Johnson v Prereira-Singletary
2020 NY Slip Op 31853(U)
June 11, 2020
Supreme Court, New York County
Docket Number: 154892/2015
Judge: Adam Silvera

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ADAM SILVERA** **PART** **IAS MOTION 22**

Justice

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RANDLE JOHNSON JR.,

Plaintiff,

- v -

ALMA D. PREREIRA-SINGLETARY, KEVIN MORGAN, and OLYMPIA TRAIL BUS CO.,

Defendants.

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INDEX NO. 154892/2015

MOTION DATE 04/22/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 51, 53, 55, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 79

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ORDERED that defendants Kevin Morgan and Olympia Trail Bus Co.'s motion for summary judgment, pursuant to CPLR 3212 to dismiss plaintiff Randle Johnson Jr.'s Complaint is denied. Before the Court is defendants' motions for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendants on the grounds that plaintiff has failed to demonstrate that plaintiff has suffered a "serious injury" as defined under Section 5102(d) of the Insurance Law. Plaintiff opposes the motion.

This matter stems from a motor vehicle incident, which occurred on September 10, 2014, on 42nd Street, at or near the intersections with 5th Avenue and 6th Avenue, in the County, City, and State of New York, which allegedly led to plaintiff's serious injury.

"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"]).

Defendants allege that plaintiff has failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law. Defendants allege that the injuries plaintiff is seeking relief for are not causally related to the underlying accident and is a result of prior injuries and degenerative changes. In support of their motion Defendants attach the supplemental discovery response of plaintiff, plaintiff's deposition, the report of Dr. Kuflik, the report of Dr. Grelsamer, and Prior Treatment Medical Records (Mot, Exh E, F, G, H, I).

Plaintiff alleges injuries to the cervical spine, lumbar spine, right knee requiring surgery, and left knee. Defendants note that plaintiff does not claim an exacerbation or aggravation of a pre-existing injury/condition (Mot at 4, ¶ 15). Plaintiff testified that he was involved in prior accidents and suffered prior injuries to his back and knees (Mot, Exh F). Plaintiff fell and injured his knee, tore his meniscus/ACL sometime between 1993 and 1997, was hit by a car in 1998, fell in 2002 and injured his back and left knee resulting in surgery, was involved in a motor vehicle accident in February 2003, slipped and fell in June 2003 and injured his right knee resulting in

surgery, and fell off of a moped after being his by a car in August 2006 resulting in surgery to his right knee and a 30% disability rating (*id.* at 70, 72-73, 78-79, 120, 126, 131, 137-38).

Defendants attach plaintiff's hospital records from Harlem Hospital in 2006, which note that plaintiff, had "degenerative change" to plaintiff's lower thoracic vertebra (Mot, Exh I). Defendants also attach plaintiff's records for treatment with Multi-Specialty Pain Management from 2007, which note that plaintiff suffers from degenerative disc disease in the lumbar spine and degeneration in the cervical spine (*id.*). In regards to plaintiffs knees defendants point to the records of Dr. Louis C. Rose who treated plaintiff fro 2006 to 2009 and performed arthroscopic surgery on plaintiffs left knee for a tear, found that plaintiff's left knee suffered a 30% loss of use and diagnosed plaintiff with a consequential injury to his right knee (*id.*).

Plaintiff was examined on December 14, 2017, by Dr. Paul L. Kuflik who reviewed plaintiff's prior medical records and concluded that plaintiff's injuries to the cervical spine, thoracic spine, and lumbar spine are pre-existing, degenerative and not causally related to the accident at issue (Mot, Exh G). As to plaintiff's knees, Dr. Ronald Paul Grelsamer also examined plaintiff on December 19, 2017, reviewed plaintiff's prior medical records, and concluded that plaintiff's injuries to the knees could not have been caused by the underlying accident and that the arthroscopies of plaintiff's knees were unnecessary (Mot, Exh H). Dr. Grelsamer suggested that plaintiff's tears were small and of no clinical significance for the surgery to have been carried out (*id.*). Thus, defendants have made a prima facie showing of entitlement to summary judgment on the issue of serious injury and the burden now shifts to plaintiff.

In opposition, plaintiff's responding medical submissions raise a triable issue of fact as to plaintiff's alleged degenerative injuries. In *Rosa v Delacruz*, 32 NY3d 1060, 2018 N.Y. Slip Op.

07040 [2018], the Court of Appeals found that where a plaintiff's doctor opined that tears were causally related to the accident, but did not address findings of degeneration or explain why the tears and physical deficits found were not caused by the preexisting degenerative conditions, plaintiff failed to raise a triable issue of fact as it "failed to acknowledge, much less explain or contradict, the radiologist's finding. Instead, plaintiff relied on the purely conclusory assertion of his orthopedist that there was a causal relationship between the accident" (*See id.*)

Here, plaintiff, in contrast to the plaintiff in *Rosa,* plaintiff, submits an opinion from his doctors which address findings of degeneration. Plaintiff submits the affirmation of Dr. Joshua Auerbach, who found that plaintiff "aggravated underlying degenerative cervical and lumbar conditions" (Aff in Opp, Exh C at 1). Dr. Auerbach concludes that plaintiff's neck, cervical spine, lumbar spine, and low back injuries are causally related to the underlying accident, which aggravated "the underlying degenerative previously dormant condition" (*id.* at 2). Thus, plaintiff has raised an issue of fact precluding summary judgment on the issue of "serious injury" as defined in 5102 of the Insurance Law.

Accordingly, it is ORDERED that defendants' motion for summary judgment to dismiss plaintiff's Complaint on the grounds that plaintiff allegedly has not sustained a "serious injury" as defined in 5102 of the Insurance Law is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon all defendants with notice of entry.

06/11/2020
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE