Dolub v Shpolyansky
2020 NY Slip Op 35404(U)
September 30, 2020
Supreme Court, Kings County
Docket Number: Index No. 503440/2018
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 30th day of September, 2020.

PRESENT:

CARL J. LANDICINO, J.S.C.

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BORIS DOLUB and ANNA SHNAYDER, Index No. 503440/2018

Plaintiff,

-against- DECISION AND ORDER

ROBERT SHPOLYANSKY, ELVIRA SHPOLYANSKY, Motions sequence #3, 4

Defendants.

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

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	35-42, 49-53
Opposing Affidavits (Affirmations)	44-47, 57-62
Affirmation or Affidavit in Reply	48, 63-64

After a review of the papers and oral argument the Court finds as follows:

This lawsuit arises out of a motor vehicle accident that occurred on June 18, 2016. The Plaintiff, Boris Dolub (hereinafter the "Plaintiff") alleges in his Complaint that on that day he suffered personal injuries when his bicycle collided with a vehicle owned by Defendant Elvira Shpolyansky and operated by Defendant Robert Shpolyansky (hereinafter referred to individually or collectively as the "Defendants").[1] The Plaintiff alleges that the Defendants' vehicle collided with him when Defendant Robert Shpolyansky opened the driver's side door of the Defendants' parked vehicle, and as a result struck

[1] Plaintiff Anna Shnayder is the spouse of Plaintiff Boris Dolub and brings a derivative cause of action for a loss of companionship and services.

the Plaintiff. This collision allegedly occurred on Bedford Avenue at or near its intersection with Avenue U in Brooklyn, New York. In his Verified Bill of Particulars, the Plaintiff claims, *inter alia*, injuries to his right shoulder, right forearm, cervical and thoracic spine, and post-concussion syndrome. The Plaintiff also alleges that he was prevented "from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury."

The Defendants now move (Motion Sequence #3) for an order, pursuant to CPLR 3212, granting summary judgment and dismissal of the complaint, (i) contending that the Plaintiff has failed to meet the serious injury threshold required pursuant to Insurance Law §5102(d). In support of this application, the Defendants rely on the deposition of the Plaintiff and the report of Drs. Satish Kashyap and Steven M. Peyser.

The Plaintiff opposes the motion and cross moves for separate relief. The Plaintiffs contend that the Defendants have failed to establish a *prima facie* evidentiary showing, in relation to Motion Sequence #3. The Plaintiffs further contend that even assuming the Defendants had made a *prima facie* showing, there are sufficient issues of fact raised by the reports of the Plaintiff Dolub's Doctors which serve to support the denial of summary judgment. The Plaintiff also cross moves (motion sequence #4) for an order, pursuant to CPLR 3212, granting partial summary judgment on the issue of liability. In opposition, the Defendants contend that the Plaintiff's motion is untimely and that there are sufficient material issues of fact that should serve to deny the Plaintiff's motion for summary judgment.

It has long been established that "[s]ummary 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.'" *Pizzo-Juliano v. Southside Hosp.*, 129 AD3d 695, 696, 10 N.Y.S.3d 572, 574 [2d 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 AD3d 70, 74 [2d 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 AD2d 493 [2d 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 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994]. It is true that, "[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case..." if they can show "...that the defendant's negligence was a proximate cause of the alleged injuries." *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 A.D.3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018].

Defendant's Motion (Motion Sequence #3)

In support of their motion (motions sequence #3) the Defendants proffer the affirmed medical reports of Satish Kashyap and Steven M. Peyser. Dr. Kashyap examined the Plaintiff on February 25, 2019, more than two years after the date of the accident. Dr. Kashyap conducted range of motion testing of the Plaintiff's cervical spine, thoracic spine, right shoulder, left shoulder, right elbow/forearm, left elbow/forearm, right hand/wrist and left hand/wrist. Dr. Kashyap found normal range of motion for each test. Dr. Kashyap's impression was that the Plaintiff had suffered from a sprain/strain of the cervical spine,

thoracic spine and left and right shoulders and that these sprain/strains had resolved. Dr. Kashyap opined that there was no evidence of an orthopedic disability. Dr. Kashyap also states that he used an objective test instrument, a hand held goniometer, to perform the range of motion testing. (See Defendant's Motion, Exhibit E, Report of Dr. Kashyap).

Dr. Steven M Peyser did not examine the Plaintiff but instead reviewed an MRI of the Plaintiff's cervical spine and right shoulder. The MRI of the Plaintiff's cervical spine was initially performed on October 31, 2018. Dr. Peyser's review of the MRI of the cervical spine revealed "cervical spondylosis with disc desiccation and posterior central disc osteophyte formation at C4-5, C5-6 and C6-7 with impingement." Dr. Peyser opined that "[t]hese findings are most consistent with pre-existing degenerative disc desease" and "[n]o post traumatic-type etiologies related to the accident date of June 18, 2016 can be determined." The MRI of the right shoulder was initially performed on June 21, 2016. As to the right shoulder, Dr. Peyser found "degenerative change of the acromioclavicular joint with degeneration and tearing of the anterior labrum." Dr. Peyser further opined that "[t]hese findings appear consistent with pre-existing degenerative joint disease." Dr. Peyser also found that the "[s]prain of the acromioclavicular joint would be consistent with recent post traumatic change related to the accident date of June 18, 2016." However, Dr. Peyser found that "[t]he described moderate grade muscle injury to the trapezius and deltoid by Dr. Melisaratos cannot be appreciated on this review." (See Defendant's Motion, Exhibit F, Report of Dr. Peyser).

Turning to the merits the Defendants' motion, the Court is of the opinion that the Defendants have not met their initial burden of proof. *See Che Hong Kim v. Kossoff*, 90 AD3d 969, 969, 934 N.Y.S.2d 867 [2d Dept 2011]. The Defendants contend that the affirmed reports of Dr. Kashyap and Dr. Peyser support their contentions that the Plaintiff did not suffer a serious injury as defined under Insurance Law § 5102(d). Dr. Kashyap conducted a medical examination of Plaintiff on February 25, 2019, more than two years

after the date of the accident. Dr. Peyser reviewed a Magnetic Resonance Imaging Scans (MRIs) of the Plaintiff. These MRIs were performed relatively shortly after the motor vehicle incident. However, while Dr. Peyser did note that the Plaintiff suffered a shoulder sprain, Dr. Peyser did not opine on the ability of the Plaintiff to conduct his daily activities during this early post-accident period. Neither Dr. Kashyap nor Dr. Peyser address Plaintiff's alleged "90/180" claim. *See Aujour v. Singh*, 90 AD3d 686, 934 N.Y.S.2d 240 [2d Dept 2011]. The Plaintiff's Bill of Particulars indicate that he was incapacitated from employment for six (6) months following the accident (see Exhibit B to Defendants' Motion). *See Marmer v. IF USA Exp., Inc.*, 73 A.D.3d 868, 869, 899 N.Y.S.2d 884 [2d Dept 2010].

The Plaintiff's deposition is consistent with his Bill of Particulars. In his deposition the Plaintiff states that during "[t]he first three days I was bedbound, and the next month I didn't work at all, and for the period of four months after the accident I had to hire a therapist to help me out because I could not touch the patients." He also stated at his deposition that he had reduced manually addressing his physical therapy patients since the accident. (see Exhibit D to Defendants' Motion, Page 13-15). As a result, the Court is of the opinion that the Defendants' motion fails to adequately address, as a matter of law, the Plaintiff's claim set forth in the verified bill of particulars, that he sustained a medically determined injury or impairment of a nonpermanent nature which prevented [her] from performing substantially all of the material acts which constituted [her] usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. *See Lewis v. John*, 81 AD3d 904, 905, 917 N.Y.S.2d 575 [2d Dept 2011]; *Menezes v. Khan*, 67 AD3d 654, 889 N.Y.S.2d 54 [2d Dept 2009]; *Faun Thai v. Butt*, 34 AD3d 447, 448, 824 N.Y.S.2d 131, 132 [2d Dept 2006].

Insofar as the Defendants have failed to make a *prima facie* showing, as indicated above, the Court need not address Plaintiff's opposing papers. "Since the defendants failed to meet their, *prima facie* burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were

sufficient to raise a triable issue of fact." *Trivedi v. Vural*, 90 A.D.3d 1031, 1032, 934 N.Y.S.2d 861 [2nd Dept, 2011].

Plaintiff's Motion (Motion Sequence #4)

The Court denies the Plaintiff's cross motion as untimely. In the instant matter, the Note of Issue was filed on September 17, 2019, the Defendant's motion was filed on October 31, 2019 and the Plaintiff's cross-motion was filed on January 20, 2020. In King's County, the Kings County Supreme Court Uniform Civil Term Rules provide that summary judgment motions made by parties other than the City of New York must be made within sixty (60) days. *See First Union Auto Fin., Inc. v. Donat*, 16 A.D.3d 372, 372, 791 N.Y.S.2d 596, 597 [2d Dept 2005]. It is true that a cross-motion can be entertained in some circumstances when the initial motion was timely filed. In *Grande*, the Court held that "an untimely motion or cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds." See *Grande v. Peteroy*, 39 A.D.3d 590, 591–92, 833 N.Y.S.2d 615, 617 [2d Dept 2007]. However, the Plaintiff incorrectly cites *Grande v. Peteroy* as applying to the instant action. In that proceeding both motions sought summary judgment in relation to Insurance Law 5102. In the instant proceeding, the Defendants' motion sought summary judgment in relation to Insurance Law 5102 while the Plaintiff's cross motion sought summary judgment on the issue of liability. As a result, "the plaintiffs' cross motion which was for summary judgment on the issue of liability cannot be entertained, as the issue of liability is a 'matter separate from the issue of' serious injury." *Alexander v. Gordon*, 95 A.D.3d 1245, 1247, 945 N.Y.S.2d 397, 399–400 [2d Dept 2012], *quoting Reid v. Brown*, 308 A.D.2d 331, 764 N.Y.S.2d 260 [1st Dept 2003] *and Paredes v. 1668 Realty Assocs., LLC*, 110 A.D.3d 700, 702, 972 N.Y.S.2d 304, 306 [2d Dept 2013].

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

Defendants motion (motion sequence #3) for summary judgment is denied.

Plaintiff's motion for partial summary judgment on the issue of liability (Motion Seq. #4) is denied.

This Constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.