Henderson v Lamb
2014 NY Slip Op 31892(U)
July 17, 2014
Sup Ct, New York County
Docket Number: 104646/11
Judge: Geoffrey D. Wright
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SCANNED ON 7/22/2014
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JUDGE GEOFFREY D. WRIGHT

PRESENT: ______________________ Justice

PART 47

Gilbert Henderson

-v-

Lamb et al

INDEX NO. 104646/11

MOTION DATE ______

MOTION SEQ. NO. 002

The following papers, numbered 1 to 5, were read on this motion to/for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ No(s). 1

Answering Affidavits — Exhibits ______ No(s). 3, 4

Replying Affidavits ______ No(s). 5

Cross Motion ______ 2

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed hereto decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

FILED

JUL 22 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/17/14

GEOFFREY D. WRIGHT
AJSC ______, J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
---x
GILBERT HENDERSON,

DECISION/ORDER

Plaintiff,

Index # 104646/11

-against-

KEITH B. LAMB, ALERT AMBULETTE SERVICE CORP., INTEGRATED LEASING, INC., STACY K. JOHNSON, DEPARTMENT OF HEALTH AND MENTAL HYGIENE, NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE AND THE CITY OF NEW YORK,

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JUL 22 2014
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NEW YORK

Defendants.

Present:
Hon. Geoffrey D. Wright
Acting Justice Supreme Court
---x

RECITATION, AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion/Order for summary judgment.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed......	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits......................................	3, 4
Replying Affidavits...	5
Exhibits...	
Other.................cross-motion.........................	2

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendants Keith B. Lamb and Ambulette Service Corp., ("Lamb") move for summary judgment dismissing the claim of plaintiff, Gilbert Henderson, ("Mr. Henderson"), on the grounds that Mr. Henderson failed to establish a "serious injury" under Article 51: No-Fault Law §5102(d); Insurance Law of the State of New York. Co-defendants, Stacy K. Johnson, Department of Health and Mental Hygiene, New York City Department of Health and Mental Hygiene, and the City of New York, ("The City"),

cross-move for summary judgment against Mr. Henderson, also on the grounds that Henderson has not established a "serious injury". Defendant Lamb moves against the City on the issue of liability. The City cross-moves on the grounds of a non-negligent explanation for the accident, exonerating them of liability.

Lamb's motion and the City's cross-motion for summary judgment are both denied. Lamb's motion on the issue of liability is denied and the City's cross-motion on the issue of liability is granted.

The proponent of a motion for summary judgment must make a prima facie showing that there is an absence of material issues of fact. Demonstrating such entitles the moving party to judgment as a matter of law. *Alverez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 (1986). Once the movant has made such a showing, the burden then shifts to the opposing party to produce admissible evidence sufficient to establish the existence of any material issues of fact requiring a trial of the action. *Zuckerman v City of New York*, 49 NY2d 557 (1980). Where the moving party fails to make a *prima facie* showing, the motion must be denied. *Winegrad v. City of New York Univ. Med. Ctr.*, 64 NY2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985).

The chain reaction collision at the heart of this case began when a taxicab (Vehicle 1) came to a complete stop, causing the two vehicles, which immediately followed (Vehicles 2 and 3), to suddenly stop. Plaintiff, Mr. Henderson and defendant Lamb occupied the third vehicle (Vehicle 3). Co-defendant, The City, occupied the fourth and final vehicle (Vehicle 4). Vehicle 4 was unable to come to a complete stop and impacted Vehicle 3. Vehicle 3 then impacted Vehicle 2, which then impacted Vehicle 1. Plaintiff Henderson alleges that he has sustained serious injuries as a result of the accident.

Serious injury, defined by Article 51- §5102(d), states:

"'Serious injury means a personal injury which results in... 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 such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

Mr. Henderson claims to have sustained serious injuries to his shoulders, cervical and lumbar spines. He claims that such injuries hinder him from participating in recreational activities such as basketball, football, baseball, dancing and jogging. He has difficulty carrying packages, tying his shoes, sleeping, standing or sitting for too long, and carrying out his daily activities, without experiencing pain or discomfort. Additionally, Mr. Henderson was required to undergo surgery to his lumbar spine on January 18th, 2011, and received lumbar epidural injection on September 22nd, 2010 and December 15th, 2010.

Defendant Lamb makes several claims as to why plaintiff has not met the serious injury threshold. First, defendant argues that plaintiff's medical records were not contemporaneous to the accident in question, and plaintiff's medical records are devoid of any recent indications of physical limitations, or any specified duration of said physical limitations.

Defendant alleges that plaintiff did not seek medical evaluation until a full two months following the accident, however, Mr. Henderson has provided evidence that he sought medical treatment from Dr. Denny Rodriguez as soon as two weeks following the accident. Further, the evidence reflects that Mr. Henderson received medical attention from Dr. Gary Thomas as recently as February 10th 2014 (one month prior to his deposition) and received consistent medical evaluations and treatment from five separate doctors between July 2010 and February 2014. Two out of the five doctors (Dr. Jones and Dr. Thomas) have submitted affirmations reflecting that when they treated Mr. Henderson they noted physical limitations. This in itself is sufficient to deny summary judgment. Where a doctor asserts a permanent injury and sets forth his findings expressed through his opinion, such evidence is sufficient for the denial of summary judgment. Lopez v. Senatore, 65 N.Y. 2d 1017, 494 N.Y.S.2d 101 (1985).

