

Martinez v Ramos

2019 NY Slip Op 30405(U)

February 21, 2019

Supreme Court, New York County

Docket Number: 159796/2016

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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JOSE MARTINEZ,

Plaintiff,

- v -

JUAN RAMOS, JOHN DOE-DRIVER

Defendant.

INDEX NO. 159796/2016

MOTION DATE 12/17/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendant Juan Ramos’s motion for summary judgment, pursuant to CPLR 3212 to dismiss plaintiff Jose Martinez’s complaint is denied. Before the Court is defendant’s motion for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendant on the grounds that plaintiff has failed to demonstrate that plaintiff suffered a “serious injury” as defined under Section 5102(d) of the Insurance Law. Plaintiff opposes the motion.

This matter stems from a motor vehicle incident which occurred on July 28, 2016, on East 59th Street between Madison Avenue and Fifth Avenue in the County, City and State of New York, when plaintiff was allegedly seriously injured when the rear passenger door of a vehicle operated by unknown defendant “John Doe” – Driver, and transporting defendant Ramos, opened onto the roadway and struck plaintiff.

Summary Judgment (Serious Injury)

Defendant's motion, for summary judgment, pursuant to CPLR 3212, against plaintiff on the issue of "serious injury" as defined under Section § 5102(d) of the Insurance Law 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"]).

Defendant alleges that plaintiff has failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law and that the injuries plaintiff is seeking relief for are not causally related to the accident at issue. Defendant claims that plaintiff's injuries stem from degenerative disc disease (Mot at 12, ¶27). In support of his motion, defendant submits the affirmations of Dr. Rikki Lane, Dr. David A. Fisher, Dr. Barbara Freeman, and Dr. Robert S. April (*id.*, Exh H, I, J, K, & L).

Dr. Lane examined the emergency room records and notes that “[t]he records reviewed are inconsistent with the injuries alleged in the Bill of Particulars . . . and could not be demonstrated to be causally related to the accident on 7/28/16” (*id.*, Exh I). Dr. Lane further notes that plaintiff has pre-existing L5-S1 degenerative disease (*id.*). Dr. Fisher also found degenerative changes at the L5-S1 in addition to L4-5 and found no radiographic evidence of any injury causally related to the accident at issue (*id.*, Exh J). Neurologist Dr. April’s report concludes with reasonable medical certainty that the “the accident of record did not produce a neurological diagnosis” (*id.*, Exh K).

As with the findings of the other doctors, Dr. Freeman concluded that plaintiff “had a preexisting degenerative condition to his lumbar spine. The surgery performed was to address this preexisting condition . . . Today the claimant presented with symptoms of internal derangement of the right hip” (*id.*, Exh L at 5). While defendant submits Dr. Freeman’s report in support of his motion, the report contradicts the motion. Dr. Freeman notes that plaintiff has suffered from a loss of range of motion to the right hip with 75 degrees flexion compared to the normal range of greater than or equal to 100 degrees flexion (*id.*, at 4).

Defendant’s motion contains evidence of a restriction in plaintiff’s range of motion. A defendant fails to meet its initial burden when one of its examining physicians finds a limited range of motion (*Servones v Toribio*, 20 AD3d 330 [1st Dep’t 2005] citing *McDowall v Abreu*, 11 Ad3d 590 [2d Dep’t 2004] [finding that “defendants’ examining doctor found that the plaintiff continued to have restrictions in motion of her lower back . . . in light of this finding by the defendants’ expert, the defendants did not meet their initial burdens”]). Thus, defendant has failed to satisfy it’s burden as to plaintiff’s alleged hip injury; however, defendant has made a

prima facie showing of entitlement to summary judgment on the issue of serious injury regarding injuries to the cervical spine and the lumbar spine and the burden now shifts to plaintiff.

In opposition, plaintiff's responding medical submissions raise a triable issue of fact. In *Rosa v Delacruz*, 32 NY3d 1060, 2018 N.Y. Slip Op. 07040 [2018], the Court of Appeals found that where a plaintiff's doctor opined that tears were causally related to the accident, but did not address findings of degeneration or explain why the tears and physical deficits found were not caused by the preexisting degenerative conditions, plaintiff failed to raise a triable issue of fact as it "failed to acknowledge, much less explain or contradict, the radiologist's finding. Instead, plaintiff relied on the purely conclusory assertion of his orthopedist that there was a causal relationship between the accident" (*See id.*)

Unlike the plaintiff in *Rosa*, plaintiff, Jose Martinez submits several doctor's affirmations which address the issue of degeneration. The affirmation of Dr. Parachuri, dated July 30, 2018, which addresses plaintiff's degenerative conditions and states that "I disagree with Dr. Fisher's conclusions and set forth that the positive findings set forth below in this affirmation are causally related to the date of the accident of 7/28/16 and are not degenerative in nature" (Aff in Op, Exh 2). Dr. Parachuri concludes that the lumbar and hip injuries sustained by plaintiff are causally related to the accident (*id.*). Further, Dr. Mansukhani also concluded that "the injuries to the lumbar spine and right hip are not pre-existing nor degenerative and are causally related to the motor vehicle accident of 7/28/16" (*id.*, Exh 6 at 6). Dr. Mansukhani also provides range of motion data for the lumbar spine, right hip and right knee (*id.* at 3). The range of motion report reveals a decrease in all three body parts as compared to the normal range of motion (*id.*) Thus, plaintiff has raised an issue of fact and defendant's motion for summary judgment on the issue of serious injury is denied.

Accordingly, it is ORDERED that defendant’s motion for summary judgment to dismiss plaintiff’s Complaint on the grounds that plaintiff allegedly has not sustained a “serious injury” as defined in 5102 and 5104 of the Insurance Law is denied; 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.



2/21/2019
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	