

Scott v Olaya

2019 NY Slip Op 30439(U)

February 25, 2019

Supreme Court, New York County

Docket Number: 153927/2016

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22

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| MAURICE SCOTT, | INDEX NO. <u>153927/2016</u> |
| Plaintiff, | MOTION DATE <u>01/09/2019</u> |
| - v - | MOTION SEQ. NO. <u>006</u> |
| CARLOS OLAYA, COWAN EQUIPMENT LEASING | |
| Defendant. | |

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 80, 82

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is ORDERED that defendants Carlos Olaya and Cowan Equipment Leasing’s motion for summary judgment, pursuant to CPLR 3212 to dismiss plaintiff, Maurice Scott’s complaint is denied in part and granted in part. 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 October 19, 2015, near the intersection of Broadway and West 71st Street in the County, City and State of New York, when plaintiff was allegedly seriously injured when her vehicle was rear-ended by defendants’ vehicle.

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 as to plaintiff's cervical spine injuries and denied as to plaintiff's lumbar spine injuries. "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 a prior motor vehicle accident (Mot, Exh E at 79). Defendants note that plaintiff did not seek medical treatment of his alleged injuries until two weeks after the accident when he was referred to a physical therapy provider by his attorney (*id.*

at 66). Defendants submit the IME report from orthopedist Dr. Yong H. Kim, defense radiologist report of Dr. John T. Rigney and plaintiff's testimony in support of their motion.

In his report, Dr. Kim opined that plaintiff's medical records and examination indicate preexisting degenerative changes in the cervical spine that predate the accident at issue (Mot, Exh F). Further, Dr. Kim noted that there is no objective evidence of orthopedic/neurologic issues in the lumbar spine (*id.*). Dr. Rigney reviewed the MRI of plaintiff's cervical spine and found degeneration in addition to an arthritic condition (*id.*, Exh G). Dr. Rigney opined that there was no evidence that the alleged injuries are a result of the accident at issue (*id.*). Thus, defendants have 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 as to plaintiff's lumbar spine but fails to raise an issue of fact as to plaintiff's degeneration in the cervical spine. 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.*)

Here, like the plaintiff in *Rosa*, plaintiff, fails to submit an opinion from his doctors which address findings of degeneration or explain why the injuries found to the cervical spine were not caused by preexisting degenerative conditions. Thus, the Court finds that plaintiff has not suffered as serious injury to the cervical spine as a result of the accident at issue. However,

plaintiff's Complaint should not be dismissed as a serious injury has been demonstrated to plaintiff's lumbar spine. Plaintiff submits the November 25, 2015 report of Dr. Sebastian Lettuga who found restricted ranges of motion in the lumbar spine (Aff in Op, Exh 2). Plaintiff exhibited a lumbar flexion of 25 degrees (normal 90 degrees) an extension of 15 degrees (normal 40 degrees) and left and right turning of 35 degrees (normal 60 degrees) (*id.*).

Thus, plaintiff has raised an issue of fact precluding defendants' motion for summary judgment to dismiss plaintiff's Complaint with prejudice. The branch of plaintiff's motion for summary judgment on the issue of serious injury is granted solely as to plaintiff's cervical spine as plaintiff has failed to rebut defendants' demonstration that plaintiff suffered from degenerative and pre-existing conditions. The branch of defendants' motion to dismiss plaintiff's Complaint 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 the branch of defendants' motion for summary judgment on the issue of serious injury is granted as against plaintiff solely as to plaintiff's alleged cervical spine injuries; 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.

2/25/2019
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED
 SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
 GRANTED IN PART
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT

OTHER
 REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

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