Evans v Evans-Mitchell
2017 NY Slip Op 32126(U)
October 11, 2017
Supreme Court, New York County
Docket Number: 150653/2015
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

KENNETH EVANS and SPENCER CHEREBIN,
Plaintiffs,

-against-

KENNETH EVANS-MITCHELL, RONALD ROSS and VERIZON NEW YORK, INC,
Defendants.

INDEX NO. 150653/2015
MOTION DATE 10/04/17
MOTION SEQ. NO. 002
MOTION CAL. NO. ______

The following papers, numbered 1 to 9 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 6
Replying Affidavits	7 - 9

Cross-Motion: ☐ Yes X No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Kenneth Evans-Mitchell's ("Evans-Mitchell") motion for summary judgment pursuant to CPLR §3212, is denied.

Plaintiffs commenced this action on January 12, 2015 to recover for personal injuries sustained in a motor vehicle accident (Moving Papers Ex. A). On August 22, 2014 at around 1:30pm Plaintiffs were passengers in a vehicle operated by Defendant Evans-Mitchell that struck the rear of the vehicle in front of it while traveling north on Seventh Avenue between 135th Street and 136th Street, New York, New York. The other vehicle was operated by Defendant Ronald Ross and owned by Defendant Verizon New York, Inc. As a result of the motor vehicle accident Plaintiff Spencer Cherebin ("Cherebin") was treated the following day at Harlem Hospital Center located at 506 Lenox Avenue, New York, New York for injuries to his neck, back and shoulder (Moving Papers Ex. D, Opposition Papers Ex. B). After the accident, Cherebin received physical therapy treatment for approximately six months for three to four times per week (Opposition Papers Ex. C). The Defendants answered, and the parties proceeded with discovery. The note of issue was filed on November 21, 2016.

Defendant Evans-Mitchell now moves for summary judgment dismissing the Verified Complaint in regards to the causes of action asserted by Plaintiff Cherebin contending he did not suffer a "serious injury" as defined in Insurance Law §5102[d]. Cherebin opposes the motion.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied their burden, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-

moving party (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (Kornfeld v NRX Tech., Inc., 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Epstein v Scally, 99 AD2d 713, 472 NYS2d 318 [1984]). Summary Judgment is "issue finding" not "issue determination"(Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti v Musallam, 11 AD3d 280, 783 NYS2d 347 [1st Dept. 2004]).

A plaintiff must show a "serious injury" as defined by Insurance Law §5102[d] as No-Fault Law bars recovery in automobile accident cases for "non-economic loss" (Perl v Meher, 18 NY3d 208, 936 NYS2d 655, 960 NE2d 424 [2011]). Any injury outside of the stringent definition of "serious injury" as defined in Insurance Law §5102[d] is incapable of supporting an action to recover for pain and suffering arising out of a motor vehicle accident (Licari v Elliot, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [1982]). The "statement of ... a physician ... authorized by law to practice in the state, who is not a party to the action" can constitute evidentiary proof in admissible form (CPLR §2106).

§5102[d] defines "serious injury" as a personal injury resulting in:

> (i) death; (ii) dismemberment; (iii) significant disfigurement; (iv) a fracture; (v) loss of fetus; (vi) permanent loss of use of a body organ, member function or system; (vii) permanent consequential limitation of use of a body organ or member; (viii) significant limitation of use of a body function or system; and (ix) a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment (Insurance Law §5102[d]).

Defendant Evans-Mitchell meets his prima facie burden establishing that Plaintiff Cherebin did not suffer a "serious injury" as defined under Insurance Law §5102[d] by submitting medical records and Cherebin's own deposition testimony (Charley v Goss,12 NY3d 750, 876 NYS2d 700, 904 NE2d 837 [2009]). Evans-Mitchell submitted Dr. Elizabeth Ortof's medical report summarizing Cherebin's July 6, 2016 medical evaluation and Dr. Shariar Sotudeh's medical report following Cherebin's March 21, 2014 orthopedic medical evaluation (Moving Papers Exs. E, F). To establish "permanent loss of use of a body organ, member, function or system," the permanent loss must be total (Oberly v Bangs Ambulance, 96 NY2d 295, 727 NYS2d 378, 751 NE2d 457 [2001]). There must be proof of a limitation of use that is permanent and consequential (Altman v Gassman, 202 AD2d 265, 608 NYS2d 651 [1st Dept. 1994]).

