James v Nunez
2020 NY Slip Op 31385(U)
April 13, 2020
Supreme Court, Kings County
Docket Number: 501968/2015
Judge: Carl J. Landicino

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 13th day of April, 2020.

PRESENT:
HON. CARL J. LANDICINO, J.S.C.

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DORRIAN H. JAMES,

Plaintiff,

- against -

PA HERNANDEZ NUNEZ, TWINS TRANSPORT, LLC, ANGEL INAHUAZO, IMRAN SATTAUR,

Defendants.

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Index No.: 501968/2015

DECISION AND ORDER

Motions Sequence #9, #10, #11

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2, 3/4, 5/6,
Opposing Affidavits (Affirmations).....	7,
Reply Affidavits (Affirmations).....	8, 9, 10,

Upon submission and review of the foregoing papers, the Court finds as follows:

This lawsuit arises out of a motor vehicle accident that allegedly occurred on December 5, 2013. Plaintiff Dorrian H. James (hereinafter "the Plaintiff") alleges in his Complaint that on that date he suffered personal injuries after the vehicle he was operating was in a multiple vehicle collision with a vehicle operated by Defendant PA Hernandez Nunez (Defendant "Nunez") and owned by Defendant Twins Transport, LLC (hereinafter referred to collectively as the "Twins Defendants"), a vehicle owned and operated by Defendant Angel Inahuazo ("Defendant Inahuazo"), and a vehicle owned and operated by Defendant Imran Sattaur ("Defendant Sattaur").

The Plaintiff claims in his Verified Bill of Particulars (Twins Defendants' Motion Exhibit D, Paragraph 8), that as a result of the accident he sustained, *inter alia*, a concussion, right shoulder injury, left and right arm injury, cervical spine herniated and bulging disc(s), neck

sprain, and a lower back sprain. The Plaintiff also alleges, *inter alia*, that he has sustained "significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the plaintiff from performing substantially all of the material acts which constitute plaintiff's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment." (Twins Defendants' Motion Exhibit D, Paragraph 12)

Defendant Sattaur now moves (motion sequence #9) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint as against him. Defendant Sattaur contends that he was not involved in a motor vehicle collision with the Plaintiff's vehicle and as a result bears no liability for the subject incident. Specifically, Defendant Sattaur testified, as part of his deposition, that on the day of the incident he witnessed the Plaintiff's vehicle, after the Plaintiff's vehicle had been in a collision and pulled to the side of the road, and then his vehicle was struck by a tractor trailer, while he was stopped.

The Twins Defendants also now move (motion sequence #10) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint. The Twins Defendants contend that they were not involved in a motor vehicle collision with the Plaintiff's vehicle and accordingly bear no liability to the Plaintiff. The Twins Defendants also contend that the Plaintiff has failed to satisfy the requisite serious injury threshold requirements as set forth in New York Insurance Law Section 5102(d). Defendant Inahuazo also moves (motion sequence #11) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint because the Plaintiff has failed to satisfy the requisite threshold requirements set forth in New York Insurance Law Section 5102(d).

The Plaintiff opposes these motions and argues that there are material issues of fact in dispute which are related to the events at issue. As it relates to the Defendants' application for summary judgment on the issue of liability, the Plaintiff contends that summary judgment should

not be granted when there is a multi-car collision, especially in this case wherein there are various and conflicting versions by the parties of what occurred. Specifically, the Plaintiff contends that his vehicle came to a slow smooth stop behind the vehicle of the Twins Defendants because that vehicle was partially obstructing the right moving lane of traffic and that the Twins Defendants's vehicle failed to have its operating hazard lights on at the time of the incident. Plaintiff also contends that after his stop, the vehicle of Defendant Inahuazo struck the Plaintiff's vehicle at which time he was rendered unconscious. As to those applications made in relation to the threshold requirements set forth in New York Insurance Law Section 5102(d), the Plaintiff contends that both the Twins Defendants (motion sequence #10) and Defendant Inahuazo (motion sequence #11) have failed to meet their initial burden. The Plaintiff also contends that in any event, the report by Dr. Hedayatnia serves to raise an issue of fact as to whether the Plaintiff satisfied the threshold requirements set forth in New York Insurance Law Section 5102(d).

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff*, 14 A.D. 3d 493 [2nd Dept 2005], *citing Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 A.D.3d 70, 74 [2nd Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 A.D.2d 493 [2nd Dept 1989].

Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept 2006]; see *Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept 1994].

Liability

Turning to the merits of the motion made by Defendant Sattaur (motion sequence #9), the Court finds that Defendant Sattaur has provided sufficient evidence to meet his *prima facie* burden. In support of his application, Defendant Sattaur relies on the deposition of the Plaintiff, the deposition of Defendant Sauttar, the deposition of Hernandez Nunez, the deposition of Defendant Inahuazo, and a Police Accident Report. As an initial matter, the Plaintiff has denied making the statement attributed to him in the Police Accident Report. As such the Plaintiff's assertions in opposition to the motion, which are contrary to those reflected in the police report, do not serve to constitute a feigned issue. *See Ramos v. Rojas*, 37 A.D.3d 291, 292, 830 N.Y.S.2d 109, 110 [2nd Dept, 2007]. However, Defendant Sattaur contends that in any event the testimony establishes as a matter of law that he is not liable for the injuries suffered by the Plaintiff. *See Fonteboa v. Nugget Cab Corp.*, 123 A.D.3d 759, 999 N.Y.S.2d 113 [2nd Dept, 2014].

Defendant Inahuazo does not indicate that Defendant Sattaur caused Inhuazo's collision with the Plaintiff's vehicle. During his deposition (Motion Seq# 9, Exhibit I) Defendant Inahauzo stated that his vehicle came into contact with Defendant Sattaur's vehicle after his collision with the Plaintiff's vehicle. (Page 35) He stated that he walked over to Defendant Sattaur's vehicle after the incident "[t]o see how much damage I did to it" (Page 52) and that Sattaur's vehicle never moved out of the left lane. (Page 70)

In opposition, the Plaintiff has failed to raise an issue of fact that prevents this Court from granting summary judgment to Defendant Sattaur. The Plaintiff argues that summary judgment

should be denied in a situation where there is a multiple vehicle incident, concerning rear end collisions or attempted lane changes or stops to avoid a collision. However, the Plaintiff's own testimony indicates that he was stopped behind the Defendant Twins' vehicle that was partially or wholly obstructing the right moving lane of travel without the use of cones or hazard lights. Plaintiff further states that after he was stopped he was hit in the rear and thereafter collided with the Defendant Inhuazo's vehicle. The Plaintiff states that he then became unconscious. There is no proof that Defendant Sattaur collided with Plaintiff's vehicle or that Defendant Sattaur contributed to the collision with Plaintiff's vehicle. As such Defendant Sattaur's motion (motion sequence #9) is granted.

As to the application made by the Twins Defendants (motion sequence #10) on the issue of liability, the Court finds that there is a material issue of fact that prevents the Court from granting this application. The Plaintiff has raised a material issue of fact as to whether the Twins Defendants' vehicle was stopped in the driving lane without hazard lights or safety cones and caused the Plaintiff's vehicle to either 1) collide with the Twins Defendants' vehicle or 2) suddenly slow or stop in the moving lane resulting in a collision with another vehicle. *See Krutul v. Tanner*, 139 A.D.3d 1015, 1015, 33 N.Y.S.3d 331, 332 [2nd Dept, 2016].

Serious Injury

In support of their respective motions the Twins Defendants (motion sequence #10) and Defendant Inahuazo (motion sequence #11) proffer affirmed medical reports from Richard Lechtenberg, M.D., Arnold Berman, M.D. and Audrey Eisenstadt, MD. The moving Defendants contend that the medical evidence demonstrates that the Plaintiff has made a full recovery of any arguable injury causally related by the accident, and suffers from no residual limitations. It is also contended that the MRI reports show that the Plaintiff had degenerative conditions that pre-date the accident at issue.

Dr. Lechtenberg, a neurologist, purportedly examined the Plaintiff on April 9, 2018, more than four years after the accident. Dr. Lechtenberg conducted range of motion testing with the use of a goniometer in relation to the Plaintiff's cervical spine, lumbar spine, thoracic spine, shoulders, knees, ankles, feet, elbows, wrists and hips. Except with regard to a limitation detected in the extension of the Plaintiff's cervical spine, Dr. Lechtenberg found no limitation in Plaintiff's range of motion. Dr. Lechtenberg found this restriction to be voluntary because incidental movement showed "normal range of motion." Dr. Lechtenberg opined that the Plaintiff "did not sustain any permanent neurologic impairment or disabilities causally related to the accident of 12/5/13." (Twin Defendants Motion, Report of Dr. Lechtenberg, Exhibit "I").

Dr. Berman, an orthopaedist, purportedly examined the Plaintiff on April 11, 2018, more than four years after the accident. Dr. Berman conducted range of motion testing in relation to the Plaintiff's cervical spine, thoracic spine and shoulders and found no limitation in Plaintiff's range of motion. Dr. Berman opined that the Plaintiff's "above mentioned injuries are now resolved with no clinical residuals." Dr. Berman also stated that the Plaintiff "may work at his regular employment, full time, without restrictions" and "did not sustain any disability as a result of the accident of 12/15/13." (Twin Defendants Motion, Report of Dr. Berman, Exhibit "J").

Dr. Eisenstadt, a radiologist, examined the MRI of the Plaintiff's lumbar spine that was conducted on January 18, 2014. Dr. Eisenstadt's review of the MRI found that the "lumbar spine MRI examination performed less than one-and-a-half months following the incident reveals preexisting degenerative disc disease at the L5-S1 intervertebral disc level." Dr. Eisenstadt also found a "manifestation of degenerative disc disease well over six months in origin." The Doctor also detected degenerative joint disease in relation to the Plaintiff's right shoulder. Dr. Eisenstadt indicated that the condition could not have occurred during the period between the accident and the MRI. (Defendant Inahuazo's Motion, Report of Dr. Eisenstadt, Exhibit "R").

Turning to the merits of the Defendants' motions for summary judgment, the Court is of

the opinion that based upon the foregoing submissions, including expert medical testimony, the Defendants have not met their initial burden of proof as to the Plaintiff's alleged serious injuries. The limited range of motion found by Dr. Lechtenberg suggests that the Defendants failed to meet their *prima facie* burden regarding significant limitation of use categories of Insurance Law § 5102(d). *See Nash v. MRC Recovery, Inc.*, 172 A.D.3d 1213, 1215, 101 N.Y.S.3d 376, 378 [2nd Dep, 2019]. While Dr. Lechtenberg states that the Plaintiff's decreased ranges of motion were subjective, he "...failed to adequately explain and substantiate his belief that the limitation of motion" ... "was self-imposed." *Mercado v. Mendoza*, 133 A.D.3d 833, 834, 19 N.Y.S.3d 757 [2nd Dept 2015] and *Bertuccio v. Murdolo*, 172 A.D.3d 988, 989, 101 N.Y.S.3d 192, 193 [2nd Dept 2019].

Assuming that the Defendants had made a *prima facie* showing, it becomes incumbent upon the Plaintiff to establish that there are triable issues of fact as to whether the Plaintiff suffered serious injuries, in order to avoid the dismissal of their actions. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2nd Dept 1994]; *Bryan v Brancato*, 213 AD2d 577 [2nd Dept 1995]. In opposition, the Plaintiff presents the affirmed narrative report of Mehrdad Hedayatnia, M.D. Dr. Hedayatnia examined the Plaintiff on July 25, 2019. Dr. Hedayatnia reviewed the Plaintiff's MRIs and conducted objective range of motion testing of the cervical spine, lumbar spine and right shoulder, with a hand held goniometer. Dr Hedayatnia also reviewed records referenced and incorporated in the Defendants' doctors' reports (Plaintiff's Opposition Papers Exhibit 1). *Balram v. CJ Transp., LLC*, 127 A.D.3d 796, 797, 6 N.Y.S.3d 606 [2nd Dept 2015]; *Seecoomar v. Ly*, 43 A.D.3d 900, 841 N.Y.S.2d [2nd Dept 2007] and *Bernier v. Torres*, 79 A.D.3d 776, 913 N.Y.S.2d 299 [2nd Dept 2010].

As to the MRIs, Dr. Hedayatnia found that "[w]hile the MRI's referenced above revealed the usual mild degenerative changes, one would expect to find in a patient of Mr. James' age, there is no explanation for the frank herniations and symptoms of traumatic injuries in my

clinical findings other than the accident." Dr. Hedayatnia found limitation in the plaintiff's range of motion in relation to the Plaintiff's cervical and lumbar spine and right shoulder. Dr. Hedayatnia opined that the "history and complete absence of prior right shoulder, lower back or cervical complaints prior to the accident, immediate complaints and objective findings of cervical pain and objective cervical injuries, such as muscle spasms outside of the patient's voluntary control, upon seeking medical treatment shortly after the accident, lead me to conclude that my clinical findings were caused by the cervical and lumbar disc herniations and shoulder injuries, which were traumatically induced by the accident of December 5, 2013." The doctor also concluded that the findings reflected that the Plaintiff's injuries were "permanent as well as significant."

"An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." *Toure v Avis Rent A Car Systems Inc.*, 98 N.Y.2d 345, 774 N.E.2d 1197 [2002]; *see Dufel v. Green,* 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995].

Based on the foregoing, it is hereby ORDERED as follows:

Defendant Sattaur's motion for summary judgment on the issue of liability (motion sequence #9) is granted and the action is dismissed as against Defendant Sattaur.

The Twin Defendants' motion for summary judgment on the issues of liability and serious injury (motion sequence #10) is denied.

Defendant Inahuazo's motion for summary judgment on the issue of serious injury (motion sequence #11) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.