Fayyaz v Carter
2021 NY Slip Op 32369(U)
November 17, 2021
Supreme Court, Kings County
Docket Number: Index No. 502116/2019
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17
---X
FARRIS FAYYAZ,

Plaintiff,

– against –

JONELLE CARTER, DMITRIY SHAPIRO and ZHANNA REZNIK,

Defendant.
---X

Index No.: 502116/2019
Motion Date: 09/15/2021
Motion Seq.: 01, 02, 04

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 01) 13-20, 39-45 and 50; (Motion 02) 21-27 and 48-49; and (Motion 04) 55-66 and 68 were read on these motions for summary judgment.

In this action to recover personal injuries, defendants Dmitriy Shapiro and Zhanna Reznik (hereinafter Shapiro and Reznik) move for an Order (Motion 01) granting summary judgment pursuant to CPLR § 3212 and dismissing the complaint on the ground that the plaintiffs' injuries do not satisfy the "serious injury" threshold pursuant to Insurance Law § 5102(d). Co-defendant Jonelle Carter also moves for an Order (Motion 02) pursuant to CPLR § 3212 granting summary judgment on the ground that the plaintiff did not incur a serious injury. The plaintiff also moves for an Order (Motion 04) pursuant to CPLR § 3212 granting summary judgment on the issue of liability in favor of the plaintiff. After oral argument and consideration of the parties' submissions, the defendant's motions are denied and the plaintiff's motion is granted.

Plaintiff's Motion for Summary Judgment on Liability (Motion 04)

Plaintiff commenced this action to recover damages for personal injuries he alleges were sustained in a rear-end motor vehicle accident that occurred on October 10, 2018, at or near 1499 Eastern Parkway before the intersection with St. Johns Place, in Brooklyn, NY. The plaintiff alleges that he was the front car in a three-car accident, and that he was struck in the rear after he was stopped at a red light for approximately 15 seconds by the vehicle driven by Jonelle Carter, which itself was rear ended by the vehicle owned and operated by defendants Shapiro and Reznik. *See* NYSCEF Doc. No. 61. The plaintiff claims that he suffered injuries to his left elbow, left shoulder, and lumbar, cervical, and thoracic spine as a result of the accident.

In opposition, Shapiro and Reznik argue that there are material issues of fact as to the happening of the accident given the conflicting testimony of the parties. Ms. Reznik testified that she did not see the vehicle in front of her stop prior to the impact, and that the vehicle behind hers struck her in the rear, propelling her into the front car. Ms. Carter also opposes, contending that her vehicle was also stopped and rear ended prior to hitting the plaintiff's vehicle in the rear.

Ms. Carter argues that this constitutes a non-negligent explanation for the happening of the accident warranting denial of the plaintiff's motion.

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *see also Phillips v Joseph Kantor & Co.*, 31 NY2d 307 (1972). The moving party is required to make a prima facie showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *Alvarez* at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 (1980). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion. *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). If the prima facie burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. CPLR § 3212 (b); *see also Alvarez* at 324; *Zuckerman* at 562. Generally, the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman* at 562.

A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision. *Perez v Persad*, 183 AD3d 771 (2d Dept 2020); *see also Billis v Tunjian*, 120 AD3d 1168 (2d Dept 2014). A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle. *Perez* at 771; *Witonsky v New York City Transit Authority*, 145 AD3d 938 (2d Dept 2016); *Nsiah-Ababio v Hunter*, 78 AD3d 672 (2d Dept 2010); *see* Vehicle and Traffic Law § 1129(a).

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law through his deposition testimony, which demonstrated that he did not contribute to the happening of the accident. *See Nikolic v City–Wide Sewer & Drain Serv Corp.,* 150 AD3d 754 (2d Dept 2017); *see also Rodriguez v City of New York,* 31 NY3d 312 (2018). In opposition, the defendants failed to raise a triable issue of fact, as the defendants failed to establish how there could be any potential negligence on the part of the plaintiff. As such, the plaintiff's motion for summary judgment on the issue of liability is granted to the extent that he is not liable for the happening of the accident.

Defendants' Motions for Summary Judgment on Threshold (Motions 01 and 02)

In support of their motion for summary judgment on the ground that the plaintiff did not suffer a serious injury, defendants Shapiro and Reznik submit the pleadings, the bill of particulars, a copy of the plaintiff's deposition transcript, and the IME reports of Drs. Pierce J. Ferriter and Arnold T. Berman. Further, although Ms. Carter filed a separate motion, counsel for Ms. Carter requests that the Court deem all of the arguments and case law set forth in Shapiro and Reznik's attorney's affirmation as incorporated into her motion.

The defendants first argue that they are not required to address any specific serious injury categories in this motion because the plaintiff failed to allege them in his Bill of Particulars. However, the defendants further contend that, notwithstanding his failure to specify, the objective medical evidence establishes that none of the injuries claimed by plaintiff satisfy the serious injury threshold requirements of any of the categories of the no-fault law.

Dr. Ferriter examined the plaintiff on April 16, 2019 and reviewed, inter alia, MRI reports, the plaintiff's treatment records, and the plaintiff's no-fault benefit applications. Dr. Ferriter did not review the MRI films themselves. Dr. Ferriter examined the ranges of motion in the plaintiff's cervical, thoracic and lumbar spine, along with the left elbow sprain and both shoulders. Dr. Ferriter found normal ranges of motion throughout and stated that any injuries had been resolved; however, Dr. Ferriter's report is silent as to whether the accident caused the plaintiff's initial injuries.