Dr. Ortof reported that Plaintiff Cherebin never lost consciousness or hit his head during the motor vehicle accident (Moving Papers Ex. E). Her diagnosis was that he had a "normal neurological exam, no disability from a neurological perspective" and was "capable of performing all normal activities of daily living from a neurological perspective" (*Id*).

Dr. Sotudeh opined that Plaintiff Cherebin had no disability resulting from the accident and Plaintiff did not disclose any injury sufficient enough to meet the No-Fault threshold requirement of a "serious injury" as Cherebin had "no orthopedic residuals" (*Id* at Ex. F). The doctors' reports demonstrate prima facie that Cherebin did not suffer

any injury that was "permanent and consequential" or that his loss was total.

As to Plaintiff's 90/180 category of serious physical injury, prima facie evidence can be established if the Defendant cites other [non-medical] evidence, such as the plaintiff's own deposition testimony to demonstrate that the plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (Elias v Mahlah, 58 AD3d 434, 870 NYS2d 318 [1st Dept. 2009]). Plaintiff Cherebin testified he was confined to his home for only one week following the accident, as he would walk to the store to buy groceries and attend therapy sessions (Moving Papers Ex. G). He also testified that the two months after the accident, he was only unable to play basketball, stand up for long periods of time, carry heavy weights and walk for an extensive time (*Id*). Defendant Evans-Mitchell proffers prima facie evidence to deny Plaintiff's injuries as serious under the 90/180 category of §5102[d].

Plaintiff Cherebin has presented evidence in admissible form to raise a triable issue of fact. He has offered a sworn affidavit from Dr. Ronald Lambert, his treating doctor who examined him on May 24, 2017 (Opposition Papers Ex. F). Prior to the examination, Dr. Lambert reviewed Cherebin's medical records, including medical charts, the MRIs, the initial exam reports and follow-up reports, and Cherebin's injection records (*Id*). He noted Cherebin's continued complaints regarding daily pain in his neck, back and shoulders and Cherebin's Medial Branch Nerve Blocks procedures on January 6 and 20, 2015 . Dr. Lambert found that the MRI films of the lumbar spine revealed a disc herniation impressing on the thecal sac and subarachnoid space, disc bulges that impressed the thecal sac and subarachnoid space. Furthermore, Dr. Lambert's examination found Cherebin had a decreased range of motion in his cervical spine, lumbosacral spine and thoracic spine. As a result of the examination, Dr. Lambert opined that Cherebin "sustained a permanent and significant damage to his neck, back and bilateral shoulders" as a direct casual result of the August 22, 2014 motor vehicle accident.

The record also raises a triable issue of fact as to whether Plaintiff offered "some reasonable explanation" to end his physical therapy treatment for his injuries (Ramkumar v Grand Style Transp. Enters. Inc., 22 NY3d 905, 976 NYS2d 1, 998 NE2d 801 [2013]). Dr. Lambert determined that the conservative nature of physical therapy treatment offered did not alleviate a majority of his pain, and reasonably explained why Plaintiff discontinued his physical therapy sessions after six months (Opposition Papers Ex. F).

Plaintiff Cherebin has raised material factual issues with regard to whether he sustained "serious injuries" as defined in Insurance Law §5102[d] requiring a denial of Defendant Evans-Mitchell's summary judgment motion.

Accordingly, it is ORDERED, that Defendant Kenneth Evans-Mitchell's motion for summary judgment pursuant to CPLR §3212 is denied, and it is further,

ORDERED, that this case is transferred to the Motor Vehicle Part.

Enter:

MANUEL J. MENDEZ
J.S.C.

Dated: October 11, 2017

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE