

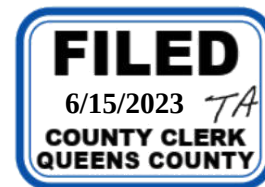
Dejesus v Kerins
2023 NY Slip Op 35166(U)
June 14, 2023
Supreme Court, Queens County
Docket Number: Index No. 703166/2021
Judge: Karina E. Alomar
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Short form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: HONORABLE KARINA E. ALOMAR
JUSTICE

IAS PART 23



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WILLIAM JR. DEJESUS and MARTINE PIERRE-LOUIS,

Plaintiffs,

Index No.: 703166/2021
Motion Date: 05/11/2023
Motion Seq. No.: 1

-against-

RICHARD KERINS and SEAN KERINS,

Defendants.

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The Following numbered papers 16 to 58 read on this motion by defendants Richard Kerins and Sean Kerins (collectively, “defendants”) for an order pursuant to CPLR §3212 and 3211(a)(7) granting summary judgment and dismissing the complaint in as much as plaintiffs allegedly fail to meet the serious injury threshold requirement mandated by Insurance Law Section 5102(d); and plaintiffs cross-motion for an order pursuant to CPLR §3212 granting partial summary judgment on the issue of liability as against defendants

PAPERS	NUMBERED
Notice of Motion, Affidavit, Exhibit.....	EF No: 16 – 32
Notice of Cross-Motion, Affidavit, Exhibit.....	EF No: 33 – 41
Affirmation in Opposition, Affidavit, Exhibit.....	EF No: 42 – 57
Affirmation in Reply.....	EF No: 58

Upon the foregoing papers, it is ordered that defendants’ motion pursuant to CPLR §3212 and 3211(a)(7) and plaintiff’s cross-motion pursuant to CPLR §3212 are decided as follows:

Plaintiff commenced the instant action on February 9, 2021, to recover for personal injuries allegedly sustained as the result of a motor vehicle incident that occurred on October 16, 2020, on Eastbound roadway of the Nassau Expressway at or near Rockaway Blvd, Queens, New York. Plaintiff William Jr. Dejesus (“Dejesus”) was the operator, and plaintiff Martine Pierre-Louis (“Pierre”) was the owner, of a certain motor vehicle bearing New Jersey license plate number 776696R. Defendant Sean Kerins was the owner, and Richard Kerins was the operator, of a certain motor vehicle bearing Connecticut license plate number 0AJAW0. It is alleged that defendant’s vehicle rear-ended plaintiff’s vehicle while plaintiffs were stopped at a red light.

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 (*see, Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also 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” (*see, Alvarez*, 68 NY2d at 324; *see also, Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]). However, failure to make prima facie showing of entitlement to judgment requires denial of

the motion, regardless of the sufficiency of the opposing papers. When the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 NY2d 8, 167 NE2d 328 [1960]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [1991]).

Pursuant to Insurance Law §5104(a), in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss. Pursuant to Insurance Law §5102(d), serious injury means personal injury which results in, inter alia, “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.”

Defendants' summary judgment motion as against plaintiff Martine Pierre-Louis

In support of their motion, defendant submits, inter alia, plaintiff Pierre's deposition transcript dated October 28, 2021. Mrs. Pierre testified that at the time of the accident she was a passenger in a motor vehicle that was operated by her husband. Immediately before the accident, plaintiffs' vehicle was stopped at a red light for about five or ten seconds. Mrs. Pierre testified that their vehicle was hit in the rear which caused the vehicle to be pushed to the middle of the next street. As a result of the impact her body was “jerked forward and snapped backward.” Mrs. Pierre's head and neck were also caused to hit the back of the headrest of the car. After the accident, Mrs. Pierre was taken to Jamaica Medical Center. She further testified that by the time she arrived at the hospital she was experiencing “a throbbing headache and [her] neck and [her] back [were] killing [her].” A week after the accident, Mrs. Pierre sought further medical treatment at Queens Medical Center because she continued to experience throbbing back and neck pain. For the first ninety (90) days of physical therapy, Mrs. Pierre attending physical therapy four days a week. Besides physical therapy Mrs. Pierre also saw a spinal surgeon and pain doctor for her neck and back pain. Thereafter, Mrs. Pierre received injections to her neck and back, and underwent neck and back surgery. After the surgeries, Mrs. Pierre continued to attend physical therapy approximately three times a week.

Furthermore, Mrs. Pierre testified that she was confined to her bed for about a week and confined to her house for about a month. After the first surgery, she was confined to her house for a month and after the second surgery she was confined to her bed for about a week. Mrs. Pierre further testified that as of the date of her deposition, as a result of the accident-related injuries, she experiences a lot of pain while attempting to sleep, has limited range of motion, experiences lower back sores, is unable to sleep, is unable to provide the same physical care for her child as before, is unable to pick up heavy objects, experiences pain while doing chores, has difficulty being sexually intimate with her husband, and is unable to drive anymore.

In favor of their motion defendants also submit, inter alia, Dr. Saran S. Rosner's independent medical examination of plaintiff Pierre conducted on December 3, 2021, and Dr. Eric L. Freeman's report dated November 22, 2021.

Dr. Freeman's orthopedic medical evaluation revealed limited range of motion in the cervical spine flexion, extension, lateral bend to the right and left and rotation to the right and left. It was also noted in the report that the lumbar spine also had limitations in flexion, extension and lateral bend to the right and left. He opined that the claimant had a good recovery from the alleged accident and could not substantiate any significant cervical spine injury. As to the lumbar spine, he stated that the claimant had a percutaneous discectomy and demonstrated only a mild loss of lumbar mobility. Moreover, he stated that with regard to the cervical spine, he could not substantiate any significant cervical spine injury.

Dr. Rosner's examinations reveal normal lumber flexion and extension range of motion. However, the examination also reveals that the cervical range of motion flexion was limited to 25 degrees/60 degrees, extension limited at 40 degrees/50 degrees, and cervical rotation right and left limited at 50 degrees/80 degrees. Dr. Rosner found no evidence of a traumatic injury or any compression or compromise to Ms. Pierre's neural structures at any cervical or lumbar level.

However, the examinations took place outside of the scope of the first 180 days following the subject accident, and the doctors failed to address the claim, clearly set forth in the bill of particulars, that the plaintiff sustained a medically determined injury which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (*see e.g. Mugno v Juran*, 81 AD3d 908, 908 [2d Dept 2011]; *Pinder v Salvatore*, 69 AD3d 823, 823-24 [2d Dept 2010]; *Menezes v Khan*, 67 AD3d 654, 654 [2d Dept 2009]). A physician's normal examination results, coupled with deposition testimony that plaintiff had no restriction in activity, can sometimes overcome this obstacle (*see Kouros v Mendez*, 41 AD3d 786, 788 [2d Dept 2007]).

Here, plaintiff Pierre testified that she was confined to her house for a period of time and continues to experience a lot of pain while attempting to sleep, is unable to pick up heavy objects, experiences pain while doing chores, has difficulty being sexually intimate with her husband, and is unable to drive anymore. As such, there is an issue of fact as to whether plaintiff suffered a serious injury as defined under Insurance Law §5102(d) that is better left to a jury to determine. In as much as the movants failed to meet their prima facie burden, it is unnecessary to examine the sufficiency of plaintiff's opposition papers (*see Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993]; *Wallace v Adam Rental Transp. Inc.*, 68 AD3d 856, 857 [2d Dept 2009]; *Ortiz v S & A Taxi Corp.*, 68 AD3d 734, 735 [2d Dept 2009]).

Defendants' summary judgment motion as against plaintiff William Jr. DeJesus

In support of their motion defendants submit, inter alia, plaintiff William Jr. DeJesus' deposition transcript dated October 28, 2021. Mr. DeJesus testified that as he was stopped at a red light for about ten seconds or more when defendants rear-ended his vehicle. Mr. DeJesus described the impact as heavy and testified that his body was caused to jerk forward and back. Mr. DeJesus' right knee hit the "dash, steering wheel column." Less than a week after the accident, Mr. DeJesus sought further medical treatment at Queens Professional Wellness four to three times a week for a few months. Mr. DeJesus also sought treatment at Linden Orthopedics where he was evaluated, and surgery was recommended. Thereafter, Mr. DeJesus underwent surgery to his right knee and continued medical treatment at ASC of Rockway Beach, where he received injections for his lower back and underwent discectomy surgery. About a month later, Mr. DeJesus went to ACS of Rockaway Beach for follow-up treatment and advised his physician that he still experiences pain

in his lower back. Mr. Dejesus then attended physical therapy three times a week for several months.

As a result of the accident Mr. Dejesus missed several weeks from work. Once he was able to work, he was unable to work the same number of hours as before the accident. Mr. Dejesus further testified that he can no longer or has difficulty bending down, sleeping, lifting up objects weighing over ten pounds, walking upstairs or downstairs, running, playing with his kid, standing for long periods of time, household chores, and driving. Mr. Dejesus also testified that as of the date of the deposition, he still has future appointments for medical treatment, and he still experiences pain to his right knee and back.

In favor of their motion defendants also submit, inter alia, Dr. Saran S. Rosner's independent medical examination of plaintiff Dejesus conducted on December 3, 2021 and Dr. Eric Freeman's report dated November 22, 2021.

Dr. Freeman's report reveals limitations in range of motion as to the cervical spine flexion, extension and lateral bend to the right and left. Additionally, he states that the lumbar spine had limitations in the flexion and rotation. He notes that the claimant has a mild loss of mobility of the right knee with a normal exam of the left knee. Moreover, he opined that the claimant is able to perform his full activities of daily living and he is performing his work status that he did prior to the the accident.

Dr. Rosner's examinations reveal that Mr. Dejesus has trouble turning from supine to prone and "could not walk in a tandem fashion because he had difficulty bearing weight independently on his right lower extremity because of his knee." Dr. Rosner further found that Mr. Dejesus "could not dorsiflex his right foot in the standing position because of increased pain in his right knee" and could not bear weight independently on his right leg to formal testing. Cervical and lumbar range of motion was assessed: Lumbar flexion was limited to 35 degrees/90 degrees and lumbar extension was performed to 5 degrees/30 degrees. Cervical rotation to the right was completed to 60 degrees/80 degrees, cervical rotation of the left was measured at 70 degrees/80 degrees, cervical flexion was performed to 40 degrees/60 degrees.

As such, the doctor's examinations create issues of fact as to whether plaintiff Dejesus suffered a serious injury. Moreover, the examinations took place outside of the scope of the first 180 days following the subject accident, and the doctors failed to address the claim, clearly set forth in the bill of particulars, that the plaintiff sustained a medically determined injury which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (*see e.g. Mugno v Juran*, 81 AD3d 908, 908 [2d Dept 2011]; *Pinder v Salvatore*, 69 AD3d 823, 823-24 [2d Dept 2010]; *Menezes v Khan*, 67 AD3d 654, 654 [2d Dept 2009]). A physician's normal examination results, coupled with deposition testimony that plaintiff had no restriction in activity, can sometimes overcome this obstacle (*see Kouros v Mendez*, 41 AD3d 786, 788 [2d Dept 2007]). Here plaintiff testified that he received two surgeries and still is unable to walk upstairs or downstairs, run, play with his kid, stand for long periods of time, or perform household chores almost two years after the accident.

As such, there is an issue of fact as to whether plaintiff Dejesus suffered a serious injury as defined under Insurance Law §5102(d) that is better left to a jury to determine. In as much as the movants failed to meet their prima facie burden, it is unnecessary to examine the sufficiency of plaintiff's opposition papers (*see Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993]; *Wallace v*

Adam Rental Transp. Inc., 68 AD3d 856, 857 [2d Dept 2009]; *Ortiz v S & A Taxi Corp.*, 68 AD3d 734, 735 [2d Dept 2009]).

