

Olitt v Brooks

2019 NY Slip Op 34253(U)

October 24, 2019

Supreme Court, Westchester County

Docket Number: Index No. 60689/2018

Judge: Lawrence H. Ecker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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**

-----X
JOYCE M. OLITT,

Plaintiff,

-against -

JOAN BROOKS,

Defendant.

-----X

**Index No. 60689/2018
DECISION/ORDER
Submission Date: 10/09/2019
Motion Seq. 2**

ECKER, J.

The following papers were considered on the motion of JOAN BROOKS (defendant) [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that JOYCE M. OLITT (plaintiff) has not sustained a serious injury as defined by Insurance Law 5102(d):

PAPERS

- Notice of Motion, Affirmation, Exhibits A-E
- Affirmation in Opposition, Exhibits A-E
- Affirmation in Reply
- Letter [NYSCEF No. 52]

Upon the foregoing papers, the court determines as follows:

This action for personal injuries arises from an auto accident that occurred on June 25, 2017(the Accident). Most of the facts concerning the circumstances of the Accident are uncontraverted.

It is undisputed that plaintiff was driving southbound in the right lane on South Central Avenue when defendant's vehicle came out of the Hartsdale Post Office at 441 South Central Avenue at a high rate of speed and struck plaintiff's vehicle. Defendant's vehicle then struck a third vehicle. Two witnesses to the Accident, at their depositions, confirmed plaintiff's version of the relevant events. As for defendant, she did not deny plaintiff's version, but instead testified that her car went over the curb, would not stop and went out of control, causing her to speed into South Central Avenue and to hit plaintiff's vehicle. By decision dated July 25, 2019, this court

granted plaintiff's motion [Mot. Seq.1], made pursuant to CPLR 3212, for an order granting plaintiff partial summary judgment as to liability as against defendant. [NYSCEF No. 48].

Defendant now moves for summary judgment dismissing the complaint as against plaintiff on the ground that, as a matter of law, plaintiff has not demonstrated, by competent medical evidence, that she sustained a serious injury as defined in Insurance Law 5102. In support of their respective positions on the motion for summary judgment, the parties have submitted copies of the pleadings, the bills of particular, deposition transcripts, attorney affirmations, medical records, and medical expert reports and affirmations.

Defendant submits the IME report of Dr. John R. Denton, a Board Certified Orthopedic Surgeon, dated June 3, 2019. [NYSCEF No. 40]. Dr. Denton opines that the examination of plaintiff's spine is normal and the left knee has a slight decrease in range of motion, but the left shoulder has, in essence, a significant decrease in range of motion. Under the topic "impression," the doctor states that the lumber spine, left shoulder sprain, and left knee sprain are "resolved." He finds that there was evidence of a contributing pre-existing condition, as plaintiff had prior left shoulder injury and states, in essence, that plaintiff could work and could carry out regular daily activities.

In terms of permanency, Dr. Denton opines that "the injuries sustained are consistent with the mechanism of injury reported" and plaintiff has a "residual loss of some motion of the left shoulder." Under the topic of "casual relationship," the doctor states that, "based on the history provided and findings on examination, there is a causal relationship between the accident of record and [plaintiff's] injuries" and plaintiff's "current complaints are solely attributed to the accident of record."

In opposition, plaintiff submits the medical examination report of Salvatore R. Lenzo, M.D., orthopaedic surgeon. [NYSCEF No. 46]. Dr. Lenzo records the results of range of motion tests and MRIs relevant to plaintiff's left shoulder. Dr. Lenzo opines that, based upon the examinations, records and MRI film, that:

"[t]his individual sustained a serious injury to her left shoulder. Because of this, she has had definitive anatomical changes about the ligamentous structures and musculotendinous structures around the left shoulder which will be permanent in nature and are causally related to the date of accident."

On a motion for summary judgment it is the obligation of the court to determine whether or not there are issues of fact that militate against granting that relief to either plaintiff or defendant. It is not the court's function on a motion for summary judgment to assess credibility (*Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Garcia v Stewart*, 120 AD3d 1298, 1299 [2d Dept 2014]), or to engage in the weighing of evidence (*Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]). "Resolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact" (*Bykov v Brody*, 150 AD3d 808 [2d Dept 2017]; *Kahan v Spira*, 88 AD3d 964 [2d Dept 2011]). Thus a motion for summary judgment "should not be granted where the facts are in dispute, where conflicting

inferences may be drawn from the evidence, or where there are issues of credibility” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010]; *Civil Serv. Empls. Assn. v County of Nassau*, 144 AD3d 1077 [2d Dept 2016]).

Furthermore, it is well-settled that the proponent of the 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 (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *De Souza v Empire Transit Mix, Inc.*, 155 AD3d 605 [2d Dept 2017]). Importantly, 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.*, *supra*; *Alvarex v Madeline D’Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606 [1st Dept 2012]; see *De Souza v Empire Transit Mix, Inc.*, *supra*). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact (*Zuckerman v City of New York*, *supra*; *Hammond v Smith*, 151 AD3d 1896 [4th Dept 2017]).

Applying these governing legal principles here, the court finds that defendant fails to meet the *prima facie* burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) as a result of the accident. Defendant’s expert finds that: there is a loss of range of motion in the left shoulder; “the injuries sustained are consistent with the mechanism of injury reported”; the residual loss of some motion of the left shoulder is causally related to the accident; and plaintiff’s “current complaints are solely attributed to the accident.” The evidence submitted by defendant in fact fails to contradict plaintiff’s claim that she sustained a serious injury (*Ji Hae Kim v Quintanilla*, 175 AD3d 476 [2d Dept 2019]; *Toure v Avis Rent A Car, Inc.*, 98 NY2d 345 [2002]). Having failed to set forth a *prima facie* showing of entitlement to summary judgment, defendant’s motion is denied without the need to consider plaintiff’s opposition (see *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Ji Hae Kim v Quintanilla*, *supra*; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

In any event, plaintiff submits competent medical expert evidence that generates triable issue of facts as to the relevant medical issue (*Karademir v D.A. Mirando-Jelinek*, 153 AD3d 509 [2d Dept 2017]; *Mulhern v Gregory*, 161 AD3d 881 [2d Dept 2018]). It is not for this court on a summary judgment motion to decide which expert is to be accepted over the other. That is the function of the trier of fact (*Pantojas v Lajara Auto Corp.*, 117 AD3d 577 [1st Dept 2014]).

Accordingly, it is hereby

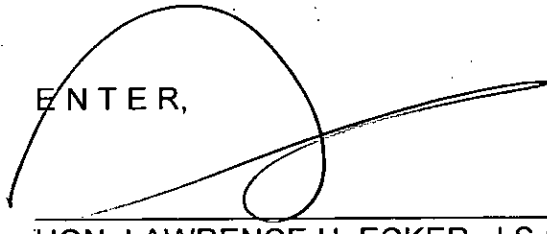
ORDERED that the motion of JOAN BROOKS (defendant) [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that JOYCE M. OLITT (plaintiff) has not sustained a serious injury as defined by Insurance Law 5102(d) is denied; and it is further

ORDERED that the parties shall appear at the Settlement Conference Part of the Court, Room 1600, on December 10, 2019, at 9:15 a.m.

The foregoing constitutes the decision and order of the court.

Dated: White Plains, New York
October 24, 2019

ENTER,



HON. LAWRENCE H. ECKER, J.S.C.

Appearances
All parties via NYSCEF