

Watson v Gonzalez
2018 NY Slip Op 32899(U)
November 14, 2018
Supreme Court, New York County
Docket Number: 150469/2015
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

MARK WATSON, Plaintiff, - v - JOELINE GONZALEZ, JOEL SUAREZ, Defendant. INDEX NO. 150469/2015 MOTION DATE 10/24/2018 MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendant Joeline Gonzalez's 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 March 31, 2012, at the roadway in front of 1870 229th Street (at the intersection of Scieffelin Avenue and 226 Drive) in the County of Bronx, City and State of New York, when a vehicle operated by defendant, Joeline Gonzalez, and owned by defendant, Joel Suarez, struck a vehicle operated by plaintiff, Mark Watson, which led to the alleged 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 to 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 has a perfect range of motion in the areas plaintiff has claimed injury to and that plaintiff was merely confined to his home for 1 week after the accident. Defendant provides the affirmed medical report of Board Certified Orthopedic Surgeon, Dr. Raghava Polavarapu, which notes that plaintiff has a perfect range of motion in his cervical spine, thoracic spine, lumbar spine,

bilateral knees and bilateral wrist/hand (Mot, Exh D). Defendant claims that plaintiff's medical records and deposition indicate that plaintiff's complaints predate the accident at issue. Further, plaintiff allegedly was involved in a subsequent in 2015 where he injured his neck, back, and knees motor vehicle accident and thus, defendant claims that his injuries are not causally related to the accident at issue. Defendant has demonstrated a prima facie showing of entitlement to judgment as a matter of law, and the burden shifts to plaintiff.

In opposition, plaintiff raises several issues of fact precluding defendant's motion for summary judgment. Plaintiff claims that both of his knees were injured in the incident at issue. Plaintiff avers to have sought medical treatment the morning after the accident and to have continued treatment even during a period of incarceration after an arrest later on that same year. Plaintiff attaches the certified treatment records of Dr. Gautam Khakhar at Physical Medicine and Rehabilitation of New York, where he began treatment immediately following the accident and underwent 28 physical therapy visits (Aff in Op, Exh D). Plaintiff further attaches the report of orthopedist, Dr. Shahid Mian, who performed range of motion testing with a goniometer, and found that plaintiff suffered a loss of range of motion to the cervical spine, lumbar spine, right wrist, left wrist, right knee, and left knee (*id.* Exh E). Thus, plaintiff has raised an issue of fact precluding defendant from summary judgment on the issue of "serious injury" as defined under the Insurance Law.

Accordingly, it is

ORDERED that defendant's 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 in room 103 of 80 Centre Street on January 23, 2019 at 9:30 AM; 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.



11/14/2018
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: