Lowery v Dellsite
2020 NY Slip Op 34534(U)
March 13, 2020
Supreme Court, Kings County
Docket Number: 500362/2017
Judge: Carl J. Landicino

FILED: KINGS COUNTY CLERK 07/08/2020 INDEX NO. 500362/2017
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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 13th day of March, 2020.

PRESENT:
HON. CARL J. LANDICINO, Justice.

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CARLA LOWERY,

Plaintiff,

- against -

CYNTHIA DELLSITE,

Defendants.

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DECISION AND ORDER

Motion Sequence #5

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,
Opposing Affidavits (Affirmations).....	3,
Reply Affidavits (Affirmations).....	4,

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

This action concerns a motor vehicle incident that occurred on October 30, 2014. The Plaintiff Carla Lowery (the "Plaintiff"), was involved in a motor vehicle accident with a vehicle owned and operated by Defendant Cynthia Dellesite (the "Defendant"). The accident purportedly occurred on the Grand Central Parkway service road at or near its intersection with Little Neck Parkway.

The Plaintiff claims in her Verified Bill of Particulars (Defendants' Motion Exhibit B, Paragraph 4), that as a result of the accident she sustained a number of serious injuries including, but not limited to, injuries to her cervical and lumbar spine. The Plaintiff also alleges, *inter alia,* that she has sustained "a disabling injury for a period in excess of 90 out of 180 days following this occurrence, plaintiff sustained a significant limitation of use of a bodily function or system; plaintiff sustained a significant disfigurement; plaintiff sustained a permanent consequential limitation of use of a bodily organ and/or member and , in that the Plaintiff has sustained an injury encompassed within the intent and meaning of the aforementioned Insurance Law."

The Defendant moves (motion sequence #1) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint of the Plaintiff on the ground that none of the injuries

allegedly sustained by the Plaintiff meet the "serious injury" threshold requirement of Insurance Law §5102(d). The Plaintiff opposes the motion and argues that it should be denied. In support of the otherwise untimely motion, the Defendant seeks leave to make the untimely application because the Plaintiff did not appear for depositions until January 23, 2019. Additionally, the Plaintiff did not appear for an IME until May 22, 2019 and the Defendant did not receive the resulting report of the medical examination until August 2, 2019. Shortly thereafter the Defendants filed the instant motion. As such, the Defendants are granted an extension of time to move for summary judgment. There has been no prejudice to the Plaintiff in light of its own conduct and delay. *Jerry v. New York City Hous. Auth.*, 285 A.D.2d 531, 728 N.Y.S.2d 497 (2d Dept. 2001). See also, *Armentano v. Broadway Mall Properties, Inc.*, 48 A.D.3d 493, 852 N.Y.S.2d 266 (2d Dept. 2008); *Brill v. City of New York*, 814 N.E.2d 431 (2003).

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 report from Richard A. Weiss, M.D. Dr. Weiss examined the Plaintiff on May 22, 2019, more than four years after the accident. Dr. Weiss conducted range of motion testing of the Plaintiff's cervical spine, lumbar spine, thoracic spine, and both shoulders, elbows, wrists/hands, hips, knees and ankles/feet and found no limitations in the Plaintiff's range of motion. Dr. Weiss opined that "The claimant has no disability. She is capable of working and of performing all of her normal activities of daily living without any limitations." (Defendants' Motion, Exhibit G)

While the Plaintiff sets forth in the subject verified Bill of Particulars that she 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, where the Bill of Particulars contains conclusory allegations of a 90/180 claim and the Deposition and/or affidavit of Plaintiff does not support, or reflects that there is no, such claim, Defendant movant may utilize those factors in support of its motion. *See Master v. Boiakhtchion*, 122 A.D.3d 589, 590, 996 N.Y.S.2d 116, 117 [2nd Dept, 2014]; *Kuperberg v. Montalbano*, 72 A.D.3d 903, 904, 899 N.Y.S.2d 344, 345 [2nd Dept, 2010]; *Camacho v. Dwelle*, 54 A.D.3d 706, 863 N.Y.S.2d 754 [2nd Dept, 2008]. In her deposition, the Plaintiff states that she missed work for one day. (See Defendants' Motion, Exhibit F, Page 8).

Accordingly, the Court is of the opinion that based upon the foregoing submissions, the Defendants have met their initial burden of proof. In addition to the inconsistent representation in relation to her 90/180 claim, Dr. Weiss conducted range of motion testing and did "compare those findings to the normal range of motion..." *Manceri v. Bowe*, 19 A.D.3d 462, 463, 798 N.Y.S.2d 441, 442 [2nd Dept, 2005]. As the Defendants have met their initial *prima facie* burden, the Plaintiff must prove

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that there are triable issues of fact as to whether the Plaintiff suffered serious injuries, as defined by Insurance Law §5102 in order to prevent the dismissal of the action. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2nd Dept, 1994]; *Bryan v Brancato*, 213 AD2d 577 [2nd Dept, 1995]. In this regard, the Plaintiff must submit quantitative objective findings, as well as opinions relative to the significance of the Plaintiff's injuries, as defined by statute. *See Shamsoodeen v. Kibong*, 41 A.D.3d 577, 578, 839 N.Y.S.2d 765, 766 [2nd Dept, 2007]; *Grossman v Wright*, 268 AD2d 79 [2nd Dept, 2000].

Plaintiff in opposition fails to raise a material triable issue of fact. The report of the treating physician lacked probative value as it was unaffirmed . The records were also inadmissible and were similarly without probative value. See CPLR 2106 and *Parente v. Kang,* 37 A.D.3d 687, 831 N.Y.S.2d 430 [2nd Dept, 2007], *Bycinthe v. Kombos*, 29 A.D.3d 845, 815 N.Y.S.2d 693 [2nd Dept, 2006], *Joseph v. A&H Livery*, 58 A.D.3d 688, 871 N.Y.S.2d 663 [2nd Dept, 2009] and *Borgella v. D&L Taxi Corp.*, 38 A.D.3d 701, 834 N.Y.S.2d 199 [2nd Dept, 2007]. In addition, a review of the Plaintiff's submission reflects that there is no specific finding of a causal relationship between the alleged injuries and the subject accident.

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

The motion by the Defendants (motion sequence #5) is granted and the action is dismissed.

This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.