

Consuegra v Watson
2022 NY Slip Op 30146(U)
January 6, 2022
Supreme Court, Kings County
Docket Number: Index No. 505669/2017
Judge: Ingrid Joseph
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At an I.A.S. Term, **Part 83** of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of January, 2022.

P R E S E N T : HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
RAFAEL CONSUEGRA,

Index No.: 505669/2017

Plaintiff,

-against-

RACHEL S. WATSON,

Defendant.

-----X

The following e-filed papers considered herein:

NYSCEF E-filed docs

Notice of Motion/Affirmation in Support/Exhibits Annexed.....	38 - 50
Opposition.....	53 - 54
Reply.....	55

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KINGS COUNTY CLERK
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In this matter, defendant, Rachel S. Watson (“defendant”), moves by notice of motion (Motion Seq. 3) for summary judgment pursuant to CPLR § 3212, dismissing the Summons and Complaint of plaintiff, Rafael Consuegra (“plaintiff”).

Plaintiff commenced this matter on March 21, 2017 to recover damages for personal injuries that he allegedly sustained as a result of a motor vehicle accident that occurred on the Williamsburg bridge (“bridge”) on November 12, 2015. The defendant was eight and-a-half months pregnant and operating a motor vehicle in the middle lane of the bridge when she purportedly fainted before striking plaintiff’s vehicle.

Plaintiff alleges that he sustained injuries in the cervical and lumbar spine as a result of the accident, for which he received epidural injections in both spines and underwent a percutaneous discectomy at L3-L4, L4-L5 and L5-S1. Plaintiff seeks special damages for medical expenses incurred, as well as damages for injuries under the statutory categories

outlined in Section 5102(d) of the New York Insurance Law, including permanent loss of use of a body organ, member, function, or system, a scar, a fracture or a bone, a significant limitation of use of a body function or system, a permanent consequential limitation of use of a body function or system, and a medically determined injury or impairment which prevented the plaintiff from performing substantially all of the material acts which constitutes plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident.

Defendant seeks an award of summary judgment in her favor and against the plaintiff on the issues of liability, based upon her contention that she is not chargeable with negligence due to the unforeseen medical emergency and regarding damages, on the ground that plaintiff did not sustain a serious injury within contemplation of Insurance Law § 5102 (d).

It is well-established law that summary judgment is a drastic remedy in that it deprives the non-movant party of her day in court and should only be granted if there is no material and triable issue of fact (*Sillman v Twentieth Centurv-Fox Film Corp.*, 3 NY2d 395 [1957]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material issues of fact (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557, 562; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404; *see also Giuffrida v Citibank*, 100 NY2d 72 [2003]). Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d at 853). Once this showing has been made, however, the burden shifts the non-moving party to produce evidentiary proof in admissible from sufficient to establish the existence of material issues of fact (*Zuckerman v City of New York*, 49 NY2d at 562).

In this case, the court finds that the defendant has tendered insufficient evidence to eliminate material issues of fact in this case. It is understood that the operator of a vehicle who

becomes involved in an accident as a result of suffering a sudden medical emergency will not be chargeable with negligence as long as the medical emergency was unforeseen (*Doran v Wells*, 101 AD3d 937 (2d Dept 2012)). However, progress notes from the defendant's obstetric & gynecologic exams, without corresponding expert interpretation and opinion, leaves unanswered the question of whether the defendant suffered an unforeseen medical emergency when the accident occurred. The defendant's medical records from Beth Israel are insufficient for the same reason.

Regarding damages, the court finds that the defendant established, through the reports of orthopedist, Dana Mannor, M.S., and radiologist, David A. Fisher, M.D., that plaintiff does not meet the threshold criteria to recover damages under the permanent consequential limitation and significant limitation categories. Defendant further established that plaintiff did not sustain a medically determined injury or impairment of a non-permanent nature that prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for 90 days during the first 180 days immediately following the accident. Plaintiff failed to address the special damages outlined in plaintiff's complaint and verified bill of particulars.

Through the affirmation of John J. McGee, M.D. ("Dr. McGee"), plaintiff raised issues of fact regarding his claims under the permanent consequential and significant limitation categories. Dr. McGee affirmed, within a reasonable degree of medical certainty, that plaintiff sustained 15-50 degree deficits in the range of motion of his cervical spine and 15-40 degree deficits in his lumbar spine, as well as diminished reflexes. Dr. McGee also opined that plaintiff's injuries were causally related to the subject accident. Regarding plaintiff's claim under the 90/180 category, the court finds that Dr. McGee's affirmed opinion, that plaintiff was temporarily "disabled" for at least 90 out of the 180 days immediately following the accident, insufficient, since the legal standard requires a showing that plaintiff suffered a medically

determined injury that prevented him from performing substantially all of the material acts that constituted his usual and customary daily activities for 90 out of the 180 days immediately following the accident.

Based upon the foregoing, defendant's motion for summary judgment (Motion Seq. 3) is granted solely to the extent that plaintiff's claim for the recovery of damages under the 90/180 category is hereby dismissed.

This constitutes the decision and order of the court.

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HON. INGRID JOSEPH, J.S.C.

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