

Black v Kennedy

2019 NY Slip Op 34601(U)

September 3, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 610939/2017

Judge: John H. Rouse

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

Action 2
MOTION DATE: 01/23/2019
ADJ. DATE: 06/19/2019
Mot. Seq. 001-MD

Action 1
MOTION DATE: 02/27/2019
ADJ. DATE: 06/19/2019
Mot. Seq. 002-MD

MOTION DATE: 02/27/2019
ADJ. DATE: 06/19/2019
Mot. Seq. 002-MD

MOTION DATE: 02/27/2019
ADJ. DATE: 06/19/2019
Mot. Seq. 003-MG

MOTION DATE: 02/27/2019
ADJ. DATE: 06/19/2019
Mot. Seq. 003-MG
CASEDISP ACTION 2
e-filed full participation

JOHN BLACK,

Plaintiffs

-against-

Action 1
610939/2017

LISA KENNEDY and CLAUDETTE LACAST

Defendants

AMENDED

CLAUDETTE LACAST,

Plaintiff

-against-

Action 2
614303/2017

JOHN BLACK and LISA KENNEDY,

Defendant

DECISION & ORDER

TO:

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By Order of the Hon. Paul J. Basiley, Jr., J.S.C. dated December 12, 2017 Action 1 and Action 2 have been joined for trial.

This Amended Order is to correct the prior order of the court so as to reflect that the Defendant, Claudette LaCast's motion for summary judgment on the issue of liability is granted rendering, as to her, the question threshold injury moot and dismissing Action 1 as to her; and further conforming the Order to the decision to reflect that there remains a question of fact with respect to whether Plaintiff Claudette LaCast sustained a serious injury.

Upon the reading and filing of the following papers in Action 1: (1) Notice of Motion (002) in Action 1 by Defendant Lisa Kennedy for An Order, pursuant to CPLR Section 3212, for summary judgment due to plaintiff's failure to meet the threshold limits set by New York State Insurance Law, Sections 5102 and 5104; (2) Notice of Motion (003) in Action 1 by Defendant Claudette LaCast for An Order, pursuant to CPLR Section 3212, for summary judgment on the issue of liability; and in the alternative upon the issue of plaintiff's failure to meet the threshold limits set by New York State Insurance Law, Sections 5102 and 5104; and (3) all e-filed documents numbered 1-80; and

Upon the reading and filing of the following papers in Action 2: Notice of Motion (001) by Defendant John Black for an Order pursuant to CPLR § 3212 which grants summary judgment to the defense as plaintiff CLAUDETTE LACAST has failed to breach the threshold requirement of Insurance Law section 5102(d), In the alternative, an Order pursuant to CPLR section 3212 which dismisses any/all sub-portions of Insurance Law section 5102(d) which are not viable as a matter of law; (2) Notice of Motion (002) by Defendant Lisa Kennedy for An Order, pursuant to CPLR Section 3212, for summary judgment due to plaintiff's failure to meet the threshold limits set by New York State Insurance Law, Sections 5102 and 5104; (3) Notice of Motion (003) by Defendant John Black An Order pursuant to CPLR § 3212 which grants summary judgment to defendant BLACK on the issue of liability as to any/all claims; and (4) e-filed documents 1-71; it is:

ORDERED that in Action 1 motion (Seq. #002) by Defendant Lisa Kennedy for An Order, pursuant to CPLR Section 3212, for summary judgment due to plaintiff, John Black's failure to meet the threshold limits set by New York State Insurance Law, Sections 5102 and 5104 is denied; and it is further

ORDERED that in Action 1 motion (Seq. #003) by Defendant Claudette LaCast for An Order, pursuant to CPLR Section 3212, for summary judgment in Action 1 upon her contention that she was not negligent and bears no responsibility for either the primary or secondary collision is granted and all claims and cross claims against her are dismissed; and it is further

ORDERED that in Action 2 motion (Seq. #001) by Defendant John Black for an Order pursuant to CPLR § 3212 which grants summary judgment to Defendant Black as plaintiff CLAUDETTE LACAST has failed to breach the threshold requirement of Insurance Law section 5102(d) is denied; and it is further

ORDERED that in Action 2 motion (Seq. #002) by by Defendant Lisa Kennedy for an Order pursuant to CPLR § 3212 which grants summary judgment to Defendant Kennedy as plaintiff CLAUDETTE LACAST has failed to breach the threshold requirement of Insurance Law section 5102(d) is denied;

ORDERED that in Action 2 motion (Seq. #003) by Defendant John Black for an Order pursuant to CPLR 3212 for summary judgment upon his contention that he was free from all negligence in this three vehicle collision and was not in any part at fault is granted and he shall have summary judgment upon all claims and cross claims as he was not negligent; and it is further

ORDERED that in Action 1, John Black, in accordance with CPLR § 3212(b) and the determination made this date in Action 2 wherein it is determined as a matter of law that John Black was not negligent in any part, shall have partial summary judgment on the issue of liability; and it is further

ORDERED that the prevailing parties are directed to serve a copy of this decision and order with notice of entry as soon as practicable on all other parties to the respective actions *See Protocol for Electronic Filing in Suffolk County Supreme Court at II (M) page 6 for rules on serving notice of entry.* <https://www.nycourts.gov/courts/10jd/suffolk/EFiling/>

DECISION

Plaintiff commenced Action 1 on June 12, 2017 to recover for injuries he alleges he sustained in a motor vehicle collision on February 22, 2015 on the Sunrise Highway when a motor vehicle owned and operated by Defendant Lisa Kennedy collided with a motor vehicle owned and operated by Defendant Claudette LaCast which then struck the vehicle operated by Plaintiff.

Action 1

Defendants in Action 1 now move for summary judgment upon their contention that Plaintiff did not sustain a serious physical injury in the motor vehicle collision. Defendant's have failed to make a *prima facie* case insofar as their motion is based upon their contention that Plaintiff will be unable to prove that the subject injury was, in fact, caused by the collision on February 22, 2015. Plaintiff will ultimately bear that burden of proof upon the trial of this action. However, upon this motion it is the moving Defendants' burden to present a *prima facie* case that the

collision was not a substantial factor in causing the Plaintiff to sustain a serious injury. Accordingly, Defendants motions (002 and 003) in Action 1 are denied.

Action 2

Defendants in Action 2 move for summary judgment upon their contention that Plaintiff Lacast in Action 2 did not suffer a serious injury as defined by Insurance Law § 5102(d). Plaintiff in opposition contends that she meets the criteria of two categories of serious injury: “(1) permanent consequential limitation of use of a body organ or member and (2) significant limitation of use of a body function or system.” See *Affirmation in Opposition at par. 23.*, e-document 63. NY Insurance Law 5102(d) provides that:

A.

A permanent consequential limitation of use of a body organ or member means that the body organ or member does not operate at all or operates only in some limited way. It is not necessary that there has been a total loss of the use of the body organ or member. The limitation of use must be consequential, which means that it is significant, important or of consequence. A minor, mild or slight limitation of use is not significant, important or of consequence. *Ins. Law § 5102(d); Kordana v Pomellito, 121 AD2d 783, 503 NYS2d 198 (3d Dept 1986); Dwyer v Tracey, 105 AD2d 476, 480 NYS2d 781 (3d Dept 1984).*

B.

A significant limitation of use of a body function or system means that the function or system does not operate at all or operates only in some limited way. It is not necessary to find that there has been a total loss of the body function or system or that the limitation of use is permanent. However, the limitation of use must be significant, meaning that the loss is important or meaningful. A minor, mild or slight limitation of use is not significant. *Ins. Law § 5102(d); Licari v Elliott, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 (1982); Decker v Rassaert, 131 AD2d 626, 516 NYS2d 710 (2d Dept 1987); Colvin v Maille, 127 AD2d 926, 511 NYS2d 982 (3d Dept 1987); Hezekiah v Williams, 81 AD2d 261, 440 NYS2d 274 (2d Dept 1981).*

Defendants John Black and Lisa Kennedy in support of their motion have submitted the affirmation of David J. Weisberg, MD based upon his personal examination of the Plaintiff and a review of Plaintiff's medical record. Plaintiff was seen by a number of physicians and due to persistent pain and swelling of Plaintiff's right leg she was recommended to have an aspiration of the region but she refused. Plaintiff had a CT scan of the region showing a probable hematoma in the region. Plaintiff eventually was followed by a vascular surgeon who stated that over time it was resolving as were her symptoms and she did not require any further interventional care or treatments. Dr. Weisberg assessed the Plaintiff's range of motion with the use of a goniometer and found her range of motion to be normal.

Here, the Defendants have made a *prima facie* case that the Plaintiff, Claudette Lacaste, did not sustain a serious injury in the car accident on February 22, 2015.

In opposition Plaintiff has submitted the unsworn notes of Charles LaRosa, MD which are consistent with the opinions of Dr. Weisberg, namely that Plaintiff suffered a bruise to her right leg and declined to permit aspiration of residual fluid. Plaintiff, in opposition, has also submitted report by Carla Danielson, DC sworn to before a notary on February 10, 2019 in Kings County, NY. In Danielson's report she alleges the Plaintiff has limited range of motion as measured by a goniometer. Under these circumstances there remains a question of fact with respect to whether Plaintiff sustained a serious injury limiting her range of motion. Accordingly, the Defendants motions (001 and 002) are denied to the extent provided in the order above.

Defendant John Black moves for summary judgment (003) on the issue of liability. He offers the testimony of Claudette Lacast in which she testified she was traveling at the rate of 45 to 50 miles per hour in the westbound right lane of Sunrise Highway in the area where there were two westbound lanes divided from the eastbound lanes by a metal guardrail. Lacast testified that she was struck in the vehicle driven by Lisa Kennedy and that she had not been braking her vehicle prior to the collision and her foot was on the accelerator. Kennedy was driving a Suburban. Lacast testified that while there was a small amount of snow on the shoulder of the road there was none on the roadway and the accident had nothing to do with road conditions. Lecast testified that the rear end collision propelled her into left lane and within a couple of seconds she was struck by the vehicle driven by Black, and that she had no time to react to either collision as it all happened too fast. Kennedy testified at an examination before trial that she had been at Seafield prior to the collision and had been visiting a friend. Kennedy acknowledged she had been driving the Suburban that struck the vehicle driven by Lacast in the rear, did not know whether there was a secondary collision between Black and Lacast, and was unable to recall most of the events leading up to the collision and immediately after. Black also offers his own pretrial testimony in support of the motion in which he testified that the collision that the collision between Lacast and Black that forced Lacast into his lane occurred so quickly he was unable to take any evasive action and the secondary collision was unavoidable. Defendant Black has made a *prima facie* case that he was not negligent and did not contribute to the cause of either collision, and that instead both the primary and secondary collision were entirely the fault of Kennedy. *See Victor v. Daley, 150 A.D.3d 1307 (2nd Dept. 2017)*. Plaintiff in Action 2, Lacaste, does not oppose the motion and Defendant Kennedy has failed to raise a material issue of fact.

The foregoing shall constitute the decision and order of the court.

Dated: September 3, 2019



JOHN H. ROUSE, Acting J.S.C.

NON-FINAL DISPOSITION