

Diaz v Citywide Auto Group LLC

2014 NY Slip Op 32647(U)

September 8, 2014

Supreme Court, Bronx County

Docket Number: 30719011

Judge: Wilma Guzman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 30719011
Motion Calendar No. 10,11
Motion Date: 7/14/14

DAVID DIAZ

Plaintiff,

-against-

DECISION/ ORDER

Present:

Hon. Wilma Guzman
Justice Supreme Court

CITYWIDE AUTO GROUP LLC, PHILLIP S.
ROSE, PILOT CAB CORP. and JULIO MENDEZ
Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support, and Exhibits Thereto.....	1, 2,
Cross-Motion, Affirmation in Support and Exhibits Thereto	3
Affirmation in Opposition,	4, 5
Reply Affirmation	6,7
Supplemental Affirmations	8, 9

Upon the foregoing papers and after due deliberation, and following oral argument, the Decision/Order on this motion is as follows:

Defendants Pilot Cab Corp. and Julio E. Mendez (hereinafter collectively referred to as “the Mendez defendants”) move this Court for summary judgment and dismissing the plaintiff’s complaint and all cross-claims against these defendants on the grounds that no triable issues of fact exist as to liability.

The Mendez defendants further move for an Order granting summary judgment dismissing David Diaz’ complaint on the grounds that plaintiff did not sustain a serious injury under Ins. Law sections 5102(d) and 5104(a). Defendants Citywide Auto Group and Phillip S. Rose submit a cross-motion seeking the same relief and relying upon and adopting the arguments and records of the Mendez defendants motion.

Plaintiff has opposed both motions. For purpose of decision, both motions are consolidated and decided as follows.

Plaintiff commenced this action seeking damages for injuries allegedly sustained as the result of a motor vehicle accident which occurred on March 26, 2011. Plaintiff was a passenger in a vehicle driven by James P. Harrison.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. *see, Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (NY 1986) and *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (NY 1985) Summary judgment is a drastic remedy that deprives a litigant of his or her day in Court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party. *see, Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). It is well settled that issue finding, not issue determination, is the key to summary judgment. *see, Rose v. Da Ecib USA*, 259 A.D.2d 258, 686 N.Y.S.2d 19 (1st Dept. 1999). Summary judgment will only be granted if there are no material, triable issues of fact. *see, Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 (NY 1957) Summary judgment in negligence cases may be granted where the facts clearly point to the negligence of one party without any culpable conduct by the other. *see, Barnes v. Lee*, 158 A.D.2d 414, 551 N.Y.S.2d 247 (1st Dept. 1990). Summary judgment will only be granted if there are no material, triable issues of fact. *see, Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 (NY 1957) Summary judgment in negligence cases may be granted where the facts clearly point to the negligence of one party without any culpable conduct by the other. *see, Barnes v. Lee*, 158 A.D.2d 414, 551 N.Y.S.2d 247 (1st Dept. 1990).

It is well established that a rear-end collision with a stationary vehicle creates a prima facie case of negligence, requiring judgment for the driver of the stationary vehicle unless the offending driver can proffer a non-negligent explanation for the accident. *Mitchell v. Gonzalez*, 269 A.D.2d 250, 251, 703 N.Y.S.2d 124, 125-126, 2000 N.Y. Slip Op. 01672 (1st Dept. 2000). A driver is expected to drive at a sufficiently safe speed and maintain enough distance between himself and cars

ahead of him so as to avoid a rear-end collision, taking into account the weather and road conditions. Malone v. Morillo, 6 A.D.3d 324, 775 N.Y.S.2d 312, 313, 2004 N.Y. Slip Op. 03045 (1st Dept. 2004); Verdejo v. Aguirre, 8 A.D.3d 63, 777 N.Y.S.2d 648, 2004 N.Y. Slip Op. 04780 (1st Dept. 2004); Veh. & Traf. § 1129(a). The failure of an opposing party to rebut the presumption of negligence will entitle the moving party to summary judgment on the issue of fault. Toulson v. Young Han Pae, 6 A.D.3d 292, 774 N.Y.S.2d 706, 2004 N.Y. Slip Op. 03006 (1st Dept. 2004). The rear driver in a chain reaction collision is presumptively responsible for that collision absent any non-negligible excuse. De La Cruz v. Leong, 16 A.D.3d 199 (1st Dept. 2005); Mustafaj v. Driscoll, 5 A.D. 3d 139 (1st Dept. 2004).

It should be noted that pursuant to a July 25, 2013 decision by the Honorable Mary Ann Brigantti-Hughes which held that James Harrison was entitled to summary judgment on the issue of any culpable conduct on the issue of liability as his vehicle was stopped at the time of the accident. The issue of liability between the Mendez defendants and the Rose defendants was denied.

In the case herein, the plaintiff David Diaz was the passenger in a parked vehicle which was rear ended. To the extent that it has already been decided that no culpable conduct lies with the driver James Harrison, as was held in the July 25, 2013 Order and to the extent that David Diaz was a passenger, summary judgment dismissing the Diaz complaint is hereby denied. Tselebis v. Ryder Truck Rental, Inc., 2010 N.Y. Slip Op. 01442 (1st Dept. 2010); Strychalski v. Dailey, 65 A.D.3d 546 (2nd Dept. 2009). The Mendez Defendants argument that the plaintiff testified that he was passing a cup of coffee to the driver is of no consequence, as the driver has been found without any culpable conduct and the vehicle was not moving at the time of the plaintiff's conduct. Furthermore, the July 25, 2013 Order of Justice Brigantti- Hughes found issues of fact as to the liability of the Mendez Defendants and the Rose Defendants. This Court will not disturb or revisit that ruling. As such, the defendants motion is denied in its entirety.

In support of the motion for summary judgment, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician. Pagano v. Kingsbury, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2nd Dept. 1992) Also, an affirmed physician's report, being in admissible form and showing that a plaintiff was not suffering from any disability or consequential injury from the accident would be sufficient to satisfy a defendant's

burden of proof and shift to the plaintiff the burden of establishing the existence of a triable issue of fact. See Gaddy v. Eyler, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992), where defendant established a prima facie case that plaintiff's injuries were not serious through the affidavit of a physician who examined plaintiff and concluded that plaintiff had a normal examination. When the movant has made such a showing, the burden shifts and it then becomes incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). To raise a triable issue of fact as to whether a herniated disc constitutes a serious injury, a plaintiff is required to 'provide objective evidence of the extent or degree of the alleged physical limitations resulting from the [injury] and their duration' (Noble v. Ackerman, 252 A.d.2d 392, 394). In lieu thereof, "[a]n expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (see Dufel, 85 N.Y.2d at 798." (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 350.).

Defendant Ramirez has met the burden of prima facie entitlement to summary judgment through the submission of the affidavits of Dr. Edward M. Weiland and Dr. Michael Setton. Dr. Weiland performed a neurological evaluation of plaintiff on January 21, 2013. Dr. Weiland normal ranges of motion as compared to the norm in the cervical spine, thoracic and lumbar spine. Dr. Weiland that plaintiff's examination was normal and there was no need for any treatment and that plaintiff is able to perform any activities of daily living and Occupational duties without restriction.

Dr. Weiland reviewed the plaintiff's June 3, 2011 lumbar spine MRI and opined that plaintiff exhibited the presence of chronic degenerative changes of the lumbar spine and no indication of chronic injury.

In opposition, the plaintiff submits the affirmation of Dr. Alexandre B. DeMoura, treated the plaintiff from March 31, 2011 through October 15, 2013 noting range of motion limitations as it compared to the norms in the lumbar spine. Dr. DeMoura reviewed the plaintiff's MRI's and noted that the films demonstrated herniated nucleus pulposus at L5-S1, right and central with neurological compression. Plaintiff underwent physical therapy. In July 2011, November 2011 and October 15, 2013, plaintiff received trigger point injections and transforaminal epidural steroid injection and

lumbar epidural steroid injection, respectively. Straight leg raising was positive. Dr. DeMoura opined that the plaintiff suffered from post-traumatic spinal trauma particularly lumbar disc herniations with severely restricted range motion. Plaintiff's injuries were causally related to the subject accident and have resulted in a severe permanent partial disability. Furthermore, the plaintiff's injuries will certainly manifest in future symptoms and functional loss that will necessitate further treatment and therapy and will increase risk for further spinal injury.

Accordingly, it is

ORDERED that defendants Pilot Cab Corp. and Julio E. Mendez' motion for summary judgment on the issue of liability is denied in its entirety. It is further

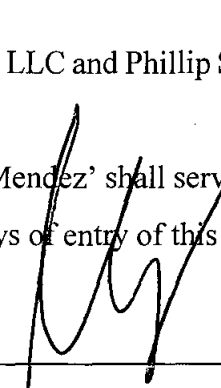
ORDERED that defendants Pilot Cab Corp. and Julio E. Mendez' motion for summary judgment on the issue of serious injury is denied. It is further

ORDERED that defendants cross-motion Citywide Group LLC and Phillip S. Rose's cross-motion for summary judgment is denied. It is further

ORDERED that defendants Pilot Cab Corp. and Julio E. Mendez' shall serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days of entry of this Order.

This constitutes the decision and Order of the Court.

9/8/14
DATE


HON. WILMA GUZMAN
Justice Supreme Court