Vega v Torres
2016 NY Slip Op 31122(U)
May 17, 2016
Supreme Court, Bronx County
Docket Number: 308054/2011
Judge: Alison Y. Tuitt

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

HAROLD VEGA,

Plaintiff,

-against-

ANGEL TORRES, HERMINIO ORTIZ and FATOU KOUROUMA,

Defendants.

INDEX NUMBER: **308054/2011**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1-6,

Read on this Defendants' Motion and Cross-Motion for Summary Judgment

On Calendar of **6/29/15**

Notices of Motion/Cross-Motion-Exhibits and Affirmations 1, 2

Affirmations in Opposition 3, 4

Reply Affirmations 5, 6

Upon the foregoing papers, defendants Angel Torres (hereinafter "Torres") and Herminio Ortiz's (hereinafter "Ortiz") motion and defendant Fatou Kourouma's (hereinafter "Kourouma") cross-motion for summary judgment are consolidated for purposes of this decision. For the reasons set forth herein, the motion is denied in part and granted in part, and the cross-motion is granted.

The within action arises from a motor vehicle accident on September 3, 2010 as a result of which plaintiff claims to have sustained serious injuries. Defendants move for summary judgment on the grounds that plaintiff fails to prove a serious injury as required by §5102(d) of the Insurance Law.

The Court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment

is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

In the present action, the burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a serious injury. Lowe v. Bennett, 511 N.Y.S.2d 603 (1st Dept. 1986), *aff'd*, 69 N.Y.2d 701 (1986). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. Licari v Elliot, 57 N.Y.2d 230 (1982); Lopez v. Senatore, 65 N.Y.2d 1017 (1985). When a claim is raised under the "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 non-permanent 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment," in order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion is acceptable. Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis and, (2) the evaluation

compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. Toure, supra. [1]

In the instant action, defendants move for summary judgment arguing that plaintiff has not suffered a serious injury pursuant to §5102 of the Insurance Law. As a result of the accident, plaintiff claims to have sustained injuries as a result of the accident on September 3, 2010, in relevant part, dis herniations at L4 and L5 and L5-S1, confirmed by MRI taken on October 7, 2010 The Court finds that the defendants met their prima facie burden of establishing that plaintiff did not sustain a serious injury by submitting the affirmed report of their medical experts Dr. Isaac Cohen who, based upon his physical examination of the plaintiff, found full range of motion in the plaintiff's lumbar spine and concluded that lumbosacral spine strains had resolved. Additionally, Dr. Cohen states that plaintiff's MRI revealed a small disc herniation at L4-L5 and L5-S1 which is of a chronic nature and not posttraumatic.

In opposition, plaintiff raises triable issues of fact as to the existence of serious injuries to his lumbar spine. Plaintiff submits the medical affirmation of Dr. Richard Denise who interpreted plaintiff's lumbar MRI which was taken on October 7, 2010 and found a central posterior herniation of the L4-L5 and L5-S1 discs. Plaintiff also submits the report of Dr. Nicky Bhatia, who states that he conducted an independent review of plaintiff's MRI films and states that he disagrees with Dr. Cohen and in his opinion, to a reasonable degree of medical certainty, the films show central posterior herniation at L4/5 and L5-S1 with central spinal stenosis in the lumbar spine with no signs of degeneration or a pre-existing condition. Dr. Bhatia states that it is his opinion that the herniated discs are causally related to the subject accident. Additionally, Dr. Bhatia examined plaintiff on October 23, 2014 and found 15% restriction in plaintiff's range of motion of the flexion in the lumbar spine. Dr. Bhatia states that plaintiff has significant restriction in lumbar range of motion with neural impingement as a result of spinal derangement, resulting in continued pain and disability. Furthermore, Dr. Bhatia states that plaintiff, who received approximately five months of physical therapy, received adequate physical therapy and medical treatment, and has reached essentially maximal medical improvement. Dr. Bhatia

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[1] The Toure decision appears to indicate that claims of neck or back injury resulting from bulging or herniated discs may be considered either under the category of a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system," as well as the 90/180 day category (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 352, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002].)

opines that plaintiff has a permanent partial disability reflecting the consequential limitation of use of the lumbar spine.

Defendants' motion and cross-motion for summary judgment on the issue of serious injury must be denied. Plaintiff has presented evidence which raises issues of fact as to whether he sustained a serious injury. Plaintiff shows contemporaneous objective proof of the limitations sustained as a result of the injury. See, Lazarus v. Perez, 901 N.Y.S.2d 39 (1st Dept. 2010) citing Franchini v. Palmieri, 1 N.Y.3d 536 (2003). Plaintiff here submits the affirmation of a treating physician and a medical affirmation which is based on a physician's personal examination and observations of the plaintiff which is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury. O'Sullivan v. Atrium Bus Co., 668 N.Y.S.2d 167 (1st Dept. 1998). Thus, plaintiff has raised an issue of fact as to whether he sustained a significant limitation and loss of use of his lumbar spine. Dr. Bhatia opines that these injuries are permanent. The positive findings on the plaintiff's MRI films of his lumbar spine are accompanied by objective evidence in admissible form as to the extent of the limitation resulting from the herniations. Onishi v. N&B Taxi, Inc., 858 N.Y.S2d 171 (1st Dept. 2008). Thus, plaintiff has produced objective, contemporaneous and qualitative medical evidence regarding his injuries. See, Blackman v. Dinstuhi, 810 N.Y.S.2d 79 (1st Dept. 2006); Jimenez v. Rojas, 810 N.Y.S.2d (1st Dept. 2006). In the records, plaintiff shows contemporaneous objective proof of the limitations sustained as a result of the injury such as an expert's designation of a numeric percentage of loss of range of motion or the extent or degree of physical limitation. See, Lazarus v. Perez, 901 N.Y.S.2d 39 (1st Dept. 2010) citing Franchini v. Palmieri, 1 N.Y.3d 536 (2003). Plaintiff's submissions adequately rebuts defendants' expert's findings and Dr. Bhatia opines that plaintiff's herniated discs are causally related to the accident and not due to a preexisting condition. Spencer v. Golden Eagle, Inc., 920 N.Y.S.2d 24 (1st Dept. 2011); Valentin v. Pomilla, 873 N.Y.S.2d 537 (1st Dept. 2009).

Plaintiff, however, fails to raise an issue of fact as to whether he was unable to perform substantially all of her usual and customary activities for 90 days during the first 180 days following the accident. In order to establish a claim under the 90/180 category, there must be proof that plaintiff's usual and customary activities were impaired in some significant way for 90 out of the first 180 days after the accident. Cruz v. Calabiza, 641 N.Y.S.2d 255 (1st Dept. 1996). The claim must be supported by "competent medical proof that directly substantiated the claim". Cruz v. Aponte, 874 N.Y.S.2d 442 (1st Dept. 2009) quoting Uddin

v. Cooper, 820 N.Y.S.2d 44 (1st Dept. 2006)(citations omitted). Furthermore, missing 3 months of work out of the first 180 days is insufficient without a showing of other daily activities that were hindered due to the injury. Uddin, 820 N.Y.S.2d at 45. Here, there is no admissible proof that plaintiff could not perform his usual and customary activities for 90 out of the 180 days.

Defendant Kourouma's branch of the cross-motion for summary judgment on the issue of liability is granted and the complaint and cross-claims against her are dismissed.

The within is a three car motor vehicle accident that occurred at the intersection of Grand Concourse and East 184th Street in Bronx County, New York. At the time of the accident, plaintiff was traveling in the northbound lanes of the Grand Concourse service road behind a van operated by defendant Torres and owned by defendant Ortiz. Plaintiff testified at his deposition that the northbound lanes of the service road had two lanes and he was traveling in the right lane. Plaintiff was driving behind defendant Torres' vehicle when he observed Torres' right turn signal. As Torres' vehicle began to turn right, plaintiff attempted to pass him on the left hand side and continue through the intersection when Torres suddenly made a left hand turn. Plaintiff's vehicle was struck by Torres' vehicle which pushed his vehicle "over to the left" over the median and then a defendant Kourouma's vehicle hit his vehicle in the rear. Plaintiff testified that only a matter of seconds passed between the two impacts. Defendant Torres testified at his deposition that he was involved in an accident with a minivan which then was involved in a collision with a third vehicle, when the van was pushed to the left, and went from the service road to the main road of the Grand Concourse, and made contact with the other vehicle. Torres further testified that there was a traffic light at the intersection of Grand Concourse and East 184th Street and he had stopped for a red light behind a vehicle that was double parked. He had to make a right turn and he had his signal on to make the right turn. In order to get around this double parked car to make his turn, defendant had to go to the left, so he first put on his signal indicating he was going left. He never made the right turn because the accident occurred prior to him making the turn. Torres was driving with a suspended license at the time of the accident and was arrested at the scene. Defendant Kourouma testified that she was traveling on the "main road" of the northbound lane of the Grand Concourse and as she approached the intersection of 184th Street, traveling 20-25 miles per hour, plaintiff's vehicle crossed over the median into her path of travel, causing her to collide with plaintiff's vehicle. Kourouma testified that there was nothing she could do to avoid the accident.

The police accident report provides that "[a]t T/P/O driver of vehicle #1 while making improper lane change struck vehicle #2 while traveling north. Driver of vehicle #2 stated he was struck by vehicle #1 causing him to hit vehicle #3. Driver of vehicle #3 stated vehicle #2 struck her auto while she was traveling northbound on Grand Concourse. All vehicles were traveling northbound on Grand Concourse."

The emergency doctrine applies only to circumstances where a driver is confronted by a sudden and unforeseen occurrence not of the driver's own making. Rivera v. New York City Transit Authority, 77 N.Y.2d 322 (1991). "If the operator could not reasonably foresee the injury as a result of his action in the over-all context of this particular fact pattern, or if his conduct was reasonable and proportionate to the danger he could anticipate, defendant may be excused or found not liable by a fact finder. Id. at 329 citing Danielenko v. Kinney Rent-A-Car, 57 N.Y.2d 198, 204 (1982). See also Stewart v. Ellison, 813 N.Y.S.2d 397 (1st Dept. 2006) citing Rivera ("An emergency situation arises when one is confronted with a sudden an unexpected event or combination of events not of one's own making that leaves little or not time for reflection or the exercise of deliberate judgment.").

Here, defendant Kourouma has presented evidence that she was confronted with a sudden and unforeseen occurrence not of her own making and she could do to avoid the accident. Defendants Torres and Ortiz's contend that Kourouma observed plaintiff's vehicle for approximately 30 seconds prior to impact and did nothing to avoid the accident. However, when Kourouma was asked to estimate how much time passed prior to fist seeing plaintiff's and the time of impact, she testified that "I don't know. Less than a minute. I cannot say. Like I don't know. Maybe 30 seconds, less than that. I'm not sure." She later testified that "I just saw him moving from his lane to my lane and I couldn't stop because it was – it would be so close. It was on my right side and I was on the left side. So for me, I just saw him moving the vheicle to my right, yes" and "... I braked – I tried to brake, but it was too late, I couldn't." There is no evidence that Kourouma could have avoided the accident, but failed to do so. Accordingly, her motion is granted and the complaint and cross-claims against her are dismissed.

This constitutes the decision and Order of this Court.

Dated: 5/17/16

Hon. Alison Y. Tuitt