

Josiah v Premier Paratransit, LLC
2020 NY Slip Op 33727(U)
November 5, 2020
Supreme Court, Kings County
Docket Number: 523792/2017
Judge: Reginald A. Boddie
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At an I.A.S. Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 5th day of November 2020.

P R E S E N T:
Honorable Reginald A. Boddie
Justice, Supreme Court

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ESTHER ARLENE JOSIAH,

Plaintiff,

Index No. 523792/2017
Cal. No. 23 MS 2

-against-

DECISION AND ORDER

PREMIER PARATRANSIT, LLC,
ACCESS-A-RIDE, THE CITY OF NEW YORK and
NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

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

<u>Papers</u>	<u>Numbered</u>
MS 2	Doc # 37-64

Upon the foregoing cited papers, defendants' motion for summary judgment, pursuant to CPLR 3212, is decided as follows:

Plaintiff, who suffers from multiple sclerosis, commenced this action against defendants Premier Paratransit, LLC (Premier), Access-A-Ride, the City of New York (City) and New York City Transit Authority (Transit) to recover for personal injuries allegedly sustained as a passenger in an Access-A-Ride van driven by Cheyanne Smith on February 18, 2017, at approximately 2:48 PM, on Ocean Parkway in Brooklyn, New York.

Plaintiff alleged that Smith failed to properly secure her seatbelt prior to travel. She alleged that Smith stopped short and she was thrown from her seat onto the floor causing her to suffer injury and permanent damage to her right knee, back, neck and shoulder. She averred "I

felt one major jerk that made me fall. It was intense.” Pursuant to CPLR 3212, all defendants moved for summary judgment on the grounds that plaintiff cannot establish the jerk was unusual or violent and did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff opposed.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact, but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman*, 49 NY2d at 562).

In seeking summary judgment dismissing the complaint against a common carrier for injuries allegedly sustained by a passenger when the vehicle comes to a halt, common carriers have the burden of establishing, prima facie, that the stop was not unusual and violent and not of a “different class than the jerks and jolts commonly experienced in city bus travel” (*Burke v MTA Bus Co.*, 95 AD3d 813 [2d Dept 2012], quoting *Urquhart v New York City Tr. Auth.*, 85 NY2d 828, 830 [1995] [citations omitted]). Here, defendants did not submit admissible evidence that the stop was not unusual and violent and not of a different class than the jerks and jolts commonly experienced in city bus travel and did not offer any testimony from the driver. Accordingly, defendants failed to meet their prima facie burden (*see id.*).

Defendants also sought summary judgment on the grounds that plaintiff did not suffer a serious injury. In a “serious injury” threshold motion for summary judgment, as here, defendants

must initially submit competent medical evidence establishing that plaintiff did not suffer a “serious injury” and the injuries are not causally related to the accident (*see* Insurance Law 5102 [d]; *see Kelly v Ghee*, 87 Ad3d 1054, 1055 [2d Dept 2011]; *see Winegrad*, 64 NY2d at 853). The issue is not whether plaintiff can ultimately establish a “serious injury,” but whether there exists an issue of fact in the case on such issue (*Zuckerman*, 49 NY2d at 562).

In support of their motion, defendants proffered reports from several physicians who evaluated plaintiff. Dr. Lourdes Esteban, board-certified doctor of psychiatry and neurology, conducted a neurological examination of the plaintiff on December 23, 2019, more than two years after the accident, and opined that there was no objective evidence of neurological disability from the accident. However, Dr. Esteban found plaintiff had reduced ranges of motion in the lumbar spine. Her examination revealed plaintiff’s range of motion was 15/25 for lateral flexion on the right and left, 15/25 for extension, and 50/60 for flexion. Dr. Esteban noted plaintiff had subjective complaints of pain in the neck, mid and low back. She further noted that plaintiff had pre-existing thoracic myelopathy which causes gait dysfunction and pain and degenerative changes in the spine including scoliosis and pain. She opined, as to causality, “[i]f the history is true that the claimant experienced symptoms after the accident then a causal relationship exists.” She concluded that lumbar sprain was resolved and there was no medical necessity for further neurological treatment, work-up, durable medical equipment, [or] home help related to the accident.

Dr. David A. Fisher, a board-certified radiologist, reviewed the MRIs of plaintiff’s lumbar spine, left and right knees taken in March 2017. He opined there was no radiographic evidence that plaintiff sustained a traumatic or casually related injury to these body parts.

Dr. Jeffrey Passick, a board-certified orthopedic surgeon, conducted an orthopedic examination of the plaintiff on January 3, 2020. Dr. Passick documented decreased ranges of motion in plaintiff's lumbar spine and both knees upon examination. He determined that plaintiff's lumbar sprain and right knee contusion were resolved. He opined that the conditions appeared to be causally related to the February 18, 2017 accident, and also concluded there was no causally related orthopedic disability based on his physical examination.

Dr. Passick's report indicated plaintiff had no prior history of an accident, injury or surgery, and concluded the imaging suggests degenerative disease only, yet his impression of the right knee MRI was that "a nondisplaced healed fracture of the lateral tibial plateau cannot be excluded." He did not review the MRI of plaintiff's left knee and did not opine on whether injuries to it were resolved, although he found decreased range of motion in the left knee on examination.

Moreover, Dr. Fisher and Dr. Passick had different impressions regarding what the MRI of the right knee showed. Dr. Fisher's finding upon review of the March 18, 2017 MRI of the right knee stated:

There is **severe lateral compartment osteoarthritis**. This is **manifested by joint space narrowing and marginal spurring with subchondral cystic change along the lateral tibial plateau**. There is associated degeneration of the lateral meniscus. The **medial meniscus appears grossly intact**. The anterior and posterior cruciates, medial and lateral collateral ligaments, quadriceps and patellar tendons are intact. There is a physiologic amount of joint fluid. [emphasis added]

Dr. Passick's impression upon review of the March 18, 2017 MRI of the right knee stated:

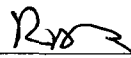
Mildly limited examination secondary to patient motion with MR related artifact. Multicompartment joint space narrowing with productive change. **Subchondral and osteochondral changes of the lateral tibial plateau, which may represent trauma to this level and a nondisplaced healed fracture of the lateral tibial plateau cannot be excluded. Oblique tear of the posterior horn of the medial meniscus. Oblique tear of the anterior horn of the medial meniscus.** Tears of the posterior horn of the lateral meniscus with degenerative/chronic change. Significant marrow edema involving the

distal lateral femur and proximal tibia in the previously described region of the lateral tibial plateau, as well as the distal femur and clinical correlation is recommended. Lateral patella tilt and patella tendinosis. Subligamentous edema of the medial collateral ligament, The lateral collateral ligament is not optimally visualized. [emphasis added]

Therefore, defendants did not meet their prima facie burden as defendants' IME doctors provided conflicting, contradictory and/or incomplete conclusions (see *Wilcoxon v Palladino*, 122 AD3d 727, 728 [2d Dept 2014]). Denial of summary judgment is warranted here, regardless of the sufficiency of plaintiff's opposition (see *Winegrad*, 64 NY2d at 853). Accordingly, defendants' motion for summary judgment is denied.

ENTER:

HON. REGINALD A. BODDIE
J.S.C.



Hon. Reginald A. Boddie
Justice, Supreme Court

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