Espinal v Olivero
2014 NY Slip Op 32643(U)
September 17, 2014
Supreme Court, Bronx County
Docket Number: 306679/2010
Judge: Mary Ann Brigantti
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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti

--X

JOSE ESPINAL,

Plaintiff,

-against-

DECISION / ORDER
Index No. 306679/2010

HUMBERTO OLIVERO, et als.,

Defendants

--X

The following papers numbered 1 to read on the below motion noticed on April 8, 2014 and duly submitted on the Part IA15 Motion calendar of **June 24, 2014**:

Papers Submitted	Numbered
Almonte Def. Notice of Motion, Exhibits	1,2
Peralta Cross-Motion, Exhibits	3,4
Peralta Aff. In Opp.	5
Espinal Aff. In Opp., Exhibits	6,7
Solis Aff. In Opp., Exhibits	8,9
Almonte Def. Reply	10
Peralta Reply	11

Upon the foregoing papers, defendants Juan Almonte ("Almonte") and NYLL Managment LTD (collectively the "Almonte Defendants") move for summary judgment on the issue of liability, dismissing the complaint of the plaintiff Jose Espinal ("Plaintiff") and all cross-claims pursuant to CPLR 3211 and 3212. The motion is opposed by the plaintiff in a joined action, Carmen Solis ("Solis"), Plaintiff, and defendant Ruddy Peralta ("Peralta").

The Almonte Defendants also move for summary judgment, dismissing the complaint of the Plaintiff for failure to meet the "serious injury" threshold as required by New York Insurance Law §5102(d). Peralta cross-moves for summary judgment, dismissing Plaintiff's complaint on "serious injury" threshold grounds. Plaintiff opposes the motion and cross-motion.

I. Background

This matter arises out of an alleged December 11, 2009 motor vehicle accident involving four vehicles. Plaintiff testified that the accident occurred on Sherman Avenue at or near its

FILED Sep 22 2014 Bronx County Clerk

intersection with Dyckman Street in New York, New York. At the time, Plaintiff was a passenger in a vehicle operated by defendant Eric Pena. Their vehicle was double-parked in the right hand lane on Sherman Avenue near its intersection with Academy Avenue. Plaintiff testified that he saw co-defendant Peralta's vehicle, that was going southbound on Academy Avenue, make a U-turn, strike defendant Almonte's vehicle, a Lincoln livery cab. Plaintiff testified that the Lincoln was 100 feet away from his vehicle, on the opposite side of Sherman Avenue. After striking Almonte, Peralta's vehicle then crossed the double-yellow lines and struck Plaintiff's vehicle. Plaintiff testified that Almonte never came into contact with his vehicle. The driver of the Peralta vehicle tried to flee the scene. Plaintiff's vehicle remained double-parked at all times.

Defendant Olivero testified that he was traveling in the southbound lane of Sherman Avenue at the time of the accident. He testified that he saw a car turn from Dyckman Street onto the northbound lane of Sherman Avenue, and proceed over 50-60 miles per hour towards Olivero's vehicle, a van. The car passed his van, and then Olivero heard two crashes, a light one behind him first, and then a second one, with just seconds between them. He said that the Peralta vehicle struck a livery cab. Because the Peralta car was coming towards him from the opposite direction, the car in front of him stopped quickly, forcing him to stop suddenly as well. Olivero's wife, Solis, testified that she was a front-seated passenger in Olivero's vehicle at the time of the accident. She testified that she saw the Peralta vehicle coming "out of nowhere" from the opposite direction "fast." The movement of the Peralta vehicle caused her husband, Olivero, to stop suddenly, and then Olivero was struck from behind. Solis did not personally see any impacts between the vehicles.

Almonte testified that he was driving at around 10 miles per hour on Sherman Avenue, past the Dyckman Street intersection, when "a person that was coming fast hit him on the left side." The oncoming vehicle, an Audi (Peralta's vehicle), turned into the lane that he was in. Almonte tried to avoid the accident by turning to the right, but couldn't avoid the impact. He could not recall whether the Audi impacted the front-left, or front-right portion of his vehicle.

Peralta testified that he is the owner of the Audi involved in this accident, but said that he was not driving the car at the time. Rather, his friend "Jose" was operating the vehicle. His last

name, and whereabouts, are currently unknown.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

A. *The Almonte Defendants' motion on the issue of Liability*

Almonte now argues that they are entitled to summary judgment on the issue of liability, since there is no indication that they contributed to this accident, or caused any of Plaintiff's injuries. None of the parties testified that there was any contact between Almonte's vehicle and Plaintiff's vehicle. Rather, it was the Peralta vehicle that made a U-turn, struck Almonte, and then struck Plaintiff.

The basis for Peralta's opposition is that there are "different versions" of this accident and an issue of fact as to whether Almonte "kept a proper lookout and saw all that could be seen." Peralta urges that there is a dispute as to whether his Audi made a "left" turn, and not a "U-turn,"

FILED Sep 22 2014 Bronx County Clerk

onto Sherman Avenue. Carmens Solis did not see the Audi before it approached her vehicle. Plaintiff Almonte could not state whether the Audi struck the left or right bumper of his vehicle.

After review of the testimony, this Court finds that under any "version" of this accident, however, there is no indication whatsoever that Almonte vehicle contacted the Espinal vehicle, or that the Almonte vehicle proximately caused an impact between Espinal and the Peralta vehicle. It is not disputed that the Almonte vehicle did not collide with the Espinal vehicle. There is, moreover, absolutely no indication that Almonte contributed to Espinal's accident by failing to avoid the Audi (Peralta) vehicle. Almonte testified that he was driving on Sherman Avenue towards Broadway, in Sherman's left-hand lane going in that direction, when the Audi, coming in the opposite direction from Broadway, turned into his lane, and struck him. He tried to avoid the accident by turning to the right, but could not do so. This testimony regarding the Almonte-Peralta impact is not disputed by any party. "A driver in his proper lane is not required to anticipate that an automobile going in the opposite direction will cross over into his lane" (*Cruz v. MTLR Corp.*, 111 A.D.3d 568 [1st Dept. 2013, citing *Williams v. Simpson*, 36 A.D.3d 507 [1st Dept. 2007]). The fact that Almonte could not recall the specific location where his vehicle was impacted does not require denial of the motion, which cannot be defeated by a mere "shadowy semblance of an issue" (*see Hatzis v. Balliard*, 13 A.D.3d 106, 107 [1st Dept. 2004], citing *Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338 [1974]).

Peralta's affirmation in opposition raises no triable issue of fact regarding Almonte's alleged negligence. Olivero did not see any of the impacts between the Peralta, Almonte, or Espinal vehicles. He alleges that his own vehicle was rear-ended by Almonte. Solis testified that she did not see the impact between the Peralta, Almonte, or Espinal vehicles. The line in her testimony on page 32 is that the vehicle to her left – the Audi – and not the Almonte vehicle. "caused" the accident.

Espinal's opposition to the motion on the issue of liability "adopts the arguments" set forth in opposition papers filed by plaintiff Solis in Action #2, (Index #301363/12). Those opposition papers, however, refer to Almonte's motion for summary judgment filed in that matter, against that particular plaintiff, not Espinal. The Solis opposition papers do not raise a triable issue of fact as to whether the Almonte vehicle contributed to Espinal's accident, or ever

came into contact with Espinal's vehicle.

Accordingly, the Almonte Defendants' motion for summary judgment will be granted on those grounds, and the complaint of plaintiff Espinal and any cross-claims arising out of Espinal's complaint asserted against the Almonte Defendants are dismissed with prejudice.

B. *Peralta's Cross-Motion for Summary Judgment on Threshold Grounds*

Defendant Peralta cross-moves for summary judgment, asserting that Espinal's complaint must be dismissed for failure to meet the "serious injury" threshold as required by New York Insurance Law §5012(d).

According to Espinal's verified bill of particulars, as a result of this December 11, 2009 accident, he suffered various injuries including (1) a tear of the posterior horn of the left knee and lateral meniscus, (2) herniated discs at L5-SI, (3) bulging discs at C3-C4, C4-C5, and C6-C7, and (4) lumbar/cervical sprain/strain.

In support of the motion, Peralta submits a sworn report from J. Serge Parisien, M.D., an orthopedic surgeon who conducted an independent orthopedic examination of Espinal on April 16, 2012. Dr. Parisien performed range-of-motion testing, as well as other objective testing on Plaintiff's neck, lumbosacral spine, and left knee, finding full movement when compared to normal range of motion, and no abnormalities. He opined that Plaintiff had a "resolved" injury to the cervical and lumbar spine, as well as the left knee. Dr. Parisien found no evidence of residuals or permanency and stated that Plaintiff could continue daily activity without restriction.

