Marcelo v Elmoudni
2018 NY Slip Op 31848(U)
August 1, 2018
Supreme Court, New York County
Docket Number: 163090/2015
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22

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ALEJANDRO MARCELO,

Plaintiff,

- v -

SAID ELMOUDNI, ANDY TRANS CORP., ELLEN LEIKIND

Defendant.

---X

INDEX NO. 163090/2015

MOTION DATE 06/18/2018, 06/18/2018

MOTION SEQ. NO. 001 002

DECISION AND ORDER

HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 61
were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 55, 56, 57, 58, 59, 60
were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ORDERED that plaintiff Alejandro Marcelo's motion, motion sequence 001 is granted in part and that defendant Said Elmoundi and defendant Andy Trans Corp's motion, motion sequence 002 is denied. In motion sequence 001, plaintiff moves pursuant to CPLR 3126 and NYCRR 130-1 to strike defendants' answer and grant plaintiff judgment on all liability issues, and for a further order to set this matter down for an inquest, on the grounds that the defendants have willfully and contumaciously frustrated the discovery process by repeatedly failing to appear for Court-ordered depositions or in the alternative to preclude defendants from contesting liability and proximate cause at the time of trial and award judgment to plaintiff on said issues and to compel defendants to appear for Court-ordered depositions and comply with all prior Orders and Stipulations of the Court dated July 19, 2016,

February 27, 2017, June 12, 2017, and September 11, 2017, and for an award of sanctions, and for an order to award sanctions and to direct defendants' counsel to pay the plaintiff costs and disbursements for this motion.

In motion sequence 002, defendants Said Elmoundi and Andy Trans. Corp move pursuant to CPLR 3212 for summary judgment and to dismiss plaintiff's complaint on the grounds that there are no triable issues of fact and that plaintiff cannot meet the "serious injury" threshold requirement as mandated by Insurance Law Sections 5104(a) and 5201(d).

BACKGROUND

The matter at hand involves an accident that occurred on November 2, 2014, on West 86th Street and Columbus Avenue, in the County, City and State of New York when plaintiff Alejandro Marcelo, a bicyclist, was allegedly seriously injured when defendant passenger Ellen Leikind opened the passenger door of a motor vehicle owned by defendant Andy Trans. Corp and operated by defendant Said Elmoundi and struck plaintiff.

Defendants were to appear for Court-ordered depositions scheduled by Orders and Stipulations of this Court dated July 19, 2016, February 27, 2017, June 12, 2017, and September 11, 2017 and have failed to appear for depositions to date.

MOTION SEQUENCE 001

The branch of plaintiff's motion which seeks the preclusion of defendants Said Elmoundi, Andy Trans. Corp and Ellen Leikind from testifying as to liability and proximate cause at the time of trial and from submitting any affidavit as to substantive motions concerning liability and proximate cause is granted. The Appellate Division First Department has found that "the specific remedy for . . . [a party's] failure to appear for deposition was preclusion, not the striking of his answer . . . in the event however, that he is not made available for deposition, as

indicated, he shall be precluded from testifying" (Glaser v Fugazy Limousine, Ltd., 227 AD2d 111, 112 [1st Dep't 1996]). The Court may exercise its discretion in "precluding a party from testifying at trial, given … [their] irresponsible approach to discovery" Mehta v Chugh – AD3d - , 2012 NY Slip Op 06645 [1st Dep't 2012] [finding that a party who fails to apprise the Court of their inability to be deposed on the day of a scheduled deposition and fails to explain their failure to appear for a Court-ordered deposition shall be precluded from testifying at trial]). A party's "numerous and unexplained failures to comply with longstanding and still outstanding discovery obligations justify the inference that . . . [their] noncompliance with discovery has been willful and contumacious" and upon such a showing, the Court may grant a motion to preclude said party's testimony and affidavits at for noncompliance (Sanchez v City of New York, 266 AD2d 127 [1st Dep't 1999]).

Here, while plaintiff seeks to strike defendants' answer for failure to appear for deposition, this is not the proper remedy. The defendants failed to appear for seven scheduled depositions, have not provided this Court with a proper explanation for their failure to appear, and did not apprise the Court of their inability to be deposed on the scheduled deposition dates. Thus, the Court can infer that defendants have willfully failed to comply with discovery warranting the imposition of preclusion. Thus, the branch of plaintiff's motion seeking defendants' preclusion is granted to the extent that the Court shall preclude any testimony of defendants at trial and from providing any affidavits as to any substantive motion concerning liability and proximate cause.

MOTION SEQUENCE 002

Defendants' motion for summary judgment to dismiss plaintiff's complaint on the grounds that there are no triable issues of fact, in that plaintiff has not suffered a "serious injury" pursuant to Insurance Law Sections 5104(a) and 5102(d), is denied.

