

Rodriguez v Rodriguez
2019 NY Slip Op 30602(U)
March 11, 2019
Supreme Court, New York County
Docket Number: 153682/2016
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

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INDEX NO. 153682/2016

CARMEN RODRIGUEZ,

11/28/2018,

Plaintiff,

MOTION DATE 11/28/2018

- v -

MOTION SEQ. NO. 001 002

GEORGE RODRIGUEZ, MATADEEN CHANDRIKA, JOSE
BARZALLO, JOSE ZUMBA

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62, 66, 67, 70, 72, 73, 74, 75, 76, 80, 81

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 60, 63, 64, 65, 68, 69, 71, 79

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

Upon the foregoing documents, it is ordered that defendant George Rodriguez’s motion (mot. seq. no. 001) for summary judgment dismissing the complaint, and defendant Jose Alejandro Zumba’s (also named herein as Jose Zumba Barzallo) motion for summary judgment dismissing the complaint as against them, are both decided below.

The Court notes that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established it is warranted as a matter of law. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). “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). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. *Id.* at 853. Additionally, summary judgment motions should be denied if the opposing party presents admissible evidence

establishing that there is a genuine issue of fact remaining. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). “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, defendant Rodriguez argues that plaintiff failed to show that she sustained a serious injury pursuant to Insurance Law §5102(d) in that, based upon the x-rays, CT scans and MRI reports, as well as the independent medical examinations by defendant Rodriguez’s doctors, some of plaintiff’s alleged injuries are degenerative in nature. Defendant Rodriguez further argues plaintiff did not suffer any permanent total loss of use, any significant limitation of use of a body function or system, any permanent consequential limitation, and was not prevented from performing substantially all of the material acts constituting her customary daily activities for 90 out of 180 days following the accident. In support of the motion, defendant Rodriguez proffers, *inter alia*, the independent medical examination report of Dr. Robert S. April, dated August 15, 2017, which states that plaintiff’s range of motion for her legs, arms, and back were normal. The report of Dr. April opines that he “has concluded with reasonable medical certainty that the accident of record did not produce a neurological diagnosis, disability, limitation or need for further intervention.” Notice of Motion, Exh. M, Dr. April’s report dated August 15, 2017, p.3. Defendant Rodriguez also points to the CT scans of plaintiff’s lumbar spine to argue that such alleged injuries are degenerative in nature. Defendant Zumba supports defendant Rodriguez’s motion and adopts the arguments therein.

In opposition, plaintiff proffers, *inter alia*, her physicians' medical reports which show limited ranges of motion which conflict with defendants' physicians' medical reports. Moreover, in direct contradiction to defendant Rodriguez's claims of degeneration, plaintiff's physician Dr. Joyce Goldenberg, who first started treating plaintiff eight (8) days after the instant motor vehicle accident, opines that she found "no evidence of longstanding degenerative disease in Ms. Rodriguez's cervical or lumbosacral spine or left/right shoulders or left/right knees". Aff. in Opp., Exh. A, Goldenberg Aff., ¶32. Dr. Goldenberg goes on to state that she "can state within a reasonable degree of medical certainty that [plaintiff's] cervical, lumbosacral, left/right shoulder and left/right knee injuries, symptoms and limitations are directly causally related to the accident of May 6, 2013 and that the accident of May 6, 2013 was the direct producing cause of [plaintiff's] current limitation and injuries." *Id.*

Preliminarily, the Court notes that Dr. April's report is deficient in that he failed to state the normal ranges of motion. Dr. April's report, aside from the normal range of motion listed for straight leg raising, merely states in a conclusory manner that the ranges of motion listed for plaintiff are normal. While Dr. April lists plaintiff's range of motion for her upper limbs, elbow flexion, wrist flexion, low back flexion, and lateral rotation, he fails to state what the normal ranges of motion are. The Appellate Division, First Department, has consistently held that "[t]he report of the doctor...is deficient because he...failed to indicate what the normal range of motion would be". *Nagbe v Minigreen Hacking Group*, 22 AD3d 326, 327 (1st Dep't 2005). Furthermore, plaintiff has sufficiently raised a triable issue of fact. The conflicting medical reports as to limitations on plaintiff's range of motion and causation, including two medical reports in direct contradiction regarding the existence of degenerative disease, are issues of fact

precluding summary judgment. Thus, defendant Rodriguez's motion for summary judgment on the issue of threshold is denied.

Turning to defendant Zumba's motion for summary judgment on the issue of liability, defendant Zumba argues that he did not breach any duty to plaintiff and is not liable for her injuries. In support of the motion, defendant Zumba proffers, *inter alia*, the deposition transcripts of plaintiff, defendant Matadeen Chandrika, defendant Rodriguez, and himself. Here, it is undisputed that plaintiff was a passenger in the vehicle operated by defendant Rodriguez when such vehicle was involved in an accident with the vehicle owned and operated by defendant Chandrika. Prior to the accident, defendant Zumba's vehicle was traveling in the middle lane of traffic on the Bronx River Parkway. According to defendant Zumba's testimony, his right front tire malfunctioned turning sideways causing the front of his vehicle to fall onto the roadway and spark. After applying the brakes and bringing his vehicle to a stop, defendant Zumba turned on his hazard lights and called the police on several occasions. However, the police did not arrive at the scene until after the accident which occurred 40 to 45 minutes after defendant Zumba's vehicle was stopped. According to defendant Zumba, due to the unexpected mechanical failure of his vehicle, he could not move the vehicle to the shoulder of the road.

In opposition, defendant Rodriguez and plaintiff argues that issues of fact exist as to whether defendant Zumba caused or contributed to causing the accident, and whether defendant Zumba had the opportunity to move his vehicle out of the way of moving traffic prior to the accident. The Court notes that, despite the opposition papers, a review of the deposition transcripts reveals that the testimony of defendant Zumba, defendant Chandrika, and defendant Rodriguez do not conflict as to defendant Zumba's hazard lights. Specifically, defendant Zumba testified that following the mechanical failure in which the front right wheel of his vehicle

unexpectedly turned sideways and fell off, he turned on his hazard lights which remained on until 40 to 45 minutes later when his vehicle was rear ended by the vehicle driven by defendant Chandrika. Defendant Chandrika's deposition testimony reveals that he was traveling in the middle lane of the Bronx River Parkway for approximately 5 minutes before observing defendant Zumba's stopped vehicle which had the hazard lights on. Upon seeing defendant Zumba's stopped vehicle, defendant Chandrika applied the brakes and brought his vehicle to a stop. Defendant Chandrika testified that he was stopped for 2 to 3 seconds when he was struck in the rear by defendant Rodriguez's vehicle. Defendant Rodriguez testified that he did not see defendant Zumba's vehicle prior to the accident, and that defendant Chandrika's vehicle had its brake lights on at the time of the accident. Thus, as defendant Rodriguez testified that he did not see defendant Zumba's vehicle prior to the accident, no issue of fact exists as to whether defendant Zumba's vehicle had the hazard lights on at the time of the accident.

Furthermore, here, where defendant Zumba's vehicle was stopped, defendant Zumba's stopped vehicle merely "furnish[ed] the condition or [gave] rise to the occasion by which the injury was made possible and which was brought about by the intervention of a new, independent and efficient cause". *Gregware v City of New York*, 94 AD3d 470, 470 (1st Dep't 2012). Moreover, the Appellate Division, First Department, has explicitly held that a defendant "established his prima facie entitlement to judgment as a matter of law, by submitting evidence that he was stopped in the right lane on the bridge, with no other place to go, due to the mechanical failure of his vehicle". *Vespe v Kazi*, 62 AD3d 408, 408-409 (1st Dep't 2009). Here, defendant Zumba established that his vehicle suffered a mechanical failure. Defendant Zumba further testified that he could not move his vehicle. Plaintiff and defendant Rodriguez failed to

raise a genuine issue of triable fact. Thus, defendant Zumba’s motion for summary judgment dismissing the complaint against him is granted.

Accordingly, it is

ORDERED that defendant George Rodriguez’s motion for summary judgment on the issue of threshold is denied in its entirety; and it is further

ORDERED that defendant Jose Alejandro Zumba’s motion for summary judgment to dismiss this action as against him only is granted and this action is dismissed as to defendant Jose Zumba Barzallo and Jose Alejandro Zumba only; and it is further

ORDERED that any and all cross-claims against said defendant are dismissed; and it is further

ORDERED that the claims against the remaining defendants are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Jose Zumba Barzallo and Jose Alejandro Zumba dismissing the claims and cross-claims made against him in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that within 30 days of entry, defendant Jose Zumba Barzallo and Jose Alejandro Zumba shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

3/11/2019
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

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

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

APPLICATION:

CHECK IF APPROPRIATE: