

Cervantes v Gracious Home, LLC
2016 NY Slip Op 30828(U)
May 9, 2016
Supreme Court, New York County
Docket Number: 152017/13
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22**

Index No.: 152017/13
Mot. Seq. 001

**Carlos M. Cervantes and Mildred M. Cervantes,
*Plaintiffs,***

-against-

**Gracious Home, LLC and Steven R. Leone,
*Defendants.***

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Plaintiffs' motion for summary judgment on the issues of liability and serious injury is granted in its entirety.

Plaintiff Carlos Cervantes alleges that on February 11, 2013 he sustained serious injuries within the meaning of Insurance Law 5012(d) when he was struck by the minivan owned by defendant Gracious Homes LLC and operated by defendant Leone. Plaintiff alleges that he was walking with the pedestrian crossing signal in his favor in the crosswalk from the northeast corner to the northwest corner at the intersection of 27th Street and Fifth Avenue in Manhattan when defendants' vehicle, proceeding east on 27th Street, made a left turn onto Fifth Avenue and struck him. Plaintiff Mildred M. Cervantes asserts only a derivative claim.

In order to prevail on a motion for summary judgment, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). To make out a *prima facie* case on liability in a motor vehicle accident such as the instant one, the plaintiff must establish that he or she was struck while crossing the street within the crosswalk, with the light in favor of pedestrians (*see Gonzalez v ARC Interior Constr.*, 83 AD3d 418, 419 [1st Dept 2011]). Once the movant demonstrates entitlement to judgment, the burden shifts to the

opponent to rebut that *prima facie* showing (*Bethlehem Steel Corp. v Sollow*, 51 NY2d 870, 872 [1980]). The opponent must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the moving party fails to meet the *facie* burden, the papers submitted in opposition need not be considered (*Alvarez*, 68 NY2d at 324). Lastly, in deciding a summary judgment motion, the court draws all reasonable inferences in favor of the non-moving party and does not decide credibility issues (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 204 [1st Dept 1990]).

Liability

Plaintiffs set forth a *prima facie* case through Cervantes' deposition testimony that he was crossing Fifth Avenue within the crosswalk with the walk sign in his favor when defendants' minivan struck him as it was making a left turn.

In opposition, defendants argue that the accident did not happen in the crosswalk. Defendants cite to Leone's testimony that he was making a right turn at the corner, stopped the vehicle one foot away from the crosswalk and waited for pedestrians to cross, moved the car three or four feet forward, hit plaintiff, and he saw plaintiff lying just beyond the crosswalk. This testimony does not raise an issue of fact as to whether plaintiff was in the crosswalk when struck. Leone's testimony that plaintiff was lying on the ground just beyond the crosswalk is not evidence that plaintiff was ^{not} walking in the crosswalk when he was struck, especially in light of plaintiff's testimony that due to the heavy impact, he was *thrown* outside the crosswalk (T. at 35-37,40,42-43), and Leone's testimony that *he thought that he made contact with Cervantes in the crosswalk* (T at 35). AP

Defendants also raise the issue of comparative fault, pointing to plaintiff's testimony that

he was looking straight ahead when he was crossing. However, plaintiff testified that he first looked ahead when he stepped into the street, that he then looked to the left, that he saw the minivan, and that he kept it in sight as he was crossing. Nor does plaintiff's treatment for glaucoma or a prior incident involving plaintiff's knee buckling raise any issue of fact. Thus, because defendants failed to raise any issue of fact sufficient to defeat the branch of the motion on the issue of liability, this branch of plaintiffs' motion is granted.

Serious Injury

Regarding the branch of the motion based on serious injury, plaintiff claims that he sustained various injuries in the subject 2/11/13 accident, *inter alia*, a fractured right knee. In support of the branch of the motion on serious injury, plaintiffs submit the affirmation of Dr. Weiner, an orthopedic surgeon, who examined plaintiff on 2/22/13, 11 days after the accident and sent him for an MRI of his right knee. Dr. Weiner performed a follow-up exam on 3/1/13, recommended physical therapy and a brace. Additionally, Dr. Weiner stated that based on the extensive injuries to plaintiff's right knee and because plaintiff's work as a CT scan technician required him to stand for long periods of time, he determined that plaintiff was 100% disabled and on March 1, 2013 ordered plaintiff to stay out of work until further notice. Dr. Weiner subsequently cleared plaintiff to return to work on July 1, 2013. Thus, plaintiffs met their *prima facie* burden on the serious injury branch by submitting evidence that Dr. Weiner directed plaintiff to remain out of work during the relevant statutory period, finding him to be totally disabled. *See Jean Louis v Gueye*, 94 AD3d 504, 505, 942 NYS2d 52, 54 (1st Dept 2012).

In opposition, defendants assert that Dr. Weiner did not submit any of his progress notes

which would detail plaintiff's alleged disability. Defendants also assert that there is no evidence to support plaintiff's claim that his injury prevented him from performing substantially all of his customary activities. Neither of these assertions raise any issue of fact disputing plaintiff's 90/180 claim. The Court does not need to inspect Dr. Weiner's office notes and a doctor's directive to stay out of work for 4 months certainly satisfies the requirements of 90/180. Therefore, plaintiffs' motion for summary judgment on the issue of serious injury is granted.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment on the issues of liability and serious injury is granted in its entirety.

This is the Decision and Order of the Court.

Dated: New York, NY

May 5, 2016



ARLENE P. BLUTH, J.S.C.