

Deleon v Florida Trails, Inc.

2019 NY Slip Op 32606(U)

September 3, 2019

Supreme Court, New York County

Docket Number: 160345/2016

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. ADAM SILVERA</u>	PART	IAS MOTION 22
	<i>Justice</i>		
-----X		INDEX NO.	<u>160345/2016</u>
RAYSA DELEON,		MOTION DATE	<u>01/04/2019</u>
Plaintiff,		MOTION SEQ. NO.	<u>001</u>

- v -

FLORIDA TRAILS, INC. DBA ANNETT BUS LINES, ANDRE BARRETT, GUACORDA DURAN

DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58

were read on this motion to/for JUDGMENT - SUMMARY.
Upon the foregoing documents, it is ORDERED that defendants Florida Trails, Inc. DBA Annet

Bus Lines and Andre Lamont Barret Sr.'s motion for summary judgment and defendant Guacorda Duran's cross-motion for summary judgment, pursuant to CPLR 3212 to dismiss plaintiff, Raysa Deleon's Complaint are both denied. Before the Court are defendants' motions for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendants on the grounds that plaintiff has failed to demonstrate that plaintiff has suffered a "serious injury" as defined under Section 5102(d) of the Insurance Law. Plaintiff opposes the motion.

This matter stems from a motor vehicle incident which occurred on October 13, 2015, on Canal Street at its intersection with West Street in the County, City and State of New York, which allegedly led to plaintiff's serious injury.

Summary Judgment (Serious Injury)

Defendants Florida Trails, Inc. DBA Annet Bus Lines and Andre Lamont Barret Sr.'s motion and defendant Guacorda Duran's cross-motion, for summary judgment, pursuant to

CPLR 3212, against plaintiff on the issue of “serious injury” as defined under Section § 5102(d) of the Insurance Law are both denied. Here, defendant Guacorda Duran adopts the same arguments and exhibits brought forth by defendants in their motion.

“The proponent of a summary judgment motion 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” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the “serious injury” threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a “permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system”]).

Defendants allege that plaintiff has failed to demonstrate the existence of a “serious injury” as defined under Section 5102(d) of the Insurance Law. Defendants allege that the injuries plaintiff is seeking relief for are not causally related to the underlying accident and are a result of chronic and longstanding degenerative changes. Defendants attach the September 6, 2018 report of Dr. Robert S. Goldstein (Mot, Exh F).

In his report, Dr. Goldstein opined that plaintiff’s alleged injuries to the left knee are degenerative changes which did not occur as a result of the October 13, 2015 motor vehicle

accident (*id.*). As to plaintiff's alleged cervical spine, shoulder, lumbar spine, and knee injuries Dr. Goldstein concluded that based on his clinical examination, there are no objective orthopedic findings related to the October 13, 2015 accident (*id.*). Dr. Goldstein measured plaintiff's range of motion for the cervical spine, shoulders, and lumbar spine and found all normal ranges of motion. Defendants further submit the report of Jacqueline M. Lewis, Ph.D., a biomechanical expert, who conducted an analysis of the underlying accident (Mot, Exh H). Lewis concluded that given the restraints provided within the vehicle at issue and the low accelerations in the subject accident, that there is no injury mechanism present in the subject accident to account for plaintiff's claimed injuries to her cervical spine, lumbar spine, shoulder, and knee (*id.* at 16-17). Thus, defendants have made a prima facie showing of entitlement to summary judgment on the issue of serious injury and the burden now shifts to plaintiff.

In opposition, plaintiff's responding medical submissions raise a triable issue of fact as to plaintiff's alleged degenerative injuries. In *Rosa v Delacruz*, 32 NY3d 1060, 2018 N.Y. Slip Op. 07040 [2018], the Court of Appeals found that where a plaintiff's doctor opined that tears were causally related to the accident, but did not address findings of degeneration or explain why the tears and physical deficits found were not caused by the preexisting degenerative conditions, plaintiff failed to raise a triable issue of fact as it "failed to acknowledge, much less explain or contradict, the radiologist's finding. Instead, plaintiff relied on the purely conclusory assertion of his orthopedist that there was a causal relationship between the accident" (*See id.*)

Here, plaintiff, in contrast to the plaintiff in *Rosa*, plaintiff, submits an opinion from her doctors which address findings of degeneration. Plaintiff submits the affirmation of Dr. Imran Ashraf, who found significant restrictions in plaintiff's range of motion to the left knee including a tear in her medial meniscus and lateral meniscus for which she underwent surgery (Aff in Op,

Exh A). Dr. Ashraf disagrees with Dr. Goldstein’s conclusion that plaintiff’s left knee injury could not have been caused by the accident and explicitly notes that while plaintiff has experienced some natural degeneration, that the injuries to plaintiff’s left knee are directly related to the October 13, 2015 accident. Plaintiff further submits the affidavit of James Pugh, PhD., P.E., an expert in accident analysis and reconstruction who notes that plaintiff’s degenerative process in the alleged injured body parts were aggravated and that plaintiff’s injuries to her cervical spine, lumbar spine and left knee were causally related to the October 13, 2015 accident (*id.*, Exh C). Thus, plaintiff has raised an issue of fact precluding summary judgment on the issue of “serious injury” as defined in 5102 of the Insurance Law.

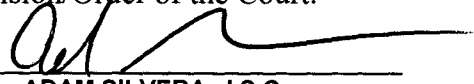
Accordingly, it is ORDERED that defendants Florida Trails, Inc. DBA Annet Bus Lines and Andre Lamont Barret Sr.’s motion for summary judgment to dismiss plaintiff’s Complaint on the grounds that plaintiff allegedly has not sustained a “serious injury” as defined in 5102 of the Insurance Law is denied; and it is further

ORDERED that defendant Guacorda Duran’s cross-motion for summary judgment to dismiss plaintiff’s Complaint on the grounds that plaintiff allegedly has not sustained a “serious injury” as defined in 5102 of the Insurance Law is denied; and it is further

ORDERED that all parties appear for an Early Settlement Conference with Samuel E. Wilkenfeld on September 11, 2019, in room 106 of 80 Centre Street at 9:30 AM; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon all defendants with notice of entry. This constitutes the Decision/Order of the Court.

9/3/19
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE