

Barbara v New York City Tr. Auth.

2007 NY Slip Op 33068(U)

September 14, 2007

Supreme Court, New York County

Docket Number: 0106829/2006

Judge: Donna Marie Mills

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 21

MITCHELL, BARBARA

INDEX NO. 106829/06

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. NO. 001

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants.

MOTION CAL NO. _____

The following papers, numbered 1 to 3 were read on this motion for Summary Judgment

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits-- Exhibits... 1

Answering Affidavits- Exhibits _____ 2

Replying Affidavits _____ 3

CROSS-MOTION: _____ YES NO

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided as follows:

Defendants, Atlantic Paratrans of NYC, Inc., Michael Lewis, The Metropolitan Transportation Authority and the New York City Transit Authority (hereinafter "defendants") seek summary judgment dismissing the complaint against them pursuant to CPLR § 3212 and Insurance Law § 5101. Plaintiff opposes the motion and contends that there are questions of fact that need to be resolved at trial.

FILED
SEP 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

BACKGROUND

This is an action to recover monetary damages for personal injuries suffered by the plaintiff as the result of an alleged motor vehicle accident that occurred on March 2, 2006. Plaintiff was injured when the car in which she was riding as a front seat passenger on East 23rd street struck the rear end of a parked New York City bus. Defendants contend that plaintiff's injuries are not serious injuries as required by law (see New York State Insurance Law § 5102 and 5104).

Applicable Law & Discussion

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

New York State Insurance Law §'s 5102 and 5104 prevent actions arising out of negligence in the use or operation of a motor vehicle, except in the case of a "serious injury" (Toure v Avis Rent a Car Systems, Inc., 98 NY2d 345 [2002]). "[A] defendant can establish that [a] 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]). If this initial burden is met, "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. at 83-84).

In support of their motion for summary judgment, the defendants rely on plaintiff's verified bill of particulars and independent medical reports obtained by them. Plaintiff was examined separately on behalf of the defendants by Dr. Jerome Block and Dr. Barry Cooper. In their reports they found that plaintiff had no objective findings of neurological injuries relating to the subject occurrence.

The medical reports submitted by the defendants obliged plaintiff to come forward with evidence that she had sustained a "serious injury" (Insurance Law § 5102[d]; Gaddy v Eyler, 79 NY2d 955 [1992]).

According to plaintiff's treating physician, Dr. Brian Kessler, a year after the event, she "remains disabled from injuries sustained (that) are causally related to the automobile collision." The doctor also found that plaintiff could not perform her usual daily activities for at least half the 180 days after the accident due to a significant limitation of a body system.

Plaintiff has established a triable issue of fact as to whether she suffers from a "permanent consequential limitation of her muscular skeletal system," within the meaning of the statute as diagnosed by Dr. Kessler. This opinion is supported by objective medical evidence including MRIs, X-rays and NCU/EGM studies of plaintiff's thoracic, lumbar and cervical spine revealing "a wedge compression deformity of the upper thoracic vertebral body." Dr. Kessler's findings are supported by the following evaluation of Dr. Aric Hausknecht, a Diplomate, of the American Board of Psychiatry and Neurology, who examined plaintiff in February 2007: "There is objective evidence of cervical and lumbar-sacral impairment including clinically significant restrictions of mobility. The MRI imaging reveals objective evidence of structural pathology...Ms. Mitchell has sustained permanent, consequential limitation of the use of her cervical and lumbosacral spine."

The Court also finds that there are questions of fact as to whether plaintiff sustained an injury which prevented her from performing substantially all of her daily activities for at least 90 out of 180 days following the accident, "which disability is also a basis for denying a motion brought under the statute in question" (see Brown v Achy, 9 AD3d 30, 34 [1st Dept 2004]). As such, this Court finds that there are triable issues of fact as to whether plaintiff suffered a "serious injury" within the meaning of Insurance Law § 5102(d) and whether it was causally related to the subject accident of March 2, 2006.

Accordingly, it is

ORDERED that the defendants' motion seeking summary judgment dismissing the Complaint is denied.

Dated:

9-14-07

D. Miller
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

FILED
SEP 26 2007
NEW YORK
COUNTY CLERK'S OFFICE