Mays v Duhan
2020 NY Slip Op 31390(U)
March 16, 2020
Supreme Court, Kings County
Docket Number: 505882/2018
Judge: Carl J. Landicino

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16th day of March, 2020.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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ZANOBIA N. MAYS,
Plaintiff,

- against -

ETIS DUHAN, RASHAWN REAVES and TERRY KENNEDY,
Defendants.

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DECISION AND ORDER

Motion Sequence #1, #2

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2, 3/4,
Opposing Affidavits (Affirmations).....	5, 6,
Reply Affidavits (Affirmations).....	7,

After a review of the papers and oral argument the Court finds as follows:

Defendant, Terry Kennedy, (hereinafter "Defendant Kennedy") moves for summary judgment and dismissal of the complaint on the basis that the Plaintiff, Zanobia N. Mays, has failed to meet the serious injury threshold required pursuant to Insurance Law §5102(d).[1] This action concerns a motor vehicle accident that allegedly occurred on November 21, 2017 at the intersection of Atlantic Avenue and Vanderbilt Avenue in Brooklyn, N.Y. The Plaintiff opposes the motion.

Plaintiff alleges in her Verified Bill of Particulars that as a consequence of the accident she sustained injuries, including injury to her lumbar spine and left shoulder, which included surgery to the Plaintiff's left shoulder on March 9, 2018. The Plaintiff also alleges that she was prevented "from performing substantially all of the material acts which constitute his [sic] usual

[1] Defendants Etis Duan and Rashawn Reaves cross-move (motion sequence #2) for the same relief and for the sake of judicial economy adopts and incorporates the submissions made by Defendant Kennedy.

and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the date of the occurrence."

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action"*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

In support of their motion the Defendants proffer affirmed medical reports from Jeffrey Guttman, M.D. (orthopedist) and Michael Setton, M.D. (radiologist). Dr. Guttman examined the Plaintiff on March 6, 2019 and conducted range of motion testing of the Plaintiff's cervical spine, lumbar spine and left shoulder, with the use of a goniometer. Dr. Guttman found normal

range of motion in all of these areas. He opined that the alleged injuries were resolved, there was no permanency and no evidence that the Plaintiff suffered traumatic injury as a result of the accident. (Defendants' Motion, Exhibit E) Dr. Setton reviewed an MRI of the Plaintiff's left shoulder (December 15, 2017) and left knee (January 3, 2018). Dr. Setton opined that there was no evidence of traumatic injury to the Plaintiff's left shoulder or left knee. (Defendants' Motion, Exhibit F)

Turning to the merits of both the Defendants' motion, the Court is of the opinion that the Defendants have not met their initial burden of proof. *See Che Hong Kim v. Kossoff*, 90 A.D.3d 969, 969, 934 N.Y.S.2d 867 [2nd Dept, 2011]. The Defendants contend that the affirmed reports of Dr. Guttman and Dr. Setton support their contentions that the Plaintiff did not suffer a serious injury as defined under Insurance Law § 5102(d). Dr. Guttman conducted a medical examination of plaintiff on March 6, 2019, approximately fifteen months after the alleged incident. Dr. Setton, reviewed a Magnetic Resonance Imaging Scans (MRIs) of the Plaintiff. These MRIs were performed relatively shortly after the motor vehicle incident. However, Dr. Setton, did not opine on the ability of the Plaintiff to conduct her daily activities during this early post accident period.

Neither Dr. Guttman nor Dr. Setton address Plaintiff's alleged "90/180" claim. In the instant proceeding, the Plaintiff's Bill of Particulars indicates that she became and continues to be incapacitated as a result of the accident. What is more, the Plaintiff, at her examination before trial stated that she was unable to return to work and had missed a whole year of work as a result of her injuries caused by the accident. (Defendant Kennedy's Motion, Exhibit H, Page 11 and Page 19). As a result, the Court is of the opinion that the motion fails to adequately address, as a matter of law, the Plaintiff's claim set forth in the verified bill of particulars, that he sustained a medically determined injury or impairment of a nonpermanent nature which prevented [her] from performing substantially all of the material acts which constituted [her] usual and customary

daily activities for not less than 90 days during the 180 days immediately following the accident. *See Faun Thai v. Butt*, 34 A.D.3d 447, 448, 824 N.Y.S.2d 131, 132 [2nd Dept, 2006].

In so far as the Defendants failed to make a *prima facie* showing, as indicated above, the Court need not address Plaintiff's opposing papers. "Since the defendants failed to meet their, *prima facie* burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact." *Trivedi v. Vural*, 90 A.D.3d 1031, 1032, 934 N.Y.S.2d 861 [2nd Dept, 2011]. In any event, a review of Plaintiff's opposition papers reflects that the material proffered therein is sufficient to raise a material issue of fact as to whether the Plaintiff suffered a "serious injury", as that term is defined in Insurance Law §5102(d), as a result of the accident.

Based on the foregoing, it is hereby ORDERED as follows:

The motions by the Defendants (motion sequence #3 and #4) are denied.

This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.