Gregory v Bengal Limo Serv. Inc.
2019 NY Slip Op 31253(U)
May 3, 2019
Supreme Court, New York County
Docket Number: 157002/2016
Judge: Adam Silvera
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
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

----------X

VON GREGORY,

Plaintiff,

- V -

BENGAL LIMO SERVICE INC.,BARRY THIERNO

Defendant.

INDEX NO. 157002/2016

MOTION DATE 10/05/2018

MOTION SEQ. NO. 003

DECISION AND ORDER

----------X

HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65
were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendants' motion for summary judgment and to dismiss plaintiff's complaint is denied. Before the court is defendant Bengal Limo Service Inc. and defendant Barry T. Thierno's motion for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendants to dismiss the Complaint of plaintiff Von Gregory 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 May 30, 2015, at West 141st Street at or near Lenox Avenue in the County, City and State of New York when a vehicle owned by defendant Bengal Limo Service Inc. and operated by defendant Barry T. Thierno struck a vehicle operated by plaintiff Von Gregory 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. In support of their motion defendants attach the deposition of plaintiff and the affirmations of Dr. Elizabeth Ortof,

Dr. Jeffrey Passick, and Dr. Michael Setton (Mot, D, E, F, & G). Defendants note that plaintiff did not request medical attention at the scene of the accident and that plaintiff was involved in a prior motor vehicle accident in 2-14 which resulted in treatment to the neck and back regions. In a February 6, 2018, report Dr. Ortof concluded that plaintiff is "capable of performing all normal activities of daily living from a neurological perspective" (Mot, Exh E at 3). Dr. Ortof found no losses in plaintiff's range of motion to the cervical and lumbar spine (*id.*). Similarly, Dr. Passick, in a February 6, 2018, report found plaintiff to have normal ranges of motion in the cervical and lumbar spine and concluded that plaintiff is capable of normal activities of daily living (*id.*, exh F) Lastly, defendants attach the February 15, 2018 report of Dr. Setton who concluded that plaintiff suffers from chronic degenerative changes of the lumbar spine but that there is no evidence that plaintiff's injuries are causally related to the accident at issue (*id.*, Exh G). Defendants have 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 claims that defendants' doctors' reports are deficient and do not review all pertinent medical records. Plaintiff attaches pertinent MRI reports of plaintiff's left shoulder (Aff in op, Exh A & B). Defendants failure to sufficiently address positive, objective findings warrants denial of defendants' motion. The court has found that a defendant fails to make a prima facie showing that it is entitled to summary judgment as a matter of law when defendants IME doctor fails to review or discuss MRI reports that contain positive, objective findings (*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]). Accordingly, plaintiff

has raised an issue of fact precluding defendants' motion for summary judgment on the issue of serious injury.

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 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