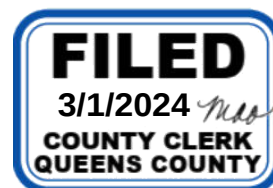


Beatty v Robinson
2024 NY Slip Op 35560(U)
February 29, 2024
Supreme Court, Queens County
Docket Number: Index No. 708945/19
Judge: Carmen R. Velasquez
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice-----x
DARRELL BEATTY,

Index No. 708945/19

Plaintiff,

Motion

Date: December 4, 2023

-against-

M# 7

FRANK F. ROBINSON, ET AL.,

Defendants.
-----x

The following papers numbered EF 163-184 read on this motion by the defendant Frank F. Robinson for summary judgment dismissing the complaint and all cross claims insofar as asserted against him pursuant to Insurance Law § 5102(d) and on liability grounds.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	EF 163-176
Affirmation in Opposition - Exhibits	EF 178-180
Replying Affirmation	EF 181-184

Upon the foregoing papers it is ordered that this motion by the defendant Frank F. Robinson for summary judgment is decided as follows:

Plaintiff, a passenger in a vehicle operated by defendant Frank F. Robinson, allegedly sustained serious injuries when the vehicle was involved in an accident with a vehicle operated by defendant Raymond Gooding on February 12, 2018 on 114th Road near the intersection with 223rd Street in Queens County. Defendant Robinson rented the vehicle at a rental branch operated by ELRAC, LLC, an affiliate of EAN Holdings LLC, doing business as Enterprise Rent a Car. This court, in an order dated February 6, 2023, granted the motion by defendant EAN Holdings LLC for summary judgment. Defendant Frank F. Robinson now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) and also on the ground that he is not liable for the subject accident.

The court will first address the branch of the motion for summary judgment pursuant to Insurance Law § 5102(d).

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 any material issues of fact. (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993].) Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. (*Peerless Ins. Co. v Allied Bldg. Prods. Corp.*, 15 AD3d 373, 374 [2d Dept 2005].)

The issue of whether plaintiff has made a prima facie showing of serious injury is a matter of law, to be determined in the first instance by the court. (*Licari v Elliott*, 57 NY2d 230, 237 [1982]; *Charles v U.S. Fleet Leasing*, 140 AD2d 481, 481 [2d Dept 1988].) A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. (see *Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]; *Turchuk v Town of Wallkill*, 255 AD2d 576, 576 [2d Dept 1998].) With this established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact as to whether a serious injury was sustained within the meaning of the Insurance Law. (see *Gaddy v Eyler*, 79 NY2d 955, 957 [1992].) A plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings. (see *Carroll v Jennings*, 264 AD2d 494, 495 [2d Dept 1999]; *Kauderer v Penta*, 261 AD2d 365, 366 [2d Dept 1999].)

Defendant made a prima facie showing that plaintiff failed to sustain a serious injury within the meaning of Insurance Law § 5102(d). (*Toure v Avis Rent-A-Car Sys., Inc.*, 98 NY2d 345, 350 [2002].) Defendant submits, *inter alia*, the affirmed medical report of Dr. Jeffrey Richmond, who performed an independent orthopedic examination of the plaintiff on November 18, 2021. Dr. Richmond found that the plaintiff had full range of motion of the cervical spine, lumbar spine, shoulders and knees. (*Ranford v Tim's Tree and Lawn Serv., Inc.*, 71 AD3d 973, 974 [2d Dept

2010]; *George v Suarez*, 71 AD3d 727, 728 [2d Dept 2010]; *McIntosh v O'Brien*, 69 AD3d 585, 587 [2d Dept 2010].) Dr. Richmond compared his range of motion findings to the normal range of motion. (cf. *Resek v Morreale*, 74 AD3d 1043, 1045 [2d Dept 2010]; *Morris v Edmond*, 48 AD3d 432, 433 [2d Dept 2008].) He also noted that a goniometer was used to measure the range of motion. (cf. *Sapienza v Ruggiero*, 57 AD3d 643, 644 [2d Dept 2008]; *Piperis v Wan*, 49 AD3d 840, 841 [2d Dept 2008]; *Tobiolo v Friedman*, 283 AD2d 483, 484 [2d Dept 2001].)

