

Persaud v Collins

2012 NY Slip Op 32753(U)

September 10, 2012

Sup Ct, Queens County

Docket Number: 17866/10

Judge: Timothy J. Dufficy

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SHORT FORM ORDER

NEW YORK SUPREME COURT-QUEENS COUNTY

**P R E S E N T : Hon. Timothy J. Dufficy
Justice**

Part 35

-----X
**RAJCOOMARIE PERSAUD and
NANDRANIE KISSOON,**

**Plaintiffs,
-against-**

**Index No.: 17866/10
Motion Date: 6/17/12
Calendar No.: 14
Motion Seq.: 4**

**KATHLEEN COLLINS and
MICHAEL KISSOON,**

Defendants.

-----X

The following papers numbered 1 to 16 read on this motion by defendant **MICHAEL KISSOON** pursuant to CPLR 3212 granting summary judgment in his favor and against plaintiff **NANDRANIE KISSOON** and the cross-motion by defendant **KATHLEEN COLLINS** for an order, *inter alia*, granting summary judgment in her favor and against the plaintiffs and dismissing the plaintiffs' complaint as against her.

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Upon the foregoing papers it is ordered that motion by defendant **MICHAEL KISSOON** pursuant to CPLR 3212 granting summary judgment in his favor and against plaintiff **NANDRANIE KISSOON** on the grounds that the plaintiffs did not sustain a serious injury pursuant to New York State Insurance Law 5102 and 5104 and the cross-motion by defendant **KATHLEEN COLLINS** for an order, *inter alia*, granting summary judgment in her favor and against the plaintiffs and dismissing the plaintiffs' complaint as against her are both denied. (see the accompanying memorandum)

Dated: September 10, 2012

TIMOTHY J. DUFFICY, J.S.C.

MEMORANDUM

**SUPREME COURT :QUEENS COUNTY
PART 35**

-----X
**RAJCOOMARIE PERSAUD and
NANDRANIE KISSOON,**

**Plaintiffs,
-against-**

**KATHLEEN COLLINS and
MICHAEL KISSOON,**

**Index No.: 17866/10
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Defendants.

-----X

This action is for bodily injury sustained by plaintiff Nandranie Kisson following a motor vehicle accident that occurred on January 2, 2010, at approximately 6:30 p.m. at the intersection of Commonwealth Boulevard and 80th Road in Queens County, New York. Defendant Kathleen Collins was the driver of a vehicle that was proceeding on Commonwealth Avenue towards 80th Road and the vehicle driven by defendant Michael Kisson was traveling on 80th road towards Commonwealth Boulevard. At the intersection of these two roadways the two vehicles collided.

Defendant **MICHAEL KISSOON** now moves for an order pursuant to CPLR 3212 granting summary judgment in his favor and against plaintiff **NANDRANIE KISSOON** on the grounds that the plaintiff did not sustain a serious injury pursuant to New York State Insurance Law 5102 and 5104. In support of defendant Michael Kisson's motion, he submits among other things the pleadings in this case, plaintiff Nandarine Kisson's deposition testimony, dated May 18, 2011, the affirmed report of orthopedic surgeon Dr. J. Serge Parisien and the affirmed report of Dr. Monette Basson.

On June 21, 2011, Dr. Parisien examined the plaintiff, who complained that she was experiencing pain in her neck, right wrist and lower back which the plaintiff stated was the result of a motor vehicle accident she was involved in on January 2, 2010, while plaintiff was a rear seat passenger in a car that was hit on the left front side.

Dr. Parisien found that the plaintiff's range of motion in all areas was normal and that the plaintiff's cervical spine, right wrist and lumbosacral spine were all normal as well. Dr. Parisien concluded that there was no objective evidence of disability and that the plaintiff could work and perform daily living activities with no restrictions. His diagnosis concluded that the plaintiff presented with status post cervical and lumbar sprain/strain and status post right wrist sprain with no clinical evidence of carpal tunnel syndrome. Dr. Parisien also concluded that the plaintiff's injuries were the result of the car accident that occurred on January 2, 2010.

Defendant Michael Kissoon also submits the affirmed report of neurologist Dr. Monette Basson regarding a neurological evaluation that she conducted on June 30, 2011. Upon Dr. Basson's examination, she found the plaintiff's range of motion to be normal in all areas and the doctor's impression was that the plaintiff sustained cervical and lumbar sprains.

As the proponent of the summary judgment motion the defendant must make a *prima facie* showing of entitlement to summary judgment as a matter of law by offering legally sufficient evidence to demonstrate the absence of any material issues of fact. Alvarez v Prospect Hospital, 68 N.Y. 2d 320(1986); Zuckerman v City of New York, 49 N.Y. 2d 557 (1980). Therefore, on this motion, the defendant bears the initial burden establishing *prima facie* that the plaintiff did not sustain a "serious injury" within the meaning of New York State Insurance Law §5102 and §5104. Gaddy v. Eyler, 79 N.Y. 2d 955 (1992); Licari v. Elliot, 57 N.Y. 2d 230 (1982); Grossman v. Wright, 268 A.D.2d 79(2d Dept. 2000). Here, the defendant has satisfied his burden through legally sufficient documentary evidence from Dr. Parisien and Dr. Basson in their affirmed medical report that the plaintiff's injuries did not meet the threshold requirement of Insurance Law §5102 and §5104 and that the plaintiff did not sustain a "serious injury" as a result of the January 2, 2010 accident. Oberly v. Bangs, 96 N.Y. 2d 295 (2001).

Defendant Kathleen Collins cross-moves for an order granting summary judgment in her favor and dismissing the plaintiff's complaint as against her on the grounds that the plaintiff's injuries fail to satisfy the serious injury threshold requirement of New York State Insurance Law § 5102, or, in the alternative, for an order granting summary judgment on the issue of liability in her favor and dismissing the claims and cross-claims

as against her. In support of her cross-motion, defendant Kathleen Collins submits the pleadings in this case and her deposition testimony, dated November 8, 2011. Defendant argues that she is not liable for any injuries sustained by the plaintiff because she was lawfully proceeding on a road which has no traffic control devices for vehicles traveling on Commonwealth Boulevard, but there were stop signs for the side streets. Defendant Collin's contends that since defendant Kisson's car struck the right front side of defendant Collin's vehicle, defendant Kisson either disregarded the stop sign or entered the intersection when it was unsafe to do so. She claims that she is entitled to summary judgment as a matter of law because there are no genuine issues of material facts with respect to the claim against her. In opposition to defendant Kathleen Collins cross-motion, defendant Michael Kisson submits his deposition testimony, the deposition testimony of plaintiff Nandranie Kisson, the deposition testimony of plaintiff Rajcoomarie Persaud, and the deposition testimony of defendant Kathleen Collins which were all taken on May 18, 2011.. Defendant Michael Kisson argued that his testimony and the testimonies of the two plaintiffs offer differing versions of the accident as compared with the testimony given by defendant Kathleen Collins. A Police Accident Report was generated at the scene and states, in pertinent part, that Vehicle #1 [Kathleen Collins' vehicle] was driving recklessly southbound on Commonwealth and the driver of vehicle #1 fled the scene twice. The report also indicates that the description was written based upon statements made by defendant Michael Kisson and a witness to the accident who is named in the report. The police officer noted in the report that he did not witness the accident. Contrary to defendant Kathleen Collin's claim, her own testimony reveals that she was mailed two tickets stemming from the accident - one ticket was issued for leaving the scene and the second one was for failure to comply, which she received in the mail and not at the time of the accident. After receiving the tickets, she stated that she checked-off the guilty box on both of the tickets then sent in money to pay for them. Based upon her own testimony, defendant Kathleen Collins failed to make out a prima facie case on liability grounds, thus, there are triable issues of fact precluding summary judgment based on liability. *See, Allens v. Echils*, 88 AD3rd 926 (2nd Dept, 2011). Moreover, there is conflicting testimony regarding the facts surrounding the accident and the evidence raised a triable issue of fact as to whether defendant Collins contributed to

the occurrence of the accident. Accordingly, the branch of the cross-motion for an order granting summary judgment on the issue of liability is denied.

Regarding the branch of defendant Kathleen Collins' cross-motion for an order granting summary judgment in her favor and dismissing the plaintiff's complaint as against her on the grounds that the plaintiff's injuries fail to satisfy the serious injury threshold requirement of New York State Insurance Law § 5102, defendant Collins adopts the arguments and proof submitted by defendant Michael Kisson.

The burden then shifts to the plaintiff to demonstrate that there are triable issues of fact which show that the plaintiff sustained a "serious injury" within the meaning of Insurance Law §5102 and §5104 and that these injuries were sustained as a result of the subject accident. Gaddy v. Eyler, *supra*; Hildenbrand v. Chin, 52 AD3d 1164 (3d Dept. 2008). In opposition to the motion and cross-motion, the plaintiffs submit the deposition testimony of plaintiff Nandranie Kissoon, dated May 18, 2011, the medical records from Long Island Jewish Medical Center, where the plaintiff was taken after the car accident, the affirmation of neurologist Dr. Ahmed Elfiky, the affirmed neurological reports of Dr. Ahmed Elfiky, the unaffirmed MRI report of radiologist Dr. Steven Winter regarding plaintiffs lumbar spine, the unaffirmed report of orthopedist Dr. Sebastian Lattuga, the unaffirmed MRI report from radiologist Dr. Steven Winter regarding a scan of plaintiff's cervical spine, the unaffirmed MRI report of radiologist Dr. Steven Winter of the plaintiff's right wrist, the affirmed report of Dr. Ahmed Elfiky, the unaffirmed report of orthopedic surgeon Dr. Barry Katzman, and the police report prepared regarding the instant accident at issue.

Dr. Elfiky's affirmation states, in pertinent part, that the plaintiff's range of motion testing revealed limitations in her cervical spine: flexion 40 degrees where the normal is 60, extension 30 degrees where the normal is 50, and right rotation 60 degrees where the normal is 80 degrees. Range of motion testing of the lumbosacral spine revealed moderate reductions in all planes. Dr. Elfiky further affirmed that the plaintiff's lumbar spine MRI revealed a disc bulge with radial annular tear at the L4-5 and straightening of the lordotic curvature. Dr. Elfiky affirmed that the MRI conducted on the plaintiff's right wrist revealed a 2 mm subcortical cyst in the lunate and a 1-2 mm negative ulnar variance. The MRI conducted on plaintiff's cervical spine revealed a left-sided extruded

herniation at C5-6 causing impingement on the left ventral cord, a central herniation at C6-7 and disc bulges at C2-3, C3-4 and C4-5. The plaintiff was treated with physical therapy which continued for 54 sessions, cortisone and epidural injections, and plaintiff states that she continues to suffer from right wrist pain, neck stiffness, and lower back pain. Plaintiff states that she cannot lift anything over 5-10 pounds with her right hand.

On February 3, 2012 Dr. Elfiky conducted range of motion testing on the plaintiff which revealed significant impairment of the plaintiff's cervical spine, lumbar spine and right wrist which Dr. Elfiky concluded was attributed to the automobile accident that occurred on January 2, 2010, in all areas.

Based upon the above, the Court finds that the plaintiff has raised triable issues of fact by submitting the affirmed medical reports of her doctors showing that she had significant limitations in range of motion both contemporaneous to the accident, as well as in recent examination. The doctors also concluded that the plaintiff's limitations were significant and permanent and in fact resulted from trauma which was caused by the accident (*see*, Ortiz v Zorbas, 62 AD3d 770 (2d Dept. 2009); Azor v Torado, 59 AD3d 367 (2d Dept 2009). Therefore, the plaintiff has raised a triable issue of fact as to whether or not plaintiff has sustained a serious injury as a result of the accident that occurred on January 2, 2010. *see*, Mahmmod v Vicks, 81 AD3d 606 (2d Dept. 2011); Evans v Pitt, 77 AD3d 611(2d Dept. 2010). Inasmuch as a material issue of fact exists as to whether plaintiff suffered serious injury summary judgment is, therefore, denied. Noble v Ackerman, 252 AD2d 392 (1st Dept. 1998); Greene v. Frontier Central District School District, 214 Ad2d 947 (4th Dept. 1995).

Accordingly, the motion by defendant Michael Kissoon and defendant Kathleen Collins' cross-motion are both denied in all respects.

Dated: September 10, 2012

TIMOTHY J. DUFFICY, J.S.C.