Brewu v Ramiz
2015 NY Slip Op 30804(U)
April 16, 2015
Sup Ct, Bronx County
Docket Number: 310688/2011
Judge: Wilma Guzman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 310688/2011
Motion Calendar No. 6
Motion Date: 2/9/15

SAMPSON BREWU

Plaintiff,

-against-

DECISION/ ORDER
Present:
Hon. Wilma Guzman
Justice Supreme Court

HAFIZ RAMIZ and DINA TAXI, INC.,

Defendants.

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

Papers	**Numbered**
Notice of Motion, Affirmation in Support, and Exhibits Thereto	**1**
Affirmation in Opposition,	**2**
Reply Affirmation	**3**

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

Defendants moves for summary judgment dismissing plaintiff's complaint on the grounds that the plaintiff failed to sustain a "serious injury" as defined by Insurance Law 5102(d).

Plaintiff cross-moves pursuant to C.P.L.R. 3212 for an Order for granting summary judgment on the issue of liability. Defendants oppose the motion.

This action arises from a motor vehicle accident that occurred on Fifth Avenue near its intersection with 29th Street, New York, NY.

Plaintiff testified that his vehicle, a yellow taxi, was stopped at the intersection of 5th Avenue and 29th Street, to pick up a passenger. His vehicle was struck in the rear by another taxi which (owned by Dina Taxi, Inc. and operated by defendant Ramiz). Plaintiff testified that he observed the defendants vehicle in his rear view mirror as it approached and struck his vehicle. He described the impact as heavy and estimated the defendant was traveling at approximately 50mph.

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).

A rear-end collision with a stopped vehicle creates a presumption that the driver of the moving vehicle was negligent and entitles the passengers of the stopped vehicle to summary judgment, unless the driver of the moving vehicle comes forward and demonstrates a non-negligent explanation for the accident or for her failure to maintain a safe distance between the cars as provided by Vehicle and Traffic Law § 1129.[1] *see*, Burns v. Gonzalez, 307 A.D.2d 863, 763 N.Y.S.2d 603 (1st Dept. 2003) and Agramonte v. City of New York, 288 A.D.2d 75, 732 N.Y.S.2d 414 (1st Dept. 2001).

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[1] V.T.L. § 1129(a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

In Cabrera v. Rodriguez, 72 A.D.3d 553 (1st Dept. 2010), the Appellate Division, First Department, affirmed it's holding that the assertion that a rear end collision with a stopped or stopping vehicle, even with allegations of non-functioning lights on the lead vehicle, is *prima facie* establishment of liability in rear-end collision cases. That a lead vehicle made a sudden stop is insufficient to rebut the prima facie entitlement to summary judgment. See also, Corrigan v. Porter Cab Corp., 101 A.D.3d 471 (1st Dept 2012); Profita v. Diaz, 100 A.D.3d 481 (1st Dept. 2012).

Applying the analysis of Cabrera and its progeny , this Court finds that defendants have failed to offer a non-negligent reason for failing to maintain a safe distance between the vehicles. As such, plaintiff is granted summary judgment on the issue of liability.

A motion for summary judgment is not premature where the defendant fails to demonstrate that there are facts that may exist but could not be stated at the time of the motion. C.P.L.R. 3212(f); Al-Nashash v. Soutra Limosine, Inc., 115 A.D3d 534 (1st Dept. 2014); Griffen v. Pennoyer, 852 N.Y.S. 2d 765(1st Dept. 2008). Plaintiffs affidavits are sufficient to meet the prima facie burden for summary judgment. However, defendants have not submitted any proof to raise a triable issue of fact. Defendants possessed the relevant facts and could have annexed an affidavit indicating said facts and a non-negligible reason for the accident which may have raised an issue of fact.

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.).

Dr. Regory Montalbano conducted an orthopedic examination on October 26, 2012. Upon the review of the plaintiff's medical records, Dr. Montalbano noted normal range of motion in the plaintiff's cervical spine and lumbar/thoracic spine. Dr. Montalbano opined that the MRI's of the cervical spine and lumbar spine indicated degenerative changes. Dr. Montalbano opined that based upon his review of the records and his clinical examination there was injury causally related to the subject accident.

In opposition, the plaintiff has submitted sufficient proof to raise a triable issue of fact. Plaintiff initially treated with Dr. Mitchell Zeren from December 15, 2008 through November, 2011 when he was discharged as he had reached maximum medical improvement. Any other treatment would have been palliative in nature. As the result of the accident, the plaintiff could not work or engage in any of his usual daily activities. He was instructed to rest, restrict his activities and refrain from working. Plaintiff was referred to chiropractic care and physical therapy. Dr. Mitchell Zeren noted range of motion limitations as compared to the norms in the cervical spine and lumbar spine which continued to be present throughout his treatment. Dr. Zeren causally relates the plaintiff's injuries as reflected in the MRI's, other medical records and his personal examination of the plaintiff to the subject accident. Dr. Zeren opined that he injuries and disc pathology and resultant nerve root impingement is clearly traumatically induced by the subject accident. Furthermore, plaitniff's injuries are permanent.

The certified reports of Dr. Yolande Bernard which chronicles plaintiff's January 15, 2009 examination reflects normal ranges of motion as compared to the norm in the cervical spine and lumbar spine. Plaintiff received a spinal consultation with Dr. Sebastian Latuga and range of motion limitations as compared toe the norms was noted in the cervical and lumbar spine. Upon hearing all options and a follow-up evaluation on April 24, 2009 where range of motion limitations continued

to present, , plaintiff was referred to surgery.

Plaintiff has submitted competent medical proof to raise a triable issue of fact. See also, Coley v. DeLarosa, 105 A.D3d 527 (1st Dept. 2013); Uddin v. Cooper,, 32 A.D.3d 270 (1st Dept.2006).; Young Kyu Kim v. Gomez, 105 A.D3d 415 (1st Dept. 2013).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment pursuant to C.P.L.R. § 3212 is hereby granted on the issue of liability. It is further

ORDERED that the Clerk is directed to enter a judgment in favor of the plaintiffs against the defendants Hafiz Ramiz and Dina Taxi, Inc on the issue of liability only. It is further

ORDERED that defendants Hafiz Ramiz and Dina Taxi, Inc.'s motion for summary judgment on the issue of threshold is hereby denied in its entirety. It is further

ORDERED that upon the completion of discovery, the payment of the appropriate fees and the filing of the Note of Issue, this matter shall be set down for a trial on the issue of damages. It is further

ORDERED that plaintiff shall serve a copy of this Order with Notice of Entry upon the defendants within thirty (30) days of entry of this Order.

This constitutes the decision and Order of the Court.

4/16/15
DATE

HON. WILMA GUZMAN
Justice Supreme Court