

Rivera v Killion

2021 NY Slip Op 32999(U)

September 15, 2021

Supreme Court, Erie County

Docket Number: Index No. 800205/2019

Judge: E. Jeannette Ogden

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At a Special Term of the Supreme Court
Held in and for the County of Erie at the
Erie County Supreme Courthouse on the
23rd day of February, 2021.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

NICHOLAS RIVERA,

Plaintiff,

ORDER

vs.

Index No.: 800205/2019

MATTHEW J. KILLION, 93 NYRPT, LLC,
J. RENTAL, INC. and J.D. BERARDI
ENTERPRISES, INC.

Defendants.

Plaintiff, Nicholas Rivera, by his attorneys, Burden Hafner & Hansen, LLC, having filed a Motion on January 14, 2021, seeking an Order granting the following relief: (a) An Order pursuant to CPLR §3212 granting Plaintiff Summary Judgment against Defendant, Matthew J. Killion, on the issues of negligence, proximate cause and serious injury; (b) An Order pursuant to CPLR §3212 granting Plaintiff Summary Judgment against Defendant, 93 NYRPT, LLC, on the issues of negligence, proximate cause and serious injury; (c) An Order pursuant to CPLR §3212 granting Plaintiff Summary Judgment against Defendant, J. Rental, Inc., on the issues of negligence, proximate cause, and serious injury; (d) An Order pursuant to CPLR §3212 granting Plaintiff Summary Judgment against Defendant, J.D. Berardi Enterprises, Inc., on the issues of negligence, proximate cause and serious injury; (e) An Order pursuant to CPLR §3212 striking Defendant, J. Rental's, First, Second, Fifth and Sixth Affirmative Defenses raised in its Answer to Plaintiff's Amended Complaint dated July 23, 2019; (f) An Order pursuant to CPLR §3212

striking Defendant, Matthew J. Killion's, First and Fourth Affirmative Defenses raised in its Answer to Plaintiff's Amended Complaint dated July 25, 2019; (g) An Order pursuant to CPLR §3212 striking Defendant, 93 NYRPT, LLC's, First, Sixth and Seventh Affirmative Defenses raised in its Answer to Plaintiff's Amended Complaint dated September 9, 2019; (h) An Order pursuant to CPLR §3212 striking Defendant, J.D. Berardi Enterprises, Inc.'s, First, Second, Third, and Fifth Affirmative Defenses raised in its Answer to Plaintiff's Amended Complaint dated September 19, 2019; and (i) An Order granting such other and further relief as the Court deems just and proper;

Defendant, Matthew Killion, having filed a Cross-Motion on January 22, 2021, for an Order pursuant to CPLR § 3212 granting Summary Judgment and dismissing Plaintiff's Complaint and any Cross-Claims on the grounds that: (a) Plaintiff, Nicholas Rivera's own negligence was the sole proximate cause of the accident; (b) Plaintiff, Nicholas Rivera did not suffer a "serious injury" under at least three of the four categories he's alleged as defined under New York Insurance Law §5102; and (c) such other and further relief as to the Court may appear just and proper;

Defendant, J.D. Berardi Enterprises, Inc., having filed a Cross-Motion on January 22, 2021, for an Order pursuant to CPLR § 3212 seeking the following relief: (a) Dismissal of Plaintiff's Complaint against J.D. Berardi Enterprises, Inc.; (b) Dismissal of all Cross-Claims asserted by Co-Defendants, Matthew J. Killion, 93 NYRPT and J. Rental, Inc., asserted against J.D. Berardi Enterprises, Inc.;

Defendant, J. Rental, Inc., having filed a Cross-Motion on January 22, 2021, for an Order pursuant to CPLR § 3212 granting Summary Judgment and dismissing the Complaint and any and all Cross-Claims against J. Rental, Inc. in their entirety, on the merits and with prejudice and

for such other and further relief as the Court may deem just and proper, together with the costs and disbursements of the Motion; and

Defendant, 93 NYRPT, having filed a Cross-Motion on January 26, 2021, for an Order pursuant to CPLR § 3212 dismissing Plaintiff's Complaint and for such other and further relief as the Court deems just and proper;

NOW upon reading and filing the Notice of Motion dated January 14, 2021, together with the accompanying supporting Affirmation of Phyliss A. Hafner, Esq., with exhibits, affirmed on January 14, 2021, the Affidavit of Plaintiff, Nicholas Rivera, with exhibits, sworn to on January 14, 2021, and the Affidavit of Carl Berkowitz, Ph.D., with exhibits, sworn to on January 9, 2021, all submitted in support of Plaintiff's Motion for Summary Judgment; the Affirmation of Michael P. Schug, with exhibits, e-filed on February 16, 2021, submitted in opposition to Plaintiff's Motion for Summary Judgment; the Affirmation of Steven E. Peiper, Esq., e-filed on February 16, 2021, submitted in opposition to Plaintiff's Motion for Summary Judgment; the Affirmation of Samantha Catone, Esq., with exhibits, affirmed on January 22, 2021 submitted in opposition to Plaintiff's Motion for Summary Judgment; the Affidavit of Kenneth Pearl, with exhibits, sworn to on February 16, 2021, submitted in opposition to Plaintiff's Motion for Summary Judgment; and the Reply Affirmation of Phyliss A. Hafner, Esq., with exhibits, affirmed on February 18, 2021, the Reply Affirmation of Phyliss A. Hafner, Esq., with exhibits, affirmed on February 19, 2021, the Affidavit of Carl Berkowitz, Ph.D., with exhibits, sworn to on February 19, 2021, submitted in further support of Plaintiff's Motion for Summary Judgment;

NOW upon reading and filing the Notice of Cross-Motion dated January 22, 2021, together with the accompanying supporting Affirmation of Michael Schug, Esq., with exhibits, e-filed on January 22, 2021, submitted in support of Defendant, Matthew J. Killion's Cross-Motion

for Summary Judgment and in opposition to Plaintiff's Motion for Summary Judgment; the Affirmation in Opposition of Phyliss A. Hafner, Esq., with exhibits, affirmed on February 16, 2021 and the Affidavit of and the Affidavit of Carl Berkowitz, Ph.D., with exhibits, sworn to on January 9, 2021, all submitted in opposition to Defendant, Matthew J. Killion's Cross-Motion for Summary Judgment;

NOW upon reading and filing the Notice of Cross-Motion dated January 22, 2021, together with the accompanying supporting Affirmation of Steven E. Peiper, Esq., with exhibits, affirmed on January 22, 2021, submitted in support of Defendant, J.D. Berardi Enterprises, Inc.'s, Cross-Motion for Summary Judgment; and the Affirmation in Opposition of Phyliss A. Hafner, Esq., with exhibits, affirmed on February 16, 2021 and the Affidavit of Carl Berkowitz, Ph.D., with exhibits, sworn to on January 9, 2021, and the Affidavit of Carl Berkowitz, Ph.D., with exhibits, sworn to on February 19, 2021 all submitted in opposition to Defendant, J.D. Berardi Enterprises, Inc.'s Cross-Motion for Summary Judgment;

NOW upon reading and filing the Notice of Cross-Motion dated January 22, 2021, together with the accompanying supporting Affirmation of Samantha Catone, Esq., with exhibits, affirmed on January 22, 2021 submitted in support of Defendant, J. Rental, Inc.'s, Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment; and the and the Affirmation in Opposition of Phyliss A. Hafner, Esq., with exhibits, affirmed on February 16, 2021 and the Affidavit of Carl Berkowitz, Ph.D., with exhibits, sworn to on January 9, 2021, and the Affidavit of Carl Berkowitz, Ph.D., with exhibits, sworn to on February 19, 2021 all submitted in opposition to Defendant J. Rental, Inc.'s Cross-Motion for Summary Judgment; and the Reply Affirmation of Samantha V. Catone, Esq., affirmed on February 18, 2021, submitted in further support of Defendant J. Rental, Inc.'s Cross-Motion for Summary Judgment;

