

Lazarus v Trump Corp.

2008 NY Slip Op 32647(U)

September 22, 2008

Supreme Court, New York County

Docket Number: 100700/05

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 22

RAINA T. LAZARUS,
Plaintiff,

- v -

THE TRUMP CORPORATION and NANCY L. MACK,
Defendants.

INDEX NO. 100700/05

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. 56

The following papers, numbered 1 to 2, were read on this motion by defendants for summary judgment on the threshold "serious injury" issue.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____	FILED OCT 02 2008 COUNTY CLERK'S OFFICE NEW YORK	PAPERS NUMBERED	_____
Answering Affidavits — Exhibits (Memo)	_____		2	_____
Replying Affidavits (Reply Memo)	_____		_____	_____

Cross-Motion: Yes No

The Plaintiff commenced this action on January 18, 2005, to recover damages for alleged personal injuries suffered as a result of the subject accident. The defendants filed an answer timely and issue was joined. The parties completed discovery and the Note of Issue was filed. Defendants now move for an order pursuant to CPLR § 3212, granting summary judgment on the issue of "serious injury" as defined by New York Insurance Law § 5102(d).

The New York Insurance Law provides that every automobile owner must carry automobile insurance, which will compensate injured parties for "basic economic loss" for injuries caused by the use or operation of that vehicle in New York State, irrespective of fault (Insurance Law § 5102 [d]). An injured party may initiate a suit against the automobile owner or driver, for damages caused by the accident only in the

event of a "serious injury." The legislative intent underlying the No-Fault Law was designed to " significantly reduce the number of automobile personal injury accident cases litigated in the courts, and thereby help contain the no-fault premium" (*Lopez v Senatore*, 65 NY2d 1017, 1020 [1985], quoting *Licari v Elliott*, 57 NY2d 230, 236 [1982]).

A "serious injury" is defined in the New York State Insurance Law 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 consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; 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" (New York Insurance Law § 5102(d); *Raffellini v State Farm Mutual Automobile Insurance Company*, 848 NYS2d 1 [2007]).

FACT PATTERN

On June 16, 2003, the plaintiff was a thirty-two year old licenced nurse employed per diem. On June 16, 2003, while driving on 12th Avenue at its intersection with West 54th Street, in Manhattan, New York, she was struck in the rear by a vehicle operated by defendant Nancy L. Mack and owned by defendant Trump Corporation. The plaintiff's vehicle, in turn, struck the vehicle in front of the her vehicle resulting in a three car

accident. The Plaintiff was taken by ambulance to the Emergency Room at St. Luke Hospital Center where she was treated and released.

SUMMARY JUDGMENT STANDARD

The proponent of a motion for summary judgment is required to make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v Congress Fin. Corp.*, 795 NY2d 502 [2005]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Thomas v Holzberg*, 751 NY2d 433, 434 [1 Dept 2002]; *Silverman v. Perlbinde*, 762 NY2d 386 [1 Dept 2003]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Medical Center, supra*). The motion must be supported "by affidavit...from a person having knowledge of the facts, by a copy of the pleadings and by other available proof . . ." (CPLR § 3212 [b]). A conclusory affidavit, expressions of hope, unsubstantiated allegations or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's *prima facie* burden (*Winegrad v New York Univ. Medical Center, supra*). A party may also demonstrate a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman v City of New York, supra*; *Prudential Securities Inc. v Rovello*, 692 NYS2d 67 [1 Dept 1999]).

Where the proponent of the motion has made a *prima facie* showing, the burden

then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a triable issue of fact (*Vermette v Kenworth Truck Co.*, 68 NY2d 714 [1986]; *Zuckerman v City of New York*, *supra*; *Forrest v Jewish Guild for the Blind*, 765 NY2d 326 [1 Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in to sufficiently establish the existence of a "serious injury," which mandate's resolution by trial.

DISCUSSION

In support of their motion defendants proffer the pleadings, plaintiff's deposition testimony, plaintiff's uncertified Emergency Room records from St. Luke's Hospital Center, plaintiff's September 16, 2004 uncertified outpatient hospital records from New York Presbyterian Hospital and the affirmed medical reports of Dr. Robert S. April, a board certified neurologist, Dr. Peter A. Godsick, an orthopedist along with a medical report of Dr. Leonard R. Harrison, Jr., plaintiff's treating physician. This evidence establishes that the defendants have come forward with sufficient evidence in admissible form to warrant as a matter of law a finding that plaintiff has not sustained a "serious injury" within the meaning of Insurance Law § 5102 [d] (See, *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]; *Lowe v. Bennett*, 511 NYS2d 603 [1 Dept 1986], *Affd*, 69 NY2d 700 [1 Dept 1986]; *Pagano v. Kingsbury*, 587 NYS2d 692 [2 Dept 1992]). Thus, the burden shifts to plaintiff to produce evidentiary proof in admissible form in order to establish the existence of a "serious injury" (See *Zuckerman v City of New York*, *supra*; *Forrest v Jewish Guild for the Blind*, *supra*).

In opposition, plaintiff has submitted her deposition and affidavit, the police

accident report, the affirmation of Dr. Harrison, a board certified orthopaedic surgeon, the affirmed medical report of Dr. David L. Milbauer, a radiologist and the uncertified Emergency Room records from St. Luke's Hospital Center and an unaffirmed MRI report. Unaffirmed or uncertified medical reports and records are inadmissible and will not be considered on this motion (*Grasso v Angerami*, 79 NY2d 813 [1991]; *Offman v Singh*, 813 NY2d 56 [1 Dept 2006]; CPLR § 2106 ["requires a physician's statement be affirmed to be true under the penalties of perjury"]; CPLR § 4518(c) [requires hospital records to be certified]).

Beginning on July 3, 2003, Dr. Harrison treated plaintiff with an aggressive course of physical therapy for the next three months, after which he determined that plaintiff's injuries were permanent and further regular treatment would not be beneficial, other than to provide temporary relief. "While a cessation of treatment is not dispositive--the law surely does not require a record of needless treatment in order to survive summary judgment--a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so" (*Pommells v Perez*, 4 NY3d 566 [2005]). In this instance plaintiff has offered a sufficient explanation.

On February 27, 2008, Dr. Harrison re-examined plaintiff and again concluded that her injuries are permanent and causally related to the subject accident. In addition, Dr. Milbauer, found disc herniations at L3-L4 and L4-L5.

Accordingly, plaintiff's submissions demonstrate the existence of a triable issue of fact as to whether or not she sustained a "serious injury" as a result of the subject

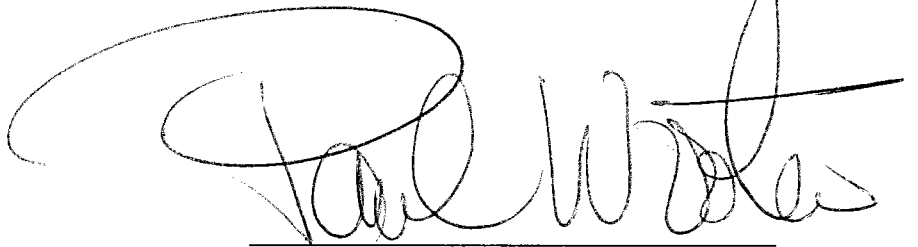
accident (*Licari v. Elliott*, 57 NY2d 230 [1982]).

For these reasons and upon the foregoing papers, it is,

ORDERED that the defendants' motion for summary judgment is denied.

This constitutes the Decision and Order of the Court.

FILED
OCT 02 2008
COUNTY CLERK'S OFFICE
NEW YORK



Dated: September ~~11~~ 2008

~~SEP 22 2008~~

Paul Wooten
Paul Wooten
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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