

Suazo v King

2019 NY Slip Op 32724(U)

September 12, 2019

Supreme Court, New York County

Docket Number: 155239/2017

Judge: Adam Silvera

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

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SERGIO SUAZO,

Plaintiff,

- v -

LARNELL KING, PIPCO TRANSPORT ION INC.,

Defendant.

-----X

INDEX NO. 155239/2017

MOTION DATE 03/26/2019

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

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 Larnell King and Pipco Transport Ion Inc.'s motion for an Order pursuant to CPLR §3212 granting summary judgment against plaintiff Sergio Suazo and in favor of defendants on the issue of liability and to dismiss the Complaint of plaintiff for failure demonstrate that plaintiff has suffered a "serious injury" as defined under Section 5102(d) of the Insurance Law. Plaintiff opposes the motion.

The suit at bar stems from a motor vehicle collision which occurred on August 20, 2016, at or near 871 North Bound Major Deegan Expressway near West 179th Street in the County of Bronx, State of New York, when defendants' vehicle allegedly struck plaintiff's merging vehicle 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. Sarasavani Jayaram and Dr. Joseph C. Elfenbein (Mot, Exh K & L). Defendant notes that both doctors found plaintiff to have a normal range of motion of the cervical spine and lumbar spine (*id.*). Dr. Jayaram’s report concludes that plaintiff has no neurological disability to the cervical spine, lumbar spine, or

thoracic spine (Mot, Exh K). Dr. Elfenbein's report opines that plaintiff has no objective orthopedic disability and suffered sprains/strains to the cervical spine, thoracic spine, and lumbar spine which have since resolved (Mot, Exh L). 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 Dr. James Noberini who found significant decreases in range of motion to plaintiff's cervical spine and lumbar spine (Aff in Op, Exh 1). Dr. Noberini further concluded that plaintiff's injuries were sustained as a result of the automobile accident of August 20, 2016, are permanent in nature, and have caused a permanent partial disability (*id.*). 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."

Defendants aver that the subject accident was entirely the fault of plaintiff. In support of their motion, defendants attach the deposition of plaintiff, the deposition of defendant King, and video footage from defendant's vehicle from the time of the accident (Mot, Exh D & F).

Defendants note that plaintiff testified that he saw the truck before the accident when he was merging on the high way with no signal and ultimately was struck by defendants' vehicle (Mot, Exh D at 33-34, & 46). Defendant King testified that his truck was not moving at the time of the accident when plaintiff cut him off and darted into defendant King's lane causing the accident (Exh F at 26-28). The video submitted by defendants does not clearly depict how the accident occurred; however, defendants have provided sufficient evidence that plaintiff violated VTL § 1128 and thus has made a prima facie demonstration of plaintiff's negligence.

In opposition, plaintiff notes that during the deposition plaintiff testified that he saw defendants' vehicle stopped when he began to merge and that upon merging, he heard defendants' vehicle accelerate and subsequently strike his vehicle (Mot, Exh D at 34). Plaintiff and defendant give two different accounts of whether defendants' vehicle was moving at the time of the incident. Thus, plaintiff has raised an issue of fact precluding defendants from summary judgment on the issue of liability.


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 of the Insurance Law is denied; and it is further

ORDERED that the branch of defendants' 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.



9/12/2019

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