

Bush v Reina

2017 NY Slip Op 33482(U)

June 27, 2017

Supreme Court, Westchester County

Docket Number: Index No. 58116/2015

Judge: William J. Giacomo

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

----- X
EBONY A. BUSH,
Plaintiff,

– against –

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BARBARA REINA,
Defendant.

DECISION & ORDER

----- X
In this action to recover damages for personal injuries as a result of a motor vehicle accident, plaintiff moves for summary judgment (1) on the issue of liability; (2) to strike defendant's affirmative defenses of the plaintiff's comparative negligence; and (3) summary judgment on the issue of "serious injury" within the meaning of Insurance Law 5102(d):

Papers Considered

1. Notice of Motion/Affirmation of Robert W. Folchetti, Esq./Affidavit of Ebony A. Bush/Affirmation of Gladys E. Cardenas, M.D./ Exhibits A-E;
2. Affirmation of Michelle R. Kolodny, Esq. in Opposition/Exhibits A-E;
3. Reply Affirmation of Robert W. Folchetti, Esq.

Factual and Procedural Background

Plaintiff commenced this action to recover for personal injuries as a result of a motor vehicle accident which occurred on May 7, 2012. Plaintiff was in the process of making a right turn into a parking area when defendant's vehicle attempted to overtake plaintiff's vehicle by cutting through the parking area and striking plaintiff's vehicle.

Plaintiff moves for summary judgment on the issue of liability and to strike from defendant's affirmative defenses of her comparative negligence. Plaintiff also moves for summary judgment on the issue of "serious injury". Plaintiff alleges that the injuries to her lumbar spine constitute a significant limitation of use of a body function or system and prevented her from performing her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident.

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Plaintiff submits an affidavit attesting that she was operating her vehicle and traveling in a westerly direction on Old Albany Post Road in the Town of Cortlandt. She had her right turn signal activated and was traveling at a safe and reasonable speed. As plaintiff was in the process of executing a right turn, defendant's vehicle, which had been traveling behind her, attempted to pass plaintiff on the right and drove around plaintiff's vehicle in the parking area and struck plaintiff's vehicle. Plaintiff attests, "I had no idea that the defendant was going to try to illegally pass me on the right as I was in the process of turning right and she did so without warning, without sounding her horn or giving any other signal."

Plaintiff submits defendant's deposition testimony wherein she testified that she was directly behind plaintiff's vehicle prior to the accident and plaintiff was in the process of making a right turn. Defendant also testified that plaintiff's vehicle looked like it was stopped so defendant just "went to go around her". Defendant admitted that there was nothing blocking her from proceeding straight in her lane of travel but she still decided to go around plaintiff's vehicle to the right.

As to her injuries, plaintiff attests that following the accident, she had significant pain in her lower back and went to the emergency room where x-rays were taken and she was given prescriptions. She went for follow up treatment with East Coast Pain Management, P.C. and underwent an MRI scan and a course of physical therapy for her lower back. For ten months, plaintiff attended physical therapy and only stopped when her insurance company ceased paying for the treatment.

At the time of the accident, plaintiff attests that she was employed as a home health aide for a senior citizen. She worked approximately twenty-five hours per week, cleaning, doing laundry, meal preparation, and doctor's appointments. After the accident, plaintiff states that she was completely disabled from her job until at least April 5, 2013. She attests that her doctor recommended that she refrain from work and physical activities until further notice. Plaintiff was never cleared to return to work or activities and did not return to work "until well-after my last treatment on April 5, 2013."

After the accident, plaintiff states that she was unable to perform her customary activities such as cooking, vacuuming, making beds, laundry, dusting, and cleaning, which she did prior to the accident. She was also unable to engage in walking, dancing, aerobic exercises and socializing with friends until at least April 5, 2013. She further states that she could not stay in any position for too long and her ability to sit, stand and lie down were significantly limited.

Plaintiff submits an affidavit of her treating physician Gladys E. Cardenas, M.D. Dr. Cardenas practices physical medicine and rehabilitation. Dr. Cardenas provided treatment to plaintiff after the May 7, 2012 accident. Dr. Cardenas attached copies of medical records pertaining to plaintiff's treatment. On May 11, 2012, Dr. Cardenas examined plaintiff and thereafter, plaintiff treated at East Coast Pain Management through April 5, 2013. Range of motion testing demonstrate that plaintiff's lumbar spine range of

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motion did not return to normal. Plaintiff demonstrated flexion of 30 degrees with 110 being normal; extension of 5 degrees with 30 being normal; right lateral flexion of 20 degrees with 30 being normal; and left lateral flexion of 15 degrees with 30 being normal.

Dr. Cardenas avers, with a reasonable degree of medical certainty, that plaintiff sustained significant injuries to her lumbar spine diagnosed as derangements, sprains/strains and musculo-skeletal ligamentous injuries as a result of the May 7, 2012 accident. As of plaintiff's last treatment on April 5, 2013, plaintiff was still disabled from all activities more demanding than sedentary. Dr. Cardenas opined that these injuries prevented plaintiff from performing substantially all of the material acts which constituted her usual and customary daily activities from May 7, 2012 through at least April 5, 2013. Plaintiff was precluded from any activities required exertion and stress-bearing or weight bearing of her lumbar spine.

In opposition, as to liability, defendant merely argues that her liability is an issue of fact for the jury. As to serious injury, defendant argues that issues of fact exist. Defendant argues that plaintiff's affidavit is contradicted by her deposition testimony. Defendant submits plaintiff's deposition testimony and argues that plaintiff testified that she was only confined to bed for four days after the accident and that the only activities that were limited as a result of the accident was bending, sitting, standing for long periods of time and sleeping. Defendant also argues that in her affidavit plaintiff stated that April 5, 2013, was the end period of her incapacity.

In reply, plaintiff points out that her affidavit does not state that her incapacity ended on April 5, 2013, rather, she attested that "complete incapacity due to the accident ... lasted well after my last office visit on April 5, 2013, for the purposes of this affidavit, April 5, 2013 is used as the end of the period of incapacity."

Discussion

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a prima facie showing of entitlement to summary judgment (*see Zuckerman v New York*, 49 NY2d at 562).

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I. *Liability*

Plaintiff argues that defendant violated Vehicle and Traffic Law 1123 as a matter of law. Defendant argues that there are issues of fact for a jury to determine.

Plaintiff established her prima facie entitlement to judgment as a matter of law by presented uncontroverted evidence that defendant attempted to overtake her vehicle by passing on the right as plaintiff was in the process of making a right-hand turn, in violation of VTL 1123. A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law (see *Vainer v DiSalvo*, 79 AD3d 1023 [2d Dept 2010]; *Botero v Erraez*, 289 AD2d 274 [2d Dept 2001]). Through her affidavit, plaintiff established that defendant was negligent as a matter of law and that defendant's negligence was the sole proximate cause of the accident, without any comparative negligence on her part (see *Dimou v latauro*, 72 AD3d 732 [2d Dept 2010]).

In opposition, defendant fails to raise an issue of fact on the issue of liability. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a motion for summary judgment (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Therefore, plaintiff's motion for summary judgment on the issue of liability is granted.

II. *Serious Injury*

Plaintiff argues that she sustained a medically determined injury which prevented her from performing substantially 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 the accident. She further argues that the evidence demonstrates that she sustained a significant limitation of use of a body function.

Under the "no fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained (see *Licari v Elliott*, 57 NY2d 230 [1982]). Insurance Law 5102(d) defines "serious injury" 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."

Under the "90/180" category, "a plaintiff must present objective evidence of a medically determined injury of a non-permanent nature" (*Toure v Avis Rent A Car Systems*, 98 NY2d 345, 357 [2002]; *Licari v Elliott*, 57 NY2d 230). Plaintiff must demonstrate that her usual daily activities were restricted during 90 of the 180 days following the accident and submit evidence based on objective medical findings of a

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medically determined injury or impairment which caused the alleged limitations in her daily activities (see *Toure v Avis Rent A Car Systems*, 98 NY2d 345; *Gaddy v Eyler*, 79 NY2d 955 [1992]).

Here, in support of her claim, plaintiff submits her own affidavit as well as an affirmation from her treating doctor attesting that plaintiff has sustained an injury that prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident. Plaintiff attests that she was completely disabled from her job until at least April 5, 2013, and that her doctor recommended that she refrain from work and physical activities until further notice. Dr. Cardenas averred that as of plaintiff's last treatment on April 5, 2013, she was still disabled from all activities more demanding than sedentary. Dr. Cardenas opined that these injuries prevented plaintiff from performing substantially all of the material acts which constituted her usual and customary daily activities from May 7, 2012 through at least April 5, 2013. Defendant has not submitted any proof in admissible form to refute plaintiff's evidence. The submission of plaintiff's deposition testimony fails to raise an issue of fact.

The plaintiff also met her prima facie burden of demonstrating that she sustained a significant limitation of use of a body function as a result of the subject accident (see *Toure v Avis Rent A Car Sys.*, 98 NY2d at 350; *Gaddy v Eyler*, 79 NY2d at 956-957). The plaintiff submitted competent medical evidence in admissible form demonstrating that she sustained serious injuries to the lumbar regions of her spine. The defendant failed to raise a triable issue of fact in opposition (see *Carmody v Bald*, 102 AD3d 904 [2d Dept 2013]).

Conclusion

Accordingly, plaintiff's motion for summary judgment on the issue of liability is GRANTED and the motion is GRANTED on the issue of serious injury with respect to the 90/180 and significant limitation category. That branch of plaintiff's motion to strike several of defendant's affirmative defenses is also GRANTED since defendant failed to address that branch of the motion in the opposition papers.

The parties are directed to appear in the Settlement Conference Part on July 18, 2017, room 1600, at 9:15 a.m. for further proceedings.

Dated: White Plains, New York
June 27, 2017



HON. WILLIAM J. GIACOMO, J.S.C.