

Colon v Soundview Transp., Ltd.

2021 NY Slip Op 33025(U)

December 7, 2021

Supreme Court, Bronx County

Docket Number: Index No. 20815/2017E

Judge: Bianka Perez

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.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14**

-----X

CHARLENE COLON,
Plaintiff,

Index №. 20815/2017E

-against-

Hon. BIANKA PEREZ

Justice Supreme Court

SOUNDVIEW TRANSPORTATION, LTD., MICHAEL
A. CASANOVAS, ZENG QI DONG, JAMIE R. REYES
ALVAREZ AND STEVEN REYES, SALVADOR
ANTONIO DALMASI, and LUIS A. ROSA,

Defendants.

-----X

ZENG QI DONG,
Third Party Plaintiff,

SALVADOR ANTONIO DALMASI and LUIS A.
ROSA,

Defendants.

-----X

The following papers NYSCEF Doc. # 145 to 247 were read on this motion (Seq. No. #008, 009, 010, 011) for SUMMARY JUDGMENT DEFENDANT noticed on July 29, 2020.

Notice of Motion – Affirmation in Support - Exhibits Annexed	No(s).
Affirmation in Opposition and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, defendants move for summary judgment, dismissing the complaint of the plaintiff Charlene Colon for her alleged failure to satisfy the “serious injury” threshold as defined by New York Insurance Law §5102(d). Plaintiff opposes the motion. Defendants Rosa and Dalmasi further move for partial summary judgment on the issue of liability against plaintiff. The motions are granted in part, denied in part, in accordance with this order.

Defendants’ Threshold Motions

When a defendant seeks summary judgment alleging that a plaintiff does not meet the “serious injury” threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (Franchini v. Plameri, 1 N.Y.3d 536 [2003]). “Such evidence includes ‘affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim’” (Spencer v. Golden Eagle, Inc., 82 A.D.3d 589, 590 [1st Dept. 2011][internal quotations omitted]). A defendant may also meet his or her summary judgment burden with sufficient

medical evidence demonstrating that the plaintiff's injuries are not causally related to the accident (see *Farrington v. Go On Time Car Service*, 76 A.D.3d 818 [1st Dept. 2010], citing *Pommels v. Perez*, 4 N.Y.3d 566, 572 [2005]). Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (see *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 [2002]).

In this case, Defendants established that Plaintiff's alleged injuries were not permanent or significant in nature. Defendants accomplished this by submitting a sworn report from orthopedic surgeon Dr. Raghava R. Polavarapu who found normal or near-normal ranges of motion in the allegedly injured body parts, and all diagnostic testing was either normal or negative (*Riollano v. Leavey*, 173 A.D.3d 494, 495 [1st Dept. 2019]). The moving third-party defendants join in the motion, relying upon Dr. Polavarapu's conclusions in support.

In opposition to the motion, Plaintiff successfully raised a triable issue of fact as to whether she sustained a "permanent consequential" or "significant" limitation of use of her lumbar and cervical spine as well as both her left and right knee. Plaintiff submitted affirmed treatment records showing that he complained of pain and had significant range-of-motion limitations in the injured body parts shortly after the accident and more recently. In a narrative summary, treating physician Dr. David Kreshover reports recent persisting limitations in the cervical and lumbar spine, left and right knees. He concludes that Plaintiff sustained personal injuries that were causally-related to the subject motor vehicle accident.

At a more recent examination, Dr. Kreshover continued to find significant range-of-motion limitations in plaintiff's cervical and lumbar spine. He opines that Plaintiff sustained a permanent partial disability in that treatment area as a result of this motor vehicle accident. The above submissions are sufficient to raise fact issues as to whether Plaintiff sustained a "permanent consequential" or "significant" limitation of use of his spine as a result of this accident (*Encarnacion v. Castillo*, 146 A.D.3d 600, 601 [1st Dept. 2017]). Contrary to Defendants' contentions, their medical expert did not establish that Plaintiff's spinal injury was pre-existing. Even if they did, Plaintiff's submissions in opposition raise issues of fact (see *Yuen v. Arka Memory Cab Corp.*, 80 A.D.3d 481, 481-82 [1st Dept. 2011]).

