Hedgemond v Franklin
2018 NY Slip Op 31838(U)
August 1, 2018
Supreme Court, New York County
Docket Number: 154929/2013
Judge: Adam Silvera

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22

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MACKSON HEDGEMOND, RAMONYE WALTON, DELORES JAMES

Plaintiff,

- v -

DWAYNE FRANKLIN,

Defendant.

INDEX NO. 154929/2013

MOTION DATE 07/11/2018

MOTION SEQ. NO. 004

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that defendant's motion for summary judgment, pursuant to CPLR 3212 to dismiss plaintiffs' complaint is denied. Plaintiffs allege that on December 29, 2012 on East 138th Street at its intersection with Bruckner Expressway in Bronx County, City and State of New York, plaintiffs Mackson R. Hedgemond, Ramonye Jenae Walton, and Delores James were seriously injured when a motor vehicle owned by defendant Dwayne Q. Franklin, Jr. struck the plaintiffs' vehicle. This decision and order addresses defendant's motion for summary judgment in favor of defendant against plaintiffs Mackson R. Hedgemond, Ramonye Jenae Walton, and Delores James for failure to show the existence of a serious injury as defined under Insurance Law 5102(d). The decision and order are as follows:

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64

NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure … to do [so]" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the "serious injury" threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a "permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system"]).

The Court notes that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dep't 1992], citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1st Dep't 1990]). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence (*See Ugarriza v Schmieder*, 46 NY2d 471, 475-476 [1979]).

As a preliminary matter, the court shall address the branch of defendant's motion for summary judgment against Ramonye Jenae Walton for failure to show the existence of a serious injury as defined under Insurance Law 5102(d). In a So-Ordered Stipulation dated June 12, 2017, the Honorable Paul Goetz directed plaintiff Ramonye Jenae Walton to appear for Independent Medical Examinations by July 31, 2017, or she would be precluded from offering any testimony,

or affidavits regarding her medical treatment (Mot., Exh G). Plaintiff has failed to appear for the Independent Medical Examinations. Thus, plaintiff Walton is unable to provide evidence to establish the existence of a "serious injury." Accordingly, plaintiff Walton's claims are dismissed.

As to plaintiff Mackson R. Hedgemond, defendant alleges that Hedgemond's injuries are not causally related to the incident at issue. Defendant attaches the affidavit of Dr. Arnold T. Berman, who concludes that plaintiff Hedgemond's cervical spine, lumbar spine, right knee conditions are chronic in nature and not correlated to the incident at issue (Mot, Exh D). Dr. Berman further states that an arthroscopic surgery to plaintiff's right knee on March 13, 2013, was due to a pre-existing condition and not related to the incident at issue but rather from a degenerative joint disease (*id.*).

In opposition, plaintiff highlights that Dr. Berman's examination of plaintiff took place three years after the incident at issue. Plaintiff argues that an issue of fact exists as to whether plaintiff was prevented from performing customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident. Further, plaintiff provides the affirmed narrative report of Dr. John Palemire who states that plaintiff Hedgemond's injuries "are casually related to the accident of 12/29/2012 and have resulted in the permanent partial and significant loss of use and function to the areas injured" (Aff in Op, Exh 1 at 10). Dr. Palemire provides proof of objective testing and compares plaintiff's range of motion in the cervical spine and lumbar spine to that of a normal person to demonstrate the existence of a "serious injury" (*id.*, at 10). Thus, an issue of fact exists precluding summary judgment and the branch of defendant's motion for summary judgment against plaintiff Hedgemond is denied.

As to the branch of defendant's motion for summary judgment against plaintiff Delores James, defendant alleges that James did not suffer a serious injury. Defendant attaches the affidavit of Dr. Berman who concludes that "Ms. James did not sustain a disability due to the accident of 12/29/2012" (*id.*, Exh E). In opposition, plaintiff highlights that Dr. Berman's examination of plaintiff James, like the examination of plaintiff Hedgemond, took place three years after the incident at issue. Plaintiff argues that an issue of fact exists as to whether plaintiff was prevented from performing customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident. Further, plaintiff provides the affirmed narrative report of Dr. John Palemire who states that in his "medical opinion the accident has changed her life and she will be suffering pain at some level for the rest of her life" (Aff in Op, Exh 17 at 10). Further, Dr. Palemire provides proof of objective testing and compares plaintiff's range of motion in the cervical spine to that of a normal person to demonstrate the existence of a "serious injury" (*id.*, at 9). Thus, an issue of fact exists precluding summary judgment and the branch of defendant's motion for summary judgment against plaintiff James is denied.

Accordingly, it is

ORDERED that the branch of defendant's motion for summary judgment against plaintiffs Mackson R. Hedgemond and Delores James for failure to show the existence of a serious injury as defined under Insurance Law 5102(d) is denied; and it is further

ORDERED that branch of defendant's motion for summary judgment against plaintiff Ramonye Jenae Walton for failure to show the existence of a serious injury as defined under Insurance Law 5102(d) is granted; and it is further

ORDERED that the claims of plaintiff Ramonye Jenae Walton are dismissed in their entirety as against defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendant; and it is further

ORDERED that the action shall be continued with plaintiffs Hedgemond and James against defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

ORDERED that within 30 days of entry, plaintiffs shall serve a copy of this decision/order upon defendant with notice of entry. This constitutes the Decision/Order of the Court.

8/1/2018
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION
		GRANTED		DENIED	X	GRANTED IN PART
APPLICATION:		SETTLE ORDER				SUBMIT ORDER
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT

	OTHER
	REFERENCE