

Griffith v Abdou

2015 NY Slip Op 30897(U)

May 21, 2015

Supreme Court, Queens County

Docket Number: 22234/2012

Judge: Robert J. McDonald

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

TONI GRIFFITH, Index No.: 22234/2012
Plaintiff, Motion Date: 02/25/15
- against - Motion No.: 53
SAMATTE MBAYE ABDOU and MERCHANT Motion Seq.: 2
FUNDING SERVICES CORP,

Defendants.

- - - - - x

The following papers numbered 1 to 17 were read on this motion by
defendants, SAMATTE MBAYE ABDOU and MERCHANT FUNDING SERVICES
CORP, for an order pursuant to CPLR 3212, granting the defendants
summary judgment and dismissing the complaint of plaintiff, TONI
GRIFFITH, on the ground that the plaintiff has not sustained a
serious injury within the meaning of Insurance Law §§ 5102 and
5104:

Papers Numbered

Notice of Motion-Affidavits-Exhibits-Memo of Law.....1 - 7
Affirmation in Opposition-Affidavits.....8 - 13
Reply Affirmation.....14 - 17

This is a personal injury action in which plaintiff, Toni
Griffin ("plaintiff"), seeks to recover damages for injuries she
sustained as a result of a motor vehicle accident that occurred
on April 14, 2012, at approximately 10:30 p.m. at the
intersection of West 134th Street and Lenox Avenue, New York
County, New York. At the time of the accident, plaintiff was a
pedestrian who was struck by the motor vehicle owned by Merchant
Funding Services Corp. and operated by defendant, Samatte Mbaye
Abdou ("defendant"). The plaintiff was struck while crossing West
134th Street while the defendant was making a right hand turn
from 134th Street onto Lenox Avenue.

Plaintiff commenced this action by filing a summons and verified complaint on October 23, 2012. Issue was joined by service of defendant's verified answer dated December 27, 2012. The plaintiff moved, prior to examinations before trial, for an order granting summary judgment on the issue of liability. That motion was denied by this court by decision and order dated December 9, 2013. This court found that there were questions of fact raised by the conflicting affidavits submitted by the parties. Plaintiff filed a Note of Issue on November 17, 2014. This matter is presently on the calendar of the Trial Scheduling Part for June 11, 2015.

Defendants now move for an order pursuant to CPLR 3212 dismissing the plaintiff's complaint on the ground that the injuries claimed by the plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law. In support of the motion, the defendants submit an affirmation from counsel, Artur Pogorzelski, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial; the affirmed medical report of Ronald A. Paynter, board certified in emergency medicine; the emergency room records from Harlem Hospital Center; the radiological reports of Dr. A. Robert Tantleff; the affirmed medical report of orthopedist, Dr. Christopher J. Cassels; the radiological reports from the Stand-Up MRI on the West Side; the medical report of Dr. Emmanuel Hostin; and the operative report for the plaintiff's right knee arthroscopy performed on September 7, 2012.

In her verified bill of particulars, the plaintiff states that as a result of the accident she sustained, inter alia, a horizontal tear of the lateral meniscus of the right knee requiring arthroscopic surgery; disc bulges at L3-L4 and L4-L5, and L5-S1 and a herniated disc at L3-L4. The plaintiff contends that she sustained a serious injury as defined in Insurance law §5102(d).

In her examination before trial taken on May 21, 2014, the plaintiff, Ms. Griffith, age 56, stated that she is employed as a clerical associate at Harlem Hospital. She testified that at 8:30 p.m. on the evening of April 14, 2012, she was crossing Lenox Avenue in Manhattan at the intersection of 34th Street when she was struck by a taxi cab operated by the defendant. She was struck on her knees with the front of the taxi. Right after the accident she felt pain in both knees, her lower back and her buttocks. She left the scene in an ambulance and was transported to the emergency room at Harlem Hospital. The x-rays taken in the emergency room were negative for fractures and she was released

the same evening. The following day she sought treatment with her family doctor, Dr. Ghassibbi. Nine days after the accident she began a course of physical therapy at DHD Medical. She attended physical therapy from April 2012 through September 2012 when she underwent arthroscopic surgery for a torn meniscus of her right knee. She had been referred for MRIs of her lower back and her knees. Because the MRI indicated a right knee meniscal tear, she was referred to Dr. Hostin an orthopedic surgeon who performed arthroscopic surgery of her right knee. After the surgery she continued physical therapy at NY Sports until the end of November 2012. She did not have any other medical treatment following her discharge from NY Sports. She states that presently she still suffers from pain in both knees on a daily basis and intermittent pain in her lower back. She testified that she missed two days from work immediately following the accident and four weeks from work after the surgery.

Dr. Ronald Paynter, a physician, board certified in emergency medicine, was retained as an expert by the defendants to review the plaintiff's emergency room records and to give his opinion as to the plaintiff's injuries based only on a review of the records. He states in his affirmed report that the emergency room records reviewed are inconsistent with the injuries alleged by the plaintiff in her Bill of Particulars and show that the claimed injuries other than musculoskeletal pain do not have an acute traumatic origin and cannot, therefore, be related to the accident of April 12, 2012. His opinion is based on the fact that the ER records indicate that plaintiff had normal range of motion of the back and knees when measured in the emergency room, and the plaintiff did not complain of pain to the back at any time while in the ER.

Dr. Tantleff, the defendant's retained radiologist, reviewed the MRIs taken of the plaintiff's right knee, left knee and lumbar spine. He states that he observed a degenerative flap tear of the posterior horn of the lateral meniscus in both the right and left knees. He states that the tears are associated with degeneration and body habitus and that there is no evidence of acute or recent injury due to the motor vehicle accident of April 14, 2012. His review of the MRI of the lumbar spine showed longstanding chronic degenerative disc disease and disc bulges most pronounced at L3-4, L4-5 and L5-S1. He states that the findings are chronic, degenerative and longstanding and are unrelated to the subject accident.

The plaintiff was examined by the defendants' retained orthopedist, Dr. Christopher Cassels, on July 8, 2014. She presented with intermittent pain in her back and pain in her

right and left knees. Dr. Cassels performed quantified and comparative range of motion tests with the assistance of a goniometer. The tests revealed that the plaintiff had no significant loss of range of motion of the lumbar spine, and left knee but she did have minor loss of range of motion of the right knee. He concludes that his examination of the lumbar spine was normal, and that based on his examination the plaintiff did not sustain any significant or permanent injury to the lumbar spine as a result of the subject accident. He states that the loss of range of motion of the right knee, in his opinion is consistent with degenerative arthritis and does not reflect acute trauma. He states that even the surgeon's report describes a procedure for what appears to be a chronic, rather than acute pathology of the knee. He concludes that the plaintiff's injuries are all based upon pre-existing arthritic degeneration of the knees and he found no objective evidence of a permanent disability.

Defendants' counsel contends that the affirmed medical reports of Drs. Paynter, Cassels and Tantleff, as well as the plaintiff's examination before trial are sufficient to establish, prima facie, that the plaintiff has not sustained a fracture, a permanent loss of a body organ, member, function or system; that she has not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that the plaintiff testified that she returned to work two days after the accident and therefore did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff, for not less than 90 days during the immediate one hundred days following the occurrence, from performing substantially all of her usual daily activities (see Canelo v Genolg Tr., Inc., 82 AD3d 584 [1st Dept. 2011]; McIntosh v O'Brien, 69 AD3d 585 [2d Dept. 2010]; Kearse v New York City Tr. Auth., 16 AD3d 45 [2d Dept. 2005]).

In opposition, plaintiff's attorney, Mitchell D. Frankel, Esq., submits his own affirmation as well as an affidavit from the plaintiff dated January 7, 2015; an affirmation from her orthopedic surgeon, Dr. Emmanuel Hostin; affirmed radiological reports from Dr. Ronald Wagner; emergency room records from plaintiff's admission at Harlem Hospital; affirmed medical reports from Dr. Delman and Dr. Villafuerte at DHD Medical; and physical therapy records from NY Sports Medicine certified by Dr. Michael J. Neely.