Plaintiff's cross-motion for partial Summary Judgment

In support of plaintiffs' cross motion, they submit, their deposition transcripts, and defendant Richard Kerins' deposition transcript.

Plaintiff Dejesus testified that on the date of the accident he was travelling on Nassau Expressway for approximately five to ten minutes. He stated that at the time there were three lanes of traffic moving in each direction. Dejesus explained that at the intersection, there was a traffic device. He averred that he brought his car to a stop for a red light and there were no other vehicles stopped in front of his vehicle. Dejesus averred that his right foot was pressed on the brake, and he was stopped for at least ten seconds before the accident. The first he became aware of the accident is when he heard and felt an impact to the rear of his vehicle.

Plaintiff Martine Pierre-Louis also testified and stated that she was a passenger in the vehicle operated by her husband Dejesus at the time of the accident. She averred that her husband's vehicle was stopped at a red light for five to ten seconds and thereafter felt an impact to the rear of the car.

Defendant Richard Kerins also testified and stated that at the time of the accident he saw the traffic device that controlled the intersection and saw that the light was yellow. He explained that plaintiff's vehicle was travelling in front of his vehicle for a while, approximately five to ten minutes prior to the accident. He averred that when the accident occurred, he was stopping his vehicle, and plaintiff's vehicle was also stopping.

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 (see, *Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; see also *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" (see, *Alvarez*, 68 NY2d at 324; see also, *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]). However, failure to make prima facie showing of entitlement to judgment requires denial of the motion, regardless of the sufficiency of the opposing papers. When the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v Goodson*, 8 NY2d 8, 167 NE2d 328 [1960]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [1991]).

It is well settled law that the driver of an approaching vehicle must maintain a reasonably safe rate of speed and control over their vehicle and use reasonable care to avoid colliding with a lead vehicle (see *Denezzo v Joseph*, 95 AD3d 1060, 1060 [2nd Dept 2012] [internal quotation marks omitted]). The Vehicle and Traffic Law §1129(a) imposes a duty upon drivers to maintain safe distances between their cars and cars in front of them as well as a duty to be aware of traffic conditions, including vehicle stoppages.

It is the duty of each motorist to operate his vehicle with reasonable care, having regard for the actual and potential hazards existing from weather, road, traffic, and other conditions, to maintain a reasonably safe rate of speed, to have his automobile under reasonable control, and to keep a proper lookout, under the circumstances then existing, and to see and be aware of what is in his view. (*Guzzardi v Grotas*, 98 AD2d 761, 469 NYS2d 475 [2d Dept 1983]). A rear-end

collision with a stopped or stopping car creates a prima facie case of liability as to the rearmost vehicle, requiring that driver to rebut this inference of negligence by providing a nonnegligent explanation for the collision (*see Macauley v Elrac, Inc.*, 6 AD3d 584, 585 [2nd Dept 2004]; see also Vehicle and Traffic Law 1129[a]).

“A claim that the driver of the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence.” (*see, Arias v Rosario*, 52 AD3d 551, 860 NYS2d 168 [2nd Dept 2008] *quoting Russ v Investech Sec., Inc.*, 6 AD3d 602, 775 NYS2d 867 [2nd Dept 2004].). As such, plaintiffs have demonstrated a prima facie case of liability. However, defendants have failed to provide a nonnegligent explanation for the rear-end collision.

Accordingly, it is hereby

ORDERED that, defendants’ motion for an order pursuant to CPLR §3212 granting summary judgment and dismissing the complaint in as much as plaintiffs allegedly fail to meet the serious injury threshold requirement mandated by Insurance Law Section 5102(d) is denied in its entirety, it is further

ORDERED that, plaintiffs’ cross motion for an order pursuant to CPLR §3212 granting partial summary judgement on the issue of liability as against defendants is granted, and it is further

ORDERED that, plaintiff shall serve a copy of this order, with notice of entry, upon defendants within thirty (30) days of the date of entry.

This constitutes the decision and order of the Court.

Dated: June 14, 2023



Karina E. Alomar, J.S.C.

