

Cabrera v Fiaz

2016 NY Slip Op 33202(U)

March 17, 2016

Supreme Court, Bronx County

Docket Number: Index No. 23513/2014E

Judge: Alexander W. Hunter, Jr.

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 23A**

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PROFILIA CABRERA and THALIA CARMONA,

Plaintiffs,

-against-

PAULA FIAZ, JUAN Y. NOVA, and JORGE Y.
ESPINOZA,

Defendants.

-----X
HON. ALEXANDER W. HUNTER, JR.:

The motion by the plaintiffs for an order pursuant to CPLR § 3212 granting them summary judgment on the issue of liability is hereby denied. The motion by the plaintiffs for an order pursuant to CPLR § 3212 granting them summary judgment on the issue of serious injury and setting the matter down for an immediate inquest is hereby denied. The cross-motion by defendants Juan Y. Nova (“Nova”) and Jorge Y. Espinoza (“Espinoza”) for an order pursuant to CPLR § 3212 on the issue of liability is hereby denied.

This cause of action is for personal injuries allegedly sustained by the plaintiffs as a result of an automobile accident, which occurred at or near the intersection of Washington Avenue and East 178th Street, Bronx, New York on March 7th, 2014. According to the verified complaint, plaintiffs Profilia Cabrera (“Cabrera”) and Thalia Carmona (“Carmona”) were passengers in a taxi cab operated by defendant Espinoza and owned by defendant Nova. The plaintiffs assert that the vehicle operated by defendant Paula Fiaz (“Fiaz”) unlawfully changed lanes by attempting to make a left hand turn from the right traffic lane, at which point the front end of defendant Nova’s vehicle struck the rear of Fiaz’s car. Plaintiff Cabrera avers that she sustained a tear to her left knee as well as numerous herniated and bulging discs during the aforesaid car collision.

It is well established that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of fact. **Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223 (1978); Andre v. Pomeroy, 35 N.Y.2d 361 (1974); CPLR 3212(b)**. The court’s function on a motion for summary judgment is issue finding rather than issue determination. **Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957)**. For summary judgment to be granted, the moving party must establish his or her cause of action or defense by presenting evidentiary proof in admissible form that would be sufficient to warrant the court in directing judgment in favor of the moving party. **Friends of Animals, Inc. v. Associated Fur Mfrs., Inc., 46 N.Y.2d 1065 (1979)**. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact

which require a trial of the action. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Plaintiffs' counsel incorrectly argues that defendants Nova and Espinoza improperly filed a cross-motion for summary judgment against the plaintiffs on the issue of liability under the supposition that the plaintiffs were innocent passengers and, therefore, cannot be held liable for causing the collision. It is true that an innocent passenger's right to summary judgment should not be precluded on the basis that there are potential issues of comparative negligence as between the drivers of the vehicles involved in the accident. Johnson v. Phillips, 261 A.D.2d 269 (1st Dept. 1999). However, plaintiffs' counsel seriously misses the mark in contending that "the [p]laintiff need only show that he is free from liability."

Quite to the contrary, to warrant summary judgment, the plaintiff must satisfy the twofold burden of demonstrating both that he or she is free from comparative fault as an innocent passenger and that the operator of the vehicle at issue was at fault. Phillip v. D & D Carting Co., Inc., 136 A.D.3d 18 (2nd Dept. 2015). "If the plaintiff fails to demonstrate, prima facie, that the operator of the offending vehicle was at fault, or if triable issues of fact are raised by the defendants in opposition...summary judgment on the issue of liability must be denied, even if the moving plaintiff was an innocent passenger." Id., at 24; See, Sanchez v. Taveraz, 129 A.D.3d 506 (1st Dept. 2015).

Contrary to the plaintiffs' presumption, defendants Nova and Espinoza's cross-motion for summary judgment does not attempt to attribute blame to the plaintiffs. Rather, it is predicated upon their contention that the plaintiffs have failed to satisfy the second facet of a movant's burden of proof by failing to demonstrate that defendant Nova negligently operated his vehicle.

In support of their motion, the plaintiffs submit transcripts of their respective deposition testimony, as well as that of defendant Nova and defendant Fiaz. The substance of the plaintiffs' deposition testimony has little probative value on the issue of liability as neither plaintiff was able to recall details about the moments immediately preceding the vehicle collision. In contrast, both defendant drivers disclaim liability for causing the accident by identifying specific conduct in violation of the Vehicle and Traffic Law ("VTL"), in which the other driver purportedly engaged immediately preceding the accident.