NOW upon reading and filing the Notice of Cross-Motion dated January 25, 201, together with the accompanying supporting Affirmation of Nelson E. Schule, Jr., Esq., with exhibits, affirmed on January 25, 2021 and the Affidavit of Kenneth Pearl, without exhibits, submitted in support of Defendant, 93 NYRPT, LLC's Cross-Motion for Summary Judgment; the Affirmation in Opposition of Phyliss A. Hafner, Esq., with exhibits, affirmed on February 16, 2021 and the Affidavit of Carl Berkowitz, Ph.D., with exhibits, sworn to on January 9, 2021 and the Affidavit of Carl Berkowitz, Ph.D., with exhibits, sworn to on February 19, 2021 all submitted in opposition to Defendant, 93 NYRPT, Inc's Cross-Motion for Summary Judgment;

NOW, upon hearing Burden, Hafner & Hansen, LLC (Phyliss A. Hafner, Esq. of counsel) in support of Plaintiff, Nicholas Rivera's Motion for Summary Judgment and in opposition to the Cross-Motions for Summary Judgment filed by Defendant, Matthew J. Killion, Defendant, 93 NYRPT, Defendant, J. Rental, Inc. and J.D. Berardi Enterprises, Inc.; Law Offices of Destin C. Santacrose (Michael Schug, Esq. of counsel) in support of Defendant, Mathew J. Killion's Cross-Motion for Summary Judgment and in opposition to Plaintiff, Nicholas Rivera's Motion for Summary Judgment; Hurwitz & Fine, P.C. (Steven E. Peiper, Esq. of counsel) in support of Defendant J.D. Berardi Enterprises, Inc.'s Cross-Motion for Summary Judgment and in opposition to Plaintiff, Nicholas Rivera's Motion for Summary Judgment; Goldberg Segalla LLP (Samantha V. Catone, Esq. of counsel) in support of Defendant, J. Rental, Inc.'s Cross-motion for Summary Judgment and in opposition to Plaintiff Nicholas Rivera's Motion for Summary Judgment; and Kenney Shelton Liptak Nowak, LLP (Nelson E. Schule, Jr., Esq. of counsel) in support of Defendant 93 NYRPT's Cross-Motion for Summary Judgment and in opposition to Plaintiff, Nicholas Rivera's Motion for Summary Judgment;

After due deliberation and upon submission of the parties, it is hereby,

ORDERED, that Defendant, 93 NYRPT, is granted permission to file a belated Cross-Motion for Summary Judgment, despite having not filed a Motion seeking relief for same; and it is further

ORDERED, that Defendant Matthew J. Killion's, Cross-Motion for an Order pursuant to CPLR § 3212 granting Summary Judgment and dismissing Plaintiff's Complaint and any Cross-Claims is denied with prejudice; and it is further

ORDERED, that Plaintiff, Nicholas Rivera's, Motion for Summary Judgment pursuant to CPLR § 3212 on the issue of negligence against Defendant, Matthew J. Killion, is denied with prejudice as the Court having found a question of fact; and it is further

ORDERED, that Plaintiff, Nicholas Rivera's, Motion for Summary Judgment pursuant to CPLR § 3212 on the issue of negligence against Defendant, J.D. Berardi, is denied with prejudice as the Court having found a question of fact; and it is further

ORDERED, that Plaintiff, Nicholas Rivera's, Motion for Summary Judgment pursuant to CPLR § 3212 on the issue of negligence against Defendant, J. Rental is denied with prejudice; and it is further

ORDERED, that Plaintiff, Nicholas Rivera's, Motion for Summary Judgment pursuant to CPLR § 3212 on the issue of negligence against Defendant, 93 NYRPT is denied with prejudice as the Court having found a question of fact; and it is further

