Gomez v Canada Dry Bottling Co. of N.Y., L.P.
2018 NY Slip Op 32499(U)
October 5, 2018
Supreme Court, Queens County
Docket Number: 7513/15
Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

LUIS GOMEZ and CHRISTINA DEJESUS and FRANCES SANDARIA-GOMEZ,

Plaintiffs,

-against-

CANADA DRY BOTTLING COMPANY OF NEW YORK, L.P., GREGORY LEE, AVIS RENT A CAR SYSTEM, LLC., PV HOLDING CORP., and EDDIE GOMEZ,

Defendants.

Index No.: 7513/15

Motion Date: 8/29/18
Motion Seq. No.: 4

Motion Date: 9/5/18
Motion Seq. No.: 5

The motions Sequence#4 and #5 are combined for disposition in view of the plaintiffs having submitted a single combined response to the two motions.

The following papers numbered 1 to 4 read on this motion Seq.#4 by defendants, AVIS RENT A CAR SYSTEM, LLC. and PV HOLDING CORP. for an order dismissing the complaint and all cross-claims insofar as they are asserted against them pursuant to CPLR 3211(a)(1) and (7) and 3212 and pursuant to 49 USC 30106; and motion by defendant, HENRY LUIS GOMEZ-MADERA s/h/a EDDIE GOMEZ for summary judgment dismissing the complaint and all cross-claims insofar as it asserted against him; and motion Seq.#5 by defendants, CANADA DRY BOTTLING COMPANY OF NEW YORK, L.P. and GREGORY LEE for summary judgment dismissing the first, second and third causes of action in the complaint on the grounds that plaintiffs LUIS GOMEZ and CHRISTINA DEJESUS have not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104, or, pursuant to CPLR 3126 resolving all issues against plaintiff CHRISTINA DEJESUS and/or precluding the plaintiff CHRISTINA DEJESUS from submitting evidence in support of damages for failure to appear for court ordered independent medical examinations.

		PAPERS NUMBERED
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Upon the foregoing papers it is ordered that these motions are determined as follows.

Motion Seq.#4:

The defendants, AVIS RENT A CAR SYSTEM, LLC. and PV HOLDING CORP., motion is granted without opposition and the complaint and all cross-claims insofar as they are asserted against these defendants which only seek to hold these defendants vicariously liable pursuant to Vehicle and Traffic Law § 388 is dismissed as such claim is barred by 49 USC 30106 (see Graham v Dunkley, 50 AD3d 55 [2008], appeal dismissed 10 NY3d 835 [2008]).

The defendant's, Henry Luis Gomez-Madera s/h/a Eddie Gomez, motion for summary judgment dismissing the complaint and all cross-claims insofar as they are asserted against him is denied.

"A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident" (King v. Perez, 160 AD3d 708, quoting Boulos v Lerner-Harrington, 124 AD3d 709, 709 [2015]). The defendants have failed to submit any evidence to demonstrate that the defendant, Henry Luis Gomez-Madera s/h/a Eddie Gomez, was not at fault in the happeneing of the accident.

Motion Seq. #5:

The plaintiffs, Gomez, and his wife suing derivatively, and DeJesus commenced this action to recover for, inter alia, personal injuries they allegedly sustained on January 19, 2013 and . Defendants, CANADA DRY BOTTLING COMPANY OF NEW YORK, L.P. and GREGORY LEE, move for summary judgment dismissing the complaint on the grounds that the plaintiffs did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104.

With respect to the plaintiff, Luis Gomez, defendants have submitted competent medical evidence including plaintiff, Gomez', treating physicians medical records regarding their treatment and diagnosis following plaintiff's three prior accidents and an accident subsequent to the subject accident, the affirmed examination reports of their examining orthopedist and neurologist, and the plaintiff's deposition testimony which establish, prima facie, that the plaintiff, Gomez, did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident (see Pommells v Perez, 4 NY3d 566, 574 [2005]; Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Thus, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting competent medical proof (see Gaddy v Eyler, supra; Licari v Elliott, 57 NY2d 230, 235 [1982]; Lopez v Senatore, 65 NY2d 1017 [1985]).

In opposition, the plaintiff submitted sufficient competent medical evidence, including the affirmed report of Dr. Harrison dated July 11, 2019, to raise a triable issue of fact as to whether the plaintiff's, Gomez', cervical spine condition is causally related to the accident and whether such condition constitutes a serious within under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories.

