Diarra v City Bronx Leasing Two Inc.
2021 NY Slip Op 34011(U)
August 30, 2021
Supreme Court, Bronx County
Docket Number: Index No. 31143/2018E
Judge: Bianka Perez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14

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IBRAHIMA DIARRA,

Plaintiff,

-against-

CITY BRONX LEASING TWO INC., and NELSON M. SANCHEZ,

Defendants.

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Index №. 31143/2018E

Hon. BIANKA PEREZ
Justice Supreme Court

The following papers NYSCEF Doc. # 24 to 45 were read on this motion (Seq. No. #002) for SUMMARY JUDGMENT DEFENDANT noticed on March 10, 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 City Bronx Leasing Two Inc. and Nelson M. Sanchez move for summary judgment, dismissing the complaint of the plaintiff Ibrahima Diarra for her alleged failure to satisfy the "serious injury" threshold as defined by New York Insurance Law §5102(d). Plaintiff opposes the motion and cross moves for partial summary judgment on the issue of liability against defendants. The motions are granted in part, denied in part, in accordance with this order.

Defendant's Motion

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. Steven Renzoni 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]). In further support, defendants submit the report of radiologist Dr. Scott Springer whose report concludes that there was no causal relationship between the accident and the complained of injuries and that plaintiff's injuries are degenerative in nature.

In opposition to the motion, Plaintiff successfully raised a triable issue of fact as to whether he sustained a "permanent consequential" or "significant" limitation of use of his lumbar and cervical spine. 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. Jeff Mollins reports recent persisting significant limitations in his left shoulder as well as his cervical and lumbar spine. He concludes that Plaintiff sustained personal injuries that were causally-related to the subject motor vehicle accident.

At a more recent examination, Dr. Mollins 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 he 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 his cervical/lumbar spine and left shoulder, he 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 he missed approximately seven weeks of work immediately following the accident, which is fatal to his "90/180 day" injury claim (*see Williams v. Perez*, 92 A.D.3d 528 [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]).

Plaintiff's Cross-Motion

Plaintiff commenced the instant action to recover for injuries they allegedly sustained in a motor vehicle accident that occurred on August 18, 2018 while travelling southbound on Bronx River Avenue and East 174th Street, Bronx, New York. Plaintiff now seeks summary judgment on the basis that his vehicle was struck in the rear by a vehicle operated by defendant Nelson M.

Sanchez, who failed to offer any non-negligent explanation for causing the rear end collision with plaintiff.

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, plaintiff established a prima facie case of negligence on the part of defendant, as plaintiff testified that the accident occurred when the vehicle they were operating was in struck the rear while slowing to approach a left turn. Defendants failed to submit any non-negligent explanation for this accident. Assertions that the rear-ended driver "stopped short" or "abruptly stopped" is not, in and of itself, sufficient to overcome liability in a rear end accident where, as here, had defendant been following at a safe distance, he would have had an opportunity to slow down to avoid the collision. 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 it is further,

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

ORDERED, that Plaintiff's motion for summary judgment is granted, and plaintiff is entitled to summary judgment on the issue of defendant's liability, and it is further,

ORDERED, that Plaintiff's motion for summary judgment dismissing defendant's affirmative defenses in his answers for comparative negligence is granted,

Plaintiff 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: August 30, 2021 **Hon.** _____
BIANKA PEREZ, J.S.C.

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS.....	☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
	☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT