

Ramirez v Paljusevic
2019 NY Slip Op 34748(U)
October 29, 2019
Supreme Court, Rockland County
Docket Number: Index No. 033280/2016
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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JORGE L. RAMIREZ, JR,

Plaintiff,

-against -

SHACE PALJUSEVIC¹ and PJETAR PALJUSEVIC,

Defendants.

-----X

HON. Sherri L. Eisenpress, A.J.S.C.

DECISION/ORDER

Index No. 033280/2016

(Motion #3 and #4)

The following papers, numbered 1-4, were read in connection with Defendant Pjetar Paljusevic’s unopposed Notice of Motion for an Order granting summary judgment and dismissal of the Complaint on the ground the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d) (Motion #3); and (ii) Plaintiff’s unopposed Notice of Motion, pursuant to CPLR § 3212, for an Order granting summary judgment against defendant on the issue of liability (Motion #4):

PAPERS

NUMBERED

NOTICE OF MOTION (#3)/AFFIRMATION IN SUPPORT/EXHIBITS A-G	1-2
NOTICE OF MOTION(#4)/AFFIRMATION IN SUPPORT/EXHIBITS A-C	3-4

Plaintiff, presently 40 years of age, commenced the instant matter to recover damages for personal injuries arising out of an automobile accident which occurred on February 12, 2016, at the intersection of Orange Avenue (Rt. 202) and Washington Avenue, in the Village of Suffern, New York, when the vehicle operated by defendant Shace Paljusevic, and owned by Defendant Pjetar Paljusevic, struck the rear of Plaintiff’s stopped vehicle. The police report contains defendant operator’s admission to the responding police officer that “her foot got stuck near the brake pedal and accelerator pedal (not knowing exactly what happened) causing D-V1 first to go partially off road colliding with earth embankment & bushes causing damage to

¹Defendant Shace Paljusevic, died on March 8, 2017, and Plaintiff voluntarily discontinued the action against this defendant on April 8, 2019.

bushes causing damage to passenger side of V1, D-V1 then swerved left back onto travel lane & collided into back of D-V2."

Defendant moves to dismiss Plaintiff's action on the ground that there are no triable issues of fact as to whether Plaintiff sustained an injury pursuant to Insurance Law Sections 5104(a) and 5102(d). In support of the summary judgment, Defendant submits Plaintiff's medical records made contemporaneous to the accident which show limitations of motion in Plaintiff's cervical and lumbar spine and knees. Defendant also submits the affirmed report of orthopaedic surgeon, Adam Soyer, who examined Plaintiff on October 11, 2017, approximately two years ago. Dr. Soyer noted restriction of motion in Plaintiff's cervical spine including flexion of 45 degrees (normal 50); extension of 45 degrees (normal 60); right rotation of 50 degrees (normal 80); and left rotation of 60 degrees (normal 80); right lateral flexion of 30 degrees (normal 45) degree; and left lateral flexion of 40 degrees (normal 45). Examination of Plaintiff's thoracic spine also demonstrated limited motion including right lateral binding of 20 degrees (normal 45) and left lateral bending of 20 degrees (normal 20). Examination of Plaintiff's lumbar spine also revealed limitations including extension of 20 degrees (normal 25) and left lateral bending of 20 degrees (normal 25).

Dr. Soyer also found limitations in the flexion of Plaintiff's right knee of 130 degrees (normal 150) and left knee flexion of 120 degrees (normal 150). Further limitations were noted in Plaintiff's right hip and left hip including forward flexion in the right hip of 90 degrees (normal 120) and 80 degrees in the left hip (normal 120). Dr. Soyer diagnosed Plaintiff with cervical, thoracic and lumbar spine sprain, all of which have resolved. Although defense counsel argues that Plaintiff suffered a subsequent accident, Dr. Soyer makes no reference to a subsequent accident and attributes any limitation in movement to "voluntary restrictions."

Legal Discussion

The proponent of a summary judgment motion must establish his or her claim

or defense sufficient to warrant a Court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v Citibank Corp., et al., 100 N.Y.2d 72 (2003) (citing Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986)). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v Gonzalez, 306 A.D.2d 250 (2d Dept 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124 (2000). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

In order to be entitled to summary judgment it is incumbent upon the defendant to demonstrate that plaintiff did not suffer from any condition defined in Insurance Law §5102(d) as a serious injury. Healea v Andriani, 158 A.D.2d 587, 551 N.Y.S.2d 554 (2d Dept 1990). Precedent in the Second Department holds that where a defendant relies upon the affirmed medical report of its examining physician in support of its motion for summary judgment which notes a significant limitation of motion in a body part, the defendant has failed to meet his prima facie burden and the Court need not consider the sufficiency of the plaintiff's opposition papers. Robinson v. Yeager, 62 A.D.3d 684, 880 N.Y.S. 88 (2d Dept. 2009); Locke v. Buksh, 58 A.D.3d 698; 872 N.Y.S.2d 148 (2d Dept. 2009); Bentivegna v. Stein, 42 A.D.3d 555; 841 N.Y.S.2d 316 (2d Dept. 2007); Zamaniyan v. Vrabeck, 41 A.D.3d 472; 835 N.Y.S.3d 903 (2d Dept. 2007); Kovalenko v. General Electric Capital Auto Lease Inc., 37 A.D.3d 664; 831 N.Y.S.2d 438 (2d Dept. 2007)

