

Saavedra v Isabell

2019 NY Slip Op 30590(U)

March 8, 2019

Supreme Court, New York County

Docket Number: 158002/2016

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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JUAN SAAVEDRA,

Plaintiff,

- v -

TYRONE ISABELL, GLOBAL RENTAL COMPANY

Defendant.

INDEX NO. 158002/2016

MOTION DATE 01/16/2019

MOTION SEQ. NO. 002 & 003

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 42, 43, 44, 45, 46
were read on this motion to/for JUDGMENT - SUMMARY

Before the Court is defendants’ motions for summary judgment, motion sequence 002, for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendant and to dismiss plaintiff’s complaint on the grounds that plaintiff has failed to demonstrate that they suffered a “serious injury” as defined under Section 5102(d) of the Insurance Law. Plaintiff opposes the motion and moves in motion sequence 003 for an Order pursuant to CPLR §3212 granting summary judgment in favor of plaintiff and against defendants on the issue of liability for the underlying motor vehicle incident. Defendants’ oppose the motion.

This matter stems from a motor vehicle incident which occurred on March 12, 2015 at or near the intersection of 8th Avenue and West 56th Street County, City and State of New York, when plaintiff Juan Rafael Saavedra was allegedly seriously injured when his vehicle was struck in the rear by a vehicle operated by defendant Tyrone Isabell and owned by defendant Global Rental Company.

Defendant's motion for summary judgment, pursuant to CPLR 3212, against plaintiffs 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 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"]).

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 two prior accidents that plaintiff testified to having been involved in and that plaintiff suffers from degenerative and pre-existing conditions. In support of their motion, defendants submit hospital records from Metropolitan Hospital Center and plaintiff's deposition (Mot, Exh D & E).

Defendants note that plaintiff's hospital records indicate that plaintiff suffers from degenerative changes to the lumbar spine, thoracic spine, and cervical spine (Mot Exh D at 28,

30-32). Plaintiff testified at deposition that he was involved in two prior accidents which resulted in injuries to his neck and back (Mot, Exh E at 49-52). Further plaintiff's hospital records record plaintiff's statement that his hernia, for which he treated on October 27, 2016, "started many years ago, but has only become bothersome recently . . . [h]e has a history of right inguinal hernia that was surgically repaired in 2009" (*id.*, 87). Thus, defendants have demonstrated a prima facie showing that plaintiff has failed to satisfy the "serious injury" threshold requirement and the burden shifts to plaintiff to raise an issue of fact.

In opposition, plaintiff's responding medical submissions fail to raise a triable issue of fact. Plaintiff attaches the report of his Chiropractor Mark Heyliger, D.C. (Aff in Opp, Exh A). Dr. Heyliger provides attaches treatment records which end in May 2015 and states that they are accurate in an attached affidavit, making no mention of plaintiff's current condition (*id.*) Dr. Heyliger's initial treatment records with plaintiff note that plaintiff "explained that he has never injured his same area before" (*id.*). The court notes that this statement contradicts plaintiff's deposition in which he testified that he was injured two times prior to the neck and back (Mot, Exh E at 49-52). Dr. Heyliger's report's note that plaintiff has suffered a loss of range in motion however the medical reports fail to note that the decrease in range of motion was caused by the accident at issue and not by plaintiff's pre-existing and degenerative conditions.

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, plaintiff's medical reports fail to address plaintiff's supposed degenerative conditions. Plaintiff's doctor does not address the cervical spine degeneration, lumbar spine degeneration, thoracic spine degeneration or hernia as having been exacerbated by the accident. Thus, plaintiff has failed to raise an issue of fact and defendants' motion for summary judgment on the issue of "serious injury" as against plaintiff Juan Rafael Saavedra is granted. Plaintiff's motion for summary judgment on the issue of liability is denied as moot. The Court need not address plaintiff's motion as defendants' motion for summary judgment dismisses the complaint.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on the issue of liability is denied as moot; and it is further

ORDERED that defendants' motion for summary judgment, on the grounds that plaintiff has not sustained a "serious injury" as defined in 5102 of the Insurance Law, is granted; and it is further

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

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

This constitutes the Decision/Order of the Court.

3/8/2019

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: