

Perez v Johnson

2008 NY Slip Op 32662(U)

September 23, 2008

Supreme Court, Nassau County

Docket Number: 18377/06

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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JOSE TOMAS PEREZ,
Plaintiff,

-against-

LAMONTE JOHNSON and BMW FINANCIAL
SERVICES NA, LLC,
Defendants.

**MICHELE M. WOODARD
J.S.C.**

**Index No.: 18377/06
TRIAL/IAS Part 16
Motion Seq. No.: 01**

DECISION AND ORDER

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Papers Read on this Motion:

- 1. Defendants' Notice of Motion.....01
- 2. Plaintiff's Opposition.....XX
- 3. Defendants' Reply to Plaintiff's Opposition.....XX

The Defendants move for an Order pursuant to CPLR §3212 granting the following relief:

- 1. Dismissing the Plaintiff's Complaint against the Defendants on the grounds that the Defendants bear no liability, and the Plaintiff has failed to sustain "serious injury" under New York Insurance Law §5102(d).
- 2. Granting the Defendant, BMW Financial Services NA, LLC (hereinafter "BMW") summary judgment on the grounds that said Defendant is neither actively nor vicariously liable for the subject accident, and the action against BMW is preempted by federal statute.

The Plaintiff urges the Court to deny the within motion as it was filed well beyond 60 days after the filing of the Note of Issue. The Plaintiff maintains that he filed his Note of Issue on December 24, 2007 (Def's Exhibit F), and although the Defendants' motion is dated March 20, 2008, the Affidavit of Service is not attached, thus the date of service is unknown. However, the Plaintiff maintains that he did not receive the within motion until April 1, 2008. The Defendants maintain that the Plaintiff's Note of Issue was filed on December 24, 2007; therefore, the within motion should have been served on or before February 24, 2008. However, the Defendants maintain that because the Plaintiff did not appear for his independent medical examination until January 23, 2008, and the Defendants could not file a complete summary judgment motion until it had received copies of said examination, the within motion was late. However, the Defendants maintain that the Court of Appeals has held that late but otherwise meritorious motions should be heard when there is good cause shown and no prejudice to the other parties. *Citing Brill v City of New York*, 2 NY3d 648 (2004). The Court acknowledges that the within motion was untimely filed; however, finds that the Defendants had good cause for the delay as significant outstanding discovery may in certain circumstances constitute good cause for the delay. CPLR 3212(a); *Chao v A to Z Vending Service*, 36 AD3d 745 (2d Dept 2007). Therefore, in the interest of judicial efficiency, the Court will review the within motion.

On March 15, 2006, the Plaintiff and Defendant, Lamonte Johnson, were involved in a motor vehicle accident on Greenwich Street at its intersection with Jerusalem Avenue, Hempstead, New York, County of Nassau. The Plaintiff was travelling southbound on Greenwich Street with the intentions of turning left onto Jerusalem Street at the intersection while the Defendant, Lamonte Johnson, was travelling northbound in his leased vehicle on Greenwich Street. The Defendants maintain that at the EBT on August 21, 2007 (Defs' Exhibit D), the Plaintiff testified that at the time of his approaching the intersection, he observed a traffic light in the intersection; however it did not have a left turn signal. The Plaintiff also testified that when he turned left at said intersection, the subject light was red, and at which point Mr. Johnson struck the right passenger side of the Plaintiff's vehicle. As a result, the Plaintiff allegedly sustained serious personal injuries, and the Plaintiff brought a claim against the Defendants.

The Defendants argue that they demonstrated their entitlement to judgment as a matter of law by establishing that the Plaintiff violated New York State Vehicle Traffic Law §1411 when he made a left turn directly into the path of the vehicle driven by the Defendant, Mr. Johnson. *Citing Pryor v Reichart*, 265 AD2d 270 (1d Dept 1999); *Agin v Rehfeldt*, 284 AD2d 352 (2d Dept 2001); *Stiles v County of Dutchess*, 278 AD2d 304 (2d Dept 2001); *Russo v Scibetti*, 298 AD2d 514 (2d Dept 2002). The Defendants argue that the Plaintiff had a duty to ensure that there were no oncoming vehicles before proceeding with his left turn, and failed to do so.

With respect to the Plaintiff's personal injury claim, the Defendants argue that upon reviewing the emergency room record dated March 17, 2006, Dr. Killian, the doctor who examined the Plaintiff on January 23, 2008, indicated in his affirmed report that, "it is clear that the Plaintiff did not sustain major trauma to the areas he claims given the fact that it was not until two days after the subject accident that the Plaintiff went to the emergency room for evaluation". (Defs' Exhibit F). Additionally, Dr. Killian reported that the April 10, 2006 follow-up note from the Plaintiff's psychiatrist, Dr. Gregorace, indicates that x-rays of the Plaintiff's thoracic spine, lumbar spine, left shoulder, and left knee showed no evidence of fracture. The Defendants maintain that in order for a Plaintiff to meet the statutory requirement of permanent loss of use of a body organ, member, function or system, the Plaintiff must show that the loss of use was total. *Citing Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 (2001). The Defendants allege that no such medical documentation has been provided by the Plaintiff; therefore, the Defendants argue that as indicated by Dr. Killian, the Plaintiff has full use of all body organs, members, functions, and systems. As such, the Defendants urge the Court to grant summary judgment in their favor as the Plaintiff did not sustain serious injury pursuant to New York Insurance Law §5102(d), and thus has no cause of action under New York Insurance Law §5204(a).

With respect to the Plaintiff's vicarious liability claim, the Defendants argue that said claim against the Defendant, BMW is barred by applicable provisions of the Federal Transportation Equity Act. The Defendants argue that New York State courts have held that NYS Vehicle and Traffic Law §388, which imposes vicarious liability on the owner of a motor vehicle for the negligence of the driver is preempted by 49 USCA §30106. *Citing Kuryla v Halabi*, 39 AD3d 485 (2d Dept 2007); *Jones v Bill*, 825 NYS2d 508 (2d Dept 2006). As such, the Defendants request that the Court dismiss the Plaintiff's cause of action against the Defendant, BMW as it is precluded by 49 USCA §30106. In light of the foregoing, the Defendants urge the Court to grant the within motion.

In response, the Plaintiff maintains that as a result of his injuries sustained in the accident, he was unable to pursue his normal daily activities for a significant period of time following the accident, and is limited to a certain extent to the present date. Moreover, the Plaintiff maintains that following his return to work, he reduced his hours from the 6 days a week he worked prior to the accident to the 5 days a week he presently works since the accident. On March 17, 2006, Dr. Gregorace evaluated the Plaintiff and reported that upon examination of the Plaintiff's thoracic and lumbar spine, he observed that range of motion was limited, restricted and painful. Beginning March 20, 2006, Dr. Avella, Dr. Gregorace's colleague, began treating the Plaintiff. According to Dr. Avella's Affirmation (Plaintiff's Exhibit B), the Plaintiff's range of motion in the lumbar to be 80 degrees for the flexion (90 normal), and 20 degrees for the extension (30 normal), 60 degrees for the rotation (90 normal), and 20 degrees for the lateral bending (30 normal). Dr. Avella opines that the Plaintiff was unable to perform the activities of daily living, occupational requirements and his recreational endeavors in a full and completely pain-free environment because of the traumatic injuries sustained in the subject accident. Dr. Avella maintains that upon his last examination of the Plaintiff on May 13, 2008, due to the mechanism of the traumatically induced sprain injury, there was general weakening of the supportive soft tissue structure (Plaintiff's Exhibit B). Dr. Avella determined that the Plaintiff's injuries were permanent with moderate disability (Plaintiff's Exhibit B). The Plaintiff asserts that there still exists a triable issue of fact with respect to whether the Defendant, Mr. Johnson, was operating his vehicle with reasonable care, and proper lookout under the circumstances. The Plaintiff urges the Court to deny the within motion.

With respect to the Plaintiff's serious injury claim, the Defendants maintain that there was no showing that the Plaintiff was physically unable to perform substantially all of his daily activities for 90 out of the first 180 days following the accident. The Defendants contend that as the Plaintiff's Affidavit states that he missed four months of work following the accident, this lay statement is insufficient to support his medical or legal conclusions. (Plaintiff's Exhibit B). The Defendants argue that the Plaintiff's subjective complaints of pain as well as medical opinions based solely upon such complaints are insufficient to raise a question of fact warranting a trial. *Citing Malloy v Brisco*, 183 AD2d 704 (2d Dept 1992). The Defendants further maintain that although the April 17, 2006 MRI of the Plaintiff's lumbar spine indicates that the Plaintiff sustained a disc herniation at several disc bulges, it is well settled that the simple showing of a disc herniation in addition to some restricted range of motion is not, in and of itself, sufficient to establish a serious injury. *Citing Pommells v Perez*, 4 NY3d 566 (2005); *Kearse v New York City Transportation Authority*, 789 NYS2d (2d Dept 2005). As such, the Defendants urge the Court to grant the within motion.

New York State Insurance Law §5102(d) states in relevant part:

Serious injury means a personal injury which results in death; dismemberment; significant disfigurement; a fracture... permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute a person's usual and customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury or impairment.

The Court acknowledges that it is well settled that a minor limitation of movement is not significant within the meaning of the statute. *Christopher v Caldarulo*, 160 Misc. 2d 360 (1994); *Waldman v Chang*, 175 AD2d 204 (2d Dept 1991). In *Waldman*, the Court established that such a minor limitation of 15% in range of motion was not significant within the meaning of the statute. *Waldman v Chang, supra*. The Court finds that the Plaintiff's submitted doctor's Affirmations were not based on objective findings; however, the Defendants have submitted their affirmed report of their examining doctor, Dr. Killian, who established from a broad range of objective tests, and previous examination reports that the Plaintiff did not sustain "major trauma [to the areas claimed]" (Defs' Exhibit F). Therefore, the Plaintiff's Affirmations are insufficient to defeat the Defendants' assertion that the Plaintiff did not sustain serious personal injury. Therefore, the Court finds that the Plaintiff did not sustain personal injury under NYS Insurance Law §5102(d). Although the Court finds that there exist triable issues of fact for a jury to determine whether the Plaintiff was negligent under NYS Vehicle and Traffic Law §1411, this issue is now moot. Moreover, with respect to the Plaintiff's cause of action against BMW, this issue is also moot.

As such, it is hereby

ORDERED, that the Defendants' motion for Summary Judgment is **GRANTED** and that the Plaintiffs Complaint against the Defendants is dismissed.

This constitutes the **DECISION** and **ORDER** of the Court.

DATE: September 23, 2008
Mineola, N.Y.

ENTER:



HON. MICHELE M. WOODARD
J.S.C.
XXX

ENTERED

SEP 26 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE