Chaffin v New York City Tr. Auth.
2017 NY Slip Op 31075(U)
May 5, 2017
Supreme Court, Kings County
Docket Number: 507018/2014
Judge: Carl J. Landicino

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 5th day of May, 2017.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

----------X

JOYCE CHAFFIN

Plaintiff,

- against -

NEW YORK CITY TRANSIT AUTHORITY, MV PUBLIC TRANSPORTATION, INC., SARANKAN SINGARASAN, and PLINIO MATEO,

Defendants.

----------X

Index No.: 507018/2014

DECISION AND ORDER

Motions Sequence #3

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2,
Opposing Affidavits (Affirmations).....	3, 4
Reply Affidavits (Affirmations).....	5, 6

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This lawsuit arises out of a motor vehicle accident that occurred on October 11, 2013. On that day, the Plaintiff Joyce Chaffin (hereinafter "the Plaintiffs") alleges in her Complaint that she suffered personal injuries while a passenger in an Access-A-Ride vehicle as part of a program funded by Defendant New York City Transit Authority, that was administered by Defendant MV Public Transportation, Inc. and operated by Defendant Sarankan Singarasan (hereinafter "the Access-A-Ride Defendants"). The Plaintiff was allegedly injured when the vehicle she was a passenger in collided with a vehicle owned and operated by Defendant Plinio Mateo (hereinafter "Defendant Mateo") The incident took place at the intersection of Atlantic Avenue and 3rd Avenue in Brooklyn, New York.

The Access-A-Ride Defendants now move (motion sequence #3) for an order pursuant to CPLR § 3212 granting summary judgment and dismissing the complaint. Specifically, the Access-A-Ride Defendants argue that summary judgment should be granted since their vehicle bears no liability for the subject incident as the vehicle operated by Defendant Singarasan was hit by the vehicle driven by Defendant Mateo while he was executing a right turn onto 3rd Avenue. The movants allege that the vehicle owned and operated by Defendant Mateo was in a parking lane and that Defendant Mateo suddenly pulled his car out and collided with the other vehicle. The Access-A-Ride Defendants also move for an order pursuant to CPLR § 3212, granting summary judgment and dismissing the complaint on the ground that the injuries allegedly sustained by the Plaintiff fail to meet the "serious injury" threshold requirement of Insurance Law § 5102(d).

In opposition, the Plaintiff argues that the Access-A-Ride Defendants' motion should be denied because there are issues of fact related to the position of the vehicles prior to impact. The Plaintiff argues that Defendant Mateo was in an appropriate driving lane and that it was the Defendant's vehicle that collided with the front of the vehicle owned and operated by Defendant Mateo. The Plaintiffs argue that the Defendants' application for summary judgment in relation to the Insurance Law § 5102(d) should be denied since the report of Dr. Antoine relied upon by the Defendants fails to sustain their *prima facie* burden. Specifically, the Plaintiff argues that this report fails to address the claims of serious injury under the "90/180 day" category. What is more, the Plaintiff argues that the affirmation of Dr. Antoine fails to address the Plaintiff's past medical condition in relation to his present findings.

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974].

The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action"*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v.* Plotnick, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Turning to the merits of the instant motion, the Court finds that insufficient evidence has been presented to establish, *prima facie*, that the Access-A-Ride Defendants are free from liability for the accident. In support of their motion, the Access-A-Ride Defendants rely primarily on the Examination Before Trial (EBT) of Defendant Mateo. In his EBT, Defendant Mateo testified (Affirmation in Opposition, Exhibit 1, Page 17) that he "was in the last parking spot of the street, I just started driving straight." Defendant Mateo also testified that he didn't change lanes and continued straight before the collision. The Access-A-Ride Defendants characterize this testimony as supporting the position that the Access-A-Ride Defendants were not liable for the alleged incident. However, Defendant Mateo's testimony, taken alone, is insufficient for the Access-A-Ride Defendants to meet their prima facie burden since it does not make clear what Defendant Singarasan saw or did as he approached the intersection and started making his turn. Moreover, this testimony is insufficient for the Access-A-Ride Defendants to meet their *prima*

facie burden since "Vehicle and Traffic Law §1143 provides that 'the driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed.'" *Adobea v. Junel*, 114 A.D.3d 818, 819, 980 N.Y.S.2d 564, 566 [2nd Dept, 2014], quoting VTL §1143.

Even assuming, *arguendo*, that the Access-A-Ride Defendants had met their prima facie showing, the Plaintiff and Defendant Mateo raise a material issue of fact that prevents this Court from granting summary judgment at this time. Defendant Mateo points to his own EBT testimony wherein he testified (Affirmation in Opposition, Exhibit 2, Page 19) that he drove in the right lane for six to ten cars before the impact with the other vehicle. Defendant Mateo further testified (Affirmation in Opposition, Exhibit 2, Page 20) that he only noticed the other vehicle when it began to turn in front of his vehicle. This testimony, taken together, creates an issue of fact as to whether the Access-A-Ride Defendants vehicle was making a right turn from the appropriate lane when the alleged incident occurred and proceeded only after seeing what there was to be seen. *See Katikireddy v. Espinal*, 137 A.D.3d 866, 868, 26 N.Y.S.3d 775, 777 [2nd Dept, 2016]. As a result, that aspect of the motion made by the Access-A-Ride Defendants is denied.

As to the Access-A-Ride Defendants' application for summary judgment in relation to Insurance Law §5102(d), the Defendants contend that the affirmed report of Dr. Roger Antoine supports their contention that Plaintiff did not suffer a serious injury as defined under Insurance Law §5102(d). When making a motion for summary judgment on the grounds of threshold a defendant has the initial burden of demonstrating that the plaintiff did not sustain a "serious injury" as that term is defined by Insurance Law § 5102(d).

Dr. Antoine, an orthopedist, conducted an independent medical examination of Plaintiff on August 12, 2016, nearly three years after the date of the alleged incident. In his report (Defendant's Motion, Exhibit K), which was duly affirmed that same day, Dr. Antoine detailed

his findings based upon his review of, among other things, Plaintiff's medical records. Dr. Antoine reports that he conducted an orthopedic examination of the Plaintiff's cervical spine and the lumbar spine. Dr. Antoine reported normal range of motion for the cervical and lumbar spine and opined that there was no disability and that the Plaintiff was able to perform activities of daily living without restrictions.

However, Dr. Antoine did not address the Plaintiff's "90/180" (see Insurance Law § 5102(d)) claim. What is more, Dr. Antoine's examination was conducted more than 180 days from the date of the alleged incident. The Court notes that Plaintiff's Verified Bill of Particulars states that the Plaintiff was confined to her home, except for medical visits, for three months as a consequence of the accident (Movant's Motion Exhibit, G). The Plaintiff corroborated this in her EBT testimony as well (Movant's Motion Exhibit, H, Pages 120 through 122). As a result, the Court is of the opinion that the motion does not adequately addresses as a matter of law, the Plaintiff's claim set forth in the verified bill of particulars, that she sustained a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. *See Faun Thai v. Butt*, 34 A.D.3d 447, 448, 824 N.Y.S.2d 131, 132 [2nd Dept, 2006].

Based upon the foregoing, it is hereby ORDERED as follows:

The Access-A-Ride Defendants' motion for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

Date: May 5, 2017

ENTER:

Carl J. Landicino
J.S.C.