Smales v Rosenzweig

2017 NY Slip Op 31057(U)

April 18, 2017

Supreme Court, Suffolk County

Docket Number: 14-18940

Judge: Denise F. Molia

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[* 1]

SHORT FORM ORDER

COPY

INDEX No. 14-18940

CAL. No. 16-00352MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 4-29-16 (001)
MOTION DATE 6-17-16 (002)
ADJ. DATE 1-13-17
Mot. Seq. # 001 - MG
002 - MD

---X

BRIAN SMALES,

Plaintiff,

- against -

JASON ROSENZWEIG and ROSE FENCE, INC.,

Defendants.

---X

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Upon the following papers numbered 1 to 49 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers 14 - 24; Answering Affidavits and supporting papers 25 - 47; Replying Affidavits and supporting papers 48 - 49; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor on the issue of liability is granted; and it is further

ORDERED that the cross motion by defendants for summary judgment dismissing the complaint on the ground that plaintiff did not sustain serious injuries as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries sustained by plaintiff when his vehicle was rear-ended by a vehicle owned by defendant Rose Fence, Inc. and operated by defendant Jason Rosenzweig. The accident allegedly occurred on July 11, 2014, at approximately 11:04 a.m., at the grassy median of the westbound Sunrise Highway in Bayport, New York. By his bill of particulars, plaintiff alleges that, as a result of the subject accident, he sustained serious injuries and conditions,

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including post traumatic stress disorder; post-concussion syndrome, including dizziness, imbalance, distorted vision, and depressions; a herniated disc at level T7-T8; and lumbar sprain/strain.

Plaintiff now moves for summary judgment in his favor on the issue of liability. In support, plaintiff submits, *inter alia*, the pleadings, a certified police accident report, and the transcripts of the deposition testimony of plaintiff.

Plaintiff testified that at the time of the accident, he was a Suffolk County police officer assigned to highway patrol duties in a marked radio patrol car. After receiving a call over the police radio stating that a possible drunk driver was headed westbound on the Sunrise Highway, he proceeded to the area of the subject accident and completely stopped his vehicle on the westbound left shoulder. Subsequently, plaintiff's vehicle was struck in the rear by defendants' vehicle.

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed, to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see* Vehicle and Traffic Law § 1129 [a]; ***Gibson v Levine***, 95 AD3d 1071, 944 NYS2d 610 [2d Dept 2012]; ***Zweeres v Materi***, 94 AD3d 1111, 942 NYS2d 625 [2d Dept 2012]; ***Nsiah-Ababio v Hunter***, 78 AD3d 672, 913 NYS2d 659 [2d Dept 2010]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on wet pavement or some other reasonable excuse (*see* ***Fajardo v City of New York***, 95 AD3d 820, 943 NYS2d 587 [2d Dept 2012]; ***Giangrasso v Callahan***, 87 AD3d 521, 928 NYS2d 68 [2d Dept 2011]; ***Ortiz v Hub Truck Rental Corp.***, 82 AD3d 725, 918 NYS2d 156 [2d Dept 2011]; ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 AD3d 489, 904 NYS2d 761 [2d Dept 2010]).

Here, plaintiff established his prima facie entitlement to summary judgment as he demonstrated that the vehicle he was operating was struck in the rear by defendants' vehicle. The burden then shifted to defendants to come forward with a non-negligent explanation for the accident.

In opposition, defendants submit, *inter alia*, the affidavit of defendant Rosenzweig. In his affidavit, Rosenzweig stated that a speeding violation charge was filed against him as a result of the subject accident, and he plead guilty to a speeding violation at the criminal court. He also stated that prior to the accident, he fell asleep. However, defendants' opposition failed to raise a triable issue of fact, as they did not proffer a nonnegligent explanation for the accident (*see* ***Alvarez v Bryant***, 143 AD3d 527, 38 NYS3d 799 [1st Dept 2016]; ***Chowdhury v Matos***, 118 AD3d 488, 987 NYS2d 132 [1st Dept 2014]). Thus, the plaintiff's motion for summary judgment on the issue of liability is granted.

Defendants cross-move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102 (d).

Insurance Law § 5102 (d) defines "serious injury" as "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 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 recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendants failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). On October 19, 2015, approximately two year and three months after the subject accident, defendants' examining orthopedist, Dr. Noah Finkel, examined plaintiff and performed certain orthopedic and neurological tests, including a straight leg raising test. Dr. Finkel found that all the test results were negative or normal. Dr. Finkel also performed range of motion testing on plaintiff's cervical and lumbar spines, shoulders, elbows, fingers and hands. Dr. Finkel found that plaintiff had range of motion restrictions in his cervical spine: 50 degrees of flexion (60 degrees normal), 30 degrees of extension and lateral flexion (35 degrees normal), and 60 degrees of right and left rotation (80 degrees normal) (*see id.*). He also determined that plaintiff exhibited the following range of motion restriction in his lumbar spine: 50 degrees of flexion (60 degrees normal) and 25 degrees of extension and lateral flexion (35 degrees normal). Dr. Finkel stated that plaintiff "continues with subjective symptomatology which does not correlate with diagnostic testing or objective findings relative to the clinical examination." Although Dr. Finkel concluded that the range-of-motion limitations in plaintiff's

cervical and lumbar regions were self-imposed, he failed to explain or substantiate, with objective medical evidence, the basis for that conclusion (*see* ***Mercado v Mendoza***, 133 AD3d 833, 834, 19 NYS3d 757 [2d Dept 2015]; ***Uvaydov v Peart***, 99 AD3d 891, 951 NYS2d 912 [2d Dept 2012]; ***Iannello v Vazquez***, 78 AD3d 1121, 911 NYS2d 654 [2d Dept 2010]). Moreover, Dr. Finkel failed to state how he measured the joint function in plaintiff's cervical and lumbar regions. The Court can only assume that Dr. Finkel's tests were visually observed with the input of plaintiff. The failure to state and describe the tests used will render the opinion insufficient (*see* ***Grisales v City of New York***, 85 AD3d 964, 925 NYS2d 633 [2d Dept 2011];***Mannix v Lisi's Towing Serv., Inc.***, 67 AD3d 977, 888 NYS2d 773 [2d Dept 2009]; ***Smith v Quicci***, 62 AD3d 858, 880 NYS2d 652 [2d Dept 2009]). In view of the foregoing, Dr. Finkel's report is insufficient to establish a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

On December 4, 2014, plaintiff's treating psychiatrist, Dr. Tad Troutman, examined plaintiff and performed certain psychiatric and neurocognitive tests. Dr. Troutman opines that plaintiff was suffering from psychological distress as a result of the subject accident, and that it was critical for him to take psychological treatment. Dr. Troutman's report is insufficient to establish a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

On October 1, 2015, defendants' examining psychiatrist and neurologist, Dr. Solomon Miskin, examined plaintiff and performed certain psychiatric and neurocognitive tests. Dr. Miskin found that all the test results were negative or normal. He opines that plaintiff evinced no psychiatric and neurocognitive disorders. Dr. Miskin did not provide specific range of motion testing results for plaintiff's thoracic or lumbar regions (*see* ***Sentino v Valerio***, 72 AD3d 1063, 902 NYS2d 106 [2d Dept 2010]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]). Dr. Miskin's report is also insufficient to establish a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

Moreover, the medical reports of Suffolk Orthopedic Associates indicate that plaintiff was treated from July 2014 until February 2015, but the reports did not provide specific range of motion testing results for plaintiff's thoracic spine (*see* ***Sentino v Valerio***, *supra*; ***Browdame v Candura***, *supra*). Thus, such reports are insufficient to defeat summary judgment.

Finally, Dr. Adam Wilner's July 2014 MRI reports concerning plaintiff's lumbar and thoracic spines and his July 2014 CT reports concerning plaintiff's brain are insufficient to defeat summary judgment. Dr. Wilner found that there was no acute traumatic injuries in plaintiff's brain and there was a small central extruded disc herniation in plaintiff's thoracic spine at level T7-T8. He opined that his finding of plaintiff's thoracic spine injury is degenerative. However, Dr. Wilner failed to explain or substantiate, with objective medical evidence, the basis for that plaintiff's injuries were not causally related to the accident (*see* ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; ***Tricarico v Vicale***, 5 AD3d 761, 773 NYS2d 572 [2d Dept 2004]).

Inasmuch as defendants failed to meet their prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiff in opposition to the motion were sufficient to raise a triable issue of fact (*see* ***McMillian v Naparano***, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; ***Yong Deok***

Lee v Singh, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]). Accordingly, defendants' cross motion for summary judgment on the issue of serious injury is denied.

Dated: 4-18-17

Hon. Denise F. Molia
A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**