In her affidavit, the plaintiff states that she was initially evaluated by Dr. Villafuerte at DHD Medical. Dr Villafuerte advised her to begin a course of physical therapy and

to get MRIs of her knees and lumbar spine. She was also referred to Hostin Orthopedics to be evaluated for arthroscopic surgery of her knees. Dr. Hostin performed surgery on her right knee on September 7, 2012. After surgery she recommenced physical therapy at NY Sports Med. She states that after the surgery she was out of work for four weeks. She states that she suffers from pain in her back and knees on a daily basis.

Dr. Hostin submits an affirmed report stating that he initially examined the plaintiff on May 1, 2012. At that time he performed objective range of motion testing which revealed substantially reduced range of motion of the plaintiff's left and right knees. He re-evaluated the plaintiff on November 25 2014 and found that she still had loss of range of motion of both knees. He states that based upon his examinations and review of the plaintiff's records that her injuries are permanent and were causally related to the trauma she sustained on April 14, 2012.

The radiological reports from Dr. Wagner, based upon his review of the plaintiff's MRIs show a lateral meniscal tear of the right knee, a sprain of the left knee, disc bulges at L3-L4 and L4-L5 and a herniated disc at L5-S1.

Dr. Delman first evaluated the plaintiff on April 23, 2012 at which time she complained of bilateral knee pain and lower back pain. Range of motion testing at that time showed reduced range of motion of both knees and her lumbar spine due the motor vehicle accident.

Dr. Delman also evaluated the plaintiff on December 11, 2014. At that time he found, based upon his physical examination that plaintiff exhibited loss of range of motion of the lumbar spine and right knee but that the left knee had no pain. He states that in his opinion the plaintiff sustained a permanent loss as a result of the subject accident. In his affirmation dated January 26, 2015, he states that based upon his review of the records, including the reports of the defendants' retained experts, he finds that the plaintiff presently has limitations of range of motion that are significant and permanent and causally related to the subject accident. He also states that he specifically disagrees with the findings of the defendants' retained experts that the plaintiff's knee injuries are of a longstanding and chronic nature, are pre-existing and are degenerative. He states, rather, that the knee injuries were a direct result of the trauma suffered in the pedestrian knockdown accident of April 14. 2012.

Initially, it is defendants' obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting

affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557[1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the competent proof submitted by the defendants, including the affirmed medical reports of Drs. Cassels, Tantleff and Paynter, as well as the deposition testimony of the plaintiff stating that she only missed two days from work immediately following the accident, is sufficient to meet defendants' prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Although Dr. Cassels found minor limitations in plaintiff's range of motion of the right knee, his report, based upon his review of the plaintiff's prior treatment records, adequately explained his opinion that the limitations were due to pre-existing arthritic and degenerative conditions (see Park v Shaikh, 82 ADd 1066 [2d Dept. 2011]; Gonzales v Fiallo, 47 AD3d 760 [2d Dept. 2008]; cf. Burns v Stranger, 31 AD3d 360 [2d Dept. 2006]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Drs. Delman, Wagner, Villafuerte, and Hostin attesting to the fact that the plaintiff had significant limitations in range of motion of both knees and her lumbar spine both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and resulted from trauma causally related to the accident (see Perl v Meher, 18 NY3d 208[2011]; Dixon v Fuller, 79 AD3d 94 [2d Dept. 2010]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). Further, Dr. Delman, attested that plaintiff's limitations resulted from trauma causally related to the subject accident, rather than from degenerative disease. As such, the plaintiff raised a triable issue of fact as to whether she sustained a serious injury of her knees and lumbar spine under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 ADd 606[2d Dept. 2011]; Compass v GAE

Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the defendants' motion for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: May 21, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.