Pellicier v Martinez
2019 NY Slip Op 31250(U)
May 3, 2019
Supreme Court, New York County
Docket Number: 154671/2016
Judge: Adam Silvera

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ADAM SILVERA** **PART** **IAS MOTION 22**

Justice

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TERESA PELLICIER,

Plaintiff,

- v -

DIONICIO MARTINEZ, ALLEN ROBINSON

Defendant.

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INDEX NO. 154671/2016

MOTION DATE 11/09/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 72, 73, 74, 81, 82, 83

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 Dionicio Martinez's motion for an Order pursuant to CPLR §3212 granting summary judgment against defendant Allen Robinson and in favor of defendant Martinez on the issue of liability and to dismiss the Complaint of plaintiff Teresa Pellicier for failure demonstrate that plaintiff has suffered a "serious injury" as defined under Section 5102(d) of the Insurance Law. Plaintiff opposes the motion and defendant Robinson has been precluded from submitting affidavits as to substantive motion practice pursuant to this Court's Order dated July 25, 2018 (Mot, Exh G).

The suit at bar stems from a motor vehicle collision which occurred on April 5, 2015, at on 3rd Avenue, between 117th Street and 118th Street in the County, City, and State of New York, when a vehicle operated by defendant Dionicio Martinez and carrying plaintiff passenger Teresa Pellicier pulled out of a parking spot and was struck by a vehicle operated by defendant Allen C. Robinson which allegedly resulted in the serious injury of plaintiff.

Serious Injury

"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. In support of their motion defendant attaches the affirmed medical reports of Dr. Arnold Berman and Dr. Melissa Sapan Cohn (Mot, Exh I & J). Defendant notes that plaintiff testified she had prior neck complaints and prior neck surgery (Pellicier Dep at 27-28). Plaintiff testified that she had a plate and four screws put in her neck prior to the accident in a 2014 surgery (*id.* at 29). Further, plaintiff testified that she had no recollection of being confined to her bed or home following the underlying automobile accident of April 5, 2015 (*id.* at 85-86).

Dr. Berman examined plaintiff on December 28, 2017 and stated in his affirmed medical report that plaintiff had normal ranges of motion in the cervical, thoracic and lumbar spine (Mot, Exh I). Further, Dr. Berman stated that plaintiff had resolved cervical sprain with no aggravation or exacerbation of the prior discectomy performed in 2014 due to pre-existing degenerative disc changes (*id.*). Dr. Sapan Cohn performed an independent radiological review of a cervical spine MRI performed on plaintiff about four years before the underlying accident and found degenerative changes at C5-6 (Mot, Exh J). 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 attaches her medical records from the day of the accident at Mt. Sinai St. Luke's Emergency Department, treatment records from Apollo Physical Therapy, records of her treatment with neurologist Dr. Aric Hausknecht, and records from Lenox Hill Radiology (Aff in Op, Exh B, C, D, & E). A certified copy of the chart from plaintiff's initial evaluation at Apollo Physical Therapy on July 31, 2015, records that plaintiff suffered from a reduced range of motion to the cervical spine and recommended that plaintiff undergo physical therapy twice weekly (*id.*, Exh C).

Plaintiff treated with Dr. Hausknecht on August 4, 2015 where she reported that she had a prior history of cervical spine surgery in 2014 and that she had been feeling well up until the time of the underlying accident and thereafter her symptoms had been aggravated (*id.*, Exh D ¶5). Dr. Hausknecht found a decrease in motion to the cervical spine, noted that plaintiff has diffuse degeneration and examined MRI's of plaintiff's cervical spine from before the accident in addition to MRI's of plaintiff's cervical spine from the day following the accident (*id.*, ¶6). Dr. Hausknecht opined "with a reasonable degree of medical certainty that the motor vehicle accident of April 5, 2015 was a substantial cause of patient's condition" (*id.*, ¶7). At a follow up appointment on September 1, 2015, Dr. Hausknecht noted that plaintiff continued to have a restriction of mobility in the cervical spine (*id.*, ¶10).

Upon several examinations and reviews of plaintiff's MRIs, x-rays, CT scans, and other medical records, Dr. Hausknecht concludes that the accident caused aggravation of her prior neck condition and underlying degenerative joint disease (*id.*, ¶17). Plaintiff's Doctor's affirmation sufficiently explains that her current condition is causally related to the accident and explains why plaintiff's physical deficits were not caused by her degeneration and preexisting injuries (*See Rosa v Delacruz*, 32 NY3d 1060, 2018 N.Y. Slip Op. 07040 [2018]). Thus, plaintiff has raised an issue of fact precluding defendant's motion for summary judgment on the issue of serious injury.

Liability

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]).

Violation of the Vehicle and Traffic Law ("VTL") constitutes negligence per se (*See Flores v City of New York*, 66 AD3d 599 [1st Dep't 2009]). Pursuant to VTL § 1128 (a) "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

Defendant Martinez avers that the subject accident was entirely the fault of co-defendant Robinson. In support of his motion, defendant attaches the deposition transcripts of himself and plaintiff (Mot, Exh E & F). Plaintiff and defendant both testified at deposition that Robinson crossed over three lanes of traffic on 3rd Avenue, between 117th Street and 118th Street, and struck the passenger side of Martinez's vehicle. Defendant has provided sufficient evidence that co-defendant Robinson violated VTL § 1128 and thus has made a prima facie demonstration of Martinez's negligence.

In opposition, plaintiff states that numerous questions of fact exist on the issue of liability. Plaintiff notes that the police report contains a statement against interest by defendant Martinez in which he stated that he did not see the vehicle approaching his prior to the accident and that Martinez testified at deposition to having recalled giving such statement to the reporting police officer (Aff in Op, Exh A; Martinez Depo at 34, ¶ 13-21). Plaintiff argues that there are questions of fact as to whether defendant Martinez kept a proper lookout and saw what there was to see when pulling out into traffic. Pursuant to VTL § 1162, "no person shall move a vehicle which is stopped, standing, or parked unless and until such movement can be made with

reasonable safety." Thus, plaintiff has raised an issue of fact precluding defendant Martinez from summary judgment on the issue of liability.

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 of the Insurance Law is denied; and it is further

ORDERED that the branch of defendant's motion for summary judgment 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 defendants with notice of entry.

This constitutes the Decision/Order of the Court.

5/3/19
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE