

Joseph v Bruno

2017 NY Slip Op 30428(U)

February 16, 2017

Supreme Court, Kings County

Docket Number: 505776/15

Judge: Carolyn E. Wade

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At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 16th day of February 2017

PRESENT:

HON. CAROLYN E. WADE,

Justice

-----X
NESTOR JOSEPH,

Plaintiff,

Index No. 505776/15

-against-

DECISION AND ORDER

BELINA BRUNO, EMMANIEL SICARD, ENTERPRISE RENTAL and EAN HOLDINGS,

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of Defendants' Motion:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1, _____
Cross-Motion and Affidavits/Affirmations.....	2 _____
Answering Affidavits/Affirmations.....	3 _____
Reply Affidavits/Affirmations.....	4,5 _____
Memorandum of Law.....	_____

Upon the foregoing cited papers, and after oral argument, defendant EMMANUEL SICARD ("SICARD") moves for an order granting him summary judgment, and the dismissal of NESTOR JOSEPH's ("Plaintiff") Complaint on the ground that he did not sustain a "serious

injury,” as defined by Insurance Law §5102(d). Defendant BELINA BRUNO (“BRUNO”) cross-moves for the same relief.

The underlying action was commenced by Plaintiff to recover damages for personal injuries he allegedly sustained in a July 4, 2014 car accident that occurred at the intersection of Avenue I and East 49th Street, in Brooklyn, New York. Plaintiff alleges that his parked car was struck following an accident between a vehicle owned by defendant EAN HOLDINGS, LLC, and being operated by defendant SICARD; and a car owned and operated by co-defendant BRUNO.

An injured plaintiff may recover non-economic losses for injuries sustained in a motor vehicle accident if he or she sustained a “serious injury,” as defined by Insurance Law §5102(d). A defendant moving for summary judgment has the initial burden of showing that the plaintiff did not sustain a “serious injury” (*Blusiewicz v. Comeau*, 212 AD2d 657 [1st Dept 1995]; *Hagan v. Thompson*, 234 AD2d 420 [2d Dept 1996]; *Grossman v. Wright*, 268 AD2d 79 [2d Dept 2000]; *Gaddy v. Eycler*, 79 NY2d 955 [1992]). If the defendant make a prima facie case, the burden then shifts to the plaintiff to present evidence, which demonstrates that there is a triable issue of material fact as to whether he/she sustained a “serious injury” *Id.*

According to the Verified Bill of Particulars, Plaintiff sustained, *inter alia*: a) left shoulder injuries: tear involving the supraspinatus tendon, restricted range of motion in the left shoulder, severe pain and tenderness of the left shoulder; b) annual disc bulges at L1-L2; L3-L4, L4-L5, L5-S1; c) disc herniation at L4-L5 and L5-S1, d) headaches, e) severe pain and tenderness of the left knee, f) post concussion syndrome, and g) severe pain and tenderness of the lumbar spine with pain radiating into the lower extremities. (Exhibit “E” of SICARD’s motion).

Plaintiff alleges that these injuries meet the “serious injury” threshold because they resulted

in the permanent consequential limitation of use of a body organ or member; the significant limitation of use of a body function or system; and “a medically determined injury or impairment of a non-permanent nature which prevents him from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the occurrence.”

Notably, Plaintiff was involved in a subsequent car accident on October 15, 2015. Defendant SICARD, by motion, argues, *inter alia*, that Plaintiff’s medical records reflect that he complained of pain in several of the same areas that were allegedly injured during the subject July 4, 2014 accident (Exhibits “G,” “I,” and “K” of SICARD’s motion). Co-defendant BRUNO, by cross-motion, further asserts that Plaintiff’s claimed injuries do not fall within any one of the nine categories of “serious injury,” specified in §5102(d) of the Insurance Law.

After a meticulous examination of each party’s submission, this court determines that there are triable issues of material fact as to whether Plaintiff’s alleged injuries were caused by the subject accident and/or the October 15, 2015 accident. In reaching this determination, the court considers, *inter alia*, the following: 1) Defendants’ physicians, Dr. Parisien and Dr. Lechtenberg, did not evaluate Plaintiff until April 14, 2016, and May 13, 2016, respectively. Significantly, both examinations were conducted approximately six months after the October 15, 2015 accident, but almost two years after the subject July 4, 2014 accident; 2) Dr. Lechtenberg found that Plaintiff had a range of motion of 10 degrees (normal: 60 degrees) in his cervical spine extension, which constitutes an 83.4% loss of range of motion; and 3) Dr. Lechtenberg and Dr. Parisien did not compare Plaintiff’s 2014 left shoulder and lumbar spine MRI findings to MRI

studies conducted after his subsequent accident.

Accordingly, based upon the above, SICARD's motion and BRUNO's cross-motion for summary judgment are both **DENIED**. A triable issue of material fact remains as to whether Plaintiff sustained a serious injury from the subject accident.

This constitutes the Decision/Order of the court.



HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

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ACTING SUPREME COURT JUSTICE



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