

Rodriguez v R.W. Bozel Transfer, Inc.

2019 NY Slip Op 33214(U)

October 28, 2019

Supreme Court, New York County

Docket Number: 156791/2017

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

-----X

JOSE RODRIGUEZ,

Plaintiff,

- v -

R.W. BOZEL TRANSFER, INC., AND, RUSSELL WALTERS
JR

Defendant.

-----X

INDEX NO. 156791/2017

MOTION DATE 08/07/2019

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendants R.W. Bozel Transfer, Inc. and Russell Lee Walters, Jr.'s motion for summary judgment, pursuant to CPLR 3212 to dismiss plaintiff, Jose Rodriguez's Complaint is denied. Before the Court is defendants' 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 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 incident which occurred on January 11, 2017, when defendants' vehicle rear-ended plaintiff's vehicle while it was stopped on the westbound Cross Bronx Expressway at or near Park Avenue, in the County of Bronx, City and State of New York in the County of Ridgefield, State of New Jersey, which allegedly led to the serious injury of plaintiff.

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 and preexisting changes. Defendants submit the IME report of Dr. Jonathan S. Garay in support of their motion (Mot, Exh G).

In his April 23, 2019, report, Dr. Garay opined based on review of plaintiff’s medical records and an Independent Medical Examination of plaintiff on November 28, 2018, that plaintiff’s “current complaints and any future medical needs are due to the unrelated and preexisting scoliosis and degenerative disease and are unrelated to the accident” (*id.*). Dr. Garay concludes that plaintiff did not suffer any causally related impairment (*id.*). Dr. Garay noted that

plaintiff had degenerative changes in the cervical spine, preexisting scoliosis in the lumbar spine and that plaintiff's left shoulder was not injured. 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 injury to the lumbar spine. 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 submits an opinion from his doctor which addresses the findings of loss of range of motion to the left shoulder (Aff in Op, Exh A). Plaintiff submits the September 14, 2017, report of Dr. Igor Rubinshteyn who examined plaintiff on September 1, 2017, and found restrictions in plaintiff's left shoulder (*id.*). Dr. Rubinshteyn demonstrated the restriction in plaintiff's range of motion by listing the normal range of motion and the restricted range of motion of plaintiff (*id.*, at 3).

While plaintiff's opposition does raise an issue of fact as to the left shoulder, plaintiff's physician does not address the cervical spine degenerative condition and preexisting scoliosis in the lumbar spine alleged by defendants. Thus, plaintiff has failed to raise an issue of fact as to defendants' assertion that plaintiff has not suffered a serious injury to the cervical spine and

lumbar spine. Defendant’s motion is granted in part solely as to plaintiff’s cervical spine and lumbar spine and is denied in part as to plaintiff’s left shoulder.

Accordingly, it is

ORDERED that the branch of defendants’ motion for summary judgment, pursuant to CPLR 3212 to dismiss plaintiff, Jose Rodriguez’s Complaint is denied; and it is further

ORDERED that the branch of defendants’ motion for summary judgment, on the grounds that plaintiff allegedly has not sustained a “serious injury” as defined in 5102 and 5104 of the Insurance Law, is granted in part solely as to the cervical spine and lumbar spine and denied in part as to the left shoulder; and it is further

ORDERED that all parties appear for an Early Settlement Conference at 11:00 AM on November 1, 2019, with Samuel Wilkenfeld in room 106 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 defendants with notice of entry.

This constitutes the Decision/Order of the Court.

10/28/2019
DATE

ADAM SILVERA, J.S.C.

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