

Santana v New York City Tr. Auth.

2007 NY Slip Op 31779(U)

June 12, 2007

Supreme Court, New York County

Docket Number: 0403946/2005

Judge: Donna Marie Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 21

SANTANA, JOSE

INDEX NO. 403946/05

Plaintiff,

-v-

FILED

MOTION DATE _____

NEW YORK CITY TRANSIT AUTHORITY
Defendant.

JUN 22 2007

MOTION SEQ. No. 002

NEW YORK COUNTY CLERK'S OFFICE

MOTION CAL No. _____

The following papers, numbered 1 to 2 were read on this motion for Summary Judgment

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1

Answering Affidavits- Exhibits 2

Replying Affidavits _____

CROSS-MOTION: _____ YES NO

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided as follows:

Defendant, Transit Authority (hereinafter "TA"), seek summary judgment dismissing the complaint against them pursuant to CPLR § 3212 and Insurance Law § 5101. Plaintiff opposes the motion and contends that there are questions of fact that need to be resolved at trial.

BACKGROUND

This is an action to recover monetary damages for personal injuries suffered by

the plaintiff as the result of an alleged accident that occurred on September 19, 2003 when plaintiff was injured when his bicycle collided with a TA bus in New York County. The TA contend that plaintiff's injuries are not serious injuries as required by law (see New York State Insurance Law § 5102 and 5104).

Applicable Law & Discussion

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to

be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

New York State Insurance Law §'s 5102 and 5104 prevent actions arising out of negligence in the use or operation of a motor vehicle, except in the case of a "serious injury" (Toure v Avis Rent a Car Systems, Inc., 98 NY2d 345 [2002]). "[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79, 83-84 [2d Dept. 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.* at 83-84).

In support of their motion for summary judgment, the TA relies on plaintiff's EBT testimony and independent medical reports obtained by them. Plaintiff was examined on behalf of the TA by Dr. Harvey Fishman, an orthopedic surgeon. In his report he diagnosed that plaintiff sustained soft tissue trauma to his left upper extremity with cervical and lumbosacral spine strain/sprain, which was fully resolved. The TA also relies on Dr. Jonathan Glassman's examination of plaintiff on November 26, 2003 in which he concluded in his report, among other things, that plaintiff had no present disability, restriction or limitation. The medical reports submitted by the TA obliged

plaintiff to come forward with evidence that he had sustained a "serious injury"
(Insurance Law § 5102[d]; Gaddy v Eyler, 79 NY2d 955 [1992]).

In opposition to the subject motion, Plaintiff relies on several doctor's reports to rebut the TA's contentions. Plaintiff, however mainly relies on an affirmation from Dr. William Kulak, a physician and Orthopedist who examined the plaintiff on June 7, 2004 and once again on April 18, 2007 for an orthopedic reexamination. Dr. Kulak concluded, after subjecting plaintiff to objective tests, that plaintiff is permanently partially disabled as a result of the injuries he sustained on August 19, 2003. As such, this Court finds that there are triable issues of fact as to whether plaintiff suffered a "serious injury" within the meaning of Insurance Law § 5102(d) and whether it was causally related to the accident of August 19, 2003.

Accordingly, it is

ORDERED that the TA's motion seeking summary judgment dismissing the Complaint is denied.

Dated: 6-12-07



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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