

Washington v Posillico
2018 NY Slip Op 34215(U)
May 8, 2019
Supreme Court, Nassau County
Docket Number: Index No. 606057/16
Judge: Anna R. Anzalone
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SUPREME COURT OF THE STATE OF NEW YORK

**PRESENT: Honorable Anna R. Anzalone
Justice of the Supreme Court**

WILLIE WASHINGTON, x

TRIAL/IAS, PART 18

NASSAU COUNTY

Plaintiff,

- against -

Motion Seq# 2

TIMOTHY W. POSILICO,

Index No. # 606057/16

Defendants.

The following papers read on this motion: x

- Defendant’s Notice of Motion.....1
- Plaintiff’s Affirmation in Opposition2
- Defendant’s Affirmation in Reply.....3

The within action arose from a motor vehicle accident that occurred on March 17, 2015. The plaintiff was injured when her vehicle was struck in the rear by defendant’s vehicle. Defendant moves for an Order pursuant to CPLR §3212 granting summary judgment to the defendant, Timothy W. Posillico, on the grounds that plaintiff did not suffer a causally related “serious injury” as required under the New York State Insurance Law.

Plaintiff claims that as a result of the impact, plaintiff was caused to sustain, and was diagnosed with, serious and severe personal injuries, including but not limited to tears to the medial and lateral menisci in the right knee, a partial thickness tear of the supraspinatus and glenoid labrum in the right shoulder with subacromial impingement, bulging discs at C4/5, C5/6 and C6/7 with stenosis, herniated discs from L1/2 through L4/5, and a bulging disc at L5/S1.

Defendant submit the affirmed medical examination report of Ronald A. Light, M.D., a

board-certified orthopedic surgeon. Dr. Light examined plaintiff on 3/24/2018, reviewed the bill of particulars, as well as the medical records and tests results prior to and after the subject accident. Dr. Light concluded that as it relates to the accident in question, there is no evidence of a disability, and the plaintiff's injuries have resolved. Dr. Light also affirmed that the plaintiff has a long-standing history of underlying rheumatoid arthritis; her ranges of motion and current finding noted on the examination of 3/24/2018 were consistent with her underlying medical condition and respectful age. The Court notes that Dr. Light examined the plaintiff's cervical spine, lumbar spine, right shoulder, right hip, left hip, and right knees. All measurements of the range of motion were performed by using a hand-held goniometer. Dr. Light noted a significant loss of use in the plaintiff's cervical spine, lumbar spine, right knee and right shoulder.

Defendant also submit the report of Melissa Sapan Cohn, M.D. who reviewed the plaintiff's radiology studies, both prior and subsequent to the accident in question. Dr. Cohn noted that multilevel degenerative changes were noted and was not related to the accident in question.

In a motor vehicle action, a summary judgment motion seeking to dismiss a complaint, requires that a defendant establish a *prima facie* case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) see *Gaddy v. Eycler*, 79 N.Y.2d 955 (1990). A party seeking or opposing summary judgment on the question of serious injury must submit medical proof in admissible form, and consequently, unsworn and un-affirmed physicians' reports are insufficient. *Grasso v. Angerami* 79 NYS2nd 813, 580 NYS2nd 178(1991). The failure of a party to submit expert proof in proper evidentiary form is waived if not contested at the time the motion is made. *Long v. Taida Orchids, Inc* 117 AD3rd 624(1st Dept 2014). A physicians' affirmed statement, which is the equivalent of a sworn statement is competent evidence. *CPLR §2106*. Upon such a showing, it becomes incumbent on the plaintiff to come forward with sufficient evidence in admissible form to demonstrate the existence of a question of fact on the issue *Gaddy v. Eycler, supra*. The court must then decide whether the plaintiff has established a *prima facie* case of sustaining serious injury. *Licari v. Elliot*, 57 N.Y.2d 230 (1983).

"Serious injury" is defined by § 5102(d) of the New York Insurance Law as follows:

A personal injury which results in (1)death; (2)dismemberment; (3)significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; (9) 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 persons' usual and customary daily activities for not less than ninety days during one hundred and eighty days immediately following the occurrence of the injury or impairment.

Under the no-fault statute, to meet the threshold “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories, the law requires that the plaintiff’s limitations be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition *Licari v. Elliot*, 57 NY2d 230, 236 (1982); *Gaddy v. Eycler*, 79 NY2d 955 (1992). That is, in order to prove the extent or degree of physical limitation, an expert’s designation of numeric percentage of plaintiff’s loss of range of motion is acceptable *Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 (2002). Additionally, an expert’s qualitative assessment of a plaintiff’s condition is also probative, provided that: (1) the evaluation has an objective basis, and (2) the evaluation compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system. (*Id.*) Ultimately, a minor, mild or slight limitation is deemed “insignificant” within the meaning of the statute *Licari v. Eliot*, *supra*; *Grossman v. Wright*, 268 AD2d 79, 83 (2nd Dept. 2000).

Based upon defendants’ submissions, this Court finds that the defendants have established a *prima facie* entitlement to judgment as a matter of law that plaintiff did not sustain a “serious injury” as defined in Insurance Law §5102(d) *Toure v. Avis Rent A Car Sys.*, *supra*; *Gaddy v. Eycler*, *supra*; *Pagano v. Kingsbury*, 182 AD2d 268, 587 NYS2d 692 (2nd Dept 1992). As the defendant has met her initial burden of proof, the burden shifts to the plaintiff to provide evidence in admissible form to demonstrate the existence of a triable issue of fact. *Gaddy v. Eycler*, *supra*.

The plaintiff, in her opposition papers has submitted the affirmation of Asaf Klein, M.D., board certified in internal medicine and rheumatology. Dr. Klein submits that his affirmation is based upon his personal knowledge, as well as based upon a review of plaintiff’s medical records which were maintained by his facility. Dr. Klein affirms that plaintiff has been treated for rheumatoid arthritis by he and by physicians in his office with whom he has been affiliated with since 1988. Attached to Dr. Klein’s affirmation is a medical record from plaintiff visit on February 4, 2015, just prior to the accident in question which shows that plaintiff had a full range of motion

in her right and left upper extremity, thoracic spine, lumbosacral spine, and right and left lower extremity.

Dr. Klein examined the plaintiff on October 26, 2017. Dr. Klein concluded that based upon his knowledge of plaintiff's medical condition, both before and after the motor vehicle accident, and the fact that she was asymptomatic before her accident, it can be stated within a reasonable degree of medical certainty that she has sustained a significant limitation of use of her neck, back, right shoulder and right knee. Dr. Klein continued to declare that these limitations are evident in the measurements taken by Dr. Light. Furthermore, Dr. Klein determined that considering that these limitations were noted three years after the accident, it is highly likely that said limitations will be permanent in nature.

The Plaintiff has submitted competent medical evidence for the purposes of overcoming the defendant's submission that there are no triable issues of fact in this case as to whether plaintiff has sustained a "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories under the no-fault statute. Consequently, defendant's motion dismissing the complaint on the basis that the plaintiff, Willie Washington did not sustain a serious injury under Section 5102 (d) of the Insurance Law is denied.

Counsel for defendant shall file and serve a copy of the within order with notice of entry upon plaintiff within twenty (20) days from the date of this Order. The parties are directed to appear in Central Jury on May 30, 2019 at 9:30 as scheduled.

The foregoing constitutes the Decision and Order of the Court.

DATED: May 8, 2019
Mineola, New Yor

ENTER

Anna R. Anzalone
HON. ANNA R. ANZALONE

ENTERED

MAY 20 2019

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**