In *Toure v. Avis Rent A Car Systems*, the 2nd Department ruled that in order to meet the serious injury threshold, either a specific percentage of the loss of range must be ascribed, or there must be a sufficient description of the qualitative nature of plaintiff's limitations with an objective basis. *Toure v. Avis rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002). Mr. Henderson had range of motion assessments conducted by three of the doctors who evaluated him (Dr. Rodriguez, Dr. Nour, and Dr. Thomas). In making their findings the doctor's relied on commonly used medical devices, such as computerized arthometric readings and goniometer's, rather than relying on Mr. Henderson's subjective claims about his perceived limitations. Supported by such objective evidence, the doctor's qualitative assessments of the seriousness of Mr. Henderson's injury can be tested during cross-examination and cannot be deemed as wholly speculative. *Id.*

An expert opinion based on an objective basis must correlate the plaintiff's limitations to the normal function, purpose and use of the body part in question. *Id.* Similar to the facts in *Toure*, neither Dr. Rodriguez, Dr. Thomas, nor Dr. Nour, ascribed a specific percentage of loss in the range of motion. However, included in their affirmations of what Mr. Henderson's range limitations were, the doctor's also indicated what the normal range of motion for each body part ways. By doing so, the physicians sufficiently described the qualitative nature of the plaintiff's limitations based on the normal functions, purpose and use of the body parts.

Over the course of four years, Dr. Jones and Dr. Thomas objectively affirmed with a reasonable degree of medical certainty that Mr. Henderson's injuries represented significant limitations. Soft tissue injuries (which Lamb argues are the extent of Mr. Henderson's injuries) are only sufficient if objective evidence establishes that the injury

resulted in significant physical limitations of a significant duration. *Ramkumar v. Grand Style Trans. Ent. Inc.*, 941 N.Y.S.2d 610 (1st Dept. 2012) The consistent nature of Mr. Henderson's examinations with Dr.'s Jones and Thomas, clearly indicate that the injuries manifested themselves for a significant duration.

Mr. Henderson concedes that no doctor informed him that he could not perform his recreational activities. Besides his own testimony, Mr. Henderson provides no medical evidence that he was in fact unable to perform these normal activities during the 90-day period. However, courts have held that where a plaintiff is unable to engage in recreational activities and perform certain household chores, this is sufficient to raise triable issues of fact. *See Cammarere v. Villanova*, 166 A.D.2d 760, 562 N.Y.S.2d 808 (3rd Dept. 1990); *Ottavio v. Moore*, 141 A.D.2d 806, 529 N.Y.S.2d 876 (2nd Dept. 1988). Specifically, as to whether the plaintiff was prevented from performing such customary activities during the 90-day statutory period, regardless of whether plaintiff was ever confined to his bed, home, or missed time from work. *Id.* Furthermore, pain alone can form the basis of a serious injury within the meaning of the no-fault law. *Kaiser v. Edwards*, 98 A.D.2d 825, 470 N.Y.S.2d 504, 06 (3rd Dept. 1983). Whether or not pain constitutes a serious injury is a question of fact for the jury. *Id.*

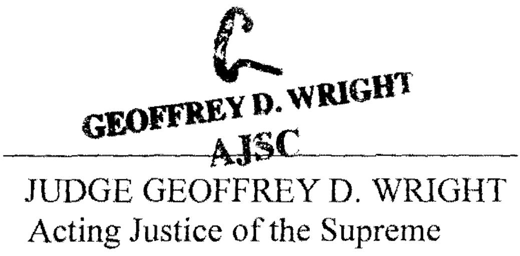
Viewing the evidence in the light most favorable to the non-moving party, Mr. Henderson, these aforementioned reasons raise genuine issues of fact that should be decided upon by the finder of fact. Lamb's motion and The City's cross-motion for summary judgment are both denied.

Moving onto the issue of liability, a rear-end collision with a stopped automobile establishes a prima facie case of negligence against the operator of the moving vehicle. *Johnston v. El-Deiry*, 230 A.D.2d 715 (2nd Dept. 1996). This presumption imposes a duty on the operator of the moving vehicle to explain how the accident occurred, rebutting the inference of negligence. *Id.* Where there is a non-negligent explanation for the accident, the driver may be exonerated for his or her conduct. *Id.*

This rationale has been widely accepted as the general rule but the larger question is what constitutes a non-negligent explanation. Specifically, does the abrupt stopping of the lead driver, exonerate the presumed negligence of the rear driver? While the 1st Department has ruled that a claim that the lead vehicle made a sudden stop, standing alone is insufficient to rebut the presumption of negligence, *Cabrera v. Rodriguez,* 72 A.D.3d 553 (1st Dept. 2010), the Court of Appeals has held that in a negligence action a party cannot obtain summary judgment as to liability if triable issues remain as to the party's own negligence and share of culpability for the accident. *See Thoma v. Ronai* 82 N.Y.2d 736, 602 N.Y.S2d 323 (1993). Reviewing the evidence in the light most favorable to the non-moving party, and coupled with ambiguity of the issue, this court finds that there are material issues of fact as to whether the City's action were reasonable

under the circumstances, and whether Lamb's action contributed to the accident. Lamb motion for summary judgment on the issue of liability is denied.

Dated: July 17, 2014



JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme

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