

Sammons v Greensmith
2009 NY Slip Op 31347(U)
June 11, 2009
Supreme Court, New York County
Docket Number: 21671/07
Judge: Antonio I. Brandveen
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

BRIAN SAMMONS and CHRISTOPHER
SAMMONS, infants under the age of 14 years by
their mother and natural guardian ROSA
SAMMONS, ROAS SAMMONS and PAUL
SAMMONS,

Plaintiff,

- against -

MARY E. GREENSMITH,

Defendant.

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 21671/07

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	_____
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendant moves for summary judgment against the plaintiff Rosa Sammons only. The plaintiff opposes the motion. The underlying personal injury action arises from a motor vehicle accident on December 8, 2004, at approximately 6:20 p.m., at the intersection of Smith Street and Hewlett Avenue, Merrick, New York. This Court has carefully reviewed and considered all of the papers submitted with respect to this motion.

Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or

defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). The courts role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590).

Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff'd* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*).

The plaintiff Rosa Sammons testified, at a deposition on October 8, 2008, she was transported from the accident site to the emergency room at Nassau Community Medical Center where the plaintiff was x-rayed, and released without any prescribed medication. The plaintiff testified she was treated the next day by her family doctor, and continued

treatment with that physician less than five times for the injuries allegedly sustained in the subject accident. The plaintiff testified she did not receive physical therapy, medical equipment nor any injections, and no doctor ever recommended surgery to treat those injuries, but did take prescription medication for only one week following the subject accident. The plaintiff admitted, during her testimony, she had no complaints of pain, and she was never confined to her bed nor to her home as a result of that accident. The plaintiff testified, as a result of the accident, there are no activities she is limited in doing, including working as an entry writer for DHL airways which is what she did before the accident. The plaintiff further testified she missed only two weeks from work as a result of the accident.

Dr. Alan J. Zimmerman stated, in an affirmation dated October 27, 2008, he conducted an independent orthopedic examination of the plaintiff Rosa Sammons on October 7, 2008, and measured all ranges of motion with a handheld goniometer, and found the plaintiff had normal ranges of motion in the cervical spine, lumbar spine and the right and left shoulder. Dr. Zimmerman also conducted various objective tests on the plaintiff, and diagnosed as resolved a cervical sprain/strain, a lumbar sprain/strain, and a left shoulder sprain. Dr. Zimmerman determined the bulging discs have no clinical significance, and all of the cervical and lumbar MRI findings are degenerative, pre-existing and not casually related to the subject accident as evidenced by the multiplicity of levels involved. Dr. Zimmerman also determined, based on the objective findings, the plaintiff has no disability. Dr. Zimmerman further indicates he reviewed an MRI report of the plaintiff's right shoulder which showed a small focal full thickness tear of the supraspinatus tendon with no evidence of tendon retraction nor muscle atrophy and small joint effusion with fluid extending

through the tendon gap into the subdeltoid bursa, and reports the plaintiff denied any current complaints. Dr. Zimmerman tested both shoulders and were negative bilaterally with normal range of motion.

Dr. Sheldon Feit stated, in an affirmation dated August 25, 2008, he conducted an independent film review of the plaintiff Rosa Sammons's cervical spine MRI film which was scanned on January 22, 2005. Dr. Feit found desiccatory changes were identified at all the visualized cervical discs. Dr. Feit noted there was a mild disc bulge at C4-5 encroaching on the subarachnoid space without indentation on the cervical cord, there was a bulging disc at C5-6 encroaching on the subarachnoid space slightly indenting on the cervical cord, did not identify any other bulges nor herniations, and found no evidence of spondylolisthesis. Dr. Feit determined the disc bulges are no post-traumatic, but were degenerative secondary to annular degeneration, and ligamentous laxity, no post-traumatic changes were noted, and the findings were not casually related to the subject accident.

Dr. Feit, in another affirmation dated August 25, 2008, he conducted an independent film review of the plaintiff Rosa Sammons's lumbar spine MRI film which was scanned on January 22, 2005. Dr. Feit found desiccatory changes were identified at all the visualized lumbar intervertebral discs, most marked at L4-5 and L5-S1. Dr. Feit noted there was a disc bulge at the L5-S1 level effacing the epidural fat and impinging on the traversing L5 nerve roots bilaterally, there was a bulging disc at L4-5 compressing on the thecal sac and impinging on the exiting L4 nerve root bilaterally, and noted mild facet hypertrophy bilaterally and a mild disc bulge at L3-4 Dr. Feit found no evidence of spondylolisthesis, and determined the disc bulges are not post-traumatic, but are degenerative secondary to

annular degeneration and ligamentous laxity, and the associated central herniation at L4-5 is also degenerative as it is seen in association with disc bulge, as well as osteophyte formation. Dr. Feit concluded these findings are not post-traumatic, and were not casually related to the subject accident.

The plaintiff Rosa Sammons's attorney submits only an opposing affirmation dated April 9, 2009, by counsel. The plaintiff Rosa Sammons's attorney states familiarity with the proceedings by virtue of the law office's representation of the plaintiffs since the inception of the underlying personal injury action, and a review of the file maintained by that law office. The plaintiff Rosa Sammons's attorney asserts, in detail, the defense submissions with respect to this motion are insufficient, as a matter of law to grant summary judgment.

The sole submission made by the plaintiff Rosa Sammons in opposition to this motion for summary judgment is the bare affirmation of an attorney, which is not based on personal knowledge, and thus without evidentiary value (*see, Zuckerman v City of New York*, 49 NY2d, *supra*; *Carpluk v Friedman*, 269 AD2d 349). The Court finds, as a matter of law, this defendant met the *prima facie* showing of entitlement to summary judgment, to wit the plaintiff Rosa Sammons did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. The Court finds, with respect to nine categories of serious injury listed in Insurance Law § 5102 (d), the first six categories do not apply in this personal injury action, and, with respect to the remaining three categories, the plaintiff Rosa Sammons has failed to make a sufficient showing that she sustained a serious injury. The plaintiff Rosa Sammons's opposition, consisting solely of an affirmation by an attorney is insufficient, as a matter of law to raise a triable issue of

fact (*Huerta v. Longo*, --- N.Y.S.2d ----, 2009 WL 1563852 [2nd Dept., 2009]).

Accordingly, the motion is granted with respect to the plaintiff Rosa Sammons only.

So ordered.

Dated: **June 11, 2009**

ENTER:



J. S. C.

FINAL DISPOSITION XXX

NON FINAL DISPOSITION

ENTERED
JUN 15 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE