

Chalmers v Bergeau

2011 NY Slip Op 30569(U)

February 24, 2011

Supreme Court, New York County

Docket Number: 11128/09

Judge: Thomas A. Adams

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,

Acting Supreme Court Justice

TRIAL/IAS, PART 33
NASSAU COUNTY

PHILIP CHALMERS,

Plaintiff(s),

MOTION DATE: 12/14/10

INDEX NO.:11128/09

-against-

SEQ. NOS. 1 & 2

JEAN A. BERGEAU, MTA LONG ISLAND BUS and
METROPOLITAN SUBURBAN BUS AUTHORITY,

Defendant(s)

The plaintiff's motion, pursuant to CPLR 3212(e), for partial summary judgment as to the issue of liability and the defendants' cross motion, pursuant to CPLR 3212, for summary judgment as to the issue of liability or, in the alternative, pursuant to Insurance Law §5102(d), for summary judgment due to the plaintiff's failure to sustain a serious injury are determined as hereinafter provided.

This personal injury action arises out of a May 21, 2008 motor vehicle accident that occurred at approximately 2:00 p.m. near the intersection of North Cottage Street and East Merrick Road in Hempstead (see plaintiff's Exhibit D, 11/20/09 bill of particulars, para.1).

During an April 12, 2010 deposition (see plaintiff's Exhibit E) the plaintiff testified, inter alia, that on May 21, 2008 he parked his vehicle on Merrick Road. After exiting the vehicle in order to run an errand, he subsequently returned to it and observed "[n]o visible traffic" before re-entering (p.58,L6;p.68,L6-18). His unobstructed view to his left down Merrick Road was approximately one to two hundred feet (p.68,L19;p.72,L6;p.73,L16). He unlocked the vehicle, opened the door and was "partially" inside (p.76,L5-13) with his left hand on the door handle when, approximately four seconds later (p.106,L21), the door was impacted by the defendant Metropolitan Suburban Bus Authority's bus operated by the defendant Jean A. Bergeau.

Prior thereto, the plaintiff neither heard (p.80,L16) nor saw (p.79,L15) the defendants' oncoming vehicle. Upon impact, he was "yanked out of [his] vehicle" (p.80,L5), "bounced" against the side of the bus (p.81,L24) and thrown "back against [his] vehicle" (p.82,L2). His brother (Michael) arrived and drove him to the North Shore University Hospital emergency room (p.13,L22) where he was treated and released (p.119,L12).

Six days later on May 27, 2008 he visited "Health Makers" (p.119,L25) where he was examined and a rehabilitation program was scheduled (p.121,L7). Initially, he visited about four times each week (p.122,L8) and received physical therapy, chiropractic treatment, electrotherapy and acupuncture (p.122,L15-19). After approximately four months, his visits were reduced to three occasions a week (p.123,L8) and thereafter, to once a week (p.123,L17). His last visit prior to the April 12, 2010 deposition was during April, 2009 (p.124,L20). In addition, he was sent for multiple (cervical, lumbar/sacral, left hip, left wrist and left shoulder) MRI examinations (p.130,L21; see plaintiff's affirmation in opposition to the defendants' cross motion, Exhibit D). As of the April 12, 2010 deposition, he had no scheduled medical appointments (p.133,L10). Finally, he had no out of pocket expenses (p.136,L18) and, in direct contrast to his June 4, 2009 bill of particulars (see plaintiff's Exhibit D, paras. 11 & 12), the plaintiff testified that he was not confined to either his bed or home (p.138,L5-10).

During the defendant Jean A. Bergeau's April 12, 2010 deposition (see plaintiff's Exhibit F), he testified, inter alia, that he was driving westbound on Merrick Road (p.20,L4) and traveling approximately 25 miles per hour (p.31,L12). He did not see the plaintiff's vehicle prior to the impact (p.25,L9;p.56,L14). Instead, he heard the collision and therefore pulled the bus over to the side of the road (p.20,L19). Upon inspection, he observed that the bus' rear wheel well and the door of the plaintiff's vehicle had collided (see photographs defendants' Exhibits D & E).

