Theodore v Nimmons
2021 NY Slip Op 30059(U)
January 6, 2021
Supreme Court, Kings County
Docket Number: 526178/2018
Judge: Richard Velasquez
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At an IAS Term, Part 66 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 6th day of JANUARY, 2021

P R E S E N T:
HON. RICHARD VELASQUEZ, Justice.
--X
BEVERLY THEODORE and VICTOR THEODORE,

Plaintiff,

-against-

Index No.: 526178/2018
Decision and Order

TERRELL D. NIMMONS and GREATER WAY INC.,

Defendants,
--X

The following *papers NYSCEF* Doc #'s 7 to 51 read on this motion:

Papers	NYSCEF DOC NO.'s
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	7-19; 27-34
Opposing Affidavits (Affirmations)	36-38; 41-50
Reply Affidavit (Affirmations)	51

After having heard Oral Argument on January 6, 2021 and upon review of the foregoing submissions herein the court finds as follows:

Defendants moves pursuant to CPLR 3212 for an order granting defendants summary judgment and dismissing the Complaint of plaintiff, as plaintiff fails to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (a). (MS#1). Plaintiffs oppose the same. Plaintiffs move pursuant to CPLR 3212 for summary judgment on liability. (MS#3). Defendants oppose the same.

BACKGROUND/FACTS

This action arises from an alleged motor vehicle accident on May 29, 2018. It is alleged that plaintiffs' vehicle was stopped at a red light and struck in the rear by a motor vehicle operated by defendant TERRELL D. NIMMONS and owned by defendant GREATER WAY INC.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". *CPLR* §3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id*. The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. The moving party must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Zuckerman v. City of New York*, 49 NY2nd 557 [1990].) Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v. Algaze*, 84 NY2d 1019 [1995]).

It is well settled, in a soft tissue injury case, a plaintiff alleging a "serious injury", must provide objective medical evidence of a "serious injury" within the meaning of the Insurance Law § 5102(d). A defendant seeking summary judgment on the grounds that plaintiff's injury does not meet the threshold, the defendant must show that there is no question of fact that there is no loss of range of motion.

In the present case, defendants fail to show that there is no "serious injury" as a matter of law because the evaluating doctors find loss in range of motion in both plaintiffs as well as differing ranges of motion from the evaluating doctos. This is similar to the situation in *Knokhinov v. Murray*, 27 Misc.3d 1211(A), 2010 WL 1542529 (N.Y.Sup.), where the evaluating doctors found differing normative values. In *Knokhinov*, the court denied summary judgment because when the findings reported by one doctor are assessed by application of the standard of "normal" stated by the other doctors, the reports present "contradictory proof". *Id*. *See also Dettori v. Molzon*, 306 AD2d 308, 309 [2d Dept 2003]. As Judge Battaglia noted in *Knokhinov supra.,* in the Second Department, measuring a plaintiff's range of motion and comparing it to a normal range of motion has become the linchpin of determining if a soft tissue injury is a "serious injury." Therefore, in a case such as this where the ranges of motion observed by one of the doctors is less than the range of motion sworn to by another of the doctors, there are issues of fact. As such, defendants motion for summary judgment on serious injury threshold is hereby denied.

Next the court will address plaintiff motion for summary judgment. In the present case, both the plaintiff's depositions testimony establish that plaintiff was hit in the rear by defendant while stopped at a red light. (*see Hanakis v. DeCarlo,* 98 AD3d 1082, 1084, 951 NYS2d 206; *Napolitano v. Galletta,* 85 AD3d at 882, 925 NYS2d 163). "A rear-end collision with a stopped vehicle creates a prima facie case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision" (*Hauser v. Adamov*, 74 AD3d 1024, 1025, 904 NYS2d 102). Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by demonstrating that their vehicle was struck in the rear by the vehicle operated by the defendant, *see Perez v. Robert*s, 91 AD3d 620, 621, 936 NYS.2d 259; *Giangrasso v. Callahan*, 87 AD3d 521, 522, 928 NYS2d 68; *Hauser v. Adamov*, 74 AD3d at 1025, 904 NYS2d 102; *Hanakis v. DeCarlo*, 98 AD3d 1082, 1084, 951 NYS2d 206, 208 (2012).

In opposition, defendants fail to raise a triable issue of fact because they fail to submit an admissible affidavit by the defendant and instead only submit an attorney affirmation. (*see Sehgal v. www.nyairportsbus.com, Inc.,100 AD3d 860, 955 NYS2d 604, 2012 NY Slip Op.; Hanakis v. DeCarlo,* 98 AD3d at 1084, 951 NYS2d 206; *Perez v. Brux Cab Corp.,* 251 AD2d 157, 159, 674 NYS2d 343). The attorney affirmations submitted by defendant are not based on personal knowledge of the facts and have no probative value (*see, Skinner v. City of Glen Cove,* 216 AD2d 381, 628 NYS2d 719; *Thoma v. Ronai,* 189 AD2d 635, 592 NYS2d 333, *affd.* 82 NY2d 736, 602 NYS2d 323, 621 NE2d 690). *Bendik v. Dybowski*, 227 AD2d 228, 229, 642 NYS2d 284, 286 (1996). As such, plaintiffs motion for summary judgment as to liability is hereby granted.

Accordingly, Defendant motion for summary judgment on serious injury threshold is hereby denied, for the reasons stated above. (MS#1) Plaintiff's motion for summary judgment on liability is hereby granted, for the reasons stated above. (MS#3).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
January 6, 2021

HON. RICHARD VELASQUEZ