Deonauth v Sherman Ave. Eighth, Inc.
2019 NY Slip Op 31350(U)
May 9, 2019
Supreme Court, New York County
Docket Number: 155233/2015
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

RAVINDRA DEONAUTH,

Plaintiff,

- v -

SHERMAN AVENUE EIGHTH, INC.,HECTOR HERRERA

Defendant.

---X

INDEX NO. 155233/2015

MOTION DATE 11/16/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63
were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ORDERED that defendant Sherman Avenue Eighth, Inc. and defendant Hector Herrera's motion for summary judgment pursuant to CPLR 3212 for an order to dismiss plaintiff Ravindra Deonauth's complaint on the grounds that plaintiff has failed to demonstrate that plaintiff has 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 accident which occurred on December 23, 2014, at the intersection of Broadway and West 173rd Street in the County, City, and State of New York when plaintiff, a bicyclist, was stopped waiting for the traffic light to turn from red to green and was struck and allegedly seriously injured by a vehicle owned by defendant Sherman Avenue Eighth, Inc. and operated by defendant Hector Herrera.

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 allege that the injuries plaintiff is seeking relief for are not causally related to the underlying accident and are a result of degenerative disc disease. In support of their motion Defendants submit the affirmation of Dr. Warren E. Cohen, a neurologist who examined plaintiff on August 24, 2018, the report of Dr. A. Robert Tantelff who reviewed MRI films of plaintiff's lumbar and cervical spine, and the report of Dr. Rikki Lane who reviewed plaintiff's emergency room records (Mot, Exh D, E,& G).

In his report, Dr. Cohen concluded that there was no objective basis for plaintiff's complaints, plaintiff exhibited no disability, and had a full range of motion in the cervical and

lumbar spine (*id.*, Exh D). Upon review of plaintiff's MRI films, Dr. Tantleff found that plaintiff suffers from degeneration in the lumbar spine and spondylosis and longstanding chronic discogenic disease in the cervical region and concludes that the findings are not causally related to the accident at issue (*id.*, Exh E). Additionally, Dr. Lane concluded that upon review of the records, plaintiff's injuries alleged in the Bill of Particulars are not causally related to the accident at issue (*id.*, Exh F). Thus, defendants have made a prima facie showing of entitlement to summary judgment on the issue of serious injury and the burden now shifts to plaintiff.

In opposition, plaintiff's responding medical submissions raise a triable issue of fact as to plaintiff's alleged degenerative injuries. 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.*)

Here, plaintiff, in contrast to the plaintiff in *Rosa,* plaintiff, submits an opinion from his doctors which address findings of degeneration. Plaintiff submits the March 6, 2019 report of Dr. Paul Lerner (Aff in Op, Exh D). Dr. Lerner specifically addresses degeneration and states that the injuries to plaintiff's "cervical, thoracic and lumbar spines, are casually related to his accident of 12/23/14" (*id.*). Dr. Lerner demonstrates that plaintiff has suffered a loss of range of motion to the cervical spine and lumbar spine (*id.*). Thus, plaintiff has raised an issue of fact precluding defendants' motion for summary judgment to dismiss plaintiff's Complaint.

Accordingly, it is

ORDERED that defendants' 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 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 defendants with notice of entry.

This constitutes the Decision/Order of the Court.

5/9/2019
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