Mr. Bergeau's admitted failure to see the plaintiff's vehicle prior to the impact constituted negligence. However, despite allegedly checking for oncoming traffic on repeated occasions before opening his vehicle's door, the plaintiff also neither saw

nor heard the defendants' oncoming bus. He has therefore failed to establish that Mr. Bergeau's conduct was the sole proximate cause of the accident (see Vehicle and Traffic Law §1214; Sayed v Aviles, 72 AD3d 1061,1062). The plaintiff's motion for partial summary judgment as to the issue of liability and that branch of the defendants' cross motion are therefore denied.

The remaining branch of the defendants' motion, pursuant to CPLR 3212, for summary judgment due to the plaintiff's failure to incur a serious injury within the meaning of Insurance Law §5102(d) is premised upon the plaintiff's testimony and medical history as well as the May 14, 2010 affirmations of an orthopedist (Joseph Y. Margulies, M.D.) and neurologist (R.C. Krishna, M.D.) and the August 11, 2008 affirmation of a physician of "Physical Medicine and Rehabilitation" (Ayman Hadhoud, M.D.) (see defendants' Exhibits G-I). Their contemporaneous examinations, utilizing objective medical criteria, conclude that the plaintiff suffered only sprains, strains and contusions each of which have resolved. These findings are sufficient to establish the defendants' prima facie entitlement to summary judgment as a matter of law by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d)(1) on May 21, 2008 (see Pommells v Perez, 4 NY3d 566; Toure v Avis Rent A Car Sys., 98 NY2d 345). An additional August 14, 2008 purported affirmation from a chiropractor, Albert P. Claps (see defendants' Exhibit I), is not in admissible form (see CPLR 2106).

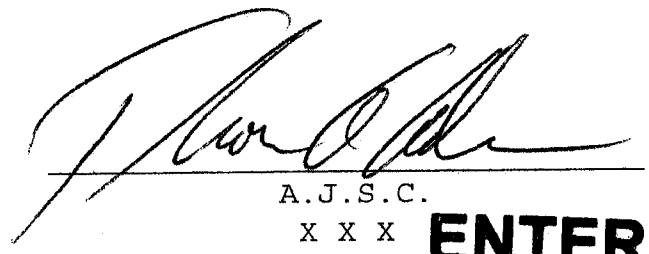
In opposition, the plaintiff has failed to create a triable issue of fact.

The initial (5/29/08) affirmation of the plaintiff's physician, Matthew Gannon, M.D. (see plaintiff's affirmation in opposition, Exhibit A) diagnosed only "[c]ervical sprain/strain. Lumbar sprain/strain. Left shoulder injury. Left wrist injury". The subsequent November 15, 2010 affirmation of Harold James, M.D., recites specific restrictions in the plaintiff's cervical, lumbar, left shoulder and left wrist range of motion. However, it is based upon a September 30, 2010 examination following the August 26, 2010 service of the defendants' cross motion, and no explanation is even proffered for the almost eighteen (18) month (i.e., 4/09 - 9/30/10) gap in treatment which exists (see Pommells supra; Albano v Onolfo,

36 AD3d 728). Moreover, Dr. James impermissibly incorporates the findings of the radiologist, Dr. Richard J. Rizzuti, M.D., who conducted the MRI examinations (see Umanzor v Pineda, 39 AD3d 539). Dr. Rizzuti has affirmed his June 24, 2008 (cervical), June 26, 2008 (lumbosacral) and June 27, 2008 (left shoulder) MRI reports (see plaintiff's Exhibit D). Yet, no opinion is proffered as to causation (see Collins v Stone, 8 AD3d 321; Albano supra at 729). Moreover, his report with respect to the plaintiff's July 28, 2008 (left wrist) is only "electronically signed". Similarly, the affirmed "NCV/EMG Report" of Aric Hausknecht, M.D. (see plaintiff's Exhibit E) is undated. Lastly, the conclusory and unsubstantiated assertions of the plaintiff - despite his concession that he was not confined to either bed or home after the accident - that he was rendered disabled are insufficient to create a triable issue of fact as to whether he was unable to perform substantially all of his daily activities for not less than 90 out of the first 180 days as a result of the accident (see Doyaga v Teleeba, Inc., 35 AD3d 798; Felix v New York City Transit Authority, 32 AD3d 527).

Accordingly, that branch of the defendants' motion, pursuant to CPLR 3212, for summary judgment due to the plaintiff's failure to incur a serious injury within the meaning of Insurance Law §5102(d) on May 21, 2008 is granted.

Dated: FEB 24 2011



A. J. S. C.
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ENTERED

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