Windley v Rodriquez
2016 NY Slip Op 30894(U)
April 1, 2016
Supreme Court, Bronx County
Docket Number: 309156/2009
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 24

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David L. Windley

Plaintiff,

DECISION and ORDER
Index No. 309156/2009

-against-

Rene S. Rodriguez

Defendant.

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

Plaintiff alleges that he sustained a serious injury on February 25, 2008 as a result of a motor vehicle accident at/near the intersection of 149th street and River Avenue, Bronx, New York. Defendant moves for summary judgment pursuant to CPLR 3212 on threshold grounds pursuant to Insurance Law § 5102(d). Plaintiff opposes the motion and cross moves for partial summary judgment on the issue of liability.

Summary judgment is a drastic remedy that a court should employ only in the absence of triable issues of fact. (*Andre v Pomeroy*, 35 NY 2d 361 [1974].) Insurance Law § 5102(d) sets forth the serious injury threshold:

> a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

The proponent of a motion for summary judgment must present evidence sufficient to show that no material issues of fact exist with regard to the threshold issue. (*Bray v Rosas*, 29 AD3d 422 [1st Dept 2006]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad*

v New York Univ. Medical Center, 64 NY2d 851 [1985].) Here, the burden rests on the defendant to establish by the submission of proof in admissible form that plaintiff did not suffer a serious injury. When a defendant's motion is sufficient to raise the issue as to whether a serious injury has been sustained by the plaintiff, the burden shifts to the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]; *Licari v Elliot,* 57 NY2d 230 [1982]; *Espinal v Senatore*, 65 NY2d 1017[1985].)

Defendant contends that plaintiff's injuries do not meet the statutory mandate of a serious injury. In support of his motion, defendant submits a copy of the pleadings, bill of particulars, discovery orders and responses, plaintiff's deposition transcript, emergency room records from Montefiore Medical Center, and the medical findings of Dr. Joseph Y. Margulies, Dr. R.C. Krishna and Dr. Peter A. Ross. The affirmed report of defendant's examining neurologist, R.C. Krishna, M.D., indicates that an examination conducted on September 2, 2010 revealed a normal range of motion of plaintiff's cervical and lumbar spine. Dr. Krishna noted no atrophy in the upper and lower extremities. His impression was resolved cervical and lumbar strain. He did not render an opinion regarding any injury to the shoulder and deferred the same to a specialist. He opined that plaintiff's prognosis is good and that plaintiff is able to return to his pre-loss activities without restrictions. There was no objective evidence of disability concerning his daily living and no pre-existing conditions which may be having an effect on his recovery. The affirmed report of defendant's examining orthopedist, Joseph Y. Margulies, M.D., indicates that an examination conducted on September 2, 2010 revealed a diagnosis of a normal orthopedic examination. His examination showed a normal range of motion of both plaintiff's cervical and lumbar spine and shoulders. His diagnosis was resolved cervical and lumbar sprain and resolved contusion to both shoulders. He opined that the plaintiff has no disability and that he may continue with his daily activities as no further treatment or therapy is necessary.

Defendant also submitted the affirmed radiologist report of Dr. Peter A. Ross who reviewed plaintiff's MRI's of the right shoulder, cervical and lumbar spine. His review of

plaintiff's MRI of the right shoulder revealed no evidence of fracture or tears except a small partial thickness rotator cuff tear at the insertion of the supraspinatus tendon at the humeral head. His conclusion was that plaintiff had lateral downsloping of the acromion which is congenital in nature and the degenerative bony productive changes and resultant impingement that is chronic in nature and pre-existing to the subject accident. Regarding the rotator cuff tear, Dr. Ross is uncertain if it is related or not to the subject accident and recommends clinical correlation. Dr. Ross next examined the MRI of plaintiff's cervical spine finding that the bulges and herniations noted were pre-existing and degenerative in nature and not casually related to the subject motor vehicle accident. His examination of plaintiff's MRI of the lumbar spine revealed that the bulges and herniations in the lumbar region were degenerative in nature and pre-existing and not related to the subject accident.

Based on the foregoing, the defendants have established prima facie that plaintiff did not suffer a serious injury *(Clemmer v Drah Cab Corp.*, 74 A.D.3d 660, 667 [1st Dept 2010]). Consequently, it is incumbent upon plaintiff to come forward and present proof of a serious injury in admissible form. (See, *Grasso v Angerami*, 79 NY2d 814 [1991]).

In opposition plaintiff submits his affidavit, defendant's deposition transcript, the affidavit of treating chiropractor Henry Hall, the affirmed MRI reports regarding plaintiff's right shoulder, cervical and lumbar spine, and the affirmed medical report of Dr. Richard Memoli.

The evidence proffered by the plaintiff's experts showing disc bulges in the cervical and lumbar region and rotator cuff tear in the right shoulder along with restricted range of motions to both the cervical and lumbar spine and persistent neck, back and shoulder pain associated with this accident is sufficient to establish that there are divergent medical opinions from both sides on the question of whether or not these injuries are causally related to the accident. Under the facts and circumstances of the instant case, considered in a light most favorable to the plaintiff, the Court finds that the plaintiff has provided sufficient medical evidence to raise a factual issue which requires resolution by a jury. Although the defendants submit expert medical proof to the contrary stating that nothing significant or

consequential or permanent was noted, the Court views the discrepancies between the medical reports and affidavits submitted on behalf of the parties to involve issues of credibility for resolution by the jury. (*Windisch v Weiman*, 161 AD2d 433 [1st Dept 1990].) Furthermore, the more than 4 year gap in treatment between plaintiff's visits to the chiropractor and the recent examination conducted by his physician, the results of which were submitted in opposition to defendant's respective motions go to the weight, not the admissibility, of the evidence. Where, as here, plaintiff's chiropractor averred that plaintiff "had reached maximum benefits" plaintiff has, with minimal adequacy, explained his treatment gap in this case (*see Brown v Achy*, 9 AD3d 30, 33 [1st Dept 2004] citing *Ramos v Dekhtyar*, 301 AD2d 428, 429-430 [1st Dept 2003]; *see also Lantigua v Williams*, 305 AD2d 286 [1st Dept 2003], citing *Ramos* with approval; *compare Melendez v Feinberg*, 306 AD2d 98, 99 [1st Dept 2003], *lv denied* 1 NY3d 508 [2004]).

Accordingly, defendant's motion for summary judgment on the issue of threshold is denied.

With respect to plaintiff's cross motion on the issue of liability, the motion is also denied for the reasons set forth below.

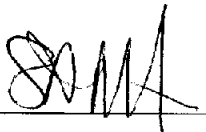
Plaintiff states that he was traveling northbound on Exterior Avenue and when he approached East 149th street, he stopped at the traffic light for a minute or less and observed the defendant on the other side of the intersection. When the light turned green he proceeded on River Avenue (Exterior Avenue turns into River Avenue at this junction) and defendant made a sudden left turn without signaling colliding with plaintiff's vehicle. Defendant in opposition testified that he was traveling southbound on River Avenue and that he stopped at the traffic light at the intersection with East 149th street. There was a car in front of his vehicle and when the traffic light turned green, the vehicle in front made a right turn. According to defendant, he had perfect visibility of the intersection and did not see plaintiff's vehicle ahead until after defendant was already making a left turn. As he was making the left turn, plaintiff's vehicle suddenly emerged speeding from the northbound River Avenue and struck his vehicle.

Summary judgment is the procedural equivalent of a trial. (See, *S.J. Capelin Associates Inc., v Globe Mfg. Corp.*, 34 NY2d 338 [1974]). It is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. See *(Rotuba Extruders Inc., v Ceppos*, 46 NY2d 223 [1978]). The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, presenting sufficient evidence, in admissible form, to eliminate any material issues of fact from the case. (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad, supra* at 853. In this case, there are triable issues of fact as to whether the defendant driver properly attempted to turn left when the plaintiff's vehicle was approaching, whether the plaintiff failed to use appropriate caution in the operation of his vehicle, and the allocation of fault, if any, as to each driver (*see, Rexer v Sklar,* 277 AD2d 216 [2nd Dept 2000]; *Young v Mauch,* 268 AD2d 583 [2nd Dept 2000]).

Generally, negligence cases do not lend themselves to resolution by a motion for summary judgment unless the facts clearly demonstrate the negligence of one party without any culpable conduct by the other. (*Barnes v Lee*, 158 AD2d 414 [1st Dept 1990]). Furthermore when issue of credibility are presented by conflicting testimony, a motion for summary judgment should not be granted (*Lossing v Dilemani*, 188 AD2d 423 [1st Dept 1992]), or where there is any doubt as to the existence of a material and triable issue of fact, summary judgment should not be granted (*Krupp v Aetna Life & Casualty Co.*, 103 AD2d 252 [2nd Dept 1984]). For the foregoing reasons, triable issues of fact exist which warrant denial of plaintiff's motion.

This is the Decision and Order of the Court.

Dated: Bronx, New York
April 1, 2016



Hon. Sharon A.M. Aarons
Justice, Supreme Court