

Lake v Hertz Corp.
2010 NY Slip Op 34015(U)
December 20, 2010
Supreme Court, Kings County
Docket Number: 27135/06
Judge: Francois A. Rivera
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At an IAS Term, Part 52 of the
Supreme Court of the State of
New York, held in and for the
County of Kings, at the
Courthouse, at Civic Center,
Brooklyn, New York, on the
20th day of December, 2010

HONORABLE FRANCOIS A. RIVERA

-----X
DERRICK LAKE,
Plaintiff, Index No. 27135/06
- against -

HERTZ CORPORATION, MICHAEL KEVIN
WALKER, YVONNE HAMILTON and
ANDREA M. KNIGHT,
Defendants.

-----X
By notice of motion filed on June 30, 2010, under sequence number ten,
defendants Yvonne Hamilton and Andrea M. Knight, jointly move pursuant to CPLR
§3212 and Insurance Law §5102(d) for an order dismissing the complaint on the basis
that plaintiff did not sustain a serious injury.

By notice of cross-motion filed on July 2, 2010, under sequence number eleven,
defendants Hertz Corporation and Michael Kevin Walker, jointly move pursuant to CPLR
§3212 and Insurance Law §5102(d) for the same relief. Furthermore, cross-movants
adopt movants' arguments and incorporate within their own motion papers by reference
said arguments as well as the affirmations, affidavits, documents, and exhibits in support
of that motion filed under motion sequence number ten. Thus, the court will refer to the
movants and cross-movants collectively as "defendants" hereinafter.

Plaintiff Derrick Lake (Lake) opposes the motion and cross-motion.

BACKGROUND

On September 8, 2006, Lake commenced this action for personal injuries by filing a summons and verified complaint with the Kings County Clerk's office. The movants joined issue by their verified answer, dated September 21, 2006. The cross-movants joined issue by their verified answer, dated October 20, 2006.

By order of this Court dated May 4, 2007 and entered on May 8, 2007, the instant action was joined with another action pending in Kings County Supreme Court bearing index number 35866/2006 (the earlier action). In the earlier action, Michael Walker brought a claim against Yvonne Hamilton and Andrea M. Knight.

By order of this court dated June 23, 2010 and entered on June 25, 2010, a motion and a cross-motion for relief identical to that sought by the instant motion and cross-motion were denied without prejudice to renew because pleadings from the action bearing index number 35866/2006 were not annexed to those motion papers filed under motion sequence numbers eight and nine.

Lake's complaint and bill of particulars alleges the following facts. On October 7, 2005, at approximately 10:00 p.m., he was a passenger in a 2005 Mazda motor vehicle bearing New York State license plate number EWT2131 that was being operated by Michael Kevin Walker and was owned by Hertz Corporation. At the same time, Andrea M. Knight was operating a 1995 Honda motor vehicle owned by Yvonne Hamilton bearing New York State license plate number CYM4834. Due to the negligence of both drivers the vehicles collided at or near the intersection of New York Avenue and

Hempstead Turnpike, in the Town of Hempstead, County of Nassau, in the State of New York. The collision caused Lake to sustain serious injuries.

MOTION PAPERS

Yvonne Hamilton and Andrea M. Knight's motion papers consist of an affirmation of their counsel and nine annexed exhibits labeled A through L. Exhibit A is the instant summons and verified complaint. Exhibit B is their verified answer with cross-claims. Exhibit C is a copy of the verified answer of Hertz Corporation and Michael Kevin Walker. Exhibit D is an order of Justice Spodek dated November 4, 2009, which, among other things, extended the time to file a note of issue to February 25, 2010. Exhibit E is the aforementioned order of this court dated May 4, 2007 which joined the instant action with the earlier action bearing index number 35866/2006. Exhibit F is Lake's verified bill of particulars. Exhibit G is the certified but unsigned transcript of Lake's deposition conducted on July 20, 2007. Exhibit H is the affirmed, narrative report of Dr. Jacquelin Emmanuel, an orthopedic surgeon, who examined Lake on August 9, 2007. Exhibit I is affirmed narrative report of Dr. Audrie DeJesus, a neurologist, who also examined Lake on August 9, 2007. Exhibit J is a copy of a check made payable to the Clerk of Supreme Court, Kings County by the law firm representing Andrea Knight and Yvonne Hamilton. Exhibit K is a copy of the summons and complaint in the earlier action bearing index number 35866/2006. Exhibit L is a copy of the verified answer to the summons and complaint in the earlier action bearing index number 35866/2006.

Hertz Corporation and Michael Kevin Walker's cross-motion papers consist of an affirmation of their counsel and two annexed exhibits labeled A and B. Exhibit A is the instant summons and verified complaint. Exhibit B is their verified answer. Exhibit C is the verified answer with cross claims of Andrea Knight and Yvonne Hamilton.

Lake's opposition to the motion and cross-motion consist of an affidavit of his counsel and five annexed exhibits labeled A through G. Exhibit A is a copy of the police accident report (MV-104) of the subject accident. Exhibit B is a set of records from Mercy Medical Center Hospital. Exhibit C is the affirmed, narrative report of Dr. Allen Rothpearl, a radiologist, pertaining to his review of an MRI taken of Lake's spine on November 18, 2005. Exhibit D is the affirmed report of Dr. Boris Kleyman, a medical doctor, pertaining to his medical treatment of Lake during 2005 and 2006. Exhibit E is a set of physical therapy records. Exhibit F is the affirmed report of Dr. Ida Tetro, pertaining to his physical examination of Lake on February 2, 2010. Exhibit G is Lake's affidavit sworn to on February 2, 2010.

Yvonne Hamilton and Andrea M. Knight submitted an affirmation of their counsel in reply to Lake's opposition papers.

Hertz Corporation and Michael Kevin Walker also submitted an affirmation of their counsel in reply. Their counsel's affirmation referenced two annexed exhibits labeled A and B. Exhibit A is a cover letter to Lake's counsel seeking that counsel arrange for Lake to sign his deposition transcript before a notary. Exhibit B is another

copy of Lake's deposition transcript.

LAW AND APPLICATION

A motion for summary judgment may be granted only when there is no doubt as to the absence of any triable issue of material fact (*Kolivas v. Kirchoff*, 14 A.D.3d 493 [2nd Dept. 2005]). "Issue finding, rather than issue determination is the court's function. If there is any doubt about the existence of a triable issue of fact, or a material issue of fact is arguable, summary judgment should be denied" (*Celardo v. Bell*, 222 A.D.2d 547 [2nd Dept. 1995]). A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]; *Napolitano v. Suffolk County Dept. Of Public Works*, 65 A.D.3d 676 [2nd Dept. 2009]). Once the movant has met this burden, the burden then shifts to the party opposing the motion to demonstrate via admissible evidence the existence of a factual issue requiring a trial of the action (*Alvarez v. Prospect Hosp.*, *supra*; *Zuckerman v. City of New York* 49 N.Y.2d 557, 560 [1980]). "As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merits of its claim or defense" (*See, Mennerich v. Esposito*, 4 A.D.3d 399 [2nd Dept. 2004]).

Insurance Law § 5104 (a) provides that in any action by, or on behalf of, a covered person against another covered person for personal injuries arising out of

negligence in the operation of a motor vehicle in New York, there shall be no right of recovery for non-economic loss, *i.e.*, pain and suffering, except in the case of a “serious injury” (*Toure v. Avis Rent a Car Systems, Inc.*, 98 N.Y.2d 345 [2002]).

Lake indicated in paragraph six of his bill of particulars that he sustained certain injuries to his back which he alleges are permanent in nature. In paragraph eight, Lake indicates that he was not completely confined to bed as a result of the subject accident. In paragraph nine, Lake indicates that he was not completely confined to home as a result of the subject accident. In paragraph ten, Lake indicates that he did not miss time from work or school as a result of the subject accident.

In paragraph eighteen, Lake alleges that his injuries are serious as that term is defined within Insurance Law § 5102 (d). However, Lake does not specify the particular provision within Insurance Law § 5102 (d) upon which his injuries may be “serious”. The court thus interprets Lake’s bill of particulars to allege that his injuries are “serious” solely as a result of their constituting a permanent consequential limitation of a use of a body organ or member.

In the context of a motion for summary judgment, a defendant can establish that the 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 concluded that no objective medical findings support the plaintiff’s claim of serious injury (*See, Grossman v. Wright*, 268 A.D.2d 79 [2nd Dept. 2000]).

In order for the defendants to prevail on their motion for dismissal of the complaint, they must establish prima facie entitlement to judgment that Lake did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject motor vehicle accident (*Toure v. Avis Rent a Car Systems, Inc.*, 98 N.Y.2d 345 [2002]).

In support of their motion and cross-motion, defendants rely upon the affirmed medical reports of Jacquelin Emmanuel, M.D. and Maria Audrie DeJesus, M.D. Drs. Emmanuel and DeJesus affirm that Lake exhibited normal ranges of motion in his cervical and lumbar spines. Defendants have thus made a prima facie showing that plaintiff has not suffered a permanent "serious" injury to his back.

Lake seeks to raise a triable issue of fact through his presentation of the affirmed medical report of Drs. Allen Rothpearl, Boris Kleyman, and Ida Tetro.

Dr. Rothpearl's affirmation does not include the results of range of motion testing. Dr. Rothpearl merely affirms that Lake has suffered from various back herniations and disc bulges. Neither herniations nor bulging discs alone constitute a serious injury (*Howell v. Reupke*, 16 A.D.3d 377 [2nd Dept. 2005]).

However, Dr. Kleyman, Lake's treating physician, affirmed that on November 4, 2005, Lake had significant ranges of motion restrictions in his lumbar spine causally linked to the subject motor vehicle accident. Furthermore, Dr. Tetro, Lake's examining physician, affirmed that on February 2, 2010, Lake's range of motion restrictions in his

lumbar spine were still present, were causally linked to the motor vehicle accident and were permanent. Lake raised a triable issue of fact through the affirmed medical reports of Drs. Tetro and Kleyman. Together they found significant limitations of motion in the plaintiff's lumbar spine both on an examination contemporaneous with the accident, and on recent examinations as well (*Smiley v. Johnson*, --- N.Y.S.2d ---, 2010 WL 5094397 [2nd Dept., 2010] citing *Tai Ho Kang v. Young Sun Cho*, 74 A.D.3d 1328 [2nd Dept., 2010]).

The motion and cross motion are denied.

The foregoing constitutes the decision and order of the court.

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 HON. FRANCOIS A. RIVERA
 J.S.C. J.S.C.

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 J.S.C.
 HON. FRANCOIS A. RIVERA
 J.S.C.