However, the plaintiff's competent medical evidence fails to raise a triable issue of fact as to whether the plaintiff's alleged lumbar spine condition, left and right knee condition and right shoulder condition are pre-existing conditions and not causally related to the accident. The defendants submitted "persuasive" objective medical evidence to support their experts' conclusion of the lack of causation with respect to these injuries. Thus, the plaintiffs are required to present non-conclusory expert evidence sufficient to demonstrate or to raise a triable issue of fact, that the alleged injuries are "serious" within the meaning of Insurance Law § 5102 (d), and that they are causally related to the accident (see Pommells v Perez, supra at 575; Penaloza v Chavez, 48 AD3d 654 [2008]).

Plaintiff's counsel's contention that even if these conditions were pre-existing, they were aggravated as a result of the subject accident is unavailing. First, counsel's opinion is of no probative value and merely pleading aggravation is insufficient to raise a triable issue. While aggravation of a pre-existing condition may, under appropriate circumstances, constitute a "serious injury" (see Trunk v Spross, 306 AD2d 463 [2003]; Walsh v Kings Plaza Replacement Serv., 239 AD2d 408, 409

[1997]), the plaintiff must submit competent medical evidence demonstrating, or raising a triable issue of fact, that such alleged aggravation was so severe as to produce a statutory serious injury above and beyond the pre-existing condition (see Pommells v Perez, supra at 580; Trunk v Spross, supra; Dabiere v Yager, 297 AD2d 831, 832 [2002], lv denied 99 NY2d 503 [2002]). Although Dr. Harrison in his report states that plaintiff's lumbar spine injury has resolved long before the subject accident, the plaintiff's medical records submitted by the defendants in support of their motion is replete with plaintiff's continued complaints of lower back pain commencing from the 1996 accident to the present.

In addition, in view of the plaintiff's deposition testimony that he was never confined to his home following the subject accident and that he returned to work after the accident and only missed a few days sporadically from work he has failed to raise a triable issue of fact as to as to whether he sustained a serious injury of a nonpermanent nature which prevented him from performing substantially all of the material acts constituting his usual and customary daily activities for at least 90 of the first 180 days following the accident (see Small v City of New York,148 AD3d 959, 960 [2017]; Kreimerman v Stunis, 74 AD3d 753 [2010]; Sainte-Aime v Ho, 274 AD2d 569, 570 [2000]).

Accordingly, the defendants' motion to dismiss the first cause of action is granted to the extent that the plaintiff's, Gomez' claim of serious injury under the 90-180 days category and under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories based upon his alleged lumbar spine, bilateral knees and right shoulder condition are dismissed.

The motion to dismiss the first and third causes of action is denied insofar as it based upon Gomez' claim of serious injury under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories based upon his alleged cervical spine injuries.

The branch of the defendants' motion pursuant to CLR 3216 seeking to preclude the plaintiff, CHRISTINA DEJESUS, from submitting evidence in support of damages is granted. Inasmuch as plaintiff is precluded from presenting evidence in support of her claim of damages, the second cause of action in the complaint asserted on behalf of DeJesus is dismissed.

Despite the prior Orders of this court the plaintiff DeJesus has failed to appear for independent medical examinations (IMEs). It is pointed out that on February 28, 2018 the parties entered into a stipulation so ordered by the court, which provided, inter alia, that DeJesus would appear for IMEs and that the final date for completion of the discovery contained therein was March 31, 2018. Despite this Order, the plaintiff DeJesus failed to appear for the IMEs.

To be relieved of her default in failing to appear for the medical examinations and to avoid the adverse impact of the order of preclusion, plaintiff was required to demonstrate a reasonable excuse for the default and a meritorious claim (see Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co., 67 NY2d 138 [1986]; G.D. Van Wagenen Financial Services, Inc. v Sichel, 43 AD3d 1104 [2007]). The plaintiff failed to offer any excuse for her failure to appear as provided in the February 28, 2018 so ordered stipulation or for her repeated failure to appear for IMEs pursuant to the prior orders. Plaintiffs' counsel's claim that she would appear for the examinations in July, 2018, after the final date set by the court and after the defendants' moved herein, does not warrant denial of the motion.

Dated: October 5, 2018
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J.S.C.