Williams v Sow
2020 NY Slip Op 35328(U)
December 7, 2020
Supreme Court, Kings County
Docket Number: Index No. 511672/2018
Judge: Carl J. Landicino
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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 7th day of December, 2020.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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SHANIQUA WILLIAMS,,

Plaintiff,

- against -

MAMADOU BOYE SOW,

Defendant.

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Index No.: 511672/2018

DECISION AND ORDER

Motions Sequence #2

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

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	30-36
Opposing Affidavits (Affirmations)	40-49
Reply Affidavits (Affirmations)	52

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This action concerns a motor vehicle incident that occurred on September 15, 2015. The Plaintiff Shaniqua Williams (hereinafter "the Plaintiff") was a passenger in a vehicle owned and operated Defendant Mamdou Boye Sow (hereinafter "the Defendant"), when it was allegedly involved in a collision with a parked vehicle. The Plaintiff alleges that the collision occurred at Buffalo Avenue at or near Bergen Street, in Brooklyn, New York. The Plaintiff further claims in her Verified Bill of Particulars (Defendants' Motion Exhibit B, Paragraphs 10), that she sustained a number of serious injuries, inter alia, injuries to her right shoulder, thoracic spine, cervical and lumbar spine. The Plaintiff additionally alleges (Defendant's Motion Exhibit B, Paragraph 20) that she was *prevented from "performing essentially all of the material acts which constitute such persons usual* and customary daily activities, for not less than ninety (90) days during the one hundred and eighty (180) days immediately following the occurrence of the injury or impairment."

The Defendant moves (motion sequence #2) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint on the ground that none of the injuries allegedly sustained by the Plaintiff meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of this application, the Defendant relies on the deposition of the Plaintiff and the reports of Dr. Alan J. Zimmerman and Dr. Michael Setton. The Plaintiff opposes the motion and contends that the Defendant has failed to meet his *prima facie* evidentiary showing, and that even assuming that he had, there are sufficient issues of fact raised by the reports of the Plaintiff's doctors which serve to support the denial of summary judgment.

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 [2d 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 [2d 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 [2d 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 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

Insurance Law § 5102(d)

In support of his motion (motions sequence #2) the Defendant proffers affirmed medical reports from Dr. Alan J. Zimmerman and Dr. Michael Setton. Dr. Alan J. Zimmerman conducted an orthopedic medical examination upon the Plaintiff on April 9, 2019, more than three years after the collision at issue. In his report, which was duly affirmed on April 12, 2019, Dr. Zimmerman detailed his findings based upon his review of Plaintiff's medical records, his personal observations and objective testing. Dr. Zimmerman performed an orthopedic examination of the Plaintiff's cervical spine, thoracic spine, lumbar spine, and her left and right shoulders, with the use of a hand held goniometer. Dr. Zimmerman found no limitation in the Plaintiff's range of motion in relation to these areas. Dr. Zimmerman opined that the "claimant presents a normal orthopedic examination on all objective testing; subjective complaints do not correlate with negative clinical test results." Further, Dr. Zimmerman opined that "[t]here was no medical necessity for right shoulder surgery." (See Defendant's Motion, Report of Dr. Zimmerman, Exhibit D). However, the Court notes that this assessment failed to provide any detail or explanation as to what led Dr. Zimmerman to this conclusion. Dr. Zimmerman does not conclude that the injuries alleged were a product of a degenerative or chronic condition. *See Kearney v. Garrett*, 92 A.D.3d 725, 726, 938 N.Y.S.2d 349, 350 [2d Dept 2012].

However, Dr. Setton, a radiologist, examined the MRI of the Plaintiff's right shoulder, that was conducted on October 14, 2015. Dr. Setton's review of the MRI found "no evidence of osseous or soft tissue injury which may have resulted from the accident one month prior." Dr. Setton opined that the right shoulder injury "reflects a chronic repetitive overuse type injury, with no causal relation to trauma." (Defendant's Motion, Report of Dr. Setton, Exhibit "E"). The Court notes that Dr. Setton did not review or make reference to the MRIs for either the Plaintiff's cervical spine or lumbar spine.

Turning to the merits of the motion for summary judgment, the Court is of the opinion that based upon the foregoing submissions, including expert medical testimony, the Defendant has met his initial burden of proof as to the Plaintiff. 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 for summary judgment. *See Master v. Boiakhtchian*, 122 AD3d 589, 590, 996 N.Y.S.2d 116, 117 [2d Dept 2014]; *Kuperberg v. Montalbano*, 72 AD3d 903, 904, 899 N.Y.S.2d 344, 345 [2d Dept 2010]; *Camacho v. Dwelle*, 54 AD3d 706, 863 N.Y.S.2d 754 [2d Dept 2008]. In this case, the movant points to both the conclusory statements in the Plaintiff's Bill of Particulars and her deposition wherein Plaintiff states, *inter alia*, that she was confined to her home for three to six weeks after the within accident. (Defendants' Motion, Exhibit "C", Page 51). As such, this together with the medical reports, serves to establish a *prima facie* showing in support of the Defendant's motion.

As a result, it becomes incumbent upon the Plaintiff to establish that there are triable issues of fact as to whether the Plaintiff suffered serious injuries, in order to avoid the dismissal of her action. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2d Dept 1994]; *Bryan v Brancato*, 213 AD2d 577 [2d Dept 1995]. In this regard, the Plaintiff must submit quantitative objective findings, in addition to opinions as to the significance of the Plaintiff's injuries. *See Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]; *Candia v. Omonia Cab Corp.*, 6 AD3d 641, 642, 775 N.Y.S.2d 546, 547 [2d Dept 2004]; *Burnett v Miller*, 255 AD2d 541 [2d Dept 1998]; *Beckett v Conte*, 176 AD2d 774 [2d Dept 1991].

In opposition, the Plaintiff relies primarily on the reports of Dr. Gabriel L. Dassa, Dr. Sasan Azar and Dr. Gordon C. Davis. Dr. Dassa, an orthopaedist, examined the Plaintiff on March 20, 2020, and conducted range of motion testing on the Plaintiff's cervical spine, lumbar spine, right wrist, and left and right shoulders, using a hand held goniometer. Dr. Dassa found limitations in the range of motion for each area examined. The Doctor also reviewed MRIs of the Plaintiff's cervical spine, lumbar spine and right shoulder. Dr. Dassa opined that "[t]he patient was injured on the above

date and sustained injuries to several areas of the body." Dr. Dassa also found that "[i]t is my professional opinion, with a reasonable degree of medical certainty, that today's evaluation and findings represent objective evidence of persistent orthopedic impairment to the patient's neck, back, right shoulder and right wrist." (See Affirmation in Opposition, Examination of Dr. Dassa, Attached as Exhibit "A").

Dr. Davis offered, by affirmation, his opinion in relation to his examinations dated September 21, 2015 (ten days after the accident) and May 9, 2016. Dr. Davis conducted range of motion testing of the Plaintiff's right shoulder, cervical spine and lumbar spine which revealed significant decreased range of motion. The Plaintiff was examined by Dr. Davis again on May 9, 2016, approximately eight months after the accident, when the Plaintiff again complained of pain in the right shoulder, neck and lower back. Dr. Davis again conducted range of motion testing of the Plaintiff's right shoulder cervical spine and lumbar spine which revealed significant decreased range of motion. Dr. Davis stated that "[i]t is my professional opinion with a reasonable degree of medical certainty that the injuries sustained by Shaniqua Williams, as set forth in my above referenced reports are permanent and causally related to the motor vehicle accident of September 15, 2015." (See Affirmation in Opposition, Examination of Dr. Davis, Attached as Exhibit "C").

While the findings of the Defendant's doctors were arguably sufficient to meet the Defendant's *prima facie* burden, Plaintiff's evidence, namely the affirmed reports of Dr. Dassa and Dr. Davis raise triable issues of fact with regard to the Plaintiff's claim that she sustained a serious injury to her cervical spine and lumbar spine. "An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." *Toure v Avis Rent A Car Systems Inc.*, 98 N.Y.2d 345, 774 N.E.2d 1197 [2002]; *see Castro v. Anthony*, 153 A.D.3d 655, 57 N.Y.S.3d 895 [2d Dept 2017]; *Dufel v. Green*, 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995]. What is more, "[t]he totality of the admissible

evidence submitted by the plaintiff was sufficient to raise triable issues of fact as to whether she sustained a serious injury to her right shoulder or the cervical and/or lumbar regions of her spine under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident." *Bernier v. Torres*, 79 A.D.3d 776, 777, 913 N.Y.S.2d 299, 301 [2d Dept 2010]. Accordingly, the Defendant's motion is denied.

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

Defendant's motion (motion sequence #2) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.