Plaintiff, in opposition, submits sufficient evidence in admissible form raising a triable issue of fact as to whether he sustained a serious injury pursuant to Insurance Law § 5102(d). (*Orgel v Kathleen Cab Corp.*, 94 AD3d 837, 838 [2d Dept 2012].) Plaintiff submits the affirmed report of Dr. Jaime Gutierrez, who notes the restrictions in plaintiff's range of motion of the cervical spine, lumbar spine, shoulders and knees shortly after the subject accident. Further, a recent examination of plaintiff revealed objectively measured limitations in the plaintiff's range of motion. (see *Johnson v Cristino*, 91 AD3d 604, 605 [2d Dept 2012]; *Williams v Fava Cab Corp.*, 90 AD3d 912, 914 [2d Dept 2011]; *Dixon v Fuller*, 79 AD3d 1094, 1094 [2d Dept 2010].) Dr. Gutierrez also noted a causal relationship between the plaintiff's injuries and the subject accident. (see *Williams v Clark*, 54 AD3d 942, 943 [2d Dept 2008]; *Lim v Tiburzi*, 36 AD3d 671, 672 [2d Dept 2007].)

The court will now address the branch of the motion by the defendant for summary judgment on liability grounds.

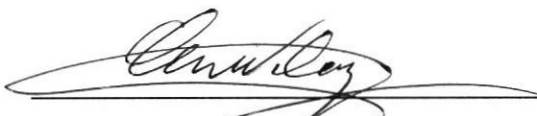
It is well settled that a driver entering an intersection controlled by a stop sign must yield the right-of-way to any other vehicle that is already in the intersection or that is approaching so closely as to constitute an immediate hazard, (Vehicle and Traffic Law § 1142(a); *Cruz v DiSalvo*, 188 AD3d 986, 987 [2d Dept 2020]; *Wolf v Cruickshank*, 144 AD3d 1144, 1145 [2d Dept 2016]; *McPherson v Chanzeb*, 123 AD3d 1098, 1099 [2d Dept 2014].) Further, a driver is required to see that which through the proper use of his or her senses he or she should have seen, and a driver who has the right-of-way is entitled to anticipate that the other motorist will obey the traffic laws requiring him to stop. (*Wolf v Cruickshank*, 144 AD3d at 1145; *Sirot v Troiano*, 66 AD3d 763, 764 [2d Dept 2009]; *Hull v Spagnoli*, 44 AD3d 1007, 1007 [2d Dept 2007].)

The admissible evidence demonstrates that the vehicle of defendant Robinson was traveling north on 223rd Street. At his deposition, defendant Robinson testified that he brought his vehicle to a complete stop at a stop sign at the subject intersection. Defendant Robinson further testified that he looked from his left to his right to make sure that there were no other cars in the intersection. When he saw there were no vehicles approaching, he proceeded from the stop sign, and his vehicle was hit on the back driver's side by the vehicle of defendant Gooding. Thus, the movant made a prima facie showing of his entitlement to judgment as a matter of law on liability grounds.

Defendant Gooding, the operator of the other vehicle involved, never appeared for a deposition and has not submitted any opposing affidavit as to how the accident occurred. Indeed, no admissible evidence has been submitted showing that defendant Robinson caused or contributed to the subject accident.

Accordingly, this motion by the defendant Frank F. Robinson for summary judgment is granted, and the complaint and all cross claims as against defendant Frank F. Robinson are dismissed, and the action is severed and continued as against the remaining defendant.

Dated: February 29, 2024


CARMEN R. VELASQUEZ, J.S.C.

