

Bell-Moran v Fink

2021 NY Slip Op 33429(U)

March 25, 2021

Supreme Court, Westchester County

Docket Number: Index No.: 71127/2018

Judge: James W. Hubert

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as a matter of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
CRISTIN BELL-MORAN AND JOSEPH MORAN,

Plaintiffs,

Motion Sequence No.: 1

-against-

DECISION & ORDER

STEVEN J. FINK AND LISA ELAINE GREEN,

Index No.: 71127/2018

Defendants.

-----X
Hubert, J.S.C.

The following documents were read on this motion by Defendants Steven J. Fink and Elaine Green (collectively, "Defendants") for an order pursuant to CPLR § 3212 granting summary judgment dismissing the Complaint of Cristin Bell-Moran and Joseph Moran (collectively, "Plaintiffs"):

- Notice of Motion - Affirmation of Bora Seo, Esq. - Exhibits A -M
- Affirmation in Opposition of Thomas G. Cascione, Esq. - Exhibits A - E
- Reply Affirmation in Further Support of Bora Seo, Esq.- Exhibit A

Upon consideration of all of the foregoing, and for the following reasons, Defendants' summary judgment motion is denied.

Relevant Procedural Background

This action was commenced by the filing of a Summons and Verified Complaint by Plaintiffs' counsel via the New York State Courts E-filing system ("NYSCEF") on December 31, 2018 (*see* NYSEF Doc. No. 1 and Defendants' Affirmation in Support, Exhibit A).

The complaint alleges that on December 18, 2016 on Farragut Avenue near Green Street in Hastings-on- Hudson, New York, a motor vehicle owned by Defendant Lisa Elaine Green (“Green Defendant”) and operated by Defendant Steven J. Fink (“Fink Defendant”) came into contact with a motor vehicle owned and operated by Plaintiff Joseph Moran (“Moran Plaintiff”), in which vehicle Plaintiff Cristin Bell-Moran (“Bell-Moran Plaintiff”) was a front passenger. Plaintiffs contend that Defendants were negligent, careless and reckless in the ownership and operation of their vehicle and that said negligence caused Plaintiffs to sustain severe and permanent personal injuries, as defined by § 5102(d) of the Insurance Law of the State of New York (“Insurance Law”).

Defendants appeared in this action by service of a Verified Answer with Counterclaim as against the Moran Plaintiff, filed via NYSCEF on February 22, 2019 (*see* NYSCEF Doc. No. 4).

In response to Defendants’ Verified Demand, Plaintiffs served a Verified Bill of Particulars which states, *inter alia*, that Plaintiffs have sustained a serious injury as defined by New York Insurance Law §5102(d), and alleges that the Bell-Moran Plaintiff suffered injuries to her cervical spine, thoracic spine, left shoulder/elbow and left wrist/hand. According to the Bill of Particulars, the Moran Plaintiff suffered injuries to his cervical spine and left and right shoulder as a result of the two-car accident.

The Moran Defendant filed a Reply to Counterclaim via NYSCEF on March 18, 2019 (*see* NYSCEF Doc. No. 6). Plaintiffs were produced for an Examination Before Trial on August 20, 2019. Copies of the Plaintiffs’ deposition transcripts have been annexed to Defendants’ instant motion as Exhibits E and J). A Note of Issue was filed by Plaintiff via NYSCEF on December 13, 2019 (*see* NYSCEF Doc. No. 13).

Defendants filed the instant summary judgment motion via NYSCEF on January 24, 2020 (*see* NYSCEF Doc. No. 14). Plaintiffs filed opposition via NYSCEF on August 4, 2020

pursuant to the parties' so-ordered motion schedule set forth in the Stipulation filed via NYSCEF on March 2, 2020 (*see* NYSCEF Doc. No. 31). Defendants filed Reply papers via NYSCEF on August 12, 2020 (*see* NYSEF Doc. No. 40).

Discussion

Defendants move for an order granting summary judgment dismissing Plaintiffs' complaint on the grounds that Plaintiffs did not sustain a "serious physical injury" as defined by New York Insurance Law § 5102(d) ("No-Fault Law"). Plaintiffs oppose Defendants' motion, and argue Defendants have failed to establish their *prima facie* entitlement to summary judgment and that questions of fact about the existence of a serious injury preclude summary judgment.

"Serious injury" is a threshold issue, and thus, a necessary element of a plaintiff's *prima facie* case. *See, Licari v Elliot*, 57 NY2d 230 (1982); Insurance Law § 5104[a]). Insurance Law § 5102(d) defines "serious injury" as:

a personal injury which results in death; dismemberment; significant disfigurement; fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system ["permanent loss"]; permanent consequential limitation of use of a body organ or member, {"permanent consequential limitation"} significant limitation of use of a body function or system ["significant limitation"]; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute each persons' usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment ["90/180 day"].

Read together, Plaintiffs allege in their Complaint and Bill of Particulars they sustained serious injuries causally related to the accident under the categories of "permanent consequential limitation" and "substantial limitation." Plaintiffs state they are not challenging serious injury under the "90/180" category (*see* Plaintiff's Affirmation in Opposition, ¶ 2). Defendants argue in their moving papers that Plaintiffs cannot prove causally-related serious injury resulting from the

subject vehicular accident as a matter of law under the two categories noted, sufficient to meet the required Insurance Law § 5102 thresholds to recover non-economic damages as a result of the collision.

The proponent of a summary judgment motion carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). In personal injury action, a summary judgment motion seeking to dismiss requires that a defendant establishes a *prima facie* case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*Gaddy v Eycler*, 79 NY2d 955 [1992]). A moving defendant seeking summary judgment on the grounds that the plaintiff's injuries are not serious must establish that the injuries do not meet the threshold promulgated by the statute. *Franchini v Palmieri*, 1 NY3d 536, 537 [2003]. Once the defendant has made such a showing, the burden shifts to the plaintiff to submit *prima facie* evidence, in admissible form, rebutting the presumption that there is no issue of fact as to the threshold question (*see Franchini v Palmieri* 1 NY3d 536, 537).

A defendant can satisfy the initial burden by relying on the sworn or affirmed statements of their own examining physician, plaintiff's sworn testimony, or plaintiff's physician's records (*see Anjona v Calcano*, 7 AD3d 279, 280 (1st Dept 2004)). A defendant can meet its burden of establishing a *prima facie* case of the nonexistence of a serious injury by submitting affidavits of medical experts who examined the plaintiff and noted that plaintiff was not suffering from any disability or consequential injury resulting from the accident (*see Gaddy v Eycler*, 79 NY2d 955, 956-957); *see also Junco v Ranzi*, 288 AD2d 440, 441 [2d Dept 2001]). A defendant can also demonstrate that plaintiff's own medical evidence fails to indicate that plaintiff suffered a serious injury or that the injuries were not causally related to the accident (*see Franchini v Palmier*, 1 NY3d at 537), or that plaintiff's own sworn testimony establishes that the injuries were not

serious (*see Anjona v Calcano*, 7 AD3d 280). The issue of whether a claimed injury falls within the statutory definition of “serious injury” under the Insurance Law is a question of law for the court that may be decided on a summary judgment motion (*see Licari v Elliot*, 57 NY2d at 237).

In support of their motion, Defendants rely upon and have annexed a number of exhibits, including depositions, reports, physician medical examinations and relevant documents obtained in the course of discovery which they argue demonstrate the absence of serious injuries to Plaintiffs (*see* Notice of Motion, Exhibits D - L).

The report of Dr. John R. Denton, the Defendants’ orthopedic surgeon, is cited by Defendants as establishing *prima facie* proof on the question of serious injury demonstrating the absence of any disputed material facts. Dr. Denton’s examination of the Bell-Moran Plaintiff occurred on October 19, 2019. Dr. Denton conducted a number of tests, which, it is claimed, show “resolved sprains/strains in the cervical spine, thoracic spine, left shoulder, left elbow and left wrist, and that “the ranges of motion are considered subjective in the absence of no objective findings.” According to Dr. Denton, the Bell-Moran Plaintiff’s injuries were causally related to the accident but are now “resolved.”

Dr. Marc J. Katzman further examined the Bell-Moran Plaintiff and interpreted her MRIs, noting that degenerative changes to the cervical spine are clearly chronic, pre-existing and unrelated to the accident of December 18, 2016, and that there is “no recent-appearing traumatic disc herniation, extrusion or annua tear.”

Defendants further argue that the affirmation of treating physician Dr. Gerald F. Gaughan, submitted by both Plaintiffs, contains opinions which should be “discredited” as “beyond his scope of practice,” and that he is “an unqualified expert” to challenge the findings of Defendants’ physician. Defendants also argue that Dr. Gaughan’s findings should not be given any weight, as the examinations of Plaintiffs took place months after the accident occurred, and there is no

explanation for the gap in Plaintiffs' medical treatment.

The Plaintiffs, however, seek to refute the Defendants' claim of absence of serious injury and also reference the reports and MRIs from Dr. Gaughan. According to Dr. Gaughan, the Bell-Moran Plaintiff's neck and cervical spine condition constitutes a "permanent disability," and her cervical spine, thoracic spine and left arm have substantial limitations which are all causally related to the accident of December 18, 2016. As to the Moran Plaintiff's injuries, Dr. Gaughan noted that the MRI's of Moran's shoulders showed "probable tears," and concludes that Moran's condition can be characterized as a "lifetime disability." Also, according to Dr. Gaughan, Bell-Moran's injuries were not all pre-existing. He notes a new finding of C6-7 radiculopathy, which was not present approximately three months before the subject accident.

Plaintiffs' opposition papers correctly argue that the opinions given by the expert witnesses are contradictory. Dr. Denton's opinion noted that all injuries of the Bell-Moran Plaintiff are causally connected, but have been resolved. Dr. Katzman, Defendants' radiologist expert, noted that all of the Bell-Moran Plaintiff's injuries are degenerative and pre-existing.

As previously noted, the burden is on the moving party to make a *prima facie* showing of entitlement to summary judgment. Assuming, arguendo, that Defendants have made a *prima facie* showing sufficient to shift that burden to Plaintiffs, the Court finds that Plaintiffs have produced evidentiary proof in admissible form sufficient to require a trial of material issues of fact. The reports and medical evaluations submitted by the Plaintiffs all support claims of serious injury.

It is well-settled that it is not the function of the court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact, or point to the lack thereof. *See Vega v Resani Const. Corp.*, 18 NY3d 499 (2012). "A motion for summary judgment should not be granted where the facts are in dispute,

where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Ruiz v Griffen*, 71 AD3d 1112, 1115 (2d Dept 2010); *see also, Bykov v Brody*, 150 AD3d 808, 809 [2d Dept 2017]) (“resolving questions of credibility, determining the accuracy of witnesses and reconciling the testimony of witnesses are for the trier of fact”). Accordingly, it is hereby:

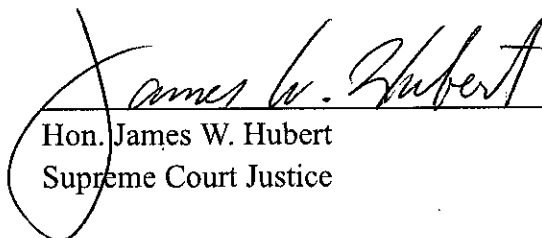
ORDERED, that the motion of Defendants Steven J. Fink and Lisa Elaine Green for summary judgment against Plaintiffs Cristin Bell-Moran and Joseph Mora is denied; and it is further

ORDERED, that Defendants’ counsel shall within ten (10) days after entry hereof serve upon Plaintiffs’ counsel a copy of this Decision and Order with Notice of Entry; and it is further

ORDERED, that this matter is referred to the Settlement Conference Part, for a virtual pre-trial conference to be scheduled by that Part in accordance with existing public health protocols.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
March 25, 2021



Hon. James W. Hubert
Supreme Court Justice