VTL § 1160 (c) requires a driver who intends to make a left turn at an intersection where traffic is restricted to one direction on one or more roadways to approach the intersection in the extreme left hand lane of the roadway. Defendants Nova and Espinoza claim that defendant Fiaz violated the mandates of VTL § 1160 when she attempted to make a left hand turn from the right lane. In a similar vein, defendants Nova and Espinoza further argue that such conduct did not conform with the duty that VTL § 1128 (a) imposes upon a driver to refrain from changing lanes until the driver has ascertained that said movement can be made safely. The version of facts conveyed by defendant Nova depict his vehicle as having the right of way at the time of the accident. Because a motorist is entitled to anticipate that other drivers would obey traffic laws that require them to yield, defendant Nova's recitation of facts, if proved, would establish a viable, non-negligent explanation for the accident. See, Martinez v. Cofer, 128 A.D.3d 421 (1st Dept. 2015).

Defendant Fiaz's deposition testimony similarly creates uncertainty over whether she should be absolved of all liability. During her deposition, she testified that she was driving in the left lane when she attempted to make a left hand turn and that, as she was turning, she applied the car's brake pedal to slow her vehicle down and safely make the turn. She further asserted that, while she was in the process of making the aforesaid turn, the defendant's vehicle struck the rear of her vehicle. If the facts presented by defendant Fiaz were proved, they would refute an inference of liability as a driver who is in the process of slowing or stopping the front car involved in a rear-end collision is typically afforded a presumption of negligence on the part of the driver of the rear vehicle. **Dattilo v. Best Transp., Inc.**, 79 A.D.3d 432 (1st Dept. 2010); **Cabrera v. Rodriguez**, 72 A.D.3d 553 (1st Dept. 2010).

Despite the plaintiffs' reliance on the proposition that issues of fact as to comparative negligence between two defendants do not bar an innocent passenger's right to summary judgment, said proposition is not controlling in the instant matter. Rather, the facts presented by the plaintiffs' own exhibits raise a triable issue of fact as to whether one or all of the defendants should be deemed entirely free of fault, which vitiates the plaintiffs' asserted entitlement to summary judgment.

Furthermore, the plaintiffs have clearly failed to meet their threshold burden under Insurance Law §5102. Insurance Law § 5102 (d) defines a serious injury as a "personal injury which results in...permanent loss of use of a body organ or member, function, or system; permanent consequential limitation of use of a body organ or member; significant limitations of use of a nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury or impairment."

To substantiate a claim for serious injury under Insurance Law § 5102, a plaintiff must provide objective medical findings "of either a specific percentage of the loss of range of motion or a sufficient description of the qualitative nature of plaintiff's limitations based on the normal function, purpose and use of the body part." **Bent v. Jackson**, 15 A.D.3d 46, 49 (1st Dept. 2005). A plaintiff's subjective attestation regarding his or her own pain or inability to perform a specific task is insufficient to sustain a claim of serious injury. **Glover v. Capres Contracting Corp.**, 61 A.D.3d 549 (1st Dept. 2009). The plaintiffs in the instant matter rely only on their own affidavits as proof of their purported serious injuries, failing to proffer either an affidavit from a medical doctor attesting to the plaintiffs' injuries or any other medical records as required by Insurance Law § 5012. Therefore, this court finds that the plaintiffs have failed to demonstrate that either plaintiff sustained a serious injury for purposes of Insurance Law § 5102 (d).

The issue of serious injury must be established before the plaintiff may proceed to damages under New York Insurance Law §5102. **Reid v. Brown**, 308 A.D.2d 331 (1st Dept. 2003); **Shafarenko v. Fu Cheng**, 5 A.D.3d 585 (2nd Dept. 2004). The plaintiffs herein have failed to make the requisite showing and therefore this matter shall not be set down for an inquest and assessment on damages.

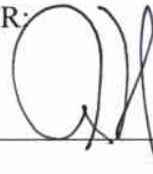
Accordingly, the plaintiffs' motion for summary judgment on the issue of liability is hereby denied. The motion by plaintiffs for an order pursuant to CPLR § 3212 granting them summary judgment on the issue of serious injury and setting the matter down for an immediate inquest is hereby denied. The cross-motion by defendants Juan Y. Nova and Jorge Y. Espinoza for an order pursuant to CPLR § 3212 on the issue of liability is hereby denied.

Movants are directed to serve a copy of this order with notice of entry upon all parties within twenty (20) days of entry and file proof thereof with the clerk's office.

This constitutes the decision and order of this court.

Dated: March 17, 2016

ENTER:

A handwritten signature in black ink, appearing to be 'JN', is written over a horizontal line.