"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"]). Under Insurance Law 5102(d) "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." A physician's affidavit which merely provides a brief opinion "with a reasonable degree of medical certainty" after having reviewed "pertinent medical records" is conclusory and does not entitle defendants to summary judgment (*Winegrad*, 64 NY2d at 852).

Here, defendants allege that plaintiff did not sustain a serious injury. Defendants point to the deposition of plaintiff wherein he testified that at the time of the accident at issue he worked as a delivery person for Aanagan Restaurant, returned to work the day after the accident, and continues to maintain the same job (Defendants' Mot, Exh D, at 18-22). Thus, defendants demonstrate that and that the alleged injuries did not keep plaintiff out of work for at least 90 days during the first 180 days following the incident.

Defendants submit the affirmations of Dr. Timothy G. Haydock, Dr. Barbara Freeman, Dr. Robert S. April, Dr. A. Robert Tantleff in support of their motion to demonstrate the lack of serious injury (Defendants' Mot, Exh E, G, H, and I). Dr. Haydock reviewed emergency room records, Bill of Particulars, and police report and notes that it is his opinion, within a reasonable degree of medical certainty, that plaintiff's claimed injuries, aside for a left upper arm contusion and mid left upper arm pain, have no causal relation with the accident at issue (*id.*, Exh E). Dr. Haydock did not perform an examination of plaintiff. Dr. Haydock's affirmation is not based on the examination of plaintiff, records of another physician which provides proper documentation as to range of motion, objective examinations, and other record of permanent injury or lack thereof. Thus, Dr. Haydock's affirmation contains conclusory assertions and insufficient to satisfy defendants' burden.

Defendants further submit the affidavit of Dr. Freeman who examined plaintiff and affirms that plaintiff has a normal range of motion of his cervical spine, shoulders, elbows, lumbar spine, and knees (*id.* Exh G at 5). Freeman states that "the claimants knee conditions are consistent with body habitus and occupation. There is no evidence of causally related acute injury to the back" (*id.*). Additionally, defendants submit the affidavit of Dr. April who examined plaintiff and concluded that plaintiff has a normal range of motion pursuant to

American Medical Association Guidelines and has no permanent injury or neurological condition (*id.* Exh H). Lastly defendants demonstrate that plaintiff was not seriously injured through the affidavit Dr. Tantleff who conducted a review of plaintiff's MRI of the cervical spine and found that plaintiff has degenerative disc disease and that "the findings are consistent with the individual's age and not causally related to the date of the incident . . . as the findings are chronic longstanding process requiring years to develop" (*id.* Exh, I). Defendants have proffered sufficient medical affirmations to satisfy their burden and the burden shifts to plaintiff to demonstrate an issue of fact.

In opposition to defendants' motion plaintiff submits the affidavit of Dr. Mark Heyligers who treated plaintiff 10 days after the incident at issue (Aff in Op, Exh A). The examination revealed restrictions to the range of motion of plaintiff's cervical spine and the lumbosacral spine (*id.,* ¶¶ 4 & 5). *Dr.* Heyligers continued to treat plaintiff and examined the plaintiff 150 times since the first examination (*id.,* ¶ 10). A recent examination of plaintiff dated January 19, 2018 revealed that plaintiff still, over three years since the incident, continues to have an impinged range of motion in the cervical spine and lumbosacral spine (*id.,* ¶¶ 11 & 12). Dr. Heyligers opines that plaintiff's injuries "are directly and causally related to and are a continuing manifestation of the accident of 11/02/14" (*id.*, ¶14). Plaintiff has raised a triable issue of fact as to the lumbosacral and cervical spine injuries and has demonstrated that a direct causal connection exists between plaintiff's injuries and the subject motor vehicle collision precluding summary judgment. Plaintiff having established that defendants have willfully failed to provide discovery as directed [e.g., in the preliminary conference order of this Court and subsequent stipulations/orders dated July 19, 2016, February 27, 2017, June 12, 2017, and September 11,

2017, respectively] in that defendant has, without reasonable justification failed to produce defendant for deposition, it is hereby

ORDERED that the motion of plaintiff is granted in part; and it is further

ORDERED that defendant is precluded from offering proof in opposition to plaintiff's claim of liability and proximate cause; and it is further

ORDERED that defendants' motion is denied; and it is further

ORDERED that the parties appear for a compliance conference on August 22, 2018, at 9:30am in Room 103 of 80 Centre Street; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon defendant with notice of entry.

This constitutes the Decision/Order of the Court.

8/1/2018
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION			
	[ ] GRANTED	[ ] DENIED	[ ] GRANTED IN PART		[X] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER			
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT		[ ] REFERENCE	