

Vanderhorst v Collins
2021 NY Slip Op 32303(U)
November 12, 2021
Suprem Court, New York County
Docket Number: Index No. 150371/2017
Judge: Suzanne Adams
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SUZANNE ADAMS

PART 21

HON. SUZANNE ADAMS Justice
J.S.C. X

INDEX NO. 150371/2017

KESHAWNA VANDERHORST,
Plaintiff,

MOTION DATE N/A

MOTION SEQ. NO. 005

- v -

THOMAS COLLINS, LACOR MECHANICAL SYSTEMS,
INC., ROBERT SONG, OUSMAN GUMSNEH, NEW YORK
CITY TRANSIT AUTHORITY

DECISION + ORDER ON
MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 92, 93, 94, 95, 96,
97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117,
118

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that defendant Robert Song's motion for
summary judgment is granted. This personal injury action arises out of an alleged multi-motor
vehicle accident that occurred on August 2, 2016, on Broadway near West 62nd Street in
Manhattan. Plaintiff alleges that on that date she was a passenger in a bus owned by defendant
New York City Transit Authority and operated by defendant Ousman Gumsneh, which came into
contact with vehicles operated by defendant Song and defendant Thomas Collins, in the scope of
his employment with defendant Lacor Mechanical Systems, Inc. By decision and order of this
court dated February 5, 2021, plaintiff was granted partial summary judgment on the issue of
liability, in that plaintiff, as an innocent passenger, was not responsible for the occurrence.
Defendant Song now moves move pursuant to CPLR 3212 for summary judgment on the grounds

that none of plaintiff's alleged injuries amount to a "serious injury" as defined in Insurance Law § 5102(d), New York's "No-Fault Law." Plaintiff opposes the motion.

It is well-settled that "the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986) (citing *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985)). The party opposing a motion for summary judgment is entitled to all reasonable inferences most favorable to it, and summary judgment will only be granted if there are no genuine, triable issues of fact. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 521-22 (1st Dep't 1989). The question of whether a plaintiff suffered a "serious injury" within the meaning of § 5102(d) of the No-Fault Law is one of law that can and should be disposed of by summary judgment. *See Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002). "Since the purpose of the No-Fault Law is to assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trials [cite omitted], requiring that every case, regardless of the extent of the injuries, be decided by a jury would subvert the intent of the Legislature and destroy the effectiveness of the statute. The result of requiring a jury trial where the injury is clearly a minor one would perpetuate a system of unnecessary litigation. '[I]f the procedural system cannot find a way to keep cases that belong in no-fault out of the courthouse, the system is not going to work' [cite omitted]." *Licari v. Elliott*, 57 N.Y.2d 230, 238 (1982).

Viewing the evidence in a light most favorable to the non-moving party, defendant Song has made a *prima facie* showing of entitlement to judgment as a matter of law, having tendered sufficient evidence to demonstrate the absence of any material issues of fact as to whether plaintiff sustained a "serious injury" as a result of the alleged accident. *Alvarez*, 68 N.Y.2d at 324.

Defendant proffers evidence that the alleged injuries do not fall under the applicable categories of injury, namely a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; or a non-permanent injury or impairment preventing the performance of substantially all usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence. For example, defendant cites the reports of Drs. Joseph Yellin, an orthopedist, and Jeffrey Passick, a neurologist (Affirmation in Support, Exhibits F and G), both of which find, *inter alia*, that plaintiff has no disability proximately caused by the subject incident.

The burden now shifts to plaintiff to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure...to do [so].” *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560 (1980). *See also Winegrad*, 64 N.Y.2d at 853. As an initial matter, plaintiff fails to refute defendant’s Statement of Facts Pursuant to Civil Rule 202.8(g), with the result that defendant’s contentions therein are deemed admitted. However, apart from said failure, plaintiff also fails to raise material factual issues that would defeat the motion, as she submits unsworn and unaffirmed medical records, which is not evidence in admissible form. *Grasso v. Angerami*, 79 N.Y.2d 813, 814-15 (1991). Moreover, even if the reports were admissible, none of them objectively set forth that plaintiff sustained a “serious injury” as defined in the Insurance Law, or that any such injury was a proximate result of the incident at issue. Nor do they address the recent findings of Drs. Yellin and Passick.

Accordingly, it is hereby

ORDERED that defendant Robert Song’s motion for summary judgment dismissing the complaint herein is granted, and the complaint and all cross-claims and counterclaims are dismissed in their entirety as against him; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving defendant shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the court.

11/12/2021

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN



HON. SUZANNE ADAMS

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

J.S.C.