

Andrade v Chester Cab Corp.
2015 NY Slip Op 30843(U)
April 16, 2015
Supreme Court, Bronx County
Docket Number: 307137/11
Judge: Wilma Guzman
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

Index No. **307137/11**
Motion Calendar No. 2, 3
Motion Date: 2/9/15

JAIME ANDRADE

Plaintiff,

-against-

DECISION/ ORDER

Present:
Hon. Wilma Guzman
Justice Supreme Court

CHESTER CAB CORP., HAMALA SACKO and
EDWARD HUGHEY, JR.,

Defendants.

EDWARD HUGHEY, JR.,

Plaintiff,

Index No. 309878/12

-against-

CHESTER CAB CORP. and HAMALA SACKO

Defendant

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
Affirmation in Opposition,	3, 4
Reply Affirmation	5, 6

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

Defendant Hughey moves this Court for an Order granting summary judgment on the issue of liability against defendants Chester Cab Corp., and Sacko on the issue of liability. Defendants Chester Cab Corp and Sacko oppose the motion. Plaintiff also opposes this motion.

Defendants Chester Cab Corp and Sacko move this Court for moves for summary judgment dismissing plaintiff Hughey's complaint on the grounds that the plaintiff failed to sustain a "serious

injury” as defined by Insurance Law 5102(d).

For purpose of disposition, both motions are consolidated and decided as follows:

This action arises from a motor vehicle accident that occurred on May 19, 2011 at the intersection of Eighth Avenue and 42nd Street. Plaintiff was the front seat passenger in the vehicle operated by defendant Hughey.

CPLR § 3212(a) permits a party to move for summary judgment after issue has been joined, provided that the court may set a date for such a motion to be made and if the court sets no date then the motion must be made no later than 120 days of the filing of the note of issue, except with leave of the court on good cause shown. Brill v. City of New York, 2 N.Y. 3d 648 (2004). A court providently exercises its discretion, finding good cause shown, where discovery was incomplete at the time of the filing of the note of issue *and* where discovery continues after the filing of the note of issue. Doe v. Madison Third Bldg. Companies, 121 A.D3d 631 (1st Dept. 2014); Pena v. Womens Outreach-Network, 35 A.D.3d 104 (1st Dept. 2006).

The Note of Issue was filed on February 24, 2014 and the Hughey motion for summary judgment was filed on June 10, 2014. Defendant Hughey offers no good cause explanation as to the delay. As such, defendant Hughey’s motion for summary judgment is untimely and denied.

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).

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 Chester Cab Corp. has met its prima facie burden for summary judgment through the submission of the affidavits of Dr. Daniel J. Feuer who performed a neurological evaluation on July 25, 2013. Upon review of the plaintiff's medical records and examination, Dr. Feuer noted normal ranges of motion as compared to the norm in the cervical spine. Dr. Feuer opined that the

plaintiff did not demonstrate any objective neurological disability or neurological permanency.

Upon review of the plaintiff's medical records and examination, Dr. Katz noted normal ranges of motion as compared to the norm in the cervical spine and lumbar spine. Dr. Katz opined that plaintiff's soft tissue injuries had all resolved. Dr. Katz further opined that plaintiff showed no signs or symptoms of permanence and is not disabled. Plaintiff is able to work without restrictions and capable of daily activities and pre-loss activities.

Plaintiff Hughey has submitted sufficient proof to raise a triable issue of fact. Dr. S. Ramachandran Nair treated the plaintiff between may 24, 2011 and December 19, 2013. During this time, using a goniometer, Dr. Nair noted range of motion limitations as compared to the norms in the cervical spine and lumbar spine. Dr. Nair also reviewed the plaintiff's July 22, 2011 MRI and noted a paracentral disc herniation at L4-L5. In the June 2, 2011 MRI, Dr. Katz noted a posterior disc bulging impressing on the thecal sac at C3-4 through C6-7. After the initial treatment, Dr. Nair referred plaintiff to conservative physical therapy, chiropractic adjustments and acupuncture three times a week until March 2012. Dr. Nair opined that the plaintiff's injuries were causally related to the subject accident and not the result of degeneration based upon his review of the MRI's. In addition, plaintiff was asymptomatic prior to the subject accident. Dr. Nair opined that the plaintiff suffered a permanent disability as the result of the subject accident, a condition that will worsen with time.

Accordingly, it is


ORDERED that defendant Hughey's motion for summary judgment pursuant to C.P.L.R. § 3212 on the issue of liability is denied as untimely. It is further

ORDERED that defendants Chester Cab Corp. And Sacko's motion for summary judgment on the issue of threshold is hereby denied. It is further

ORDERED that defendant Hughey 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.

4/16/15
DATE


HON. WILMA GUZMAN
Justice Supreme Court