Since there remain issues of fact as to whether Plaintiff sustained a serious injury to her cervical and lumbar spine and both knees, she may recover for any other injury sustained in the accident as well, even though it does not meet the "serious injury" threshold (see, e.g., *Bonilla v. Vargas-Nunez*, 147 A.D.3d 461, 462 [1st Dept. 2017]).

Defendants, however, established their entitlement to dismissal of Plaintiff's "90/180 day" injury claim. Plaintiff admitted at deposition that she missed a week of work immediately following the accident, which is fatal to her "90/180 day" injury claim (see *Williams v. Perez*, 92 A.D.3d 528 [1st Dept. 2012]), even if she only returned to modified or light duty work (*Pakeman v. Karekezia*, 98 A.D.3d 840, 841 [1st Dept. 2012]). Finally, there is no evidence on this record that Plaintiff sustained a "permanent loss of use" of any body part - which requires a "total" loss of use (*Swift v. New York City Transit Authority*, 115 A.D.3d 507, 509 [1st Dept. 2014]).

Defendant's Liability Motion

Plaintiff commenced the instant action to recover for injuries they allegedly sustained in a motor vehicle accident that occurred on September 16, 2016 while travelling on the westbound Cross Bronx Expressway at its intersection with the George Washington Bridge in New York, New York. Defendants Luis A. Rosa and Salvador Antonio Dalmasi now seek summary judgment on the basis that his vehicle was struck in the rear by a vehicle operated by plaintiff Charlene Colon. Plaintiff, in turn, opposes, arguing that her vehicle was struck in the rear and pushed into Rosa's vehicle by co-defendants Jamie R. Reyes Alvarez and Steven Reyes, who failed to offer any non-negligent explanation for causing the rear end collision with defendant and plaintiff. According to the record before the court, it appears defendant and third-party plaintiff Zeng Qi Dong merged into the lane occupied by the remaining parties, causing rapid braking which led to a chain of collisions involving five vehicles.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]). "It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate non-negligent explanation for the accident." (*Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept. 2010] citing *Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]; *Agramonte v City of New York*, 288 AD2d 75, 76 [1st Dept. 2001]; see also *Dattilo v Best Transp. Inc* 79 AD3d 432 [1st Dept. 2010]).

In this case, defendants failed established a prima facie case of negligence on the part of plaintiff, as plaintiff testified that the accident occurred when the vehicle she was operating was struck in the rear while lawfully moving westbound on the Cross Bronx Expressway. Specifically, defendant and third-party plaintiff Dong testified that he made a safe and legal lane change when a vehicle collided with the rear of his automobile. However, plaintiff Colon testified that Dong's vehicle "drift[ed] into her lane of traffic," forcing her to a complete stop which precipitated her being rear-ended and thrust forward into the Dong automobile. In his EBT testimony, Mr. Dong indicated an unidentified vehicle cut in front of him, causing him to brake suddenly, which resulted in the five-car collision. As there are plainly questions of fact as to how this accident occurred and who should bear responsibility for the various damages, a granting of summary judgment would not be appropriate on this record.

Accordingly, it is hereby

ORDERED, that Defendants' motion for summary judgment is granted only to the extent of dismissing Plaintiff's claims that he sustained a "permanent loss of use," a "90/180 day" injury

claim, and any claim of serious injury as a result of lumbar and cervical spine and knee injuries, and it is further,

ORDERED, that Defendants' motion for summary judgment on threshold is otherwise denied, and it is further,

ORDERED, that Defendants Rosa and Dalmasi's motion for summary judgment on the issue of liability is denied.

Movant shall serve a copy of this order, together with notice of entry, on all parties within 30 days of the date of entry of this order.

This constitutes the Decision and Order of this Court.

Dated: December 7, 2021

Hon.  _____
BIANKA PEREZ, J.S.C.

-
- | | | |
|------------------------------|--|---|
| 1. CHECK ONE..... | <input type="checkbox"/> CASE DISPOSED IN ITS ENTIRETY | <input type="checkbox"/> CASE STILL ACTIVE |
| 2. MOTION IS..... | <input type="checkbox"/> GRANTED | <input type="checkbox"/> DENIED <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER |
| 3. CHECK IF APPROPRIATE..... | <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> SCHEDULE APPEARANCE |
| | <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFEREE APPOINTMENT |