

Wade v Liberty Medicar Inc.

2023 NY Slip Op 31250(U)

April 12, 2023

Supreme Court, Erie County

Docket Number: Index No. 807065/2021

Judge: Raymond W. Walter

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DANAE C WADE,

Plaintiff,

Decision & Order

v.

Index No. 807065/2021

LIBERTY MEDICAR INC., ANGEL DEJESUS
BRUNO RODRIGUEZ,

Defendants.

*James Vandette, Esq.
Attorney for Plaintiff*

*Dennis Bischof, Esq.
Attorney for Defendants*

Walter, J.:

The following papers were read on this motion by Defendant and cross-motion by the Plaintiff for summary judgment pursuant to CPLR § 3212:

	<u>NYSCEF Doc. Nos.</u>
Notice of Motion, Statement of Material Facts, Affirmation, Exhibits	18-28
Cross Motion, Affirmation, Statement of Material Facts, Exhibits	29-49
Memorandum in Opposition and in Support of Cross-Motion	50
Affirmation in Opposition to Cross-Motion, Exhibits	51-52
Reply Affirmation in Support of Cross-Motion	54

This matter arises out of a motor vehicle collision that occurred on November 6, 2020 at the intersection of East Amherst Street and Holden Street in the City of Buffalo. Defendant, Angel Dejesus Bruno Rodriguez was operating a vehicle for Liberty Medicar Inc., when he proceeded into an intersection resulting in a T-bone collision with the Plaintiff, Danae C. Wade.

Defendant moved for Summary Judgment stating that the Plaintiff

failed to suffer a serious injury pursuant to Section 5102(d) of the New York State Insurance Law. Plaintiff cross-moved for an order granting Summary Judgment under CPLR § 3212 on negligence and serious injury under Insurance Law § 5102. Defendant opposed the cross-motion for summary judgment and abandoned his motion, arguing that issues of fact remain on the issue of negligence and serious injury.

The Court recognizes that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact (*see Kelsey v. Degan*, 266 AD3d 843 [4th Dept. 1999]; *McGraw v Ranieri* [3d Dept. 1994]). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]). On a motion for summary judgment, the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*S.J. Capelin Assoc. v. Globe Manufacturing Corp.*, 34 N.Y.2d 338 [1974]). To defeat a motion for summary judgment, the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material issues of fact, and importantly mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient. *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

As the Defendant has abandoned his motion for summary judgment on the issue of serious injury, the Court will turn to the Plaintiff's cross-motion for summary judgment on negligence. It is undisputed that the Plaintiff had the right-of-way through the intersection and the Defendant was required to stop at the stop sign. Pursuant to the testimony of both parties, after having stopped at the stop sign the Defendant proceeded into the intersection where he and the Plaintiff collided.

Section 1142(a) of the Vehicle and Traffic Law states "... every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection." When a driver fails to yield the right of way they are negligent (see PJI 2:80).

The Defendant argues that the Plaintiff was speeding and therefore a jury could find that she was the sole proximate cause of the accident. The Defendant's testimony regarding the Plaintiff's apparent speed, however, is conclusory and ambiguous at best. Regardless, the Court of Appeals has made clear, "that a plaintiff's comparative negligence is no longer a complete defense and its absence need not be pleaded and proved by the plaintiff, but

rather is only relevant to the mitigation of plaintiff's damages," thus, "to obtain partial summary judgment on defendant's liability, [a plaintiff] does not have to demonstrate the absence of his [or her] own comparative fault" (*Lowes v. Anas*, 195 A.D.3d 1579[4th Dept. 2021], quoting *Rodriguez v. City of New York*, 31 N.Y.3d 312, [2018]).

Turning to the Plaintiff's argument regarding serious injury. The Plaintiff must establish proof of injury that satisfies at least one category of the no-fault threshold through objective medical findings (*see Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]).

In the instant case the evidence demonstrates that the Plaintiff's usual and customary activities were curtailed in satisfaction of the 90/180 standard. In support of this claim the Plaintiff submitted the affidavit of Dr. Gerow, the affirmation of Dr. Huckell, and the No-Fault IME of Dr. Mills conducted on November 7, 2021. The evidence shows that Plaintiff was continuously disabled from her job from November 6, 2020 to March 2022. Each of the Drs. provide qualitative and quantitative objective evidence showing disc bulges, herniations, and muscle spasms upon palpation resulting in significant limitations in range of motion in Plaintiff's neck and back. These limitations affected the Plaintiff well beyond the 90/180 period.

The Defense relies on Dr. Mills' defense medical examination ("DME") conducted on February 21, 2022. The DME, however, fails to address the

90/180 category at all. In addition, the DME specifically states that the Plaintiff's injuries are causally related to the accident. The Defendant fails to address Dr. Mills' previous determination in the IME where he specifically restricted the Plaintiff from lifting anything over 25 pounds.

The Plaintiff's medical, chiropractic, and testimonial evidence demonstrates a *prima facie* showing of entitlement to judgment as a matter of law as to the 90/180 serious injury threshold. The Defendant failed to provide any evidentiary proof sufficient to require a trial of material issues of fact.

The various categories of "serious injury" as defined by Insurance Law § 5102 (d) are read in the disjunctive (*see Damas v Valdes*, 84 A.D.3d 87, 92 [2nd Dept. 2011]). The Court, therefore, having made the determination that the plaintiff qualifies for damages under the 90/180 category has no need to make a determination as to any other category.

WHEREFORE, upon the foregoing, it is hereby

ORDERED that Defendant's motion for summary judgment as to serious injury is DENIED, in its entirety; and it is further

ORDERED that Plaintiff's motion for summary judgment on serious injury is GRANTED; and it is further

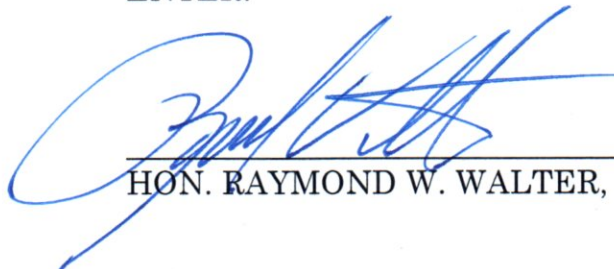
ORDERED that Plaintiff's motion for summary judgment on negligence is GRANTED in part, subject to a determination of the Plaintiff's comparative

negligence, if any; and it is further

ORDERED that this constitutes the decision and order of the court.

DATED: APRIL 12, 2023

ENTER:



HON. RAYMOND W. WALTER, J.S.C.