In Meyer v. Gallardo, 260 A.D.2d 556; 688 N.Y.S.2d 624, 625 (2d Dept. 1999), the Second Department affirmed a denial of summary judgment where one of the physicians who examined the injured plaintiff on behalf of the defendant stated that the lateral rotation

of his cervical spine was 80 degrees to the right and 50 degrees to the left. The Court found that this alone raised an issue of fact as to whether the injured plaintiff suffered a "significant limitation of use of a body function or system." *Id.* See also Rodriguez v. Ross, 19 A.D.3d 395, 396; 796 N.Y.S.2d 398 (2d Dept. 2005)(since defendants' own examining physician recorded some significant limitations in the plaintiff's movement of his cervical and lumbar spines, and his right shoulder, he did not make a prima facie showing of entitlement to summary judgment.); Korpalski v. Lau, 17 A.D.3d 536; 793 N.Y.S.2d 195 (2d Dept. 2005)(dismissal of complaint reversed because defendant failed to make prima facie showing that plaintiff did not sustain a serious injury where defendant's experts reported finding a limitation of motion in plaintiff's left shoulder and lower back.); Alam v. Karim, 61 A.D.3d 904, 879 N.Y.S.2d 1151 (2d Dept. 2009); Bagot v. Singh, 59 A.D.3d 368; 871 N.Y.S.2d 917 (2d Dept. 2009); Colon v. Chu, 61 A.D.3d 805; 878 N.Y.S.2d 127 (2d Dept. 2009).

In the instant matter, Defendant has failed to meet his burden on summary judgment with respect to the serious injury threshold. Defendant submits the medical records of Plaintiff's treating physicians, made contemporaneous to the accident, which demonstrate quantified limitations of motion in Plaintiff's spine and knees. The affirmed medical report of Dr. Soyer, who examined Plaintiff some two years ago, notes positive findings with respect to limitations of motion in Plaintiff's cervical, thoracic and lumbar spine; both knees and hips. Dr. Soyer does not attribute these limitations of motion to a subsequent accident. As such, the Court must deny Defendant's summary judgment motion with respect to the categories of significant limitation and permanent consequential limitation, notwithstanding the fact that Plaintiff did not submit opposition to Defendant's summary judgment motion.

However, Defendant is entitled to summary judgment with respect to the 90/180 day category. Defendant submits Plaintiff's examination before trial transcript which demonstrate that Plaintiff had some restrictions with regard to his work and/or everyday activities but not that he was prevented from performing all of his usual activities for 90 out of

the 180 days following the occurrence. This, coupled with Plaintiff's failure to submit medical evidence which documents that he was prevented from performing "substantially all" of his usual and customary activities for the requisite period, requires the grant of summary judgment with respect to this category. See Rubin v. SMS Taxi Corp., 71 A.D.3d 548, 898 N.Y.S.2d 110 (1st Dept. 2010). As such, that claim is hereby dismissed.

With respect to Plaintiff's summary judgment motion, it is well-settled that a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of liability with respect to the operator of the moving vehicle, unless the operator of the moving vehicle can come forward with an adequate, non-negligent explanation for the accident. See Smith v. Seskin, 49 A.D.3d 628, 854 N.Y.S.2d 420 (2d Dept. 2008); Harris v. Ryder, 292 A.D.2d 499, 739 N.Y.S.2d 195 (2d Dept. 2002)]. Further, when the driver of an automobile approaches another from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle. VTL § 1129(a) ("The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon the condition of the highway."); Taing v. Drewery, 100 A.D.3d 740, 954 N.Y.S.2d 175 (2d Dept. 2012). Drivers must maintain safe distances between their cars and cars in front of them and this rule imposes on them a duty to be aware of traffic conditions, including vehicle stoppages. Johnson v. Phillips, 261 A.D.2d 269, 271, 690 N.Y.S.2d 545 (1st Dept. 1999).

Here, Plaintiff has established his entitlement to summary judgment for this rear-end collision. Defendant Pjetar Paljusevic, as owner of the motor vehicle, is vicariously liable for the actions of the operator. Given that Defendant has failed to set forth a non-negligent excuse for striking the rear of Plaintiff's vehicle, Plaintiff is entitled to a partial grant of summary judgment as to liability.

Accordingly, it is hereby

ORDERED that Defendant Pjetar Paljusevic's Notice of Motion (#3) for summary judgment with respect to "serious injury", pursuant to CPLR § 3212, is DENIED, except with respect to Plaintiff's claim based upon the 90/180 no-fault category, which is dismissed; and it is further

ORDERED that Plaintiff's Notice of Motion (#4) for summary judgment, pursuant to CPLR § 3212, with respect to liability against Defendant Pjetar Paljusevic is GRANTED; and it is further

ORDERED that this matter is scheduled for an appearance in the Trial Readiness Part on **Wednesday, December 11, at 9:30 a.m.**

The foregoing constitutes the Opinion, Decision & Order of the Court on Motions #3 and #4.

Dated: New City, New York
October 29, 2019



HON. SHERRI L. EISENPRESS, A.J.S.C.

TO:
All Parties (by e-file)