Dr. Berman examined the plaintiff on February 27, 2020 and reviewed, inter alia, the police accident report, the bill of particulars, and the plaintiff's treatment records. Dr. Berman examined the range of motion and muscle strength in the plaintiff's cervical and thoracolumbar spine, and in his left shoulder, elbow, and wrist. Dr. Berman found limited ranges of motion in the plaintiff's left shoulder, with forward flexion of 160 degrees (180 degrees normal), abduction of 160 degrees (180 degrees normal), and internal rotation of 70 degrees (80 degrees normal). Dr. Berman opined that the plaintiff's spinal injuries are the result of degeneration, and that the injuries to the left elbow and shoulder were resolved as of the time of the examination.

The defendants also argue that the plaintiff failed to establish that he suffered an injury under the 90/180 category because he has not shown that his disability is "a medically determined injury of a non-permanent nature." The defendants assert that the plaintiff claims in his bill of particulars that he was only confined to his bed for one day and to his home for six weeks following the accident. In his deposition transcript, the plaintiff states that he returned to work at the end of February 2019, which was over four months after his accident.

Here, the defendants failed to meet their prima facie burden as to the category of a significant limitation of use of a body function or system under Insurance Law § 5102(d). A significant limitation need not be permanent in order to constitute a serious injury. *Partlow v Meehan*, 155 AD2d 647 (2d Dept 1989) quoting Insurance Law § 5102(d) (internal quotation marks omitted). "[A]ny assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of limitation, but of its duration as well, notwithstanding the fact that Insurance Law § 5102(d) does not expressly set forth any temporal requirement for a significant limitation." *Griffiths v Munoz*, 98 AD3d 997, 998 (2d Dept 2012) (internal quotation marks omitted); *see Lively v Fernandez*, 85 AD3d 981, 982 (2d Dept 2011); Partlow at 648.

Notably, although Dr. Berman does not specify the method he used to measure the plaintiff's range of motion, he recorded a decreased range of motion in the plaintiff's left shoulder. Dr. Berman makes no mention of the use of a goniometer, which is a device typically used to measure range of motion. Considering the report of the defendants' own doctor in tandem with the plaintiff's testimony, in which he states that he was limited to "light" duty even after returning to work in February 2019, reducing his hours from 70 to approximately 30, the Court cannot conclude that the defendant is entitled to judgment as a matter of law under the Insurance Law. *See Holtz v Y. Derek Taxi*, 12 AD3d 486 (2d Dept 2004) (defendants failed to make a prima facie showing that plaintiff did not sustain a serious injury within Insurance Law § 5102(d) where one of the defendant's examining physicians reported finding limitations of range of motion); *see also Servones v Toribio*, 20 AD3d 330 (1st Dept 2005); *Meyer v Gallardo*, 260 AD2d 556 (2d Dept 1999) (the finding by one of the defendants' physicians that the lateral rotation of plaintiff's cervical spine was 80 degrees to the right and 50 degrees to the left raised a triable issue of fact as to whether the injured plaintiff suffered a significant limitation). Although the defendants contend that these range of limitations are minimal in nature, a limitation of 10 degrees has been found sufficient to deny a motion for summary judgment. *See Lopez v Senatore*, 65 NY2d 1017 (1985). Furthermore, the defendants' two examining physicians, Drs. Ferriter and Berman, have conflicting findings on range of motion testing that raise issues of fact that preclude summary judgment.

The defendants also failed to meet their prima facie burden of showing that the plaintiff did not sustain a serious injury under the 90/180–day category of Insurance Law § 5102(d). *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002). The medical reports of Drs. Ferriter and Berman, which were based upon examinations conducted over six months (Dr. Ferriter) and a year and four months (Dr. Berman) after the accident did not address plaintiff's medical condition during the 90/180-day period. *See Greenidge v Righton Limo, Inc.*, 35 AD 398 (2d Dept 2006) (defendant's examining neurologist did not examine plaintiff until almost two years after the accident). Moreover, neither plaintiff's deposition transcript nor his bill particulars rule out the possibility that he suffered a serious injury under the 90/180-day category, as plaintiff testified that he missed approximately four months of work following the accident. *See Nicholson v Bader*, 105 AD3d 719 (2d Dept 2013); *Refuse v Magloire*, 83 AD3d 685 (2d Dept 2011).

Regarding the defendant's argument that there has been a gap in treatment, plaintiff asserts that he stopped treating because his no-fault benefits had been terminated as of April 13, 2019. This constitutes a sufficient explanation for the plaintiff's gap in treatment. *Francovig v Senekis Cab Corp.*, 41 AD3d 643 (2d Dept 2007); *Black v Robinson*, 305 AD2d 438 (2d Dept 2003).

Furthermore, since the defendants failed to meet their prima facie burden of showing that the plaintiff did not suffer a serious injury, it is unnecessary to consider the plaintiff's opposing papers in this regard. *See Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851 (1985); *Fils-Aime v Colombo*, 152 AD3d 493 (2d Dept 2017); *Scinto v Hoyte*, 57 AD3d 646 (2d Dept 2008).

Accordingly, it is hereby

ORDERED, that the plaintiff's motion for summary judgment on the issue of liability (Motion 04) is GRANTED to the extent that plaintiff is not liable for the happening of the accident; and it is further

ORDERED, that the defendants' motions for summary judgment on the issue of serious injury threshold (Motions 01 and 02) are DENIED in their entirety.

This constitutes the decision and order of the Court.

DATED: November 17, 2021

Lillian Wan
HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.