Bus v Mosey
2018 NY Slip Op 34137(U)
June 18, 2018
Supreme Court, Erie County
Docket Number: Index No. 810998/2016
Judge: Emilio Colaiacovo

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

REBECCA BUS and
THOMAS J. BUS,

Plaintiffs,

v.

Decision & Order
Index No. 810998/2016

ACEA M. MOSEY, Administrator of
the Estate of Florence Grissom, and
TRACY L. GRISSOM,

Defendants.

MICHAEL J. LOVECCHIO, ESQ.
Attorney for Plaintiff

MATTHEW D. PFALZER, ESQ.
Attorney for Defendant

Colaiacovo, J.:

This action arises from a motor vehicle accident that occurred at the on Interstate 90 in the Town of Cheektowaga, New York on April 7, 2014. The Plaintiff claims she sustained a "serious physical injury" as a result of the accident. Plaintiff had surgery and has treated with a number of physicians and chiropractors to address lumbar spine issues that allegedly were caused by the accident.

Defendant Grissom has moved for an Order granting summary judgment pursuant to CPLR §3212 on the grounds that the Plaintiff has not sustained a "serious injury" pursuant to §5102 of the New York State Insurance Law. The Plaintiff opposes the motion for summary judgment arguing that the Plaintiff's injuries qualify as a "serious injury" as defined by Insurance Law §5102. Further, Plaintiff maintains that the Defendant has failed to meet her burden of showing that Plaintiff did not sustain a serious physical injury as defined by Insurance Law §5102. In addition, the Plaintiff has cross-moved for summary judgment arguing that Defendant Grissom was negligent as a matter of law in the operation of her vehicle when she rear-ended the Plaintiff's vehicle.

The Court recognizes that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact. See Kelsey v. Degan, 266 A.D.2d 843 (4th Dept. 1999); Moskowitz v. Garlock, 23 A.D.2d 943 (3d Dept. 1965). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). On a motion for summary judgment, the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact. S.J. Capelin Assoc. v. Globe Manufacturing Corp., 34

N.Y.2d 338 (1974). To defeat a motion for summary judgment, the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material issues of fact, and importantly mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

> A "serious injury" is defined by the New York Insurance Law 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. Insurance Law § 5102(d).

The Defendant claims entitlement to summary judgment because they argue Plaintiff is unable to demonstrate:

- Permanent consequential limitation of use of a body organ or member;
- Significant limitation of body organ or member; and
- 90/180-day period of disability.

In support of her summary judgment motion on "serious injury", the Defendant relies most prominently on the medical report of Dr. Sherry Leitch, a neurologist who performed an independent medical examination of the Plaintiff. She also relies on medical reports of the Plaintiff's past treatment providers, Drs. Huckell and Serghany.

However, the Plaintiff underwent an "L3-4 and L4-5 microdiscectomy" which Dr. Huckell "related to the subject accident." LoVecchio Affirmation at p. 3. The Plaintiff testified that she was unable to return to work for three months after the accident. She also testified that she was unable to bathe herself for the first month after the accident and would have to seek help from her husband. See LoVecchio Affirmation at pp. 8-9. Furthermore, Dr. Huckell's findings from his examination of the Plaintiff showed a reduced cervical and lumbar range of motion. LoVecchio Affirmation at p. 6. Lastly, Dr. Huckell opines that the Plaintiff "suffered a permanent consequential limitation of use to her cervical and lumbar spine as a result of the 4/7/14 motor vehicle accident." Huckell Affirmation at p. 8.

Based on the foregoing, this Court is satisfied for the purpose of these motions that the Plaintiff has provided proof sufficient to require a trial of material issues of fact. Specifically, this Court finds the Plaintiff raised an

issue of fact under the "permanent consequential limitation" and "significant limitation of use" categories. Finally, regarding the 90/180 category, the Court finds that the Plaintiff, through her testimony and medical proof, has also raised a triable issue of fact in response to the Defendant's motion. The Court agrees with Plaintiff that Dr. Leitch "simply disagrees with the opinions of plaintiff's treating physician who opined plaintiff sustained a serious injury as a result of a motor vehicle at issue in this lawsuit." LoVecchio Affirmation at p. 3. This, in and of itself, is insufficient to warrant summary judgment.

Based on the foregoing, the Defendant's motion seeking summary judgment pursuant to the "serious injury" threshold is DENIED in all respects.

As for Plaintiff's cross-motion for summary judgment regarding the issue of negligence, the Court opines that the Plaintiff has met her initial burden of proof by submitting prima facie evidence that the Defendant's negligence was the sole proximate cause of the accident. Not only was the accident report of the accident submitted in support of Plaintiff's motion, but the Defendant's own testimony is clear that the Plaintiff's vehicle was stopped when she hit her from behind. See LoVecchio Affirmation at p. 15 referencing Grissom Testimony attached as Ex. F. The only response by the Defendant to Plaintiff's motion is to assert that the accident report at issue is "inadmissible

evidence." Pfalzer Reply Affirmation at p. 8. Notwithstanding the admissibility argument, Defendant's own admission as to negligence (unaddressed by counsel in his Reply Affirmation) supports this Court's determination that summary judgment on negligence is appropriate.

Based on the foregoing, the Plaintiff's motion seeking summary judgment regarding negligence is GRANTED in all respects.

Hon. Emilio Colaiacovo, J.S.C

Enter:

June 18, 2018