

Van Manen v New York City Tr. Auth.

2021 NY Slip Op 33006(U)

December 6, 2021

Supreme Court, Richmond County

Docket Number: Index No: 150127/2019

Judge: Thomas P. Aliotta

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART TR-2

-----X HON. THOMAS P. ALIOTTA

BRIAN VAN MANEN,
Plaintiff,

-against-

DECISION AND ORDER

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION
AUTHORITY, MTA BUS COMPANY,
ANGELO ORLANDO and JOSE L. ALMODOVAR,

Index No: 150127/2019
Motion No. 001, 002 & 003

Defendants.

-----X

Recitation of the following documents numbered "1" through "9" were marked fully submitted on October 4, 2021.

| | Papers Numbered |
|---|--------------------|
| MS_001 Defendant Almodovar's Motion for Summary Judgment with Supporting Papers..... | 1, 2 |
| MS_001 & 002 Plaintiff's Affirmation in Opposition to Almodovar's Motion and in Support of Cross-Motion with Supporting Papers..... | 3, 4 |
| MS_001 Defendant Aldomovar's Reply Affirmation | 5 |
| MS_002 Defendant Aldomovar's Affirmation..... | 6 |
| in Opposition to Plaintiff's Cross-Motion | |
| MS_002 Defendant MTA's Affirmation in Opposition to Plaintiff's Cross-Motion | 7 |
| Plaintiff's Reply Affirmation to Defendant | |
| MS_002 MTA's Opposition to Cross-Motion..... | 8 |
| MS_003 Defendant MTA's Motion for Summary Judgment with Supporting Papers..... | 9, 10 |
| MS_003 Plaintiff's Affirmation in Opposition to Defendant MTA's Motion for Summary Judgment..... | 11 |

MS_003 Defendant MTA’s Reply Affirmation12

Upon the foregoing, defendants’ respective motions for summary judgment (MS_001 and MS_003) dismissing the complaint on the grounds that plaintiff did not sustain a “serious injury” is denied. Plaintiff’s cross-motion (MS_002) for summary judgment as to liability is granted but denied as to “serious injury” in accordance with the following:

Plaintiff commenced this action for personal injuries he allegedly sustained as the result of a motor vehicle accident on January 26, 2018 at the intersection of Forest Avenue and Morningstar Road in Staten Island, New York. Plaintiff was a passenger on a bus identified as bus #8184, when it collided with defendant Aldomovar’s motor vehicle. Plaintiff’s back hit the seat as a result of being moved backwards and forwards during the collision.

Defendants Jose Aldomovar (001), NYCTA, MTA & MTA Bus Co. and Angelo Orlando (MTA defendants) (003) now move for an Order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff’s complaint on the grounds that plaintiff did not incur a “serious injury” as defined under NY Insurance Law 5102(d).

Plaintiff opposes the motion and cross-moves for summary judgment (002) as to liability contending that as a passenger on a bus he cannot be held responsible for the happening of the accident; and as to damages, for having sustained a serious injury under Insurance Law 5102(d).

Plaintiff claims that as a result of the accident, he sustained various personal injuries including but not limited to herniated nucleus pulposus with annular tear at L5-S1; L4-L5 disc bulge; L5 radiculopathy, internal derangement bilateral shoulders; and thoracic spine pain. Plaintiff alleges he was confined to bed for one month and to his home for two months immediately following the accident. Additionally, plaintiff alleges that he was confined to bed

for one additional month and his home for four additional months, following a discectomy on May 17, 2018.

Defendants allege that plaintiff's injuries are pre-existing and not causally related to the accident. In support of their motions for summary judgment defendants attach, *inter alia*, the affirmed report of Dr. Arnold T. Berman, a board-certified orthopedic surgeon who examined plaintiff on July 8, 2020, as part of the independent medical examination. In sum, Dr. Berman diagnosed plaintiff with resolved thoracic strain/sprain and resolved lumbar sprain/strain with no residuals, no objective finds and no radiculopathy. Dr. Berman also concluded that plaintiff was postoperative for a lumbar discectomy done on L5-S1 for degenerative joint disease and not for this injury. Dr. Berman also reviewed the MRI findings and determined they did not indicate acute injury.

