

King v Valdez

2021 NY Slip Op 33959(U)

January 21, 2021

Supreme Court, Queens County

Docket Number: Index No. 702317/2019

Judge: Phillip Hom

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable Phillip Hom
Justice

IA Part 43

SHELTON KING ,

Index
Number: 702317/2019

Plaintiff,

Motion
Date: November 5, 2020

-against-

LEONARDO VALDEZ AND JOHN DOE,

Motion Seq. No. 1

Defendants.

The following papers were read on this motion by Defendants for summary judgment dismissing the complaint on the ground that Plaintiff did not sustain a “serious injury” as defined in NY Insurance Law § 5102(d) and cross motion by Plaintiff Shelton King (“King”) for summary judgment on the issue of liability and dismissing Defendants’ affirmative defense of Plaintiff’s culpable conduct.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion - Affidavits -Exhibits	E 10-24
Affirmation in Opposition.....	E 25-30
Reply Affirmation.....	E 32
Notice of Cross-Motion-Affidavits-Exhibits.....	E 33-38
Affirmation in Opposition to Cross Motion.....	E 51

Upon the foregoing papers it is ORDERED that the Defendants’ motion for summary judgment is denied in its entirety and it is ORDERED Plaintiff’s cross motion for summary judgment is granted.

Background

This is an action to recover damages for personal injuries allegedly sustained by King in a motor vehicle crash when the Defendants’ vehicle allegedly struck King’s vehicle in the rear on November 24, 2018 near JFK Airport in Queens, New York. In his Verified Bill of Particulars, dated March 25, 2019, King alleges that because of the crash, he sustained, among other things: L2/L3 bulging disc indenting the thecal sac; L4/5 broad based central disc herniation impinging the

thecal sac; C2/3 right paracentral disc herniation impinging the thecal sac and C3-4 right paracentral disc herniation impinging the thecal sac.

King alleges in paragraph 20 of his Verified Bill of Particulars that he was confined to bed for about one week and confined to home until the date of his Bill of Particulars except for doctor's appointments. He also states that as a result of his injuries he has not returned to work as of that time. King further alleges in paragraph 20 of the Bill of Particulars that he sustained a medically determined injury or impairment of a non-permanent nature which prevents him from performing substantially all of the material acts which constitute his "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" under NY Insurance Law §5102 [d](8).

The Defendants move for summary judgment dismissing King's complaint, arguing that he did not suffer a serious injury under NY Insurance Law §5102(d). King opposes the motion arguing that there are issues of fact precluding summary relief.

Serious Injury

Insurance Law §5102(d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; 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 such person's 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."

It is well settled that a defendant seeking summary judgment has the initial burden of establishing, by competent evidence, that a plaintiff did not sustain a serious injury causally related to the subject accident (*Franchini v Palmieri*, 1 NY3d 536 [2003]). Once a defendant meets this initial threshold, the burden shifts to plaintiff to offer proof, in admissible form, which creates a material issue of fact requiring a trial (*id.*). A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support a plaintiff's claim (*Grossman v Wright*, 268 AD2d 79 [2d Dept 2000]).

The Defendants have failed to meet their *prima facie* burden. The papers submitted by them failed to adequately address King's claim, set forth in paragraph 20 of his Verified Bill of Particulars that he sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d) (*see Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]; *Aujourd v Singh*, 90 AD3d 686 [2d Dept 2011]; *Rouach v Betts*, 71 AD3d 977 [2d Dept 2010]). King alleges that he sustained, among other things, a serious injury pursuant to New York Insurance Law §5102(8) that prevented him from performance of his usual and customary daily activities for 90 out of the 180 days immediately following the accident. The Defendants submit an Independent Orthopedic Examination Report by Dana A. Mannor, M.D., a board-certified orthopedist who examined King. Dr. Mannor concluded, after performing various objective medical tests that all of King's injuries were resolved.

Dr. Mannor however, failed to relate her findings to Plaintiff's 90/180-day category of serious injury for the period of time immediately following the subject accident in her Independent Orthopedic Examination Report dated March 4, 2020, more than one year and three months after the subject accident of November 24, 2018 (*Encarnacion v Smith*, 70 AD3d 628 [2d Dept 2010]). Under these circumstances, the Court need not consider whether Plaintiff's opposition papers are sufficient to raise a triable issue of fact (*see Held v Heideman*, 63 AD3d 1105 [2d Dept 2009]).

The Cross-Motion

King cross moves for an order granting him summary judgment on the issue of liability and dismissing the Defendants' affirmative defense of King's culpable conduct.

King testified at his deposition that at the time of the crash, he was stopped at a traffic light and was struck in the rear by the Defendants' vehicle causing his vehicle to move forward (*see King EBT transcript at 23 and 26*). It is well settled that with regard to a rear-end collision, a *prima facie* case of negligence is established by proof that a stopped vehicle was hit in the rear (*see Briceno v Milbry*, 16 AD3d 448 [2d Dept. 2005]; *Gaeta v Carter*, 6 AD3d 576 [2d Dept. 2004]). Plaintiff has established his *prima facie* case.

King's *prima facie* showing of negligence can be rebutted if the Defendants come forward with a non-negligent explanation for the impact (*see Gaeta v Carter, supra*). The Defendants' allegation that King stopped suddenly is insufficient to raise a triable issue of fact (*see Cortes v Whelan*, 83 AD3d 763 [2d Dept 2011] *citing Macauley v ELRAC, Inc.* 6 AD3d 584, 585. A sudden stop of a leading vehicle is insufficient to rebut the presumption of non-negligence by the leading vehicle's driver, who stopped abruptly (*see Ayach v Ghazal*, 25 AD3d 742 [2d Dept. 2006]).

Conclusion

The Defendants motion for summary judgment on the ground that King did not sustain a “serious injury” as defined in NY Insurance Law §5102(d) is denied. King’s cross motion for summary judgment on the issue of liability is granted and the Valdez Defendants’ affirmative defense of culpable conduct is stricken from the answer.

This constitutes the decision and order of the Court.

Dated: January 21, 2021


Hon. Phillip Hom, J.S.C.

FILED & RECORDED
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