

Dunnaway v Pledge Cab Corp.
2019 NY Slip Op 31278(U)
May 3, 2019
Supreme Court, New York County
Docket Number: 153182/2016
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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JAMES DUNNAWAY,	INDEX NO. <u>153182/2016</u>
Plaintiff,	
- v -	MOTION DATE <u>07/31/2018,</u> <u>09/24/2018</u>
PLEDGE CAB CORP., ABDUL KAIUOM, BAMESH ROY	MOTION SEQ. NO. <u>001 002</u>
Defendant.	

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 41, 42, 44, 45, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60 were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43, 46, 47, 59 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Before the Court is defendants’ motion, motion sequence 001 for an Order to dismiss plaintiff’s Complaint on the grounds that the injuries allegedly sustained by plaintiff do not satisfy the “serious injury” requirement as defined by Insurance Law § 5102(d) and plaintiff’s motion, motion sequence 002 for an Order pursuant to CPLR §3212 granting summary judgment in favor of plaintiff as against defendants on the issue of liability.

BACKGROUND

The suit at bar stems from a motor vehicle accident which occurred on August 3, 2014, on East 46th Street, at 10th Avenue in the County, City, and State of New York, when a vehicle owned by defendant Empire Transit Corp. and operated by defendant Bamesh Chandra Roy struck a vehicle owned by defendant Pledge Cab Corp. and defendant Abdul Kaioum, operated

by plaintiff James E. Dunnaway, Jr. in the rear which allegedly led to the serious injury of plaintiff.

DISCUSSION

Motion Sequence 001 Summary Judgment (Serious Injury)

Defendants' motion for summary judgment, pursuant to CPLR 3212, against plaintiff on the issue of "serious injury" as defined under Section § 5102(d) of the Insurance Law is denied. "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"]).

Defendants allege that plaintiff has failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law. In support of their motion defendants submit the affirmation of defendants' doctors, Dr. Barbara Freeman, Dr. Robert S. April, and Dr. Robert Tantleff. Dr. April examined plaintiff on March 20, 2018, and examined

plaintiff's medical records, concluded that plaintiff had a full range of motion and that plaintiff had resolved injuries (Mot, Exh D). Dr. April further noted that plaintiff underwent cervical spine surgery but that the surgery was not related to the underlying accident (*id.*) Dr. Freeman examined plaintiff on December 22, 2017 also noted that the cervical surgery was not related to the underlying accident and that plaintiff was capable of performing all activities of daily living without restriction (*id.*, Exh E). Dr. Tantleff reviewed MRI films of plaintiff's lumbar and cervical spine and found preexisting degeneration with no findings related to the underlying accident (*id.*, Exh F). 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 avers that he sustained significant and permanent limitations to his spine. In support of this assertion, plaintiff submits the affirmation of Dr. Andrew Cordiale that plaintiff underwent cervical spine surgery on June 15, 2016, as a result of the injuries sustained from the motor vehicle accident at issue (Aff in Op Exh, E). Dr. Cordiale concludes that plaintiff has sustained significant and permanent disabilities of the cervical spine and lumbar spine, and that he will not recover completely (*id.*). Further, plaintiff submits the affirmation of Dr. Gautam Khakhar, who treated plaintiff from August 6, 2014 until December 6, 2016, and opined "that due to injuries Mr. Dunnaway sustained in a motor vehicle accident on August 3, 2014, he was disabled from his employment as a limousine driver throughout the course of his treatment (*id.*, Exh C).

Plaintiff further notes that defendants' doctors' examinations were conducted more than three years after the subject accident. Plaintiff claims that defendants' doctors have failed to address plaintiff's allegations that he suffered aggravations and exacerbations of pre-existing

latent or asymptomatic conditions. Plaintiff notes that defendants' failure to address that the

injuries sustained in the subject accident may have been superimposed on previously latent and asymptomatic conditions renders their opinions regarding any alleged ‘degenerative conditions’ speculative” (Aff in Op, ¶ 2). Plaintiff notes that Dr. Khakhar’s initial medical examination on August 6, 2014, revealed significant limitations to plaintiff’s cervical and lumbar range of motion and that the doctor noted that though plaintiff had sustained previous injuries to his neck and back, that the subject accident exacerbated those injuries (Aff in Op, Exh A). Plaintiff has raised several issues of fact pertaining to his alleged injuries and defendants’ motion for an order to dismiss the Complaint of plaintiff on the grounds that the injuries allegedly sustained by plaintiff do not satisfy the “serious injury” requirement as defined by Insurance Law § 5102(d) is denied.

Summary Judgment (Liability)

Plaintiff’s motion for summary judgment on the issue of liability as against defendants 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]). “A rear-end collision with a stopped vehicle, or a vehicle slowing down, establishes a prima facie case of negligence on the part of the operator of the rear-ending vehicle, which may be rebutted if that driver can provide a non-negligent explanation for the accident” (*Baez v MM Truck and Body Repair, Inc.*, 151 AD3d 473, 476 [1st Dep’t 2017]).

Here, in support of his motion, plaintiff submits a certified copy of the Police Accident Report, plaintiff's deposition, and defendant driver Roy's deposition (Mot 002, Exh E, F, & G). The Police Accident Report contains defendant Roy's statement against interest that "he bumped into the rear of vehicle #2 [plaintiff's vehicle]" (*id.*, Exh E). Plaintiff testified at deposition that he came to a complete stop for a couple of seconds at a red light when he was rear ended by defendants' vehicle (*id.*, Exh F at 29-33). Defendant testified at deposition that the car in front of him was at a complete stop when he attempted to brake his vehicle and struck plaintiff's vehicle (*id.*, Exh G at 27-38). Plaintiff has met its burden for summary judgment on the issue of liability and the burden shifts to plaintiff to raise an issue of fact. Defendants' opposition concedes that defendant Roy "tapped the rear of Plaintiff's vehicle" (Mot 002 Aff in Op, ¶ 20). While defendants' opposition makes mention of the "emergency doctrine", defendants fail to proffer any evidence that an emergency situation existed. Defendants' opposition hinges on plaintiff's comparative negligence for the accident at issue.

It is well settled law that a plaintiff's comparative negligence does not bar a motion for summary judgment on liability. The Court of Appeals has held that a plaintiff is entitled to partial summary judgment on the issue of a defendant's liability even if a defendant raises an issue of fact regarding plaintiff's comparative negligence (*Rodriguez v City of New York*, — NE3d —, 2018 NY Slip Op 02287 [2018]). The issue of a plaintiff's comparative negligence is addressed and determined only when considering the damages that a defendant owes to a plaintiff (*id.* at 3). Plaintiff's motion for summary judgment is appropriate regardless of plaintiff's potential comparative negligence. Thus, defendant has failed to raise a triable issue of fact and plaintiff's motion for summary judgment is granted as to defendants' liability.

Accordingly, it is

ORDERED that plaintiff's motion on the issue of liability against defendant Bamesh Chandra Roy, defendant Pledge Cab Corp. and defendant Abdul Kaioum, for an order that defendants are liable for the alleged occurrence is granted; and it is further

ORDERED that defendants' motion for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendants and to dismiss the Complaint of plaintiff for failure to satisfy the "serious injury" requirement as defined by Insurance Law § 5102(d) 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:

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

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

APPLICATION:

CHECK IF APPROPRIATE: