

McTavish v W Jake Constr. Corp.

2019 NY Slip Op 35187(U)

October 2, 2019

Supreme Court, Queens County

Docket Number: Index No. 717120/17

Judge: Timothy J. Dufficy

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

SANDRA ELAINE MCTAVISH and HORACE
ANDERSON,

Plaintiffs,

Index No.: 717120/17

-against-

Mot. Date: 10/1/19

Mot. Seq. No. 1

W JAKE CONSTRUCTION CORP. and WILMER
H. TENEZACA-AVILA,

Defendants.

The following papers were read on the motion by defendants for an order, pursuant to CPLR 3212, granting summary judgment in their favor dismissing the complaint of plaintiff SANDRA ELAINE MCTAVISH on the basis that said plaintiff did not sustain a "serious injury" under Insurance Law §5102(d).

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	EF 13-19
Answering Affidavits-Exhibits.....	EF 30-40
Replying Affidavits.....	EF 41

Upon the foregoing papers, it is ordered that the motion is denied.

In this action seeking damages for personal injuries, allegedly sustained in a motor vehicle accident that occurred on September 26, 2016, the defendant move for an order granting summary judgment dismissing plaintiff Sandra Elaine McTavish's Complaint on the basis that said plaintiff did not sustain a "serious injury" under Insurance Law §5102(d).

As a general proposition, the proponent of a summary judgment motion of this type must make a *prima facie* showing of entitlement to summary judgment as a matter of

law, tendering sufficient evidence to eliminate any material issues of fact from the case. (*See Licari v Elliot*, 57 NY 2d 230 [1982]; *Alvarez v Prospect Hospital*, 68 NY2d 320 1986]; *Zuckerman v City of New York*, 49 NY 2d 557 [1980]). The defendant's motion papers must demonstrate, through admissible medical evidence, which may include medical reports and records and affidavits and/or affirmed reports of medical examinations, including range-of-motion testing, that address all of the plaintiff's claims, that the plaintiff did not sustain functional limitations which would constitute either a permanent consequential limitation of use of a body organ, member, a significant limitation of use of body function or system, or a medically determined injury or impairment of a non-permanent nature that prevented the plaintiff from performing substantially all of the material, acts which constituted his or her usual customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. (*See Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Choi v Guerrero*, 82 AD3d 1080 [2d Dept 2011]; *Jilani v Palmer*, 83 AD3d 786 [2d Dept 2011]). The failure to make a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see e.g. Reed v Righton Limo, Inc.*, 82 AD3d 1070 [2d Dept 2011]; *Joris v UMF Car & Limo Service*, 82 AD3d 1050 [2d Dept 2011]; *Keenum v Atkins*, 82 AD3d 843 [2d Dept 2011]; *Pero v Transervice Logistics*, 83 AD3d 681 [2d Dept 2011]).

Here, the defendants' moving papers present proof in admissible form via, *inter alia*, the affirmed report of the defendants' examining physician, orthopedic surgeon, Dr. Leon Sultan, M.D. Based upon the foregoing, the defendants provided proof demonstrating, *prima facie*, the absence of any condition that might have arguably met the serious injury threshold of Insurance Law §5102(d). Thus, the burden shifts to the plaintiff Sandra Elaine McTavish to demonstrate the existence of a triable issue of fact (*See Gaddy v Eyler, supra*).

A medical affirmation or affidavit which is based upon a physician's personal examinations and observation of plaintiff is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (*O'Sullivan v Atrium Bus Co.*, 246 AD2d 418 [1st Dept 1980]). The causal connection must ordinarily be established by competent medical proof (*see Kociocek v Chen*, 283 AD2d 554

[2d Dept 2001]; *Pommels v Perez*, 4 NY3d 566 [2005]). Plaintiff Sandra Elaine McTavish submitted medical proof that was contemporaneous with the accident showing *inter alia*, range of motion limitations of plaintiff's cervical spine (*Pajda v Pedone*, 303 AD2d 729 [2d Dept 2003]). Plaintiff Sandra Elaine McTavish has established a causal connection between the accident and her cervical spine injuries. The sworn affidavit submitted by plaintiff's chiropractor, Dr. Jeffrey S. Rauch, D.C., sets forth the tests and review of medical records which were performed contemporaneously with the accident to support his conclusion that the plaintiff suffered from significant injuries, to wit, *inter alia*, range of motion limitations of the cervical spine. Dr. Rauch opines that the range of motion limitations were causally related to the subject motor vehicle accident. Furthermore, plaintiff Sandra Elaine McTavish has provided a recent medical examination detailing the status of her injuries at the current point in time (*Kauderer v Penta*, 261 AD2d 365 (2d Dept 1999)). The affidavit of Dr. Rauch provides that a recent examination of the plaintiff by Dr. Rauch, on July 26, 2019, sets forth the objective examination, tests, and review of medical records which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit, *inter alia*, range of motion limitations of the cervical spine. Dr. Rauch opines that the injuries to the plaintiff Mctavish's cervical spine are permanent in nature and causally related to the motor vehicle accident of September 26, 2016. Clearly, the plaintiff's experts' conclusions are not based *solely* on the plaintiff Sandra Elaine McTavish's subjective complaints of pain, and therefore are sufficient to defeat the motion (*DiLeo v Blumber, supra*, 250 AD2d 364, 672 NYS2d 319 [1st Dept 1998]).

Since there are triable issues of fact regarding whether the plaintiff Sandra Elaine McTavish sustained a serious injury to her cervical spine, she is entitled to seek recovery for *all* injuries allegedly incurred as a result of the accident (*Marte v New York City Transit Authority*, 59 AD3d 398 [2d Dept 2009]).

Therefore, the plaintiff's submissions are sufficient to raise a triable issue of fact on "serious injury" grounds (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Accordingly, it is

ORDERED that the defendants' motion for summary judgment on "serious injury" grounds, as relating to plaintiff Sandra Elaine McTavish is denied.

This constitutes the decision and order of the Court.

Dated: Oct. 2, 2019



TIMOTHY J. DUFFICY, J.S.C.

