

Sullivan v New York City Tr. Auth.

2007 NY Slip Op 32647(U)

August 16, 2007

Supreme Court, New York County

Docket Number: 0115278/2004

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

SULLIVAN, RICHARD

INDEX NO. 115278/04

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. NO. 001

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants.

MOTION CAL NO. _____

The following papers, numbered 1 to 3 were read on this motion for Summary Judgment

PAPERS NUMBERED

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

Answering Affidavits- Exhibits _____

Replying Affidavits _____

CROSS-MOTION: _____ YES NO

FILED
AUG 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Defendant, Transit Authority (hereinafter "Authority"), seek summary judgment dismissing the complaint against them pursuant to CPLR § 3212 and Insurance Law § 5102(d). Plaintiff opposes the motion and contends that the Authority failed to make out a prima facie case and in the alternative the motion should be denied as there are questions of fact which need to be resolved at trial.

BACKGROUND

This is an action to recover monetary damages for personal injuries allegedly sustained by plaintiff on October 27, 2003, while he was a pedestrian standing and waiting for a bus at or near the front of 11 Broadway in lower Manhattan. The plaintiff claims he was struck by an Authority bus at that location, causing severe and serious personal injuries as a result of the contact. The Authority contend that plaintiff's injuries are not serious injuries as required by law (see New York State Insurance Law § 5102 and 5104) and seek a dismissal of the complaint.

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 Authority relies on plaintiff's testimony at the Statutory hearing, Bill of Particulars and medical reports. Plaintiff was examined on behalf of the Authority by Dr. Howard Baruch, an orthopedic surgeon. In

his report he opined that the results of his examination found that the plaintiff had no limitation of motion in any of the bodily systems in which he claims he sustained injury.

In opposition to the subject motion, Plaintiff contends that the moving papers in support of summary judgment were insufficient to meet their burden of establishing a prima facie entitlement to summary judgment. Dr. Baruch's reports, one over two years after the accident, and a second over three and a half years after the accident cannot be considered as probative on the issue of whether plaintiff suffered a medically determined injury that prevented plaintiff from performing substantially all of the material acts which constituted his usual and customary daily activities for a period of not less than 90 days during the 180 day period immediately following the accident (see Connors v Center City, 291 AD2d 476, 477 [2nd Dept 2002]).

Moreover, the Authority's physician failed to identify any objective tests used to assess plaintiff's cervical spine. The affirmed report of the Dr. Baruch did not set forth the objective tests he performed which led him to conclude that the injured plaintiff suffered no limitation to his back (see Minlionica v Shahabi, 296 AD2d 569, 570 [2nd Dept 2002]).

Accordingly, the Authority has failed to make out a prima facie case of their entitlement to judgment as a matter of law. Under these circumstances this court need not consider whether the plaintiff's opposing papers were sufficient to raise a triable issue of fact (see Mariaca-Olmos v Mizrhy, 226 AD2d 437 [2nd Dept 1996]).

Accordingly, it is
ORDERED that the Authority's motion seeking summary judgment dismissing
the Complaint is denied.

Dated: 8-16-07


J.S.C.

Check one: FINAL DISPOSITION

DONNA M. MILLS, J.S.C.
NON-FINAL DISPOSITION

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