

Padilla v Merante

2015 NY Slip Op 31534(U)

August 10, 2015

Supreme Court, Queens County

Docket Number: 25658/2011

Judge: Robert J. McDonald

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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

JENNIFER PADILLA,

Plaintiff,

- against -

MARIA A. MERANTE AND MICHAEL F. PADILLA,

Defendants.

- - - - - x

MARIA A. MERANTE,

Third-Party Plaintiff,

- against -

MICHAEL F. PADILLA,

Third-Party Defendants.

- - - - - x

The following papers numbered 1 to 12 read on this motion by defendant/third-party plaintiff Maria Merante and on this cross-motion by defendant Michael F. Padilla for an order pursuant to CPLR §3212 granting summary judgment, dismissing plaintiff Jennifer A. Merante's complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d), and dismissing the third-party complaint.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1 - 4
Notice of Cross-Motion-Affirmation-Exhibits.....	5 - 8
Affirmation in Opposition-Affidavit-Exhibits.....	9 - 11
Reply Affirmation.....	12

Upon the foregoing papers, it is ordered that this motion and

cross-motion are determined as follows:

In this action for negligence, plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on December 9, 2009, on Union Turnpike at or near its intersection with Woodhaven Boulevard, Queens County, New York. Plaintiff alleges that she sustained injuries when the Padilla vehicle, in which she was a passenger, was struck by the Merante vehicle. As a result of the accident, plaintiff allegedly sustained physical injuries to her cervical spine, lumbar spine, face, and right eye.

Plaintiff commenced this action by the filing of a summons and verified complaint on November 10, 2011. Issue was joined by Jennifer A. Merante (Merante) by serving an answer dated December 20, 2011. Defendant Michael F. Padilla failed to answer the complaint. However, plaintiff failed to seek a default judgment against Michael F. Padilla within a year of his default, and the complaint was dismissed against him by Order dated December 1, 2013.

On January 28, 2014, Merante commenced a third-party action against Michael F. Padilla for indemnification. Issue was joined in the third-party action by service of an answer on or about March 4, 2014.

Merante and Michael F. Padilla now move for an order pursuant to CPLR §3212 dismissing plaintiff's complaint on the ground that the injuries claimed by plaintiff fail to satisfy the serious injury threshold requirement of Insurance Law §5102(d). Michael F. Padilla also moves to dismiss the third-party complaint.

In support of the motion, Merante submits an affirmation from counsel; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial taken on November 6, 2013; the affirmed medical report of Stewart A. Levine, M.D.; and the affirmed medical report of Iqbal S. Merchant, M.D..

On August 12, 2014, plaintiff underwent an independent ophthalmological examination performed by Dr. Levine. At the time of the examination, plaintiff explained that she sustained bruises to her body, a droopy right upper eyelid, and headaches as a result of the subject accident. Dr. Levine identifies the records he reviewed, and opines that several of plaintiff's symptoms were totally unrelated to the subject accident. He concludes that all of her accident related eye conditions have completely resolved, her vision is completely normal and there is absolutely no lid droop present in either eye. Dr. Levine also opines that plaintiff may work and perform all of her activities of daily living without restriction and there is no disability and no limitations.

Dr. Merchant performed an independent neurological evaluation on

plaintiff on February 26, 2015. Dr. Merchant reports that plaintiff explained that she sustained injuries to her head, neck and lower back as a result of the subject accident, and she received physical therapy, but was not currently receiving any treatment. Dr. Merchant also acknowledges that at the time of the accident, plaintiff was employed full-time as a host, but stopped working as a result of her pregnancy. Plaintiff is currently employed in the same capacity. Dr. Merchant identifies the medical records he reviewed and states that he performed range of motion testing using a goniometer. Dr. Merchant found all normal ranges of motion in plaintiff's cervical spine and lumbar spine. There was a 5 degree deficit found in plaintiff's lumbar spine right rotation. Dr. Merchant concludes that there is no accident-related disability or permanency and plaintiff can continue to work and perform her regular activities of daily living without any restrictions.

Merante's counsel contends that the affirmed medical reports of Drs. Levine and Merchant are sufficient to establish, prima facie, that plaintiff has not sustained a significant disfigurement; fracture; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of a body organ or member; or significant limitation of use of a body function or system.

In opposition, plaintiff first procedurally argues that Merante's motion must be denied as it is untimely. Pursuant to CPLR 3212(a), summary judgment motions must be made no later than one hundred and twenty days after the filing of the note of issue, except with leave of court on good cause shown. Here, the Note of Issue was filed on September 7, 2014, and thus, the time to move for summary judgment was on or about January 7, 2015. Merante did not move for summary judgment until March 10, 2015. As such, Merante's motion is untimely.

However, Merante has established good cause. Good cause for delay in filing a summary judgment motion is established when there is significant discovery outstanding at the time the Note of Issue is filed, and the movant had yet to receive the discovery by the deadline by which the motion was to be made (see Brill v City of New York, 2 NY3d 648 [2004]; Gonzalez v 98 Mag Leasing Corp., 95 NY2d 124 [2000]; Parker v LIJMC-Satellite Dialysis Facility, 92 AD3d 740 [2d Dept. 2012]). Here, at the time of the deadline to move for summary judgment, plaintiff's neurological independent medical examination was still outstanding due to plaintiff's failure to appear for three scheduled appointments. Defendant moved to vacate the Note of Issue and a So-Ordered Stipulation was issued which required plaintiff to appear for the independent neurological medical examination within forty-five days of October 17, 2014. Plaintiff failed to show for an independent medical examination on October 17, 2014 and January 16, 2015. She finally appeared on February 26, 2015. Accordingly, Merante has demonstrated good cause for the delay in making this summary judgment motion. As such, this Court will address the merits of the summary judgment motion.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "[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 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Where defendant's 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 the plaintiff's 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 the plaintiff 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 proof submitted by Merante is sufficient to meet her prima facie burden by demonstrating that 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]).

Accordingly, the burden shifts to plaintiff to demonstrate an issue of fact as to whether she sustained 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]). Plaintiff submits an affirmation from her counsel; her own affidavit; medical records from Jamaica Hospital Medical Center; a medical report from Kerin B. Hausknecht, M.D.; medical records from William S. Kasper, M.D.; and a photograph of herself.

The medical records and reports from Jamaica Hospital Medical Center, Kerin B. Hausknecht, M.D. and William S. Kasper, M.D. are unsworn and unaffirmed. Medical records and reports by examining and treating doctors that are not sworn to or affirmed under penalties of perjury are not evidentiary proof in admissible form, and are therefore not competent and not admissible (see Grasso v Angerami, 79 NY2d 813 [1991]; Varveris v France, 71 AD3d 1128 [2d Dept. 2012]); Malave v Basikov, 45 AD3d 539[2d Dept. 2007]). As such, the records and reports submitted by plaintiff are insufficient to defeat the summary judgment motion.

Moreover, the attorney affirmation submitted in opposition is not admissible probative evidence on medical issues and is not sufficient to defeat this summary judgment motion (see Sloan v Schoen, 251 AD2d

319 [2d Dept. 1998]). Similarly plainitff's own affidavit, in which she states that she was referred to Dr. Perry Gerber for surgery and that the ptosis is the result of the subject accident, and the undated photograph, are insufficient to raise a triable issue of fact (see Fisher v Williams, 289 AD2d 288 [2d Dept. 2001]).

Accordingly, for all of the above stated reasons, it is hereby,

ORDERED, that the motion by defendant/third-party plaintiff Maria A. Merante and the cross-motion by defendant Michael F. Padilla for summary judgment are granted and the complaint of plaintiff Jennifer Padilla and the third-party complaint of Maria A. Merante are dismissed.

Dated: August 10, 2015
Long Island City, N.Y

ROBERT J. MCDONALD
J.S.C.