In opposition, plaintiff attaches, *inter alia*, a report from the Gerling Center for Musculoskeletal and Neurological Care dated March 2, 2021. The main findings of the examination and report were that the plaintiff suffered from a lumbar disc herniation with radiculopathy and received a discectomy hemi-laminectomy L5-S1annuloplasty on May 17, 2018. Although Plaintiff improved after the surgery, he still suffered from persistent severe back pain and was prescribed physical therapy and home exercises. During the physical examination of the plaintiff, range of motion losses were noted in forward flexion as well as extension in the thoracolumbar spine. It was Dr. Michael Gerling's professional opinion, that because plaintiff was asymptomatic prior to the accident, the injury to his lumbar spine was causally related to the accident.

In addition, plaintiff states in an affidavit that immediately following the surgery he was confined to bed for approximately two months. Following the surgery, he continued medical

treatment, including extensive physical therapy. He continues to treat with Dr. Gerling to this day. Plaintiff also states that he missed approximately four months of work following the surgery. When he returned to work, he was placed on light duty. Due to severe back pain, he remains on light duty until the present time. Plaintiff cannot lift more than five to ten pounds or perform household chores that require moving or lifting without assistance.

A defendant moving for summary judgment based on the absence of “serious injury” must make a prima facie showing that plaintiff did not sustain a serious injury as a result of the underlying collision. Once this is established, it becomes plaintiff’s burden to come forward with sufficient evidence to raise a triable issue of fact on “serious injury” or the action will be dismissed (see *Gaddy v. Eycler*, 79 NY2d 955 [1992]).

Here, it is the opinion of this Court that defendants have successfully met their *prima facie* evidentiary burden by submitting the affirmed report of an orthopedic surgeon, Dr. Arnold T. Berman, who examined plaintiff and concluded that there was no evidence of an orthopedic disability with regard to his lumbar spine as a result of the subject accident. While Dr. Berman noted that plaintiff had initially suffered lumbar sprain/strain, he also reported that these conditions had resolved. Dr. Berman also reported that plaintiff has full range of motion. According to Dr. Berman, plaintiff can continue in his current employment full-time, and may continue with the activities of daily living without restriction. Plaintiff, however, has submitted reliable medical proof that his injuries were traumatically induced and permanent so as to limit him from performing all or substantially all of his daily material acts for a period longer than the statutorily prescribed period. Where the respective experts do not agree, credibility is not an issue in a motion for summary judgment (see *Rappaport v. Sear Roebuck*, 28 AD3d 449 [2d Dept 1992]). The findings of plaintiff’s expert are sufficient to raise triable issues of fact

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regarding the claims of serious injury under several categories of Insurance Law 5102(d)(see *Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002]).

Plaintiff also moves for summary judgment as to liability contending that as a passenger on a NYCTA bus, plaintiff cannot in any way be held comparatively negligent on this issue. As the Appellate Division found in *Garcia v. Tri-County Ambulette Service*, 282 AD2d 206 [2001], innocent passengers who cannot possibly be found at fault are entitled to partial summary judgment on the issue of culpable conduct regarding liability (see *Medina v. Rodriguez*, 92 AD3d 850 [2nd Dept 2012]; *Delgado v. Martinez Family Auto*, 113 AD3d 426 [1st Dept 2014]; *Petty v. Dumont*, 77 AD3d 466 [1st Dept 2010]; *Gallo v. Jairath*, 122 AD3d 795 [2nd Dept 2014]; CPLR 3212[g]; *Anzel v. Pistorino*, 105 AD3d 784 [2nd Dept 2013]). Moreover, a defendant cannot raise a triable issue of fact on a summary judgment motion by pointing to the comparative negligence of another party. Accordingly, that branch of plaintiff's motion is granted.

The court has considered the remaining arguments and finds them to be unavailing.

Accordingly, it is hereby

ORDERED that defendants' motions for summary judgment as to threshold (MS_001 and MS_003) are denied in their entirety; and it is further

ORDERED that branch of plaintiff's cross-motion for summary judgment as to liability is granted (MS_002); and it is further

ORDERED that branch of plaintiff's cross-motion for summary judgment as to serious injury is denied (MS_002); and it is further

ORDERED, that the Clerk shall enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

ENTER;



HON. THOMAS P. ALIOTTA, J.S.C.

Dated: December 6, 2021