Peralta also submits another affirmed report from Dr. Jean-Robert Desrouleaux, M.D, a neurologist, who examined the plaintiff Espinal on April 23, 2012. Dr. Desrouleaux noted that Plaintiff was transported to St. Luke's hospital as a result of this accident but did not have any surgical intervention. At the time of the examination, he was undergoing physical therapy treatment. Dr. Desrouleaux conducted neurological testing of Plaintiff, and found no abnormalities. He also examined Plaintiff's neck and lumbar spine, finding full range of motion, and all other objective testing was either normal or negative. Dr. Desrouleaux concluded that Plaintiff had no neurological injury, and no treatment was required.

Defendant also submits sworn reports from Dr. A. Robert Tantleff, a radiologist who

examined Plaintiff's cervical and lumbar spine MRIs. Regarding the cervical spine, Dr. Tantleff found evidence of "regional discogenic changes consistent with the individual's age" that were unrelated to this accident, an unchanged when compared to an earlier 2006 MRI report. As for the lumbar spine, likewise, Dr. Tantleff found that any discogenic changes were unrelated to this accident.

At his Examination Before Trial, Espinal testified that he was confined to his home for a few weeks, but not confined to bed for any period of time as a result of this accident.

Plaintiff opposes the motion. Plaintiff submits an affirmation of Dr. Stephen Silverman, who first treated him soon after the accident, on December 28, 2009. Dr. Silverman notes that he was aware of Plaintiff's prior accidents in 2004 and 2006, however he never treated in those accidents and made a full recovery before this accident. In the weeks following this accident, Dr. Silverman conducted computerized range of motion testing on the left knee, cervical spine, and lumbar spine. With respect to the cervical spine, Plaintiff demonstrated restricted movement in all planes, notably extension (17 degrees, 75 normal) and flexion (23 degrees, 60 normal). Regarding the lumbar spine, Plaintiff also had severe restrictions in movement upon flexion (15 degrees, 60 normal), as well as right and left lateral movement. As for the left knee, Plaintiff exhibited active flexion to 54 degrees (150 normal). Plaintiff thereafter underwent MRI examinations of the left knee, cervical spine, and lumbar spine. His left knee MRI, examined in a sworn report from radiologist David R. Payne, M.D., revealed a tear of the posterior horn of the lateral meniscus, as well as joint effusion. MRIs of the cervical spine, annexed to an affirmation from Dr. Charles DeMarco, revealed posterior bulging. An MRI of the lumbar spine revealed a posterior disc herniation at L5-S1.

The affirmed records from Dr. Silverman demonstrate that Plaintiff thereafter underwent a course of physical therapy, as well as nerve-conduction studies. In his affidavit, Plaintiff states that he attended physical therapy four times per week for approximately six (6) months. At the time of the accident, he had been working delivering fish. Due to the accident, he had to quit his job. Once his "no-fault" benefits had ceased, Plaintiff had to stop treating because he could not afford out-of-pocket payments.

Plaintiff submits a sworn "addendum report" from Dr. Donald I. Goldman, an orthopedist

who examined Plaintiff on April 2, 2014. At the examination, Plaintiff had continued complaints of pain in the back and left knee. Dr. Goldman conducted a range of motion examination of Plaintiff's left knee, and found restricted movement to 120 degrees with pain, 150 degrees being normal. With respect to the lumbar spine, Dr. Goldman found flexion to 70 degrees (90 normal), and extension to 20 degrees (45 degrees normal), with pain. Dr. Goldman noted that Plaintiff's MRI revealed a lateral meniscus tear and evidence of medial plica syndrome. The lumbar spine MRI revealed a herniation at L5-S1. Dr. Goldman opined that these injuries were causally related to the accident. In his affirmation, Dr. Goldman "completely disagree[s]" with the findings of Dr. Tantleff that Plaintiff's cervical and lumbar MRI findings were due to degeneration. Rather, he believes that the findings are causally related to this accident. He based his opinion on, among other things, his personal examination and Plaintiff's "acute onset of pain directly after the subject accident."

Discussion

In this matter, even assuming that Peralta has satisfactorily carried his burden of proving entitlement to judgment as a matter of law on the issue of whether Plaintiff suffered a "permanent consequential limitation of use of a body organ or member", or "significant limitation of a body function or system," in light of the above admissible evidence, Plaintiff has raised an issue of fact. "Where conflicting medical evidence is offered on the issue of whether a plaintiffs injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury." *Noble v. Ackerman* , 252 A.D.2d 392 (1st Dept. 1998), *LaMasa v. Bachman* , 56 A.D.3d 340 (1st Dept. 2008). In this matter, there are issues of fact and credibility raised that cannot be resolved on a motion for summary judgment. *Bradley v. Soundview Healthcenter* , 4 A.D.3d 194 (1 st Dept. 2004); *Lewis v. Capalbo* , 280 A.D.2d 257, 258-260, 720 N.Y.S.2d 455 [2001]).

Plaintiff has sufficiently raised a triable issue of fact as to whether the injuries to his spine and left knee were "serious" by providing objective medical evidence that he had pain and documented restrictions in the cervical and lumbar spine, and left knee soon after the accident, as well as recently upon an April 2014 examination ((*see Garner v. Tong*, 27 A.D.3d 401 [1st Dept. 2006]). Dr. Silverman's affirmation and annexed records, detailing treatment and examination of

Plaintiff in the weeks following the accident, and reported diminished range of motion of plaintiff's cervical and lumbar spine, and left knee, constitutes qualitative medical evidence of a serious injury contemporaneous with the accident. (see *Perl v. Mehr*, 18 N.Y.3d [2011]; *Prestol v. McKissock*, 50 A.D.3d 600 [1st Dept. 2008]). MRI examinations taken soon after the accident confirmed the existence of disc bulges in the cervical spine, a disc herniation in the lumbar spine, and a torn meniscus in the left knee. Taken together, this evidence constitutes sufficient proof of causation (*see Rosa v. Mejia*, 95 A.D.3d 402 [1st Dept. 2012], *citing Perl v. Meher,* 18 N.Y.3d 208 [2011]). Moreover, Dr. Goldman sufficiently disputed Dr. Tantleff's opinion that the cervical and lumbar spine injuries were unrelated to this accident. Since Dr. Goldman "... attribut[ed] the injuries to a different, equally plausible cause, that is, this accident," he had rejected the defense experts' opinions regarding causation, and his opinion was entitled to equal weight (*Lee Yuen v. Akra Memory Cab Corp.*, 80 A.D.3d 481 [1st Dept. 2011]; *citing Linton v. Nawaz*, 62 A.D.3d 434 [1st Dept. 2009], *aff'd*, 14 N.Y.3d 821 [2010]). Dr. Goldman also noted that, while Plaintiff had previous motor vehicle accidents, he "made a full and uneventful recovery" (*see Seck v. Balla*, 92 A.D.3d 543 [1st Dept. 2012]). None of the defendants' experts contended that Plaintiff's left knee injury was unrelated to the instant accident. Plaintiff sufficiently explained any gap in treatment, as he asserted in an affidavit that he could no longer afford medical treatment after his no-fault benefits ceased (*see Trezza v. Metropolitan Transp. Auth.*, 113 A.D.3d 402 [1st Dept. 2014]).

As to his "90/180 day" claim, however, Plaintiff has failed to meet his burden that, upon the direction of a medical professional, he was prevented from performing his usual and customary activities for 90 of the 180 days following the incident (*Nelson v. Distant*, 308 A.D.2d 338, 340 [1st Dept. 2003]). Plaintiff testified that he was only confined to his home for a "few weeks" following the accident, and was not confined to his bed (*Idemudia v. Fields*, 105 A.D.3d 589 [1st Dept. 2013]). Plaintiff testified that he was unemployed at the time of the accident. In any event, that plaintiff may have missed more than 90 days of work is not alone determinative of a 90/180 injury (*Nicholas v. Cablevision Systems Corp.*, 116 A.D.3d 567 [1st Dept. 2014], citing *Uddin v. Cooper*, 32 A.D.3d 270 [1st Dept. 2006]). Accordingly, that branch of Defendant's motion seeking dismissal of Plaintiff's "90/180" claim is granted.

FILED Sep 22 2014 Bronx County Clerk

IV. Conclusion

Accordingly, it is hereby

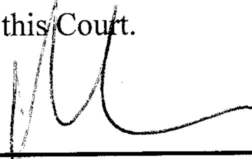
ORDERED, that the Almonte Defendants' motion for summary judgment on the issue of liability, dismissing the complaint of the plaintiff Jose Espinal, and any cross-claims, is granted, and it is further,

ORDERED, that the branch of Peralta's cross-motion for summary judgment, dismissing plaintiff Jose Espinal's "90/180" claims, is granted, and those claims are dismissed, and it is further,

ORDERED, that the remaining branches of Peralta's cross-motion for summary judgment are denied.

This constitutes the Decision and Order of this Court.

Dated: 9/17/14



Hon. Mary Ann Brigantti, J.S.C.