

Mendoza v New York City Tr. Auth.
2018 NY Slip Op 33200(U)
December 13, 2018
Supreme Court, New York County
Docket Number: 150087/2016
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

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JUAN MENDOZA,

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY, TC PARATRANSIT,
ROLANDO LIRIANO

Defendants.

INDEX NO. 150087/2016

MOTION DATE 10/31/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendant, Robert Johnson, Jr.’s motion for summary judgment, pursuant to CPLR 3212 to dismiss plaintiff, Juan D. Mendoza’s complaint is granted in part. Before the Court is defendant’s motion for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendant on the grounds that plaintiff has failed to demonstrate that plaintiff has suffered a “serious injury” as defined under Section 5102(d) of the Insurance Law. Plaintiff opposes the motion.

This matter stems from a motor vehicle incident which occurred on January 9, 2015, at the intersection of East 38th Street and 3rd Avenue, in the County, City and State of New York, when a stopped vehicle operated by plaintiff, Juan D. Mendoza was involved in a collision with a vehicle owned by defendant, TC Paratransit and defendant, New York City Transit Authority and operated by defendant, Rolando Liriano, Jr. and allegedly led to the serious injury of plaintiff.

Summary Judgment (Serious Injury)

Defendants' motion, for summary judgment, pursuant to CPLR 3212, against plaintiff on the issue of "serious injury" as defined under Section § 5102(d) of the Insurance Law is granted. "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 eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the "serious injury" threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a "permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system"]).

Defendants allege that plaintiff has failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law. Defendants allege that the injuries plaintiff is seeking relief for stem from prior injuries and degenerative changes in his cervical spine. In support of his motion, defendants submit the findings of Dr. William Walsh who found that plaintiff has a full range of motion in his cervical spine, lumbar spine, bilateral shoulders, and bilateral knees, and that plaintiff's left shoulder was negative for impingement. Further, defendants submit the report of radiologist, Dr. David A. Fisher who found only

degenerative changes in plaintiff's cervical and lumbar spine. Defendants have made a prima facie showing of entitlement to summary judgment on the issue of serious injury and the burden now shifts to plaintiff.

In opposition, plaintiff's responding medical submissions fail to raise a triable issue of fact as to all of the alleged injuries. In *Rosa v Delacruz*, 32 NY3d 1060, 2018 N.Y. Slip Op. 07040 [2018], the Court of Appeals found that where a plaintiff's doctor opined that tears were causally related to the accident, but did not address findings of degeneration or explain why the tears and physical deficits found were not caused by the preexisting degenerative conditions, plaintiff failed to raise a triable issue of fact as it "failed to acknowledge, much less explain or contradict, the radiologist's finding. Instead, plaintiff relied on the purely conclusory assertion of his orthopedist that there was a causal relationship between the accident" (*See id.*)

Here, plaintiff's medical reports fail to address plaintiff's supposed degenerative conditions to the cervical and lumbar spine. Thus, plaintiff has failed to raise an issue of fact as to the two allegedly injured body parts and summary judgment is granted in part as to the cervical and lumbar spine. As for plaintiff's alleged injuries to the thoracic spine, and meniscus tear of the right knee, plaintiff has raised an issue of fact. Plaintiff submits the affirmation of radiologist, Dr. David Payne who found a tear to the posterior horn of the medial meniscus in the right knee (Aff in Op, Exh E at 4). Plaintiff also submits the report of Dr. David Zelefsky who found a 30% decrease in range of motion to the thoracic spine (*id.*, Exh B at 4). Thus, plaintiff has raised an issue of fact and defendants' motion for summary judgment on the issue of serious injury as to the thoracic spine and right knee is denied; however, the branch of defendants' motion for summary judgment on the issue of serious injury as to the cervical and lumbar spine is granted.

Accordingly, it is

ORDERED that defendants' motion for summary judgment on the grounds that plaintiff allegedly has not sustained a "serious injury" as defined in 5102 and 5104 of the Insurance Law is granted as to the cervical and lumbar spine and denied as to the thoracic spine and right knee; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.

12/13/2018

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: