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| Rosen v Marmolejos |
| 2018 NY Slip Op 30711(U) |
| April 23, 2018 |
| Supreme Court, New York County |
| Docket Number: 152536/15 |
| Judge: Adam Silvera |
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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Adam Silvera Part 22**

NEAL ROSEN and ELISSA HORN-ROSEN,

DECISION/ORDER

Plaintiffs,

-against-

**INDEX NO. 152536/15
MOTION SEQ NO 002 & 003**

BERNARDO MARMOLEJOS,

Defendant,

ADAM SILVERA, J. :

Upon the foregoing papers, it is ordered that both defendant’s motion for summary judgment is denied and plaintiff’s motion for summary judgment are denied in part and granted in part for the reasons set forth below. Before the court are two motions: defendant moves under Motion Sequence 002 for summary judgment, pursuant to CPLR 3212, to dismiss plaintiffs’ complaint for failure to show the existence of a “serious injury” as defined under Section § 5102(d) of the Insurance Law. Plaintiffs oppose the motion. Plaintiff driver, Neal Rosen, moves under Motion Sequence 003 for summary judgment in favor of plaintiff on the issue of liability, to dismiss co-plaintiff Elisa Horn-Rosen’s complaint for failure to show a “serious injury” as defined under Section § 5102(d) of the Insurance Law, and to dismiss defendant’s counter-claim. Defendant opposes the motion.

BACKGROUND

Plaintiff filed suit on March 16, 2015, alleging that on January 9, 2015, on Amsterdam Avenue between West 181st Street and West 182nd Street in the City, County and State of New York, a vehicle operated by Defendant Bernardo Marmolejos hit the rear of a stopped vehicle

operated by plaintiff Neal Rosen and carrying passenger plaintiff Elissa Horn-Rosen. Plaintiffs' complaint alleges that both plaintiffs were seriously injured. Defendant answered timely and filed a counterclaim alleging plaintiffs sustained damages arose solely from the fault of Neal Rosen. Plaintiff Neal Rosen, who is the defendant in the cross claim, answered timely denying defendant's allegations.

DISCUSSION

Defendant's motion for summary judgment is denied. The part of plaintiff Neal Rosen's motion for summary judgment to dismiss co-plaintiff Elisa Horn-Rosen's complaint is denied. The part of plaintiff's motion for summary judgment in favor of plaintiff on the issue of liability 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"])). Additionally, on a motion for summary judgment, a defendant may establish a prima facie case against serious injury by proof

that an alleged injury/limitation was not caused by the subject accident (*Franchini v Palmieri*, 1 NY3d 536, 537 [2003]).

The court has held that there is a presumption of negligence for some rear-end motor vehicle incidents. “[A] rear-end collision with a stopped ... vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, ... [and] shift[s] the burden to defendant to come forward with an adequate nonnegligent explanation for the accident” (*Cruz v Lise*, 123 AD3d 514 [1st Dep’t 2014] [internal quotations omitted]).

Defendant’s Motion Sequence 002

Defendant’s motion to dismiss plaintiff’s complaint for failure to show the existence of a “serious injury” as defined under Section 5102(d) of the Insurance Law is denied. Plaintiffs and defendant provide conflicting medical reports as to significant limitation of use of a body function or system involving plaintiffs’ range of motion of certain body parts. As to plaintiff Neal Rosen, defendant provides the affirmed report of Dr. Igor Rubinshyteyn to demonstrate that plaintiff has a normal range of motion (Dfdts Mot., exh. F). Plaintiffs allege that the ranges of motion listed by Dr. Rubinshyteyn are reversed and impossible as stated. Further plaintiffs provide the report and affirmation of Dr. Nizarali Visram which conflicts with Dr. Rubinshyteyn’s findings. Thus, there exists an issue of fact precluding summary judgment as to plaintiff Neal Rosen.

As to plaintiff Elissa Horn-Rosen, there is, similarly, an issue of fact precluding summary judgment. Defendant alleges that plaintiff Horn-Rosen “voluntarily used suboptimal effort during range of motion testing” (Dfdts Mot. ¶8). Defendant’s doctor report prepared by Dr. Robert S. April claims that plaintiff Horn-Rosen has normal range of motion (Dfdts Mot., Exh G). Plaintiff Horn-Rosen provides the affirmed report of Dr. Visram which notes that there are

“significant limitations in the cervical spine range of motion which was up to 40%” (Pltf Horn-Rosen Aff in Op, ¶28). Given the conflicting reports, there exists an issue of fact precluding summary judgment as to plaintiff Horn Rosen such that defendant’s motion, Motion Sequence 002, is denied.

Plaintiff’s Motion Sequence 003

Plaintiff Neal Rosen’s motion, Motion Sequence 003, for summary judgment is denied in part and granted in part. For the reasons stated above, the portion of plaintiff’s motion seeking to dismiss co-plaintiff Elisa Horn-Rosen’s complaint for failure to show a “serious injury” is denied. The portion of plaintiff’s motion for summary judgment in favor of plaintiffs on the issue of liability is granted. Plaintiff has provided the testimony of the defendant in which defendant concedes to have hit plaintiffs’ vehicle from behind after seeing the vehicle at a stop in front of him before a traffic light (Plaintiff’s Mot., Exh E., 18-19). Defendant fails to come forward with an adequate nonnegligent explanation for the accident. Thus, plaintiff’s motion for liability in favor of plaintiff, and to dismiss defendant’s counterclaim, is granted. As defendant’s liability has been established, the Court, having searched the record pursuant to CPLR 3212(b), grants summary judgment to co-plaintiff Horn Rosen, against defendant, as to liability.

Accordingly, it is

ORDERED that defendant’s motion to dismiss plaintiffs’ complaint for failure to show the existence of a “serious injury” as defined under Section § 5102(d) of the Insurance Law is denied; and it is further

ORDERED that plaintiff’s motion for summary judgment to dismiss co-plaintiff Elisa Horn-Rosen’s complaint for failure to show a “serious injury” as defined under Section § 5102(d) of the Insurance Law is denied; and it is further

ORDERED that plaintiff's motion for summary judgment in favor of both plaintiffs on the issue of liability is granted in favor of plaintiff; and it is further

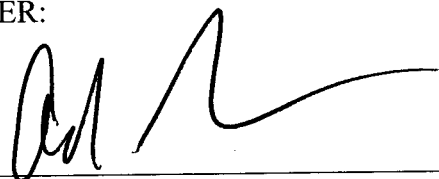
ORDERED that plaintiff's motion for summary judgment dismissing the counterclaim of defendant Bernardo Marmolejos granted; and it is further

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

This constitutes the Decision/Order of the Court.

Dated: 4/23/18

ENTER:



Hon. Adam Silvera, J.S.C.