006).

Nor have the defendants presented any proof, such as testimony or an affidavit from an eyewitness or expert, to contradict the plaintiff's account of the accident. The defendants make the bald allegation that since the only evidence of this accident comes from the plaintiff, it cannot be assumed that the taxi was

100% at fault or even the taxi existed at all. The defendants' hope and speculation that they may be able to produce such evidence or discredit the plaintiff at trial is not enough to defeat the plaintiff's motion. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to meet the requirement of tender in admissible form. Zuckerman v City of New York, *supra* at 562; see Cilli v Resjefal Corp., 16 AD3d 339 (1st Dept. 2005); Garcia v Verizon New York, Inc., 10 AD3d 339 (1st Dept. 2004).

The defendants have submitted only the affirmation of their attorney, who claims no personal knowledge of the accident. Thus, the affirmation is without probative value. See Zuckerman v City of New York, *supra* at 563; Johannsen v Rudolph, 34 AD3d 338 (1st Dept. 2006); Diaz v New York City Tr. Auth., 12 AD3d 316 (1st Dept. 2004). While an attorney's affirmation may serve as a vehicle for submitting documentary evidence or other proof in admissible form as an attachment (see Alvarez v Prospect Hospital, *supra* at 325; Zuckerman v City of New York, *supra* at 563), the only relevant attachment to the attorney's affirmation here is a portion of the MV-104 accident report, which raises no material issues of fact. Indeed, it supports the granting of summary judgment in favor of the plaintiff on liability because it supports her subsequent account of the accident. Therefore, the plaintiff is entitled to partial summary judgment on the issue of liability.

The plaintiff also moves for summary judgment on the threshold issue of whether she sustained a "serious injury" as defined by Insurance Law §5102(d). This branch of the plaintiff's motion is in effect, a motion to dismiss an affirmative defense that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d). However, the defendant, in its answer, has not asserted any such affirmative defense. Therefore, this branch of the plaintiff's motion is denied. In any event, the court notes that Insurance Law §5102(d) expressly provides that a fracture is a qualifying "serious injury." See Tagger v Olympic Van Lines, Inc., -- AD3d --, 2007WL765556 (2nd Dept. March 13, 2007).

Accordingly, the plaintiff's motion for partial summary judgment on the issue of liability is granted and her motion for partial summary judgment on the threshold issue of whether she sustained a "serious injury" as defined by Insurance Law §5102(d) is denied.

III. Leave to Amend the Complaint

The plaintiff also seeks leave to amend her complaint pursuant to CPLR 3025(b) to add a cause of action alleging bad faith on the part of the defendant insurance carriers in their refusal to make payment on her claims. However, it is well settled that there is no separate tort for bad faith refusal to comply with an insurance contract. See Pattera v Nationwide Mutual Fire Insurance Co., -- AD3d --, 2007WL678127 (2nd Dept. March 6, 2007); Johnson v Allstate Insurance Company, 33 AD3d 665 (2nd Dept. 2006); Continental Casualty Company v

Nationwide Indemnity Company, 16 AD3d 353 (1st Dept. 2005); Acquista v New York Life Ins. Co., 285 AD2d 73 (1st Dept. 2001). The plaintiff's proposed amended claim is duplicative of her existing breach of contract claim. Therefore, her motion to amend the complaint is denied.

IV. Motion to Compel Discovery

Finally, the plaintiff's motion to compel the defendants to produce their claims examiner for a deposition is granted. CPLR 3101(a)(1) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" including by "a member, agent or employee of a party." Subsection (a)(4) of the statute also permits such disclosure from a non-party. Furthermore, the phrase "material and necessary" is to be liberally construed, applying a test of "usefulness and reason." See Allen v Crowell-Collier Publishing, 21 NY2d 403 (1968). The defendants' concerns that such testimony from its claims examiner would reveal privileged work-product may be addressed at the deposition by way of objection pursuant to CPLR 3101(b) and Section 221.2 of the Uniform Rules for the Conduct of Depositions (22 NYCRR Part 221), upon the proper showing establishing the privilege asserted.

V. Conclusion

For these reasons and upon the foregoing papers, it is

ORDERED that the plaintiff's motion for partial summary judgment on the issue of liability is granted; and it is further,

ORDERED that the plaintiff's motion for partial summary judgment on the issue of whether she sustained a "serious injury" as defined by Insurance Law §5102(d) is denied; and it is further,

ORDERED that the plaintiff's motion for leave to amend the complaint pursuant to CPLR 3025(b) is denied; and it is further,

ORDERED that the plaintiff's motion to compel the defendants to produce their claims examiner for a deposition is granted and the defendants are directed to produce the claims examiner within 30 days after service of this order with notice of entry; and it is further,

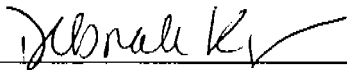
ORDERED that the parties are directed to appear for compliance conference at 9:30 a.m. on 5/7/07, at DCM, 80 Centre St., NY, NY, and it is further,

ORDERED that, upon the filing of a note of issue, the matter will be set down for a trial on the issue of damages, and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all parties, the County Clerk, and the Clerk of the Trial Support Office within 45 days of entry.

This constitutes the Decision and Order of the Court.

Dated: March 8, 2007



DEBORAH A. KAPLAN
D. J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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