

Pullum v Venture Leasing LLC
2023 NY Slip Op 35216(U)
April 5, 2023
Supreme Court, Bronx County
Docket Number: Index No. 26410/2020E
Judge: Bianka Perez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14

KATRINA PULLUM,

Index No. 26410/2020E

Plaintiff,

-against-

Hon. BIANKA PEREZ

VENTURE LEASING LLC and LAMONT GREEN,

Justice Supreme Court

Defendants.

The following papers were read on this motion (Seq. No. #1) for **SUMMARY JUDGMENT** submitted on January 30, 2023.

Notice of Motion – Affirmation in Support - Exhibits Annexed	No(s). 16-25
Notice of Cross-Motion – Affirmation in Support - Exhibits Annexed	No(s). 27-32
Affirmation in Opposition to Motion and Exhibits	No(s). 33-39
Replying Affidavit and Exhibits	No(s). N/A

Upon the foregoing papers, defendant moves for summary judgment, dismissing plaintiff's complaint for her alleged failure to satisfy the "serious injury" threshold as defined by New York Insurance Law §5102(d). Plaintiff's cross-moves pursuant to CPLR 3212, for summary judgment on the issue of liability as against defendant and to dismiss the affirmative defenses of culpable conduct. Plaintiff opposes motion. Defendants did not oppose the cross-motion.

Threshold Motion

When a defendant seeks summary judgment alleging that 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. Palmeri*, 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, defendant established that plaintiff's alleged injuries were not permanent or significant in nature. Defendants accomplished this by submitting an affirmed report from orthopedic surgeon Dr. Howard A. Kiernan, who found normal or near-normal ranges of motion in the allegedly injured body parts, and all diagnostic testing was either normal or negative. Dr. Kiernan opined that the plaintiff has no orthopedic disability and all injuries have resolved

(*Riollano v. Leavey*, 173 A.D.3d 494, 495 [1st Dept. 2019]). Defendant further annexed affirmed reports by Dr. Jessica F. Berkowitz, who found no traumatic injuries or causal relationship between plaintiff's injuries and the subject accident.

In opposition to the motion, plaintiff raised a triable issue of fact as to whether she sustained a "permanent consequential" or "significant" limitation of use of her cervical and lumbar spine. Plaintiff submitted affirmed treatment records showing that she complained of pain and had significant range-of-motion limitations in her lumbar spine shortly after the accident and recently. In a physician affirmation, Dr. Shouhei Yamagami reports persisting significant limitations in the plaintiff's cervical and lumbar spine. He opines that plaintiff sustained significant limitations of a permanent nature to her cervical and lumbar spine. The above submission is sufficient to raise fact issues as to whether plaintiff sustained a "permanent consequential" or "significant" limitation of use of her lumbar spine as a result of this accident (*Encarnacion v. Castillo*, 146 A.D.3d 600, 601 [1st Dept. 2017]).

As to defendant's branch of the motion, which argues that the proof rules out a serious injury based on the 90/180-day claim, the Court finds that defendant established his entitlement to summary judgment by annexing plaintiff's deposition transcript where she testified she did not miss time from work as a result of this accident which is fatal to her claim (see *Williams v. Perez*, 92 A.D.3d 528 [1st Dept. 2012]). The effect of the admission in establishing no serious injury under the 90/180-day category renders unnecessary any medical proof, (see *Sanchez v. Oxcin*, 157 A.D.3d 561, 69 N.Y.S.3d 623 [1st Dep't 2018]). 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]).

The Court accordingly finds that there remain issues of fact as to whether plaintiff sustained a serious injury under either the permanent consequential limitation of use or significant limitation of use categories of the Insurance Law § 5102(d) as to her lumbar spine. Since plaintiff has established a serious injury to one or more body parts, she may recover for all injuries that are causally related to the accident (see, e.g., *Bonilla v. Vargas-Nunez*, 147 A.D.3d 461, 462 [1st Dept. 2017]).

Liability Cross-Motion

Plaintiff seeks summary judgment on the basis that her vehicle was rear-ended on January 3, 2018 while stopped at a red light on Forest Avenue at its intersection with Decker Avenue, Staten Island, New York by the Defendant's vehicle. Defendant did not oppose.

In support of this motion, Plaintiff provided a copy of the pleadings and her affidavit where she states she was rear ended while stopped for approximately one minute by the vehicle driven by defendant Lamont Green and owned by defendant Venture Leasing LLC. Upon review and consideration, the motion for summary judgment is granted.

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 N.Y.2d 72 [2003]; *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 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 N.Y.2d at 324; *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]; *Chance v. Felder*, 33 A.D.3d 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 A.D.3d 553 [1st Dept. 2010] citing *Tutrani v. County of Suffolk*, 10 N.Y.3d 906, 908 [2008]; *Agramonte v. City of New York*, 288 A.D.2d 75, 76 [1st Dept. 2001]; see also *Dattilo v. Best Transp. Inc* 79 A.D.3d 432 [1st Dept. 2010]). Further, a motorist is under a “duty to see that which under the circumstances he [or she] should have seen by the proper use of his [or her] senses (VTL § 1141). Each driver in the exercise of ordinary prudence ought to have observed and used such care to avoid the collision as an ordinarily prudent person would have used under the circumstances (see *Shea v. Judson*, 283 NY 393 [1940]; *Rennie v. Barbarosa Transp.*, 151 A.D.2d 379, 380 [1st Dept 1989]; *Costalas v. City of New York*, 143 A.D.2d 573 [1st Dept 1988]; also see, 1 NY PJI 2:79 [2d ed]).

In this case, the Plaintiff established a prima facie case of negligence on the part of defendant, as she was struck in the rear by Defendant’s vehicle (Exh. 3). Defendants failed to submit any non-negligent explanation for this accident or any basis to find that the plaintiff is at fault or comparatively at fault as he failed to oppose the motion.

The Court finds the parties remaining arguments unavailing.

Accordingly, it is hereby

ORDERED, that defendant’s motion for summary judgment is granted only to the extent of dismissing plaintiff’s claims as to the “permanent loss of use” claim and the “90/180” claim, and it is further,

ORDERED, that plaintiff’s cross-motion for summary judgment on the issue of liability is granted without opposition, and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants on the issue of liability and dismissing the affirmative defenses of comparative negligence and/or comparative fault herein.

This constitutes the Decision and Order of this Court.

Dated: April 5, 2023

Hon. Blz BIANKA PEREZ, J.S.C.

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| 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 |