

Henriquez v Johnson
2018 NY Slip Op 33157(U)
December 11, 2018
Supreme Court, New York County
Docket Number: 154554/2015
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22

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JOSE HENRIQUEZ

Plaintiff,

- v -

ROBERT JOHNSON JR.,

Defendant.

INDEX NO. 154554/2015

MOTION DATE 10/31/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 34, 36, 38, 39, 40, 41

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendant, Robert Johnson, Jr.'s motion for summary judgment, pursuant to CPLR 3212 to dismiss plaintiff, Jose Henriquez's complaint is denied. Before the Court is defendant's motion for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendant 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. Plaintiff opposes the motion.

This matter stems from a motor vehicle incident which occurred on June 3, 2013, at the intersection of Convent Avenue and West 127th Street in the County, City and State of New York, when a stopped vehicle operated by plaintiff, Joes Frias Henriquez was struck in the rear by a vehicle operated by defendant, Robert Johnson, Jr. and allegedly led to the serious injury of plaintiff.

Summary Judgment (Serious Injury)

Defendants' motion, for summary judgment, pursuant to CPLR 3212, against plaintiff on the issue of "serious injury" as defined under Section § 5102(d) of the Insurance Law is granted.

"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"]).

Defendants allege that plaintiff has failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law. Defendants allege that the injuries plaintiff is seeking relief for stem from prior injuries and degenerative changes in his cervical spine. In support of his motion, defendant submits the findings of Dr. Eduardo Belandria who found that plaintiff had degenerative disc disease and made no mention of specific ranges of motion and objective tests as to plaintiff's injuries and whether they were causally related to the incident at issue (Mot, Exh C). Further, defendant submits the independent medical examination

report of Dr. Stewart Hershon, who found that plaintiff had a loss of flexion of five degrees and a loss of extension of ten degrees in the cervical spine but that such losses were normal for that of a 61-year-old patient (*id.* Exh G). Lastly, defendant points to the report of Dr. Melissa Sapan Cohn, who opined that plaintiff's alleged injuries are consistent with underlying degenerative changes and that "there are no findings consistent with an acute traumatic related injury" (*id.*, Exh H at 3). Defendant has made a *prima facie* showing of entitlement to summary judgment on the issue of serious injury and the burden now shifts to plaintiff.

In opposition, plaintiff's responding medical submissions raise a triable issue of fact. In *Rosa v Delacruz*, 32 NY3d 1060, 2018 N.Y. Slip Op. 07040 [2018], the Court of Appeals found that where a plaintiff's doctor opined that tears were causally related to the accident, but did not address findings of degeneration or explain why the tears and physical deficits found were not caused by the preexisting degenerative conditions, plaintiff failed to raise a triable issue of fact as it "failed to acknowledge, much less explain or contradict, the radiologist's finding. Instead, plaintiff relied on the purely conclusory assertion of his orthopedist that there was a causal relationship between the accident" (*See id.*)

Unlike the plaintiff in *Rosa*, plaintiff, Jose Henriquez submits the report of Dr. Mark McMahon which addresses plaintiff's degenerative conditions and opines that "the patient did have some pre-existing asymptomatic degenerative changes in his cervical spine . . . disc herniations occurred as a result of the accident of June 3, 2013" (Aff in Op, Exh A at 4). Dr. McMahon's report demonstrates a loss of range of motion to the cervical spine where plaintiff "could flex to 20 degrees with pain (normal 50). He could extend to 15 degrees with pain (normal 60). He could bend to the left 2 degrees with pain (normal 40). He could bend to the

right 10 degrees with pain (normal 40)” (*id.*, at 3). Thus, plaintiff has raised an issue of fact and defendant’s motion for summary judgment on the issue of serious injury is denied.

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 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.

12/11/2018

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

ADAM SILVERA, J.S.C.