ORDERED, that Plaintiff, Nicholas Rivera's, Motion for Summary Judgment pursuant to CPLR § 3212 to strike Defendant J. Rental's First, Second, Fifth and Sixth Affirmative defenses raised in its Answer to Plaintiff's Amended Complaint dated July 23, 2019 is denied with prejudice; and it is further

ORDERED, that Plaintiff, Nicholas Rivera's, Motion for Summary Judgment pursuant to CPLR § 3212 to strike Defendant, Matthew J. Killion's, First and Fourth Affirmative Defenses raised in its Answer to Plaintiff's Amended Complaint dated July 25, 2019 is denied as the Court having found that there is a question of fact; and it is further

ORDERED, that Plaintiff, Nicholas Rivera's, Motion for Summary Judgment pursuant to CPLR § 3212 to strike Defendant, 93 NYRPT, LLC's First, Sixth and Seventh Affirmative Defenses raised in its Answer to Plaintiff's Amended Complaint dated September 19, 2019 is denied as the Court having found that there is a question of fact; and it is further

ORDERED, that Plaintiff, Nicholas Rivera's, Motion for Summary Judgment pursuant to CPLR § 3212 to strike Defendant, J.D. Berardi's First, Second, Third and Fifth Affirmative Defenses raised in its Answer to Plaintiff's Amended Complaint dated September 19, 2019 is denied as the Court having found that there is a question of fact; and it is further

ORDERED, that Plaintiff, Nicholas Rivera's, Motion for Summary Judgment on the issue of proximate cause and the serious injury categories of significant disfigurement and a medically determined injury or impairment which has prevented him from performing substantially of the material act which constitute his usual and customary daily activities for not less than 90 days during the 180 days immediately following the June 6, 2016 accident is granted; and it is further

ORDERED, that Plaintiff, Nicholas Rivera's, Motion for Summary Judgment on the issue of proximate cause and the serious injury categories of permanent consequential limitation of use of a body organ and/or member and a significant limitation of use of a body function or system is denied as the Court having found that there is a question of fact; and it is further

ORDERED, that Defendant Matthew J. Killion’s, Cross-Motion for an Order pursuant to CPLR § 3212 granting Summary Judgment and dismissing Plaintiff’s Complaint is denied with prejudice as the Court having found a question of fact; and it is further

ORDERED, that Defendant Matthew J. Killion’s, Cross-Motion for an Order pursuant to CPLR § 3212 on the grounds that Plaintiff, Nicholas Rivera, did not suffer a “serious injury” is denied with Court having found that there are questions of fact as to whether or not Plaintiff, Nicholas Rivera, has sustained a permanent consequential limitation of use of a body organ and/or member and a significant limitation of use of a body function or system and it is denied as to the categories of significant disfigurement and a medically determined injury or impairment which has prevented him from performing substantially of the material act which constitute his usual and customary daily activities for not less than 90 days during the 180 days immediately following the June 6, 2016 accident; and it is further

ORDERED, that Defendant J.D. Berardi Enterprises, Inc.’s Cross-Motion for Summary Judgment pursuant to CPLR § 3212 seeking Dismissal of Plaintiff’s Complaint is denied with prejudice as the Court found that there is a question of fact;

ORDERED, that Defendant J.D. Berardi Enterprises, Inc.’s, Cross-Motion for Summary Judgment pursuant to CPLR § 3212 seeking dismissal of all Cross-Claims asserted by Co-Defendants, Matthew J. Killion, 93 NYRPT and J. Rental, Inc., asserted is denied with prejudice;

ORDERED, that Defendant, J. Rental, Inc.’s, Cross-Motion for an Order pursuant to CPLR § 3212 granting Summary Judgment and dismissing the Complaint and any and all Cross-Claims against J. Rental, Inc. is granted in its entirety; and it is further

ORDERED, that Defendant, 93 NYRPT’s, Cross-Motion for Summary Judgment to dismiss Plaintiff’s Complaint is denied with prejudice as the Court found that there is a question

of fact.

Dated: September 15, 2021



HON. E. JEANNETTE OGDEN, J.S.C.

~~GRANTED:~~

/