Holguin v Sabir
2019 NY Slip Op 31289(U)
May 6, 2019
Supreme Court, New York County
Docket Number: 162466/2014
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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INDEX NO. 162466/2014

JOSE HOLGUIN,

MOTION DATE 09/28/2018

Plaintiff,

MOTION SEQ. NO. 003

- V -

SHIVA SABIR, LIBERTY MECHANICAL CONTRACTORS LLC,MCG CONSTRUCTION LLC,HUTCH TWO TOWER LLC,D & D ELECTRICAL CONSTRUCTION COMPANY, INC.,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 120, 121, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137

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

Upon the foregoing documents, it is ORDERED that defendants Shiva Sabir, MCG Construction LLC ("MCG") and Hutch Two Tower's ("Hutch") motion for summary judgment, for an order pursuant to CPLR 3212 to dismiss plaintiff Jose Holguin's complaint and all cross claims against upon the grounds that there is no factual or legal basis upon which defendants can be held liable in this case.

The present motion stems from a motor vehicle accident which occurred on May 10, 2013 at 1200 Waters Place in the County of Bronx, City and State of New York, when co-defendant Shiva Sabir was operating a forklift and that made contact with plaintiff's vehicle.

Summary Judgment 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]).

Discussion

Defendants aver that defendant Sabir was still within the construction site and had not entered the street at the time that the forklift made contact with plaintiff's vehicle. Defendants note that plaintiff alleged that at the time of the accident, there were no barrels, cones or vehicles with flashing lights blocking the road (Mot, Exh J at 51-52). Plaintiff testified that after the accident people came out of the construction site and began to place barrels and cones at the entrance (*id.*, at 67-68, & 74). However, plaintiff also testified to have taken a picture of the scene of the accident before the barrels were placed and then took a picture of the scene after the barrels were placed (*id.*, at 103). Defendants note that though plaintiff testified as to the existence of these photos, upon examination, no such photographs of the entrance without the barrel and cone exist.

In support of their motion, defendants submit the deposition of defendant Sabir, who explained that the incident occurred while the fork lift was at a stop and waiting for a signal by his coworker Marchus Mondiser, who had two bright orange flags in his hand (Mot, Exh L at 23-27). Additionally, defendant Sabir testified that there was a cone and barrel used to block off plaintiff's lane of travel (*id.*, 35, & 39-40). Defendants submit the deposition and affidavit of Paul Meshonek who testified on behalf of MCG Construction and stated that at no time was the forklift owned, leased, controlled, managed or maintained by neither defendant Hutch nor defendant MCG (*id.*, Exh N at 21; Exh S). Defendants submit the Owner and Construction Manager Agreement between MCG and Hutch in support of their motion (*id.*, Exh R). The Court

notes that defendants have demonstrated that as the owner and general contractor of the construction project, defendants Hutch and MCG did not own, lease, operate, maintain, or control the subject forklift nor did they direct defendant Sabir. Defendants have made a prima facie showing that there is no factual or legal basis upon which defendants MCG Construction and Hutch Two Tower LLC can be held liable; however, as to defendant Shiva Sabir's own liability for the accident at issue, defendants have failed to meet their burden.

In opposition, plaintiff hinges its argument against defendants on the notion that defendants' vehicle exited the construction site and that at the time of the impact there were no barrels, cones or any construction workers on the road warning drivers that the subject forklift was exiting the site. Plaintiff fails to show that defendants MCG and Hutch had owned, leased, controlled, managed or maintained the fork lift in question.

The Court finds that defendants are not liable for defendant driver Sabir as they did not employ, control, direct and/or supervise Sabir on the date of the accident and did not own, rent or provide the forklift in question. Thus, plaintiff does not have a cause of action against defendants MCG and Hutch and the branch of defendants' motion to dismiss the plaintiff's complaint and all cross-claims against defendants is granted solely in favor of defendants MCG and Hutch and denied as to defendant Shiva Sabir.

Summary Judgment (Threshold)

"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, defendants allege that plaintiff did not sustain a serious injury. Defendants claim that plaintiff failed to claim any categories pursuant to Insurance Law 5102(d). In support of their motion defendants submit the February 4, 2017, medical report of Dr. Herbert S. Sherry (Mot, Exh T). The court finds Dr. Sherry's report to be conclusory and deficient as it does not list what the normal range of motion would be for plaintiff's alleged injured body parts. Defendants' motion does not contain any other medical evidence to demonstrate a lack of serious injury. Thus, defendants have failed to satisfy their burden as 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).

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint herein is granted as to defendants MCG Construction LLC and Hutch Two Tower LLC and is denied as against defendant Shiva Sabir; and it is further

ORDERED that the complaint is dismissed in its entirety against defendants MCG Construction LLC and Hutch Two Tower LLC, with costs and disbursement to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant;

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption read as follows:

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JOSE HOLGUIN
Plaintiffs,
-against- Index No. 162466/2014

SHIVA J SABIR, LIBERTY MECHANICAL CONTRACTORS LLC, D&D ELECTTRICAL CONSTRUCTION COMPANY
Defendants
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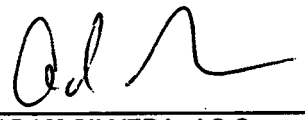
and it is further;

ORDERED that the branch of 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 of the Insurance Law is denied; and it is further

ORDERED that within 30 days of entry, counsel for defendants shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.



5/6/2019
DATE

ADAM SILVERA, J.S.C.

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