Scott v Ennon
2019 NY Slip Op 31942(U)
June 4, 2019
Supreme Court, Kings County
Docket Number: 509809/2017
Judge: Peter P. Sweeney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 509809/2017
Motion Dates: 6-3-19
Mot. Cal. Nos.: 49-50

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CHRISTOPHER W. SCOTT,

Plaintiff,

-against-

DECISION/ORDER

MARVIN L. ENNON and APRELE ELLIOTT,

Defendants,

----------x

The following papers numbered 1 to 5 were read on these motions:

Papers:	**Numbered**
Notices of Motion Affidavits/Affirmations/Exhibits.....	1-2
Answering Affirmations/Affidavits/Exhibits.....	3-4
Reply Affirmations/Affidavits/Exhibits.....	5
Other.....	

Upon the foregoing papers, the motions are decided as follows:

In this action to recover damages for personal injuries arising out of a motor vehicle accident that occurred on January 29, 2015, the defendants, MARVIN L. ENNON and APRELE ELLIOTT, move pursuant to CPLR § 3212 for an order awarding them summary judgment dismissing plaintiff's complaint on the ground that the plaintiff, CHRISTOPHER W. SCOTT, did not suffer a "serious injury" within the meaning of Insurance Law § 5102(d) as a result of the accident. By separate notice of motion, plaintiff moves pursuant to CPLR § 3212 for an order awarding him partial summary judgment against the defendants on the issue of liability. Both motions are consolidated for disposition.

By submitting the reports of Dr. Passick and Dr. Ross, defendants met their prima facie burden of demonstrating, *prima facie*, that the alleged injuries to plaintiff's cervical spine did not

ms#01-XMD
ms#02-GEXT

constitute serious injuries under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102(d) (*see Rivera v. Alvarado*, 162 A.D.3d 811, 812, 79 N.Y.S.3d 223, 224; *Staff v. Yshua,* 59 A.D.3d 614, 874 N.Y.S.2d 180), and that, in any event, the alleged injuries were not caused by the accident (*see Gouvea v. Lesende,* 127 A.D.3d 811, 6 N.Y.S.3d 607; *Fontana v. Aamaar & Maani Karan Tr. Corp.,* 124 A.D.3d 579, 1 N.Y.S.3d 324). In opposition, the plaintiff failed to raise a triable issue of fact. The only report submitted by the plaintiff concerning a recent medical evaluation was the Dr. Irving Friedman. While Dr. Friedman measured the range of motion of plaintiff cervical region and noted significant restrictions, he failed to address the conclusions of the defendants' radiologist, Dr. Ross, that the injuries to plaintiff's cervical spine were the result of long-standing degeneration and were unrelated to the subject accident. Accordingly, Dr. Friedman's conclusion that plaintiff's cervical spine injuries spine were caused by the subject accident was mere speculation (*see Cornelius v. Cintas Corp.*, 50 A.D.3d 1085, 857 N.Y.S.2d 637; *Marrache v. Akron Taxi Corp.*, 50 A.D.3d 973, 856 N.Y.S.2d 239; *Giraldo v. Mandanici*, 24 A.D.3d 419, 805 N.Y.S.2d 124; *Lorthe v. Adeyeye*, 306 A.D.2d 252, 760 N.Y.S.2d 530; *Saint-Hilaire v. PV Holding Corp.*, 56 A.D.3d 541, 867 N.Y.S.2d 494, 495).

The defendants failed, however, to meet their *prima facie* burden of showing that the plaintiff did not sustain a serious injury under the 90/180 day category of Insurance Law § 5102(d) as a result of the subject accident (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865, 774 N.E.2d 1197; *Gaddy v. Eyler*, 79 N.Y.2d 955, 956–957, 582 N.Y.S.2d 990, 591 N.E.2d 1176; *Yeu Jin Baik v. Enriquez*, 124 A.D.3d 880, 880–81, 2 N.Y.S.3d 216, 217–18). Defendants' examining physician conducted a medical examination of the plaintiff over three and a half years following the accident and he did not specifically relate any of his findings to the 90/180 day periods. Plaintiff's deposition transcript, the only other evidence submitted by the defendants to

refute plaintiff's 90/180 claim, did not adequately address what plaintiff could and could not do during the 90/180 periods (*see Hossain v. Singh*, 63 A.D.3d 790, 791, 882 N.Y.S.2d 137, 138; *Neuburger v. Sidoruk*, 60 A.D.3d 650, 875 N.Y.S.2d 144; *Miller v. Bah*, 58 A.D.3d 815, 872 N.Y.S.2d 173; *Scinto v. Hoyte*, 57 A.D.3d 646, 870 N.Y.S.2d 61). Since the defendants failed to meet their prima facie burden with respect to the 90/180 day category of a serious injury, it is unnecessary to examine the sufficiency of the plaintiff's opposition papers in this regard (*see Hossain*, 63 A.D.3d at 790–91, 882 N.Y.S.2d at 138 *Neuburger*, 60 A.D.3d 650, 875 N.Y.S.2d 144; *Miller*, 58 A.D.3d 815, 872 N.Y.S.2d 173; *Scinto*, 57 A.D.3d 646, 870 N.Y.S.2d 61).

Turning to plaintiff's motion for partial summary judgment against the defendant on the issue of liability, plaintiff did not demonstrate as a matter of law that defendants violated Vehicle and Traffic Law § 1173, which provides that "[t]he driver of a vehicle emerging from an alley, driveway, private road or building shall stop such vehicle immediately prior to driving onto a sidewalk extending across any alleyway, building entrance, road or driveway. . .at the point nearest the roadway to be entered where the driver has a view of approaching traffic thereon." Defendant was not asked at his deposition if he stopped his vehicle before entering the roadway and plaintiff testified that he did not see defendants' vehicle prior to the accident. Since plaintiff failed to demonstrate that the defendant failed to stop as required by Vehicle and Traffic Law § 1173, it was not demonstrated that the statute was (*Jarvis v. LaFarge N. Am., Inc.*, 52 A.D.3d 1179, 1180–81, 859 N.Y.S.2d 788, 790).

Likewise, plaintiff did not demonstrate as a matter of law that defendants violated Vehicle and Traffic § 1143 which provides that "[t]he driver of a vehicle about to enter or cross a roadway ... shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed." Since the defendant testified that his vehicle was already on Bedford Avenue at the time of the

accident and about two car lengths or 10-15 feet from the driveway, it was not demonstrated as a matter of law, that the defendant was about to enter or Bedford Avenue at the time of the accident.

It is well settled that the proponent of a motion for summary judgment has the initial burden of making a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient proof eliminating any material issues of fact (see, *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404) and that if the proponent fails to meet its initial burden, the Court must deny the motion regardless of the sufficiency of the opposition papers (*see Winegrad,* 64 N.Y.2d at 853; *New York & Presbyt. Hosp. v. Allstate Ins. Co.*, 29 A.D.3d 547). Since the plaintiff failed to meet his initial burden of demonstrating his entitlement to summary judgment on the issue of liability, his motion for partial summary judgment must be denied regardless of the sufficiency of the opposition papers.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss plaintiff's complaint on the ground that the plaintiff did not sustain a serious injury under the permanent consequential limitation of use and significant limitation of use categories of Insurance Law §5102(d) is **GRANTED** and in all other respects **DENIED;** and it is further

ORDERED that plaintiff's motion for partial summary judgment on the issue of liability is **DENIED.**

This constitutes the decision and order of the Court.

Dated: June 4, 2019

KINGS COUNTY CLERK
FILED
2019 JUN 28 AM 8:26

PETER P. SWEENEY, J.S.C.
HON. PETER P SWEENEY