

Feinberg v Kruta

2019 NY Slip Op 30139(U)

January 16, 2019

Supreme Court, New York County

Docket Number: 152646/2015

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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MARISSA FEINBERG

Plaintiff,

- v -

DAVID KRUTA,

Defendant.

INDEX NO. 152646/2015

MOTION DATE 11/07/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendant’s motion is denied for the reasons set forth below. Before the court is defendant’s motion, Motion Sequence 001, for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendant on the issue of liability and to dismiss the Complaint of plaintiff Marissa Feinberg on the grounds that the injuries allegedly sustained by plaintiff do not satisfy the “serious injury” requirement as defined by Insurance Law § 5102(d).

BACKGROUND

The suit at bar stems from a motor vehicle accident that occurred on September 12, 2014, at or around 525 West 28th Street, between 10th and 11th Avenue in the County, City and State of New York and allegedly led to the serious injury of plaintiff Marissa Feinberg when a motor vehicle operated by David Kruta backed up into a parking spot and struck plaintiff.

DISCUSSION

Summary Judgment (Serious Injury)

The branch of defendant's 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 denied. "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"]).

Defendant alleges that plaintiff has failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law. Defendant claims that plaintiff has admitted to previously injuring her left ankle in 2007 or 2008 for which she underwent medical treatment (Mot at 6, ¶ 17; Exh 6 at 81, ¶¶23-25 & 82, ¶¶2-13). Further Defendant notes that plaintiff did not request medical attention following the incident, went to a social event after the underlying accident, and did not seek medical attention until the following day when she

went to NYU Medical Center to undergo X-Rays (Mot at 5, ¶ 13; Exh 6 at 40, 49, &50). Plaintiff was informed that she did not have any fractures, was given crutches and discharged (*id.* at 50-51).

Defendant submits the Orthopedic Report of Dr. Arnold T. Berman, who found no acute fracture or dislocation to the ankle but merely a sprain/train type injury (Mot, Exh 5). Defendant states that based on plaintiff's own pleadings and Dr. Berman's report, that plaintiff's "alleged injuries are purely of the "soft issue" type and fail to meet the burden of "serious injury" within the meaning of Insurance Law 5102(d). Defendant also notes that plaintiff did not miss any time from work as a result of the underlying accident and thus, does not meet the 90/180 threshold requirement (*id.*, at 58, ¶4-25). Thus, defendant has met its burden and now the burden shifts to plaintiff to raise an issue of fact as to the existence of a "serious injury" associated with the underlying accident.

In opposition, plaintiff submits the medical report of Dr. Gautam Khakhar in order to raise an issue of fact as to the existence of plaintiff's alleged "serious injury" (Aff in Op, Exh 3). Dr. Khakhar affirms to have reviewed plaintiff's MRI reports from November 4, 2014, and July 18, 2017, in addition to emergency room records, physical therapy records and affirmed doctor reports, and to have personally examined plaintiff on October 3, 2018 (*id.*). Dr. Khakhar states that he performed range of motion tests on plaintiff's left ankle and found significant limitations with losses of 40 and 20 percent to ankle inversion and eversion (*id.*).

Dr. Khakhar opines that plaintiff sustained a medically significant limitation for up to six months following the accident and concludes that the ankle injury was "directly, proximately and substantially caused by the trauma she sustained from the September 12, 2014 incident" (*id.*) Dr. Khakhar explicitly states that he disagrees with the opinion of Dr. Berman and that he believes

plaintiff's ankle injury to be permanent (*id.*). Thus, plaintiff has raised an issue of fact precluding the branch of defendant's motion for summary judgment.

Summary Judgment (Liability)

The branch of defendant's motion for summary judgment on the issue of liability as against plaintiff is denied. "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]).

Defendant alleges that plaintiff crossed the street, not within a crosswalk, while defendant was attempting to parallel park his vehicle. In support of their motion, defendant cites to New York State Vehicle and Traffic Law (VTL) 1151, Pedestrians' right of way in crosswalks and VTL 1152. VTL 1151 states that:

(b) No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impractical for the driver to yield.

VTL 1152 a & c state that:

(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway;

(c) No pedestrian shall cross a roadway intersection diagonally unless authorized by official traffic-control devices; and when authorized to come diagonally, pedestrians shall

cross only in accordance with the official traffic-control devices pertaining to such cross movements.

In support of the argument that defendant cannot be found negligent for striking plaintiff while attempting to park the motor vehicle in question, plaintiff cites to *Brown v Muniz*, 61 AD3d 526 [1st Dep't], in which the Appellate Division found defendant driver not negligent for striking a plaintiff that entered the street between parked cars. Thus, defendant has met its burden for summary judgment on the issue of liability and the burden shifts to plaintiff to raise an issue of fact.

In opposition, plaintiff claims that she “did not suddenly leave the curb or walk into the path of defendant’s vehicle, nor was plaintiff crossing the street at the time of the incident” (Aff in Opp at 3, ¶ 6). Plaintiff states that she stepped off of the curb to admire a vintage car when she felt a car hitting her left arm and turned to avoid other parts of her body from being struck by defendant’s vehicle when she twisted her left ankle and sustained a serious injury (*id.*). Thus, plaintiff has raised an issue of fact precluding the branch of defendant’s motion for summary judgment on the issue of liability. Defendant’s motion is denied in its entirety.

Accordingly, it is

ORDERED that the branch of defendant’s motion for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendant and to dismiss the Complaint of plaintiff for failure to satisfy the “serious injury” requirement as defined by Insurance Law § 5102(d) is denied; and it is further

ORDERED that the branch of defendant’s motion for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendant on the issue of liability is denied; and it is further

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

This constitutes the Decision/Order of the Court.

1/16/2019

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE