

Pizarro v Wheelock
2019 NY Slip Op 31024(U)
April 11, 2019
Supreme Court, New York County
Docket Number: 155301/2017
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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ANDRES PIZARRO

Plaintiff,

- v -

TIMOTHY WHEELOCK,

Defendant.

INDEX NO. 155301/2017

MOTION DATE 11/13/2018

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) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ORDERED that defendant’s motion for summary judgment and to dismiss plaintiff’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 defendant was not liable for the incident and to dismiss the Complaint of plaintiff for failure demonstrate that plaintiff has suffered a “serious injury” as defined under Section 5102(d) of the Insurance Law.

The suit at bar stems from a motor vehicle collision which occurred on August 12, 2016, at 26 Watts Street in the County, City and State of New York when a vehicle operated by defendant Timothy J. Wheelock rear-ended the vehicle of plaintiff Andres Pizzaro which allegedly resulted in the serious injury of plaintiff.

“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”]).

The Court notes that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “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 alleges that plaintiff did not sustain a serious injury. Defendant claims that plaintiff failed to claim any categories pursuant to Insurance Law 5102(d). Further Defendant claims that plaintiff ceased treatment after “a little over three months” of treatment and that this cessation of treatment interrupts the causal chain between the accident and his

claimed injuries. Defendant submits the January 12, 2018 deposition of plaintiff in which he testified that he completed treatment in April or May 2017 and has no future appointments scheduled (Mot, Exh E at 12, 70-73, 75, 77-79). Defendant notes that the First Department held in *Holmes v Brini Transit Inc.*, 123 AD3d 628 [1st Dept 2014] that a plaintiff's complete cessation of all treatment interrupted the chain of causation and rendered speculative any finding of permanency under the permanent injury categories of no-fault automobile insurance law.

Further, defendant alleges that in a September 2011 accident, plaintiff sustained prior injuries to the same body parts alleged in the suit at bar. Defendant alleges that plaintiff's claims are causally related to the prior accident and not the underlying incident. In support of his motion defendant attaches plaintiff's testimony in which he testified that as a result of the 2011 accident he injured his neck, back, left shoulder and right knee (Mot, Exh E 90, 97). Defendant further submits MRI reports from 2011 which show disc bulges to the lumbar and cervical spine (Mot, Exh F). Defendant states that pursuant to *Andrade v Lugo*, 160 AD3d 535 [1st Dept 2018], plaintiff's own MRI reports demonstrating conditions that are not causally related to the accident at issue, entitle defendant to summary judgment on the issue of serious injury.

Defendant further attaches the report of Dr. Gregory Galano who examined plaintiff on June 12, 2018 and found that plaintiff had a full range of motion in the cervical spine, thoracic spine, lumbar spine, right shoulder, left shoulder, right knee, and left knee (Mot Exh G at 4-6). Dr. Galano concluded in his report that plaintiff had "no causally related orthopedic disability (*id.*, at 6). In addition to medical reports, defendant notes that plaintiff returned almost immediately to work as a taxi driver after the accident at issue. Thus, defendant avers that plaintiff was not incapacitated from performing substantially all of his activities for 90 days during the 180 days following the accident (*Bailey v Islam*, 99 AD3d 634 [1st Dept 2012]

[finding that defendant met its burden with respect to plaintiffs' 90/180-day claim even where a plaintiff was prevented from returning to work, plaintiffs failed to demonstrate that the injuries did not affect his usual pre-accident activities]). Defendant has made a prima facie showing of entitlement to summary judgment and the burden shifts to plaintiff to raise an issue of fact.

In opposition, plaintiff notes that the report of Dr. Galano occurred nearly two years after the subject accident. Further, Dr. Galano's report makes no mention of "undisputed, positive MRI findings in the cervical spine, lumbar spine, right shoulder, and left knee" (Aff in Op, ¶ 17). Plaintiff argues that "Dr. Galano's failure to sufficiently address these positive, objective findings warrants denial of defendant's motion" (*id.*, ¶18 citing *Lesser v Smart Cab Corp.*, 283 AD2d 273 [1st Dept 2001] [defendant failed to make a prima facie showing that it was entitled to summary judgment as a matter of law because the MRI, which was not reviewed or discussed by the IME orthopedic surgeon, was objective evidence of plaintiff's herniated discs, and raised a triable issue of fact]).

Plaintiff attaches the medical report of Dr. Michael Robinson who examined plaintiff following the subject accident on August 22, 2016 (Aff in Op Exh B). Dr. Robinson found significant range of motion deficiencies in the cervical spine and lumbar spine (*id.*). Subsequently on October 6, 2016 plaintiff was examined by Dr. Matthew Garfinkel who reported that plaintiff suffered from a reduction in range of motion to the left knee and right shoulder (*id.*, Exh C). On November 2, 2016, plaintiff underwent MRIs of the left knee and right shoulder which did find mild degenerative joint disease in the right shoulder but did show a tear to the left knee (*id.*, Exh D). Lastly, plaintiff was examined by Dr. Mark Bursztyn on December 12, 2018, who found significant limitations to plaintiff's range of motion in the right shoulder and left knee (*id.*, Exh A).

Plaintiff addresses defendant’s assertion that his injuries stem from a prior motor vehicle accident, admitting to having been involved in an accident in September 2011. However, plaintiff demonstrates that the injuries he claims were caused in the underlying accident are not preexisting injuries. Plaintiff directs the Courts attention to the difference between the injuries as demonstrated in MRIs from 2011, 2016, and 2017 (*id.*, Exh C & D). Accordingly, plaintiff has raised several issues of fact precluding defendant’s motion for summary judgment on the issue of serious injury.

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.

4/11/2019
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE