

**Blake v Moore**

2020 NY Slip Op 31790(U)

June 5, 2020

Supreme Court, New York County

Docket Number: 154455/2017

Judge: Adam Silvera

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

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ALVARO R. BLAKE

Plaintiff,

- v -

CHRISTOPHER MOORE,

Defendant.

-----X

INDEX NO. 154455/2017

MOTION DATE 04/20/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ORDERED that defendant's motion for summary judgment, pursuant to CPLR 3212 to dismiss plaintiff'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 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 May 13, 2014, on West 139th Street, near the vicinity of Lenox Avenue, in the County, City, and State of New York, which allegedly led to plaintiff's serious injury.

"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. Defendant alleges that the injuries plaintiff is seeking relief for are consistent with pre-existing degenerative disc disease. In support of their motion, defendant attaches the reports Dr. Steven M. Peyser, and Dr. Marc Katzman (Mot Exh E & F).

Dr. Peyser concluded that an MRI of the right knee revealed degenerative joint disease (Mot, Exh E). Dr. Katzman concluded that an MRI of the cervical and lumbar spine revealed pre-existing degeneration (Mot, Exh F). Defendant also attaches the report of Dr. Satish Kashyap who found that plaintiff’s injuries to the right knee and left knee are not a result of degeneration and that plaintiff’s injuries were a result of the underlying accident. Thus, defendant’s motion contains evidence of a serious injury.

“A defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold” (*Linton v Nawaz*, 62 AD3d 434, 439 [1st Dept 2009] citing *Wadford v Gruz*, 35 AD3d 258 [1st Dept 2006]). Defendant has failed to satisfy their

burden as Dr. Kashyap's report contains issues of fact as to plaintiff's alleged knee injuries.

Thus, defendants have failed to meet their burden precluding summary judgment as to the right and left knee.

In regards to the lumbar and cervical spine, plaintiffs 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 her doctor which address findings of degeneration. Plaintiff submits the records of Dr. Leonard R. Harrison who first examined plaintiff two days after the accident and found that plaintiff suffered a loss of range of motion and that the accident aggravated plaintiff's pre-existing degenerative changed (Aff in Opp, Exh 3). Thus, plaintiff has raised an issue of fact precluding summary judgment on the issue of "serious injury" as defined in 5102 of the Insurance Law.

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 of the Insurance Law is denied; and it is further

ORDERED that within 120 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



06/05/2020  
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