Rodriguez v M A Chrisman Trucking, Inc.
2018 NY Slip Op 32722(U)
October 24, 2018
Supreme Court, New York County
Docket Number: 151129/2015
Judge: Adam Silvera
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA **PART** IAS MOTION 22

Justice

----------X

JAIRO RODRIGUEZ,

Plaintiff,

- v -

M A CHRISMAN TRUCKING, INC, TERRY PENERGRASS

Defendant.

INDEX NO. 151129/2015

MOTION DATE 10/10/2018

MOTION SEQ. NO. 003

DECISION AND ORDER

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ORDERED that defendants' motion for summary judgment, pursuant to CPLR 3212 to dismiss plaintiff's complaint is denied. Before the court is defendants' motion for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendants on the grounds that plaintiff has failed to demonstrate that plaintiff has suffered a "serious injury" as defined under Section 5102(d) of the Insurance Law.

The suit at bar stems from a motor vehicle collision which occurred on February 22, 2013, on Route 95 at or near the George Washington Bridge in the County, City and State of New York, when a vehicle operated by defendant, Terry R. Penergrass, and owned by defendant, M A Chrisman Trucking, Inc., struck a vehicle operated by plaintiff, Jairo Rodriguez, which allegedly led to the serious injury of plaintiff.

"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. Defendants claim that plaintiff's injuries do not rise to the level of "serious injury" and/or are not causally related to the subject accident. Defendants argue that plaintiff's injuries stem from a prior motor vehicle accident, which occurred on January 5, 2010 (Mot, Exh I). Plaintiff filed suit for the prior accident in which he alleged that he sustained neck, back, and right shoulder injuries (Mot, Exh

Y). Defendants submits medical records of plaintiff's treatment for the prior injuries (Mot, Exh E, J, K, L, M, N). Plaintiff's medical records indicate that plaintiff suffered from severe back pain and his doctor, Dr. John R. Cifelli, opined on February 8, 2012, that plaintiff "has had pain for over two years . . . has a grossly unstable L5-S1 spondylolisthesis and surgery is the best permanent treatment for his condition" (Mot, Exh N). Defendants state that there is "no indication that the plaintiff ever underwent the lumbar decompression and fusion procedure (Mot at 7, ¶31; Exh N).

Further, defendants point to the deposition of plaintiff in which he initially denied but ultimately admitted to being involved in a subsequent motor vehicle accident in February 2014 (Mot at 11, ¶58; Exh E at 51-53). Records indicate that plaintiff brought a claim against Liberty Mutual Insurance Company for the February 17, 2014, motor vehicle accident (Mot at 11, ¶60). Plaintiff testified that as a result of the February 2014 accident he injured his left leg/foot, back, and right shoulder (Mot at 13, ¶70; Exh Z). After the February 2014 incident plaintiff was examined by Dr. Yaser El-Gazzar who "diagnosed plaintiff with a right shoulder tear; cervical herniated discs, radiculopathy, and paraspinal sprain; and lumbar paraspinal sprain, herniated discs, and spondylolisthesis" (Mot at 14, ¶75; Exh T). After the February 2014 accident, plaintiff, according to his medical records, presented to Clara Maass Medical Center, after a slip in fall on October 21, 2014 (Mot, Exh S).

As to the accident at issue, defendants claim that plaintiff refused medical attention at the scene of the incident. Defendants provide the affirmed medical report of Dr. Elizabeth Ortof who concluded that plaintiff's "complaints of back pain are, within a reasonable degree of medical certainty, not related to the injury of 2/22/13" (Exh V at 5). Additionally, defendants provide the affirmed medical report of orthopedist, Dr. Jeffrey V. Dermksian and Dr. Marc J. Katzman. In

his affirmed medical report, Dr. Dermksian, opined that plaintiff "does not have any evidence of residual orthopedic disability, or permanency related to the injury of 2/22/2013" (Mot, Exh W at 4). Simiarly, Dr. Katzman's report concluded that plaintiff has "mild chronic multilevel degenerative disc disease of the cervical spine [omitted]. There is no evidence of recent post-traumatic injury to the cervical spine related to the accident on 2/2/2013" (Mot, Exh X, Exh B). Defendant has made a prima facie demonstration of entitlement to summary judgment and the burden shifts to plaintiff.

In opposition, plaintiff claims to have suffered a "serious injury" and attempts to raise an issue of fact as to his range of motion, as reported by the sworn report of Dr. Terry Ramnanan dated July 23, 2013, attached as Exhibit Q to defendants' motion. Plaintiff relies on Dr. Ramnanan's findings, that plaintiff suffered from a decrease in range of motion to the cervical spine, lumbar spine, and shoulder. However, Dr. Ramnanan does not list the degrees of plaintiff's range of motion, does not demonstrate what a normal range of motion would be, and does not specify the objective tests used to measure plaintiff's range of motion (Mot, Exh Q).

The Appellate Division First Department has consistently held that "undated affirmation of plaintiff's treating physician… [which fail to] state what objective tests, if any, were used to determine any restriction of motion" is insufficient to create questions of fact to defeat a motion for summary judgment. *Chen v Marc*, 10 AD3d 295, 296 (1st Dep't 2004). Thus, Dr. Ramnanan's report "is deficient because he failed to identify the objective tests he employed to measure plaintiff's range of motion [and] failed to indicate what the normal range of motion would be". *Nagbe v Minigreen Hacking Group*, 22 AD3d 326 326, (1st Dep't 2005).

Plaintiff also points to the report of Dr. Yaser El-Gazzar, in which the doctor found a decrease in range of motion of plaintiff's shoulder. The court notes that this report was written

the day after plaintiff's subsequent February 2014, accident. However, Dr. El-Gazzar notes that plaintiff "who presents to the office for the second time as a referral from Dr. Haveron with R shoulder/elbow/neck pain since MVA [motor-vehicle accident] on 2/22/2013, now worsened by 2nd accident last week" (Mot, Exh T). Accordingly, plaintiff raises an issue of fact as to whether plaintiff did indeed suffer from a loss of range of motion, and thus sustained a "serious injury" as a result of the accident at issue. Defendants' motion for summary judgment 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 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.

10/24/2018
DATE

ADAM SILVERA, J.S.C.

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