Alony v PV Holding Corp.
2020 NY Slip Op 31167(U)
April 2, 2020
Supreme Court, Kings County
Docket Number: 515343/2017
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

x

MARC ALONY,

Plaintiff,

-against-

PV HOLDING CORP., JOHN NANA YAW SARPANG and AVIS BUDGET GROUP, INC.,

Defendants.

x

DECISION / ORDER

Index No. 515343/2017
Motion Seq. No. 3
Date Submitted: 2/6/20
Cal No. 1

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	46-62
Affirmations in Opposition and Exhibits Annexed.....	64-65
Reply Affirmation.....	67-72

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action arising out of a motor vehicle accident which took place on June 3, 2017. Plaintiff was riding a bicycle and defendant John Nana Yaw Sarpang was driving a vehicle which he had rented. The title holder of the vehicle was defendant PV Holding Corp., and defendant Avis Budget Group, Inc. is described as its parent corporation.

In his Bill of Particulars, plaintiff Alony alleges that as a result of the accident he sustained, *inter alia*, injuries to his left knee, neck and back. He also claims he sustained injuries to his left ankle, left hand and both shoulders. Plaintiff underwent arthroscopic surgery

to his left knee on October 16, 2017. Plaintiff asserts that he satisfies the serious injury threshold with injuries that constitute a permanent loss of use, a permanent consequential limitation, a significant limitation, and a non-permanent injury which prevented him from performing substantially all of his usual customary daily activities for 90 of the 180 days following the accident.

Defendants move for summary judgment dismissing the complaint and contend that plaintiff Alony did not sustain a "serious injury" as defined by Insurance Law § 5102(d). Defendants argue that, given plaintiff Alony's deposition testimony that he did not miss any time from work, other than a brief period following the knee surgery, he does not meet the 90/180 threshold. Further, defendants contend that plaintiff Alony's normal neurological and orthopedic IME examinations show that plaintiff did not sustain either a loss of use of a body organ or member, a permanent consequential limitation of use, or a significant limitation of use as a result of the subject accident.

In addition, defendants PV Holding Corp. and AVIS Budget Group contend that as they are the owner and an affiliate of the owner of the subject rental vehicle, that they are in the business of renting vehicles and that the failure to maintain the vehicle played no role in the subject accident, they are entitled to summary judgment dismissing the plaintiff's claims against them pursuant to the Graves Amendment (49 USC § 30106).

Defendants submit the pleadings, plaintiff's EBT transcript, the EBT transcript and affidavit of the defendant Sarpang, the affirmed IME reports from neurologist Michael J. Carciente, M.D., who examined plaintiff on May 21, 2019, the affirmed IME report of orthopedist Herbert S. Sherry, M.D., who examined plaintiff on May 23, 2019, and an affidavit from a Regional Insurance Risk Manager employed by Avis Budget Car Rental, LLC.

Dr. Carciente reports that plaintiff had a normal neurological exam, with "no evidence of a spinal cord condition"; that the MRI reports included no mention of any impingement; and that "the exam does not support the presence of an ongoing neurological injury, disability or permanency." Dr. Carciente does not indicate whether he performed any range of motion testing during his exam, and he only examined plaintiff's spine.

Dr. Sherry reports that plaintiff had a normal range of motion in all of the body parts he tested and completely negative test results, and concludes that his orthopedic examination reveals an excellent clinical result for arthroscopic surgery of the left knee and no evidence of cervical or lumbar radiculopathy and no abnormality in the right shoulder, left hand, left forearm or left ankle. Dr. Sherry tested the range of motion in plaintiff's cervical and lumbar spine, his shoulders, elbows, wrists, fingers and hands, hips, knees and ankles, but he fails to provide the "normals" or to indicate the guidelines he used. The problem with this is that, for example, for the plaintiff's lumbar spine, he reports that plaintiff had 50 degrees of flexion, when normal is usually 60 degrees, and 15 degrees of lateral bend bilaterally, when normal is usually 25 degrees, and that plaintiff had 60 degrees of rotation bilaterally, when rotation is a test for the cervical spine, not the lumbar spine. He doesn't provide any "normals" and concludes that plaintiff's range of motion was normal. This is insufficient.

Plaintiff Alony opposes the motion, contending defendants have failed to establish their entitlement to summary judgment on the serious injury threshold, insofar as Dr. Carciente, the defendants' examining neurologist, did not perform any range of motion testing and, to the extent Dr. Sherry, the defendants' examining orthopedist, did do range of motion testing, he failed to compare the plaintiff's results to the normal ranges of motion. Plaintiff relies on an affirmation from his treating doctor Viviene Etienne, M.D., who examined plaintiff most recently

on August 22, 2019, in order to oppose this motion. Plaintiff maintains that her affirmation raises triable issue of fact to the extent Dr. Etienne finds that plaintiff had reduced ranges of motion in his spine, shoulders, knees and hips. She diagnoses plaintiff with chronic cervicalgia, chronic sprain of ligaments of the cervical spine, chronic lower back pain due to discogenic disease, left knee pain, ACL tear to the left knee, left knee chondromalacia and a 10% total impairment. She concludes that plaintiff will have life-long neck and back pain, and instability in his left knee secondary to the ACL tear, all as a result of the subject accident. In addition, plaintiff contends that defendants have failed to establish their entitlement to summary judgment with regard to the Graves amendment with competent detailed evidence showing that they were engaged in the trade or business of renting or leasing motor vehicles, and that they have failed to establish that the subject vehicle is one that they own.

In reply, defendants contend that they do make a prima facie showing that the serious injury threshold is not met, even without properly quantified range of motion testing, in light of the plaintiff's bill of particulars and plaintiff's own deposition testimony which indicates a good recovery from the arthroscopic surgery and that plaintiff has recovered and has only minor, slight limitations of movement and mild degenerative disc disease, with no neurological findings. Further, defendants contend that plaintiff's own medical records show that in the emergency room shortly after the accident, plaintiff had no loss in the range of motion in his neck, back or left knee and he did not complain of knee pain. Further, defendants question the credibility and reliability of the affirmation from plaintiff's treating doctor and claim it is inconsistent with her prior reports, which defendants annex to their reply papers. As to the Graves Amendment claim, defendants argue that their failure to include a certificate of conformity for the Regional Insurance Risk Manager's out-of-state affidavit is curable, which

they have cured in their reply papers, and defendants aver that the affidavit, taken together with defendant Sarpang's affidavit and deposition testimony, is sufficient to make a prime facie showing of their entitlement to summary judgment based upon the Graves Amendment, and that plaintiff fails to raise an issue of fact to the contrary.

Conclusions of Law

Defendants fail to make a *prima facie* showing that plaintiff Alony did not sustain a "serious injury" in the categories of injury in Insurance Law §5102(d), a "permanent consequential limitation of use," and a "significant limitation of use" inasmuch as defendants' examining neurologist does not quantify any range of motion testing he may have performed and defendants' examining orthopedist failed to compare plaintiff's range of motion test results to the normal range of motion for the test (*see Connors v Flaherty*, 32 AD3d 891, 893 [2d Dept 2006] ["examining physicians failed to specify the degrees of range of motion in the plaintiff's cervical spine"]; *see also McFadden v Barry*, 63 AD3d 1120, 1120–21 [2d Dept 2009] ["defendants' examining neurologist and orthopedist, however, both failed to address whether there were any limitations in the injured plaintiff's range of motion in the rotation of her lumbar spine"]; *Whittaker v Webster Trucking Corp.*, 33 AD3d 613 [2d Dept 2006] ["The affirmed medical reports of the defendants' examining orthopedic surgeon and neurologist merely noted that the plaintiff had a full range of motion in his cervical spine without setting forth the objective test or tests performed supporting their conclusions"]).

As defendants have failed to make a *prima facie* case with regard to all of plaintiff's injuries and to all of the applicable categories of injury in Insurance Law §5102(d), the motion must be denied, and it is unnecessary to consider the papers submitted by plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow*

Taxi Corp., 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

With regard to the branch of the defendants' motion which seeks dismissal based on the Graves Amendment, the motion is granted. The affidavit of the defendants' Regional Insurance Risk Manager (having cured their failure to include a certificate of conformity), and the testimony and affidavit of defendant Sarpang, defendants PV Holding Corp. and Avis Budget Group, Inc. have established that they are the owner of the vehicle, and are in the business of renting vehicles. Defendants have also established that the subject vehicle was rented to defendant Sarpang, and the affidavit and deposition of Sarpang demonstrate that the vehicle was in good operating condition and that no mechanical difficulties or problems contributed to causing the accident. Accordingly, defendants PV Holding Corp. and Avis Budget Group, Inc. are entitled to summary judgment dismissing the complaint and any cross claims against them, based on the Graves Amendment. Plaintiff fails to offer any evidence to the contrary (*see Bravo v Vargas*, 113 AD3d 579, 580 [2d Dept 2014]; *Ballatore v Hub Truck Rental Corp.*, 83 AD3d 978, 980 [2d Dept 2011]).

Accordingly, it is

ORDERED that defendants PV Holding Corp. and Avis Budget Group, Inc. are granted summary judgment and the complaint is severed and dismissed as against them, and it is further

ORDERED that the remainder of the relief requested by defendants is denied.

This constitutes the decision and order of the court.

Dated: April 2, 2020

E N T E R :

Hon. Debra Silber, J.S.C.