Gadsden v Williams
2016 NY Slip Op 31369(U)
June 29, 2016
Supreme Court, Bronx County
Docket Number: 305167/2013
Judge: Ruben Franco
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NEW YORK SUPREME COURT
COUNTY OF BRONX: IAS PART-26

PAUL GADSDEN,

Plaintiff,

-against-

HERMAN G. WILLIAMS Jr., UPTOWN RECOVERY CORP., TYRONE W. CRAMER and TANYA M. HARRIS,

Defendants.

Index No.: 305167/2013

MEMORANDUM DECISION/ORDER

HON. RUBEN FRANCO

Defendants, Herman G. Williams Jr. ("Williams) and Uptown Recovery Corp. ("Uptown"), move for summary judgment pursuant to CPLR § 3212, and Insurance Law § 5102(d), alleging that the injuries claimed do not satisfy the "serious injury" requirements of the Insurance Law. Defendants also move pursuant to CPLR§3126, to preclude defendants Tyrone W. Cramer and Tanya M. Harris, from offering evidence at the trial, or in opposition to this motion.

This action arises out of a motor vehicle accident which occurred on May 1, 2013, in which plaintiff was a passenger in an automobile owned by defendant Harris and operated by defendant Cramer, which came into contact with an automobile owned by defendant Uptown and operated by defendant Williams.

The branch of defendants' motion seeking preclusion regarding defendants Cramer and Harris, is denied as moot, inasmuch as a stipulation of discontinuance of the action against defendants Cramer and Harris, dated May 19, 2015, was executed by the attorneys for the parties, and filed on July 1, 2015.

Although the moving defendants do not request summary judgment on the issue of

liability on the face of their motion, there are references to their entitlement to such relief in the attorney's affirmation in support of the motion. Thus, the court addresses the issue here. It is well settled that a rear-end collision with a stopped or stopping motor vehicle establishes a *prima facie* case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the driver of the rear vehicle to come forth with an adequate explanation for the accident (see Morgan v. Browner, 138 A.d.3d 560 [1st Dept. 2016]). As a corollary thereto, a presumption also arises that there was no contributory negligence on the part of the operator of the rear-ended vehicle (see Soto-Maroquin v. Mellet, 63 A.D.3d 449, 450 [1st Dept. 2009]).

Movants' attorney's affirmation asserts that defendant Uptown's vehicle was hit in the rear. However, the affirmation of an attorney who has no personal knowledge regarding the facts of the incident, has no probative value (Hasbrouck v. City of Gloversville, 63 N.Y.2d 916 [1984]). No other admissible proof has been submitted to substantiate the claim that defendant Uptown's vehicle was hit in the rear. Consequently, summary judgment dismissing plaintiff's Complaint against defendants Williams and Uptown on the issue of liability, cannot be granted.

Plaintiff claims in his Bill of Particulars, dated October 31, 2013 (defendant's Exhibit D), that as a result of this accident, he sustained the following:

> Surgery of the left shoulder;
> partial tear of the distal supraspinatus tendon;
> bony impingement of the left shoulder;
> joint space narrowing of the left shoulder;
> joint space effusion of the left shoulder; and,
> diffuse posterior bulging disc L3-L4 and L4-L5 is identified,
> deforming the thecal sac and bilateral L4 and L5 nerve roots, respectively.

The burden rests on defendant to establish by evidentiary proof in admissible form, that plaintiff has not suffered a serious injury (Lowe v. Bennet, 122 AD2d 728 [1st Dept. 1986], *aff'd*

69 NY2d 700 [1986]). When defendant's evidence is sufficient to make out a *prima facie* case that a serious injury has not been sustained, the burden shifts and it is then incumbent upon plaintiff to produce sufficient evidence in admissible form to raise a triable issue of fact as to whether plaintiff sustained a serious injury (see Licari v. Elliot, 57 NY2d 230 [1982]).

Defendants submit the affirmed report of Marc H. Appel, M.D., an orthopedist, who examined plaintiff on February 25, 2015 (defendant's Exhibit L). Dr. Appel's examination of plaintiff's left shoulder revealed, according to his report, that "Ranges of motion produced a click. This was painful. He was able to forward flex to 90°, had pain and could continue to 160°. He was able to abduct to 90°, had pain and the shoulder clicked. He was able to abduct to 140°. He was able to reach behind his head to the level of his ear. On the right side he could behind (sic) his head and touch his neck. He was able to reach behind his back to the level of T8 on the right side. He was able to reach to the level of L4 on the left side. He had 5/5 strength on the right side. On the left side he had 4+/5 rotational strength."

Dr. Appel's examination of plaintiff's thoracolumbar area, with respect to ranges of motion, revealed that plaintiff was able to bend forward 80° with seated fixation just above his ankles. Dr. Appel reported that plaintiff assumed the seated and supine position without problem, and that he could extend 30° and rotate 40°. Also, that plaintiff was able to straight leg raise 60°on the right and 60° on the left, and that there was a negative Fabere sign and negative nerve root tension sign.

Defendants fail to make a prima facie showing that plaintiff did not sustain a serious injury as a result of the subject motor vehicle accident regarding the categories of a permanent consequential limitation of use of a body organ or member, or of a significant limitation of use of

a body function or system, to wit, the left shoulder and lumbar spine (see Insurance Law § 5102(d); Bray v. Rosas, 29 AD3d 422 [1st Dept. 2006]). Although defendants' orthopedist specified the degrees of range of motion of plaintiff's left shoulder and thoracolumbar spine, he failed to compare those findings to the normal range of motion, "leaving the court to speculate as to the meaning of those figures" (Id. at 423, quoting from Manceri v. Bowe, 19 A.D.3d 462, 463 [2nd Dept. 2005]).

However, as to plaintiff's claim that he sustained a serious injury under the 90/180 category outlined in Insurance Law § 5102(d), defendant has made out a *prima facie* case. The court finds that plaintiff has not submitted medical evidence in admissible form to support his 90/180 claim. According to his deposition testimony (defendant's Exhibit K, p. 43), plaintiff missed a few days from work. This fails to raise a triable issue of fact (see Borja *v.* Delarosa, 90 A.D.3d 407 [1st Dept. 2011]; Perez v. Coor, 84 A.D.3d 646 [1st Dept. 2011]).

Accordingly, defendants' motion for summary judgment is granted to the extent that plaintiff's claim of serious injury under the 90/180 category outlined in Insurance Law § 5102(d) is dismissed, and it is denied in all other respects.

This constitutes the Decision and Order of the Court.

Dated: June 29, 2016

Ruben Franco, J.S.C.
HON. RUBÉN FRANCO