

**Gutierrez v Miller**

2019 NY Slip Op 33483(U)

November 21, 2019

Supreme Court, New York County

Docket Number: 157087/2017

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*

-----X

JOHNATHAN GUTIERREZ

Plaintiff,

- v -

KURTIS MILLER,

Defendant.

-----X

INDEX NO. 157087/2017

MOTION DATE 09/13/2019

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46  
were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ORDERED that plaintiff's motion is granted for the reasons set forth below. Before the court is plaintiff Johnathan A. Gutierrez's motion, Motion Sequence 003, for an Order pursuant to CPLR §3212 granting summary judgment in favor of plaintiff on the issue of liability and on the issue of meeting the "serious injury" threshold as defined in the New York State Insurance Law § 5102(d).

**BACKGROUND**

The suit at bar stems from a two car motor vehicle accident on July 13, 2017, at the intersection of Cooper Street and West 204<sup>th</sup> Street, in the County, City and State of New York, when plaintiff's vehicle drove through an intersection and was struck by a vehicle operated by defendant Kurtis Miller who allegedly did not stop for a stop sign on Cooper Street. The accident allegedly led to the serious injury of plaintiff.

**DISCUSSION**

**Summary Judgment (Serious Injury)**

The branch of plaintiff's motion for summary judgment, pursuant to CPLR 3212, in favor of plaintiff on the issue of "serious injury" as defined under Section § 5102(d) of the Insurance Law 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]).

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"]).

Here, plaintiff has successfully demonstrated that he sustained a "serious injury" as defined under Section 5102(d) of the Insurance Law, as a result of the July 13, 2017 accident. In support of his motion, plaintiff submits the report of Dr. Arnold T. Berman (Mot, Exh G). Dr. Berman examined plaintiff on April 18, 2019 and examined the MRI report of plaintiff's lumbar spine dated one week after the accident at issue on July 21, 2017 (*id.* at 4). While plaintiff's doctor concluded that, "Mr. Gutierrez did not sustain any permanent injuries, and has no functional loss and no disability as a result of the accident," the MRI report reveals fractures to the lumbar spine at L2 and L3 (*id.* at 5-5). The Court notes that it is well established that a

fracture constitutes a “serious injury” under the Insurance Law (*Perez-Hernandez v M. Marte Auto Corp.*, 104 AD3d 489, 490 [1st Dept 2013]; *Baez v Boyd*, 90 AD3d 524 [1st Dept 2011]; *Joyce v Lacerra* 41 AD3d 236 [1st Dept 2007]).

Dr. Berman notes that plaintiff has fully recovered from his injuries sustained as a result of the July 13, 2017 accident; however, even where fractures caused by an accident have healed, the Court has found that the mere presence of a fracture as a result of a motor vehicle accident satisfies the “serious injury” threshold (*Joyce* 41 AD3d 236 at 237 citing *Lanpont v. Savvas Cab Corp.*, 244 A.D.2d 208, 211–212 [1st Dept 1997]). Thus, plaintiff has demonstrated that he suffered a “serious injury” as defined in the Insurance Law and the burden shifts to defendant to raise an issue of fact. Defendant’s opposition fails to address the issue of “serious injury” as defined in the Insurance Law, thus, the branch of plaintiff’s motion for summary judgment, pursuant to CPLR 3212, in favor of plaintiff on the issue of “serious injury” as defined under Section § 5102(d) of the Insurance Law is granted.

#### **Summary Judgment (Liability)**

The branch of plaintiff’s motion for summary judgment on the issue of liability as against defendant 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]). Violation of

the New York State Vehicle and Traffic Law (“VTL”) constitutes negligence per se (*See Flores v City of New York*, 66 AD3d 599 [1st Dep’t 2009]).

Plaintiff alleges that defendant drove through a stop sign on Cooper Street and caused the accident. In support of their motion, plaintiff cites to VTL 1142(a): Vehicle entering stop or yield intersection, which states that:

- (a) Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.

In support of the argument that defendant is liable for the accident at issue, plaintiff submits his own deposition and the deposition of defendant (Mot, Exh E & F). Plaintiff testified that he was traveling onto 204<sup>th</sup> Street and attempted to move his vehicle to the left when he observed defendant’s speeding vehicle disregard the stop sign and strike his vehicle (Mot, Exh E at 18-20). Defendant testified that he stopped his vehicle at the stop sign, looked in both directions, continued into the intersection, and did not see plaintiff’s vehicle “until the split second” that the vehicles came into contact (Mot, Exh F at 17-22). Thus, plaintiff has demonstrated that defendant violated the VTL and has made a prima facie showing of negligence. Plaintiff has met its burden for summary judgment on the issue of liability and the burden shifts to defendant to raise an issue of fact.

In opposition, defendant claims that he did not see plaintiff’s vehicle until a split second before the accident (*id.* At 21). The Court notes however, that a purported nonnegligent

explanation of not seeing a plaintiff's vehicle until the accident is merely speculative and fails to raise a triable issue of fact (*Cartagena v Martinez*, 112 AD3d 521, 522 [1st Dept 2013]).

Defendant alleges that plaintiff is comparatively negligent for the accident; however, defendant has failed to proffer any evidence as to plaintiff's alleged negligence. Defendant's speculative assertion that plaintiff could have been contributorily negligent for the accident at issue is insufficient to raise a triable issue of fact. Thus, the branch of plaintiff's motion for summary judgment on the issue of liability in favor of plaintiff and against defendant is granted.

Accordingly, it is

ORDERED that plaintiff's motion for an Order pursuant to CPLR §3212 granting summary judgment in favor of plaintiff on the issue of liability and on the issue of meeting the "serious injury" threshold as defined in the New York State Insurance Law § 5102(d) is granted; and it is further

ORDERED that an immediate trial as to the amount of damages to which plaintiff is entitled shall be had before the Court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this Order, serve a copy of this Oder with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office (Room 158) and shall serve and file with said Clerk a Note of Issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial.

This constitutes the Decision/Order of the Court.

11/21/19  
DATE

  
ADAM SILVERA, J.S.C.

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|-----------------------|---|---|
| CHECK ONE:            | <input type="checkbox"/> CASE DISPOSED              | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
|                       | <input checked="" type="checkbox"/> GRANTED         | <input type="checkbox"/> GRANTED IN PART                  |
|                       | <input type="checkbox"/> DENIED                     | <input type="checkbox"/> OTHER                            |
| APPLICATION:          | <input type="checkbox"/> SETTLE ORDER               | <input type="checkbox"/> SUBMIT ORDER                     |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> FIDUCIARY APPOINTMENT            |
|                       |   | <input type="checkbox"/> REFERENCE                        |