

German v Hurricane Mgt. Corp.
2018 NY Slip Op 32317(U)
September 17, 2018
Supreme Court, New York County
Docket Number: 161414/2015
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22-----X
RADHAMES GERMAN,

Plaintiff,

- v -

HURRICANE MANAGEMENT CORP., JOSE CABRERA-
PICHARDO,

Defendant.

INDEX NO. 161414/2015

MOTION DATE 08/15/2018,
08/15/2018

MOTION SEQ. NO. 002 003

DECISION AND ORDER

-----X
HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 67, 68, 69, 70, 71, 72, 73, 78, 79, 80, 82, 83, 84, 85, 86, 88

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 74, 75, 76, 77, 87, 89

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendants motion, motion sequence 002 and third-party defendants motion, motion sequence 003, are denied. The parties in both motion sequences move for summary judgment pursuant to CPLR 3212 to dismiss plaintiff's Complaint on the basis that plaintiff allegedly did not sustain a "serious injury" under Sections 5104(a) and 5102(d) of the Insurance Law. The underlying action stems from a motor vehicle incident which occurred on April 11, 2015, on the Major Deegan Expressway south-bound at or near its intersection with W 167th Street, in the County of Bronx, City and State of New York, when plaintiff Radhames Bolivar German was injured while riding as a passenger in a vehicle owned by defendant Hurricane Management Corp., and operated by defendant, Jose Antonio Cabrera-Pichardo. Defendants filed a third-party summons against third-party defendants James Brown,

Sabrina E. Moye, Fatmasari Siahaan and Rangga Marola alleging that the aforementioned accident was caused solely by the Third-Party Defendants.

This decision and order addresses both motion sequence 002 and 003 for summary judgment in favor of defendants and third-party defendants as against plaintiff German 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]).

Here, defendants allege that plaintiff did not sustain a serious injury, had preexisting conditions and stopped treatment for his alleged injuries. Defendants cite to plaintiff’s deposition to demonstrate that “his treatment and therapy in connection with this accident terminated in December of 2015. Plaintiff has thus admitted to a cessation of treatment” (Mot at 7, ¶ 18). Defendants’ argument however is flawed and instead bolsters plaintiff claim that plaintiff sustained a “serious injury” as defined by the Insurance Law. In fact, plaintiff’s deposition demonstrates that plaintiff treated for injuries and did not work from the day of the April 2015 incident until 2016 next year. Pursuant to Insurance Law 5102, the Court may dismiss a serious injury claim when a plaintiff does not allege that they were disabled for at least 90 days out of 180 days immediately following the incident (*In re Abreu ex rel. Castillo*, 107 AD3d 512 [2013] citing *Arenas v Guaman*, 90 AD3d 461 [1st Dept. 2012])[finding that “the court properly dismissed a claim because plaintiff did not allege that she was disabled for the minimum duration necessary to state a claim”). Thus, defendants motion itself establishes that plaintiff may have suffered a serious injury and precludes summary judgment. As to third-party defendants’ motion plaintiff has established that threshold summary judgment is not appropriate for the aforementioned reasons. Thus, third-party defendants’ motion is denied.

Accordingly, it is

ORDERED that defendants’ motion for summary judgment to dismiss plaintiff’s Complaint on the grounds that plaintiff allegedly has not sustained a “serious injury” as defined in 5102 and 5104 of the Insurance Law is denied; and it is further

ORDERED that third-party defendants' motion for summary judgment to dismiss plaintiff's Complaint on the grounds that plaintiff allegedly has not sustained a "serious injury" as defined in 5102 and 5104 of the Insurance Law is denied; and it is further

ORDERED that all parties appear for a compliance conference on October 5, 2018, at 9:30AM in room 103 of 80 Centre Street; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.

9/17/2018

DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

☒

DENIED

☐

GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE