Armstrong v Empire Paratransit Corp.
2019 NY Slip Op 31291(U)
May 6, 2019
Supreme Court, New York County
Docket Number: 450553/2017
Judge: Adam Silvera
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22

----------X

ALDO ARMSTRONG,

Plaintiff,

- v -

EMPIRE PARATRANSIT CORP., ANDREW JONES

Defendant.

INDEX NO. 450553/2017

MOTION DATE 08/16/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

----------X

HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 50, 51, 52, 53, 54, 55, 56, 57
were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ORDERED that plaintiff Aldo Armstrong's motion for an Order pursuant to CPLR §3212 granting summary judgment in favor of plaintiff as against defendants on the issue of liability is granted and that defendant Empire Paratransit Corp. and defendant Andrew G. Jones' motion for an Order to dismiss plaintiff's Complaint on the grounds that the injuries allegedly sustained by plaintiff do not satisfy the "serious injury" requirement as defined by Insurance Law § 5102(d) is denied.

BACKGROUND

The suit at bar stems from a motor vehicle accident which occurred on March 31, 2016, on 1st Avenue at the intersection of 14th Street in the County, City, and State of New York, when a vehicle owned by defendant Empire Transit Corp. and operated by defendant Andrew G. Jones struck plaintiff's vehicle in the rear which allegedly led to the serious injury of plaintiff.

DISCUSSION

Summary Judgment (Serious Injury)

Defendants' 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"]).

Defendants allege that plaintiff has failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law. Defendants claim that plaintiff did not receive medical treatment for his alleged injuries until approximately 18 days had elapsed after the accident. Defendants further note that plaintiff continued to work prior to seeking medical treatment and that he was not confined to bed/home at any point following the accident. Defendants allege that plaintiff treated solely with Pappas Physical Medicine & Rehabilitation, PLLC with regard to the injuries allegedly sustained as a result of the underlying accident. In

support of their motion defendants submit plaintiff's Pappas Rehabilitation records and the report of Dr. Igor Rubinshteyn who performed an orthopedic independent medical examination of plaintiff, at the request of the defendants, on July 10, 2018 (Cross Mot, Exh E & F).

Dr. Rubinshteyn found a normal range of motion in the lumbar spine but a decrease in the range of motion to plaintiff's cervical spine (*id.*, Exh F at 2-3). Dr. Rubinshteyn report avers that "although range of motion was decreased in the cervical spine, this is subjective; there were no positive objective findings on physical examination such as spasms or atrophy" (*id.*, at 4). The Court finds that Dr. Rubineshteyn's report, regardless of his opinion that the decrease was "subjective", 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, defendants have failed to satisfy their burden and defendants' motion for an order to dismiss the Complaint of plaintiff on the grounds that the injuries allegedly sustained by plaintiff do not satisfy the "serious injury" requirement as defined by Insurance Law § 5102(d) is denied.

Summary Judgment (Liability)

Plaintiff's motion for summary judgment on the issue of liability as against defendants 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]). "A rear-end collision with a stopped vehicle, or a vehicle slowing down, establishes a prima facie case of negligence on the part of the operator of the rear-ending vehicle, which may be rebutted if that driver can provide a non-negligent explanation for the accident" (*Baez v MM Truck and Body Repair, Inc.*, 151 AD3d 473, 476 [1st Dep't 2017]).

Here, plaintiff affirms that he was stopped at a red light when his vehicle was struck from behind by a vehicle operated by defendant Andrew G. Jones (Mot, Exh A). In support of his motion plaintiff attaches the Police Accident Report which contains defendant Jones' statement against interest that "his foot slipped off the brake pedal causing his vehicle to hit" plaintiff's vehicle (*id.*, Exh B). Plaintiff has met its burden for summary judgment on the issue of liability and the burden shifts to plaintiff to raise an issue of fact. Defendants cross-motion makes no mention of defendants' liability. Thus, defendants have provided no evidence demonstrating defendants' lack of negligence and plaintiff's motion for summary judgment on the issue of liability in favor of plaintiff and against defendants is granted.

Accordingly, it is

ORDERED that plaintiff's motion on the issue of liability against defendant Empire Paratransit Corp. and defendant Andrew G. Jones, for an order that defendants are liable for the alleged occurrence is granted; and it is further

ORDERED that defendants' cross-motion for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendants and to dismiss the Complaint of plaintiff for failure to

satisfy the "serious injury" requirement as defined by Insurance Law § 5102(d) is denied; and it is further

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

This constitutes the Decision/Order of the Court.

5/6/19
DATE

ADAM SILVERA, J.S.C.

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