

Bailey v Abril
2024 NY Slip Op 35455(U)
April 5, 2024
Supreme Court, Queens County
Docket Number: Index No. 723424/2021
Judge: Karen Lin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: PART 24-----X
RODNEY BAILEY JR.,

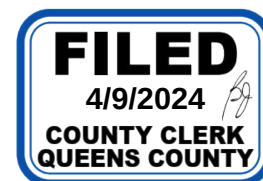
Plaintiff,

Index No. 723424/2021

Motion Seq. No. 2

-against-

DECISION AND ORDER

SIXTO ABRIL, UBER TECHNOLOGIES, INC., and
UBER USA LLC,Defendants.
-----X

The following is a recitation pursuant to CPLR 2219(a) of the papers reviewed and considered on this motion for summary judgment:

*Papers**NYSCEF Doc. No.*

Notice of Motion and annexed Exhibits, Affidavits.....59 - 66

Answering Affidavits and Exhibits.....68 - 77

Reply Affirmation.....78-79

Upon the foregoing papers, this motion for summary judgment dismissing the complaint is denied.

Plaintiff commenced this action to recover damages for injuries that he allegedly sustained as a result of a motor vehicle accident on August 12, 2021, on the eastbound lower level of the Queensboro Bridge in Queens, New York. Plaintiff claims that defendant Abril's vehicle ("Abril vehicle") struck his vehicle when it attempted to merge into plaintiff's lane. Defendant Abril was the operator and owner of vehicle. Plaintiff alleges that defendant Abril was contracted by defendants Uber Technologies, Inc. and Uber USA LLC to provide livery car services.

Defendant Abril now moves for an order for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's complaint on the grounds that plaintiff's injuries do not satisfy the serious injury threshold requirement of Insurance Law §5102(d). In support of the motion, defendant Abril submits a bill of particulars, plaintiff's deposition transcript, and the medical report of his orthopedic expert, Dr. Thomas Nipper. Defendant Abril also submits a Statement of Material

Facts, which consists of two numbered paragraphs in a conclusory manner that “[t]here is no triable issue of fact regarding whether the plaintiff sustained a ‘serious injury’ within the meaning of the no-fault law.” The Statement of Material Fact is neither signed by defendant Abril nor by his counsel.

In opposition, plaintiff assert that defendant Abril’s motion must be denied because it is procedurally defective and cannot be cured on reply. Specifically, plaintiff avers that the bill of particulars annexed as an exhibit to the motion is for a completely separate action, and therefore, defendant Abril’s failure to annex all of the pleadings is a fatal procedural defect requiring denial of the motion for summary judgment (*see* CPLR 3212[b]). Plaintiff further avers that defendant Abril’s failure to provide an admissible statement of material facts pursuant to 22 NYCRR §202.8-g(a) also requires denial of the instant motion. Additionally, plaintiff contends that the medical evidence upon which defendant’s expert relies is insufficient. Specifically, plaintiff contends that Dr. Nipper does not opine on the causal relationship between the injuries and the accident; he merely states in his conclusion that he believes there is no disability or permanency to plaintiff’s left shoulder.

In order to maintain an action for personal injury pursuant to Insurance Law §5102, a plaintiff must establish that a “serious injury” has been sustained (*Licari v Elliot*, 57 NY2d 230 [1982]). It is well established that the proponent of a summary judgment motion must make a prima facie case showing of entitlement to judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). “It is not the function of a court ... to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]). The court’s role is “issue-finding, rather than issue determination” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal quotations omitted]).

As a preliminary matter, plaintiff's assertion that the instant motion should be denied because defendant Abril failed to annex the pleadings to the motion is unavailing. Pursuant to CPLR §2214(c), a party in an e-filed action may rely on e-filed papers and need not include those papers in its motion papers, "but may make reference to them, giving the docket numbers on the e-filing system" (*Readon v Macy's, Inc.*, 191 AD3d 712, 714 [2d Dept 2021] [internal citations omitted]). In addition, while defendant Abril's Statement of Material Facts is defective as presented, 22 NYCRR §202.8-g(a) "permits a court to require that parties submit a separate statement of material facts with any motion for summary judgment, but it does not obligate a court to impose such a requirement" (*Taveras v Incorporated Vil. of Freeport*, 2024 NY Slip Op 01577 [2d Dept 2024]). As this Court does not automatically require the submission of such statement in every motion for summary judgment, defendant Abril's defective Statement of Material Facts is not fatal to his motion.

However, based upon the evidence presented, defendant Abril has failed to demonstrate his *prima facie* entitlement to judgment as a matter of law. Here, defendant Abril's medical evidence is insufficient as Dr. Nipper's indicates that he only reviewed plaintiff's bill of particulars, the supplemental bill of particulars, and police accident report when performing the independent medical examination (*see Haack v Kriss*, 47 AD3d 1007 [3d Dept 2008]). Thus, without reviewing plaintiff's medical records, Dr. Nipper could not and did not establish that plaintiff did not sustain a serious injury. Further, Dr. Nipper's failure to opine on the causal relationship between plaintiff's alleged injuries and the accident renders defendant Abril's medical evidence insufficient to establish, *prima facie*, that plaintiff's alleged injuries were not causally related to the accident (*see Almady v Martinez*, 208 AD3d 545 [2d Dept 2022]).

Consequently, defendant Abril's failure to meet his *prima facie* burden on summary judgment warrants denial of the motion regardless of the sufficiency of plaintiff's opposition (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]).

Accordingly, it is hereby

ORDERED that the defendant Abril's motion for summary judgment dismissing plaintiff's complaint is denied; and it is further

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

This constitutes the decision and order of this court.

Dated: April 5, 2024



HON. KAREN LIN, J.S.C.

