

Marsh v Lipschutz

2020 NY Slip Op 34086(U)

December 1, 2020

Supreme Court, Kings County

Docket Number: 502882/2018

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 1st day of December 2020.

PRESENT:
Honorable Reginald A. Boddie
Justice, Supreme Court

-----X
RICKY MARSH,

Plaintiff,

Index No. 502882/2018
Cal. No. 17, 18 MS 2, 3

-against-

DECISION AND ORDER

JOHANNA LIPSCHUTZ,

Defendant.
-----X

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	Docs. # 26-34, 44-47, 49
MS 3	Docs. # 35-41

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

Plaintiff commenced this action against defendant Johanna Lipschutz, to recover for personal injuries allegedly sustained on October 8, 2017, at 8:00 PM, as a result of a motor vehicle accident on Atlantic Avenue between Fort Greene Place and South Portland Avenue, in Brooklyn, New York.

At the time of the accident, plaintiff alleged that a motor vehicle owned and operated by defendant Lipschutz struck the motor vehicle he was operating in the rear when he was "fully stopped" at a red light and caused him to sustain serious and permanent injuries to the right knee, neck and back. Specifically, plaintiff alleged a right knee horizontal tear; cervical sprain and

strain with tenderness and soft tissue bruises; C3-4 herniation; C4-5 disc bulge; L4-5 disc bulge; and L5-S1 herniation.

Defendant, pursuant to CPLR 3212, moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff opposed and moved for summary judgment, pursuant to CPLR 3212, on the issue of liability.

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).

Defendant sought summary judgment on the ground that plaintiff did not suffer a serious injury. In a “serious injury threshold” motion for summary judgment, as here, defendant 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).

“Serious injury” means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; 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 injured person from performing substantially all of the material acts which constitute such person'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 (Insurance Law § 5102 [d]). 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).

Here, defendant proffered the report of Arnold T. Berman, M.D., a board certified orthopedic physician, who performed an independent orthopedic examination of plaintiff on June 27, 2019. Dr. Berman found mild pain on range of motion but no reduced range of motion in the cervical spine or neck. His neurologic examination of that region showed reflexes to be normal. However, he noted C3-4 disc herniation, C4-5 bulging disc and stenosis, which he opined pre-existed the accident. Dr. Berman found no reduced ranges of motion in the thoraco-lumbar spine or back as well as no tenderness, spasm or pain. However, he found L4-5 disc bulge with foraminal stenosis, and L5-S1 disc herniation abutting the S1 nerve roots, which he averred pre-existed the accident. Dr. Berman concluded that the plaintiff sustained cervical and lumbar spine strain or sprain, which were resolved. He further opined that the disc herniations and bulging discs could not have been caused by this single incident.

With respect to the right knee, Dr. Berman found, *inter alia*, normal ranges of motion as well as a horizontal tear of the anterior horn and body of lateral meniscus, high-grade linear tear along the central aspect of medial femoral condyle, and diffuse high-grade cartilage tear throughout the trochlea with subchondral marrow edema. Dr. Berman concluded that the findings of the right knee suggested chronic degeneration and was not the result of a single traumatic event. He noted that "the mechanism of injury described is consistent with a

strain/sprain injury.” He also noted “from an orthopedic standpoint, Mr. Marsh did not sustain any permanent injuries, and has no functional loss or disability as a result of the [subject] accident.”

Defendant also proffered the report of Jonathan Lerner, M.D., a board certified radiologist, who evaluated the MRI study of the plaintiff’s right knee conducted on November 3, 2017. Dr. Lerner found an obliquely-oriented tear extending through the superior surface of the anterior horn and body of the lateral meniscus with an associated 1.5 x 2.0 cm parameniscal cyst.; moderate osteoarthritis with diffuse (less than 50%) thinning of the articular cartilage overlying the central weightbearing aspects of the lateral femoral condyle; high-grade thinning of the articular cartilage overlying the lateral and central aspects of the trochlea with associated subchondral cystic change; and thickening and signal heterogeneity within the distal quadriceps and proximal patellar tendons consistent with tendinosis. Similar to Dr. Berman, Dr. Lerner noted that his findings are consistent with a chronic degenerative process as opposed to an acute traumatic event. Dr. Lerner further opined that his evaluation revealed no causal relationship between the plaintiff’s alleged accident and his findings. Defendant has thus submitted competent medical evidence establishing, prima facie, that plaintiff’s alleged injuries to the right knee, cervical and lumbar spine did not constitute a serious injury and were not causally related to the accident (*see Ogle v Higgins*, 122 AD3d 696, 697 [2d Dept 2014]).

In opposition, plaintiff proffered the report of Gautam Khakhar, M.D., a licensed physiatrist, who evaluated plaintiff on December 12, 2017. Dr. Khakhar found reduced ranges of motion in plaintiff’s cervical spine, lumbar spine and right knee. He concluded that plaintiff suffered cervical and lumbar disc bulges and disc herniations, and right knee internal derangement. Dr. Khakhar conducted another examination on plaintiff on August 18, 2020. He

found reduced ranges of motion in plaintiff's cervical spine, lumbar spine and right knee. Dr. Khakhar concluded that plaintiff suffered C3-C4 disc herniation, C4-C5 disc bulge, LS-S1 disc herniation, L4-L5 disc bulge, cervical and lumbar myofascial derangement and right knee internal derangement. He noted "there is a direct causal relationship between the . . . accident and [his] pathological findings." Therefore, plaintiff has raised a triable issue of fact as to whether he sustained a serious injury (*see Perez v Schreier*, 102 AD3d 938, 939 [2d Dept 2013]). Accordingly, defendant's motion for summary judgment is denied.

Plaintiff sought summary judgment on the issue of liability arguing the occurrence of a rear-end collision creates an inference of negligence on the part of the defendant. As a general rule, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*Xian Hong Pan v Buglione*, 101 AD3d 706, 707 [2d Dept 2012][citations omitted]). Thus, a plaintiff moving for summary judgment must demonstrate that their vehicle was stopping when it was struck in the rear by the vehicle operated by the defendant (*see Ramos v TC Paratransit*, 96 AD3d 924, 925 [2d Dept 2012]).

Here, plaintiff averred that at the time of the accident his vehicle was fully stopped in traffic on Atlantic Avenue and defendant's vehicle struck his vehicle from behind. Thus, the plaintiff satisfied his prima facie burden of establishing his entitlement to judgment as a matter of law on the issue of liability by demonstrating that his vehicle was stopped when it was struck in the rear by the vehicle operated by defendant (*see id.*). In opposition, the defendant did not submit a non-negligent explanation for the collision. Thus, the defendant has failed to raise a

triable issue of fact (*see Orellana v Maggies Paratransit Corp.*, 138 AD3d 941, 942 [2d Dept 2016]). Therefore, plaintiff's motion for summary judgment on the issue of liability is granted.

Accordingly, defendant's motion for summary judgment is denied on the issue of whether plaintiff suffered a serious injury. Plaintiff's motion for summary judgment on the issue of liability is granted.

ENTER:

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

Hon. Reginald A. Boddie
Justice, Supreme Court

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