

Howard v New York City Tr. Auth.
2017 NY Slip Op 30876(U)
February 28, 2017
Supreme Court, Bronx County
Docket Number: 21344/14E
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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UNA HOWARD,

Plaintiff(s),

- against -

DECISION AND ORDER

Index No: 21344/14E

NEW YORK CITY TRANSIT AUTHORITY D/B/A MTA
NEW YORK CITY TRANSIT, MANHATTAN AND BRONX
SURFACE TRANSPORTATION OPERATING AUTHORITY,
MTA BUS COMPANY, METROPOLITAN TRANSIT
AUTHORITY AND BARRINGTON WILLIS,

Defendant(s).

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In this action for alleged personal injuries sustained as a result of the negligent operation of a motor vehicle, plaintiff moves seeking an order, *inter alia*, granting her partial summary judgment on the issue of whether she sustained a serious injury as defined by the Insurance Law. Saliiently, plaintiff avers that the evidence demonstrates that as a result of the instant accident, she sustained a fracture, a serious injury under the Insurance Law. Defendants oppose plaintiff's motion on grounds that it is unsupported by admissible evidence.

For the reasons that follow hereinafter, plaintiff's motion is denied.

The instant action is for alleged personal injuries as a result of a motor vehicle accident. The complaint alleges that on

November 21, 2013, plaintiff, while traversing the intersection of Bartow and Baychester Avenues, Bronx, NY, was struck by a bus owned and operated by defendants. It is alleged that defendants were negligent in the ownership and operation of the bus, said negligence causing the accident and injuries resulting therefrom. Plaintiff alleges that she sustained a host of injuries, the most serious being a displaced fracture of her left clavicle¹.

Plaintiff's motion for summary judgment is denied. While she submits evidence of a fracture on the date of the accident alleged, she fails to submit any competent evidence on causation as required by prevailing law.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie

¹While plaintiff does not allege which categories of serious injury apply to her injuries, on this record, the only applicable categories are (1) a fracture; (2) permanent loss of use of a body organ, member, function or system; (3) permanent consequential limitation of use of a body organ or member; (4) significant limitation of use of a body function or system; and/or (5) a medically determined injury or impairment of a non-permanent nature which prevented her from performing all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following her accident.

entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

[t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing summary judgment in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact. Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary

proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

Moreover, when deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

Supreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(see also *Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]).

Accordingly, the Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). When the proponent of a motion for summary judgment fails to establish prima facie entitlement to summary judgment, denial of the motion is required "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Self serving affidavits, meaning those which contradict previous deposition testimony, will not be considered by the court in deciding summary judgment and cannot raise a triable issue of fact sufficient to defeat summary judgment (*Gloth v Brusco Equities*, 1 AD3d 294, 294 [1st Dept 2003]; *Lupinsky v Windham Construction Corp.*, 293 AD2d 317, 318 [1st Dept 2002]; *Joe v Orbit Industries, Ltd.*, 269 AD2d 121, 122 [1st Dept 2000]; *Kistoo v City of New York*, 195 AD2d 403, 404 [1st Dept 1993]). While it is clear that self serving affidavits from plaintiff him/herself, contradicting prior testimony shall be summarily disregarded, it is equally clear, that third-party affidavits, from witnesses, which contradict plaintiff's prior testimony shall be disregarded as well (*Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 324 1st Dept 2006) [Court discounted affidavit from an eyewitness when the same "was so completely at odds with plaintiff's deposition testimony."]; *Gomez v City of New York*, 304 AD2d 374, 375 [1st Dept 2003]; *Perez v South Park South Associates*, 285 AD2d 402, 404 [1st

Dept 2001]; *Philips v Bronx Lebanon Hospital*, 268 AD2d 318, 320 [1st Dept 2000]). The rationale for disregarding self serving affidavits was best articulated in *Glick & Dolleck, Inc. v Tri-Pac Export Corp.* (22 NY2d 439, 441 [1968]) wherein the court stated that while the court is generally proscribed from weighing credibility, it is free to do so when it is clear that the "issues [proffered] are not genuine, but feigned."

It is well settled, albeit rare, that a plaintiff establishes entitlement to summary judgment on the issue of serious injury when he tenders evidence demonstrating that his injuries are both serious as defined by the Insurance Law and causally related to the accident on which his suit is premised (*Perez-Hernandez v M. Marte Auto Corp.*, 104 AD3d 489, 490 [1st Dept 2013] ["Plaintiff also established his entitlement to judgment as a matter of law on the issue of threshold injury under Insurance Law § 5102 (d) by submitting testimony that he fell on the left side of his body upon being hit on the right, and certified contemporaneous hospital records showing fractures in his left arm."]; *McHugh v Marfoglia*, 65 AD3d 828, 829 [4th Dept 2009] ["Plaintiff met his burden with respect to those two categories by submitting objective evidence that he suffered a disc herniation at C6-C7 that required surgical intervention, and by submitting the affirmation of his treating neurosurgeon who concluded that, based upon his examination and treatment of plaintiff and his review of plaintiff's medical

records, plaintiff's injuries were significant, permanent, and causally related to the accident."]; *LaForte v Tiedemann*, 41 AD3d 1191, 1192 [4th Dept 2007] ["Plaintiffs submitted objective evidence that plaintiff suffered a disc herniation at L2-L3 and an annular tear at L5-S1, and they submitted the qualitative assessment of plaintiff's treating orthopedic surgeon, who concluded that plaintiff's injury was significant, permanent, and causally related to the accident" (internal quotation marks omitted).]; *Boorman v Bowhers*, 27 AD3d 1058, 1059 [4th Dept 2006] ["Plaintiff met his burden on that part of the motion by submitting the sworn report of a medical expert establishing that plaintiff fractured the lateral talus in his right ankle as a result of the accident."]).

In support of her motion, plaintiff submits her 50-h hearing transcript wherein she testified, in pertinent part, as follows: On November 21, 2013, as she traversed the intersection of Bartow and Baychester Avenues, Bronx, NY, she was struck by a bus. Immediately prior to the accident, plaintiff was en route to work, on foot. As she crossed the foregoing intersection, she saw a bus to her left. She then blacked-out, regaining consciousness at the hospital. She was then told that she had been hit by a bus and that she had a fractured clavicle requiring surgery. Plaintiff then underwent surgery.

Plaintiff also submits a certified² copy of records from Jacobi Medical Center, which establish that on November 21, 2013 she was admitted to the hospital secondary to a motor vehicle accident, diagnosed with a fractured clavicle, and underwent surgery to repair the same.

Based on the foregoing, plaintiff fails to establish prima facie entitlement to summary judgment inasmuch as she fails to tender any evidence on causation as required by law. To be sure, a plaintiff establishes entitlement to summary judgment on the issue of serious injury when the evidence tendered demonstrates a serious injury as defined by the Insurance Law and that said injury is causally related to the accident on which the suit is premised (*Perez-Hernandez* at 490; *McHugh* at 829; *LaForte* at 1192; *Boorman* at 1059). Here, while plaintiff submits evidence that she was involved in a motor vehicle accident and that upon being admitted to the hospital she was diagnosed with a fractured clavicle - a serious injury under the Insurance Law (Insurance Law § 5102[d];

²Generally, a record is admissible at trial or on a motion for summary judgment upon a proper foundation - namely, that (1) the record be made in the regular course of business; (2) it is the regular course of business to make said record and; (3) the records were made contemporaneous with the events contained therein (CPLR § 4518; *People v Kennedy*, 68 NY2d 569, 579 [1986]). It is also true that where the documents submitted are "hospital records," records of a "department or bureau of a municipal corporation or of the state" (CPLR § 4518[c]; § 2307), such records are admissible when the foregoing foundation is laid via a certification on records themselves reciting the elements of business records foundation (CPLR § 4518[c]; § 2307).

Perez-Hernandez at 490; *Boorman* at 1059) - she submits no competent evidence establishing that her injuries were caused by the instant accident. This is fatal since "[t]o recover damages for non-economic loss related to personal injury allegedly sustained in a motor vehicle accident, a plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of Insurance Law § 5102(d), but also that the injury was causally related to the accident" (*Diaz v Anasco*, 38 AD3d 295, 295-96 [1st Dept. 2007] [internal quotation marks omitted]).

Because plaintiff fails establish prima facie entitlement to summary judgment, the Court need not consider the sufficiency of any papers submitted in opposition to this motion (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

ORDERED that defendants serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : February 28, 2017
Bronx, New York


Ben Barbato, ASCJ