Blyden v Abreau
2018 NY Slip Op 30956(U)
April 6, 2018
Supreme Court, Bronx County
Docket Number: 21234/2015E
Judge: Fernando Tapia

FILED: BRONX COUNTY CLERK 04/17/2018 03:19 PM INDEX NO. 21234/2015E
NYSCEF DOC. NO. 158 RECEIVED NYSCEF: 04/17/2018

C'

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

JOHN BLYDEN, CHARMAINE DANIEL and
SHAKEMA DANIEL,

Plaintiffs

Index No.: 21234/2015E

-against-

DECISION/ORDER

FREDDY L. ABREAU, AMERICA UNITED
TRANSPORTATION, INC., HAKEEM J. CROOM,
ANTHONY C. CLEAVER and AAMCAR II,

Defendants

HON. FERNANDO TAPIA

There are three dismissal motions before the court brought by the remaining defendants in this action[1]: two by FREDDY L. ABREAU ("ABREAU") and AMERICAN UNITED TRANSPORTATION, INC. ("AUT"); and one by defendant HAKEEM J. CROOM ("CROOM").

The first motion of ABREAU and AUT is made pursuant to CPLR §3212 seeking summary judgment on the issue of liability dismissing the plaintiffs' Complaint and all cross-claims of the remaining co-defendant, CROOM. (NYSCEF Docs. No. 47-60, 69 and 70). ABREAU and AUT's second motion is labeled a "cross motion" and seeks an order of summary judgment dismissing the Complaint of all 3 plaintiffs pursuant to CPLR §3212 arguing that none suffered a "serious injury" as defined by Insurance Law §5102(d).

---

[1]Defendants ANTHONY C. CLEAVER and AAMCAR II were stipulated out of the action, with prejudice, in February, 2016 (see, Stipulation of Discontinuance; NYSCEF Doc. No. 31).

FILED: BRONX COUNTY CLERK 04/17/2018 03:19 PM INDEX NO. 21234/2015E
NYSCEF DOC. NO. 158 RECEIVED NYSCEF: 04/17/2018

The third motion was brought by defendant CROOM pursuant to CPLR §3212 seeking dismissal of the Complaint of only plaintiffs JOHN BLYDEN ("BLYDEN") and SHAKEMA DANIEL ("SHAKEMA D.") on the ground that neither sustained a "serious injury" under Insurance Law §5102(d). (NYSCEF Docs. No. 71-92). This motion was brought after the liability motion of ABREAU and AUT was made but before those defendants' threshold "cross-motion". Unlike ABREAU and AUT's threshold motion, the motion of CROOM only seeks dismissal of the claims of BLYDEN and SHAKEMA D.; it did not address the claim of plaintiff CHARMAINE DANIEL (CHARMAINE D.).

Plaintiffs did not oppose the liability motion of ABREAU and AUT. However, co-defendant CROOM opposed it with an attorney affirmation and certificate of merit (NYSCEF Docs. No. 67 and 68). Plaintiffs BLYDEN and SHAKEMA D. did oppose CROOM's threshold motion relative to their claims (NYSCEF Docs No. 98-114).

This action arises from a three vehicle collision on June 21, 2014 at the intersection of Frederick Douglas Blvd. (a.k.a. 8th Ave.) and West 154th Street in New York County. Vehicle #1 was owned by AUT and operated by ABREAU. Vehicle #2 was a large passenger van owned by defendant AAMCAR II and operated by defendant ANTHONY C. CLEAVER ("CLEAVER") and was the vehicle in which all the plaintiffs were passengers. Vehicle #3 was owned and driven by CROOM. The incident occurred at a red light with vehicle #1 being the car closest to the light and vehicle #3 being furthest away.

In support of the liability motion, AUT and ABREAU submitted multiple exhibits which included the pleadings, police accident report, an affidavit of ABREAU, and the deposition transcripts of all 3 plaintiffs. In opposition, defendant CROOM only submitted an attorney

affirmation which did not dispute the facts but, merely argued the co-defendants had not submitted sufficient proof in admissible form to meet their initial burden of entitlement to summary judgment. This court disagrees with CROOM's counsel.

A review of the deposition transcripts clearly establish the plaintiffs' were each sworn before their testimony. And, in each case, their testimony established the passenger van they were in was stopped at the red light for approximately ten seconds before being struck from behind by CROOM's car. Their vehicle was then forced forward striking the AUT/ABREAU car which was also legally stopped at the red light. There is no evidence to the contrary. While the uncertified police accident report is inadmissable hearsay, the sworn testimony of the plaintiffs and the affidavit of ABREAU are not. In this regard, it is well-settled law that a rear-end collision creates a presumption of negligence on the part of the offending rear-most vehicle (see, Woodley v Ramirez, 25 AD3d 451 [1st Dept. 2006]). There is no proof whatsoever of any negligence on the part of ABREAU, the first car in line. ABREAU and AUT have met their burden of proof to establish a prima facie case of entitlement to summary judgment on liability and co-defendant CROOM could not meet his burden to establish any questions of fact.

The Court is granting the first motion on liability thereby rendering the second motion of ABREAU and AUT regarding failure to meet the tort threshold as moot. As such, the Court did not need to review the papers for, or against, the threshold motion of ABREAU and AUT (NYSCEF Docs. No. 116-138, 143-153 and 154) as none of the parties adopted or incorporated the papers of any other.

The only motion remaining is the threshold motion of CROOM seeking dismissal against plaintiffs BLYDEN and SHAKEMA D. This motion is granted in part and denied in part.

FILED: BRONX COUNTY CLERK 04/17/2018 03:19 PM INDEX NO. 21234/2015E
NYSCEF DOC. NO. 158 RECEIVED NYSCEF: 04/17/2018

Specifically, the Insurance Law category alleging a "permanent loss of a body organ, member, function or system" is dismissed but, all other categories alleged will remain and be submitted to the finder of fact in the trial of this matter.

Both BLYDEN and SHAKEMA D. allege the same four qualifying grounds of "serious injury" under Insurance Law §5102(d) in the joint Bill of Particulars :

1. Permanent loss of use of a body organ, member, function or system;
2. Permanent consequential limitation of use of a body organ or member;
3. Significant limitation of use of a body function or system; and
4. A medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

In the Bill of Particulars, BLYDEN claims the following as injuries he suffered in this collision:

> Central herniation with thecal sac indentation and cord impingement at C2-3, broad-based left paracentral herniation with inferior extrusion causing hemicord compression at C3-4 obliterating the axial recess, impinging upon the left C5 root, left bony foraminal stenosis; broad-based central herniation with a right parasagittal, posterior extrusional component with cord compression and canal stenosis at C4-5, left bony foraminal stenosis; broad central disc herniation with thecal sac indentation at C5-6, impingement upon C7 roots bilaterally, lateral bony foraminal stenosis; broad central herniation with thecal sac indentation of C6-7, impingement upon C8 roots, right bony foraminal stenosis; central herniation with thecal sac indentation at C7-T1, right bony foraminal stenosis; central disc herniations at T1-2, T2-3, T3-4 with multilevel cord impingement; lordotic reversal at C4; painful range-of-motion of the cervical spine; tenderness, muscle spasms, neck pain with numbness and tingling in the left upper extremity; stiffness, spasms, weakness, tightness, neck pain radiating to both shoulders with weakness to the arms; tenderness, painful range-of-motion of the left shoulder; left shoulder internal derangement; rotator cuff impingement; left shoulder sprain/strain; stiffness, spasms, weakness, shooting pain of

FILED: BRONX COUNTY CLERK 04/17/2018 03:19 PM INDEX NO. 21234/2015E
NYSCEF DOC. NO. 158 RECEIVED NYSCEF: 04/17/2018

> the left shoulder; tingling sensation of the left shoulder; painful range-of-motion of the right shoulder; right shoulder internal derangement; rotator cuff impingement/tendinopathy; tenderness, stiffness, spasms, weakness, and post-traumatic arthritis cervical spine.

BLYDEN also alleges that he was confined to bed for one and a half months and was totally disabled for 3 weeks.

As for plaintiff SHAKEMA D., she denied being confined to her bed or being totally disabled but, alleged she was partially disabled up to the date of the Bill of Particulars (July 7, 2015) "and continuing". She alleged the following injuries as qualifying under the Insurance Law:

> Central herniations at C2-3 and C3-4 with thecal sac impingement; central herniation at C5-6 with thecal sac indentation; bulging disc at C4-5; bulging disc at C6-7; straightening of mid cervical lordosis with exaggerated upper cervical lordosis and exaggerated upper thoracic kyphosis; bulging disc at L3-4; bulging disc at L4-5; bulging disc at L5-S1; straightening lordosis; cervical spine strain/sprain; tenderness; constant throbbing radiating cervical pain; weakness; stiffness; spasms; tightness; neck pain; lumbar spine strain/sprain; spasms; tenderness; lower back contact pain with numbness and tingling radiates down both lower extremities; weakness; stiffness; spasms; tightness; constant throbbing radiating lumbar spine pain; soreness; posttraumatic memory impairment; traumatic brain injury; post concussive syndrome; head trauma; lost consciousness; posttraumatic dizziness; posttraumatic headaches; confusion.

In support of the motion, defendant CROOM submitted, among other things: the pleadings and bills of particulars; the deposition testimony of BLYDEN and SHAKEMA D.; uncertified copies of the Emergency Room records from New York Presbyterian Hospital on the day of the incident; report of MRI of the cervical spine of BLYDEN by Dr. Shelly Wertheim

dated July 7, 2014; radiographic report of BLYDEN's shoulder by Dr. Gregory Wilde dated July 3, 2014; affirmed medical report of Dr. Arnold T. Berman dated April 2, 2016 who examined BLYDEN at the request of defendant's counsel; medical report of Dr. Paul Brisson dated August 9, 2014 who was one of SHAKEMA D.'s treating physicians; medical report dated May 6, 2015 of one of SHAKEMA D.'s treating physicians - Dr. Diara Gross; and, the report of Dr. Arnold T. Berman dated October 13, 2016 who examined SHAKIMA D. at the request of defendant's counsel.

In opposition, plaintiffs BLYDEN and SHAKEMA D. submit, among other things: affirmation of Dr. Diara Gross dated May 30, 2017 regarding SHAKEMA D.; affidavit of SHAKEMA D. sworn to on June 26, 2017; medical records and reports of DHD Medical, P.C. for both plaintiffs; affirmed medical report of Dr. Jason Brown of the Center For Cognition and Communication dated August 15, 2014 regarding SHAKEMA D.; certified and affirmed records and reports of Dr. Andrew Cordiale of New York Spine Specialist regarding SHAKEMA D.; certified and affirmed records and reports of Dr. Joyce Goldenberg of Central Park Physical Medicine and Rehabilitation, P.C. regarding SHAKEMA D.; affirmation of Dr. Diara Gross dated May 30, 2017 regarding BLYDEN; affidavit of BLYDEN sworn to on April 26, 2017; MRI report of cervical spine of BLYDEN dated July 1, 2014; medical report of Dr. Paul Brisson dated July 21, 2014 regarding BLYDEN; and, certified and affirmed records and reports of Dr. Demetrios Mikelis of New York Spine Specialist regarding BLYDEN.

"On a motion for summary judgment dismissing a complaint that alleges a serious injury under Insurance Law §5102(d), the defendant bears the initial burden of establishing by competent medical evidence that plaintiff did not sustain a serious injury caused by the accident'"

FILED: BRONX COUNTY CLERK 04/17/2018 03:19 PM INDEX NO. 21234/2015E
NYSCEF DOC. NO. 158 RECEIVED NYSCEF: 04/17/2018

Toure v. Avis Rent A Car Sys., 98 NY2d 345, 352 (2002); Haddadnia v. Saville, 29 AD3d 1211, 1211 (3d Dept. 2006).

As concerns plaintiff BLYDEN, defendant CROOM made a prima facie showing of entitlement to judgment as a matter of law dismissing the claims of serious injury premised on all of the alleged "serious injury" grounds. Defendant's evidence demonstrated that the plaintiff only treated for a matter of months after the incident and there was no real showing of any lasting disability. Radiographic tests showed anomalies of a degenerative nature, not traumatic. At the physical examination of BLYDEN performed at defense counsel's request on April 2, 2016, he exhibited normal ranges of motion of all affected areas of his body. The diagnosis of the examining physician was that of cervical, lumbar and left shoulder strain/sprain that was resolved with no residuals. The deposition testimony of BLYDEN showed that while he did have constant complaints of pain and some limitation of his activities, these did not appear to force him to curtail "substantially all" of his daily activities. He appeared to resume his business of making and delivering juices about 2 months after the collision. Admittedly, he also retired from this business but, the record is not clear if this was based on a medical diagnosis or his age.

Turning to plaintiff SHAKEMA D., the defendant made out a prima facie showing of entitlement to summary judgment in all but the category commonly referred to as the 90/180 day category. The records submitted show complaints of pain in the head, neck and back regions but, all reports of physical examinations showed subjective complaints of pain with no real objective findings. The opinion of the physician who examined her at the request of the defendant confirmed a variety of disc herniations, bulges and other spinal abnormalities but, those alone do not establish a serious injury. His objective testing showed no clinical correlations to the spinal

FILED: BRONX COUNTY CLERK 04/17/2018 03:19 PM INDEX NO. 21234/2015E
NYSCEF DOC. NO. 158 RECEIVED NYSCEF: 04/17/2018

conditions and all of her range of motion testing was normal. It was that physician's opinion SHAKEMA D. had recovered from cervical and lumbar strain/sprain with no residuals.

However, in her deposition she testified that she was told by her doctor to stay home for approximately three to four months after the incident because of her injuries and, in fact, she cut her work hours in half due to her inability to work as a barista. She eventually took a medical leave and only returned to work briefly before being let go since she was not physically able to work. She wore her cervical collar off and on for about 6 months. In the first 3 months she helped out with some of the household chores but, not as much as she used to. Based on this testimony and the medical provided, defendant did not meet his burden of proof on the 90/180 day category. As such, this portion of the motion must be denied, regardless of the sufficiency of plaintiff's opposing papers. Santos v New York City Transit Authority, 99 AD 3d 550 (1st Dept 2012); Escotto v Vallejo, 95 AD3d 667 (1st Dept. 2012.

Although defendant established a prima facie showing of entitlement to judgment as a matter of law on all of the threshold categories of BLYDEN and all but the 90/180 day category of SHAKEMA D., both plaintiffs have raised triable issues of fact on all but one category; "permanent loss of use". The plaintiffs' evidentiary submissions have provided a fuller picture of their total overall care, treatment, physical examinations and diagnoses. These additional medical and legal documents (i.e. affidavits and affirmations) depict a completely different picture of the plaintiffs' conditions. In both cases, the proof showed contemporaneous measurements of loss of ranges of motion which were of significance and objectively determined. There also were indications of the long lasting nature and effects of the injuries with a determination that they are permanent. The experts' reports and affirmations qualified as

adequate qualitative and quantitative assessments. Finally, in the case of BLYDEN, he met his burden of raising a question of fact concerning the 90/180 day category by more fully setting out the nature and cause of his limitations in the 6 months (or more) after the collision and established satisfactorily that a question of fact exists concerning this category.

However, both plaintiffs failed to raise a triable issue of fact regarding a "permanent loss of use of a body organ, member, function or system" . It is axiomatic that under this category, only a permanent and total loss of use is compensable. Oberly v Bangs Ambulance, Inc., 96 NY2d 295(2001). Losses that are merely significant or consequential are not sufficient. Geloso v Monster, 289 AD2d 746 (3d Dept. 2001). There is nothing in the record to establish either plaintiff suffered a total permanent loss of use of any body organ, member, function or system.

Conclusion

Accordingly, it is

ORDERED that the motion of defendants ABREAU and AUT seeking dismissal of plaintiffs' Complaint and all defendants' cross-claims against them on the issue of liability is granted. As such, the motion of these defendants seeking dismissal of all three plaintiffs' claims for failure to satisfy the "serious injury" threshold of the Insurance Law has been rendered moot thereby rendering a decision on that motion as unnecessary, and it is further,

ORDERED that the motion of defendant CROOM seeking dismissal of the claims of plaintiffs BLYDEN and SHAKEMA D. based upon those plaintiffs not suffering a "serious injury" as defined by the Insurance Law is granted in part and denied in part in that the category of "permanent loss of use of a body organ, member, function or system" is dismissed but all other categories alleged in the Bill of Particulars shall survive and be determined by the trier of

FILED: BRONX COUNTY CLERK 04/17/2018 03:19 PM INDEX NO. 21234/2015E
NYSCEF DOC. NO. 158 RECEIVED NYSCEF: 04/17/2018

fact in the trial of this matter.

This constitutes the decision and order of the Court.

Dated: APRIL 6, 2018
Bronx NY.

ENTER,

FERNANDO TAPIA, J.S.C.