Love v Hargis
2018 NY Slip Op 34274(U)
September 25, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 16-604382
Judge: William G. Ford

SHORT FORM ORDER

INDEX No. 16-604382
CAL. No. 18-00741MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

FILED

PRESENT:

Hon. WILLIAM G. FORD
Justice Supreme Court

MOTION DATE 5-18-18 (001)
MOTION DATE 5-24-18 (002)
ADJ. DATE 8-23-18
Mot. Seq. # 001 - MD
 # 002 - MD

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LAQUANA LOVE,

Plaintiff,

- against -

RAYMEIL HARGIS, BEST RIDE OF HAMPTON, INC., BRIAN VINCENT and THE SALVATION ARMY,

Defendants.

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Attorney for Defendants: *Hargis & Best Ride of Hampton, Inc.*
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Upon the following papers read on these e-filed motions for summary judgment : Notice of Motion/Order to Show Cause and supporting papers dated April 20, 2018 and May 11, 2018 ; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers dated August 10, 2018 ; Replying Affidavits and supporting papers dated August 20, 2018 ; Other ___; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendants Raymeil Hargis and Best Ride of Hampton, Inc. for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the motion (improperly denominated as a cross motion) by defendants Brian Vincent and The Salvation Army for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff when the taxi in which she was a passenger collided with a vehicle owned by defendant The Salvation Army ("Salvation Army") and operated by defendant Brian Vincent. The accident allegedly occurred on November 24, 2013, at the intersection of West Main Street and Forge Road, in Riverhead, New York. At the time of the accident, plaintiff was a passenger in a taxi owned by defendant Best Ride of Hampton, Inc. ("Best Ride") and operated by defendant Raymeil Hargis. By the bill of particulars, plaintiff alleges that, as a result of the accident, she sustained various serious injuries and conditions, including herniated and bulging discs in the cervical and lumbar regions, radiculopathy at C7 and L5, and post-traumatic anxiety.

Defendants Hargis and Best Ride move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102 (d). In support of their motion, Hargis and Best Ride submit, inter alia, the sworn medical report of their examining neurologist, Dr. Edward Weiland.

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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006];

Farozes v Kamran, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, Hargis and Best Ride failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). On September 28, 2017, approximately four years after the subject accident, moving defendants' examining orthopedist, Dr. Edward Weiland, examined plaintiff and performed certain orthopedic and neurological tests, including the foraminal compression test, Soto-Hall test, Valsalva's maneuver, Romberg's test, Babinski's test, and the straight leg raising test. Dr. Weiland found that all the test results were negative or normal, and that there was no spasm or tenderness in plaintiff's cervical, thoracic and lumbar regions. Dr. Weiland also performed range of motion testing on plaintiff's cervical, thoracic and lumbar regions, using a goniometer to measure her joint movement. Dr. Weiland found that plaintiff exhibited normal joint function in those regions. However, Dr. Weiland's report failed to adequately address plaintiff's claim, clearly set forth in the bill of particulars, that she sustained post-traumatic anxiety as a result of the subject accident (*see* ***Cohn v Khan***, 89 AD3d 1052, 933 NYS2d 403 [2d Dept 2011]; ***Smith v Quicci***, 62 AD3d 858, 880 NYS2d 652 [2d Dept 2009]; ***Volpetti v Kap***, 28 AD3d 750, 814 NYS2d 236 [2d Dept 2006]). A causally-related emotional injury, alone or in combination with a physical injury, can constitute a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Kranis v Biederbeck***, 83 AD3d 903, 920 NYS2d 725 [2d Dept 2011]; ***Villeda v Cassas***, 56 AD3d 762, 871 NYS2d 167 [2d Dept 2008]). Dr. Weiland's report did not indicate that he performed any psychological tests with respect to plaintiff's alleged emotional injury (*see* ***Robinson v Lawrence***, 99 AD3d 980, 952 NYS2d 468 [2d Dept 2012]; ***Rahman v Sarpaz***, 62 AD3d 979, 880 NYS2d 125 [2d Dept 2009]; ***Joseph v Hampton***, 48 AD3d 638, 852 NYS2d 335 [2d Dept 2008]). Moreover, Hargis and Best Ride have not submitted any evidence to rule out the claimed emotional injury (*see* ***McFadden v Barry***, 63 AD3d 1120, 883 NYS2d 83 [2d Dept 2009]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Lawyer v Albany OK Cab Co.***, 142 AD2d 871, 530 NYS2d 904 [3d Dept 1988]), such as a report from a psychologist who examined plaintiff or the testimony of others who observed him (*see* ***Hill v Cash***, 117 AD3d 1423, 985 NYS2d 345 [4th Dept 2014]; ***Krivit v Pitula***, 79 AD3d 1432, 912 NYS2d 789 [3d Dept 2010]).

Inasmuch as Hargis and Best Ride failed to meet their prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiff in opposition to the motion were sufficient to raise a triable issue of fact (*see* ***McMillian v Naparano***, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]). Accordingly, the motion by defendants Hargis and Best Ride for summary judgment dismissing the complaint is denied.

Defendants Vincent and Salvation Army move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102 (d). In support of their motion, Vincent and Salvation Army submit, inter alia, the sworn medical report of their examining orthopedist, Dr. Teresa Habacker, the sworn medical report of their examining neurologist, Dr. Howard Reiser, and Dr. Weiland's September 28, 2017 medical report.

Here, defendants Vincent and Salvation Army failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Reitz v Seagate Trucking, Inc.***, *supra*). On January 10, 2018, Dr. Habacker examined plaintiff and performed certain orthopedic and neurological tests, including the straight leg raising test. Dr. Habacker found that all the test results were negative or normal, and that there was no spasm in plaintiff's cervical, thoracic and lumbar regions. Dr. Habacker also performed range of motion testing on plaintiff's cervical and thoracolumbar regions, using a goniometer to measure her joint movement. Dr. Habacker found that plaintiff exhibited normal joint function in those regions. However, Dr. Habacker's report failed to adequately address plaintiff's claim, clearly set forth in the bill of particulars, that she sustained post-traumatic anxiety as a result of the subject accident (*see* ***Cohn v Khan***, *supra*; ***Smith v Quicci***, *supra*; ***Volpetti v Kap***, *supra*). Dr. Habacker's report did not indicate that she performed any psychological tests with respect to plaintiff's alleged emotional injury (*see* ***Robinson v Lawrence***, *supra*; ***Rahman v Sarpaz***, *supra*; ***Joseph v Hampton***, *supra*). On March 28, 2018, Dr. Reiser examined plaintiff and performed certain orthopedic and neurological tests. Dr. Reiser found that all the test results were negative or normal, and concluded that plaintiff's post-traumatic symptoms were subjective. Although Dr. Reiser indicated that plaintiff's post-traumatic anxiety was subjective, he failed to explain or substantiate, with objective medical evidence, the basis for that conclusion (*see* ***Mercado v Mendoza***, 133 AD3d 833, 834, 19 NYS3d 757 [2d Dept 2015]; ***Uvaydov v Peart***, 99 AD3d 891, 951 NYS2d 912 [2d Dept 2012]; ***Iannello v Vazquez***, 78 AD3d 1121, 911 NYS2d 654 [2d Dept 2010]). In view of the foregoing, the reports of Dr. Habacker and Dr. Reiser are insufficient to establish a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

Inasmuch as Vincent and Salvation Army failed to meet their prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiff in opposition to the motion were sufficient to raise a triable issue of fact (*see* ***McMillian v Naparano***, *supra*; ***Yong Deok Lee v Singh***, *supra*). Accordingly, the motion by defendants Vincent and Salvation Army for summary judgment dismissing the complaint is denied.

Dated: September 25, 2018
Riverhead, New York

HON. WILLIAM G. FORD J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION