

Brown v Taylor

2020 NY Slip Op 32486(U)

June 18, 2020

Supreme Court, Bronx County

Docket Number: 27727/17E

Judge: Ben R. Barbato

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**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM- PART 21**

Present: Honorable Ben R. Barbato

DEBORAH BROWN,

Plaintiff,

-against-

RODNEY TAYLOR, JACQUELINE Y. PENNINGTON,
LUIS PEREZ-VARGAS AND CESA CARS, INC.,

Defendants.

DECISION/ORDER

Index No.: 27727/17E

Recitation, as required by CPLR 2219(a) of the papers considered in the review of this motion to dismiss:

Papers	Numbered
Notice of Motion, Affirmation and Exhibits Annexed	1
Notice of Motion, Affirmation and Exhibits Annexed	2
Affirmation in Opposition and Exhibit Annexed	3
Reply Affirmation (McKiernan)	4

The above Motions have been transferred from Justice MaryAnn Brigantti on June 18, 2020 to this court pursuant to Order of the Administrative Judge and shall be decided by this court pursuant to CPLR§9002.

The instant action sounds in personal injury arising from a motor vehicle accident occurring on March 21, 2017, at the intersection of East Tremont Avenue and Park Avenue, in the County of Bronx, City and State of New York. At the time of the accident the Plaintiff, Deborah Brown, claims that she was a passenger in the front seat of that vehicle owned by Defendants, Rodney Taylor and Jacqueline Y. Pennington, and operated by Defendant Taylor which came in contact with that vehicle owned by Defendant, CESA Cars, Inc., and operated by Defendant, Luis Perez-Vargas. Each Defendant moves this court by Notice of Motion for an Order pursuant to CPLR §3212 awarding Summary Judgment in favor of all Defendants dismissing Plaintiff's Complaint claiming that the Plaintiff cannot meet the serious injury threshold requirement mandated by Insurance Law §§ 5104(a) 5102(d).

The aforementioned motions are hereby consolidated and decided as follow:

Defendants offer the affirmed report of Dr. Nicholas D. Caputo, a physician Board Certified in Emergency Medicine, dated June 18, 2018, which report indicates that Dr. Caputo reviewed the medical records of Defendants emergency room visit of March 22, 2017 along with Plaintiff's Bill of Particulars. Dr. Caputo indicates that an x-ray taken at the ER of Plaintiff's right knee was negative and Plaintiff was discharged with instructions to follow up with primary care physician. Dr. Caputo opines that a review of the medical records indicate that Plaintiff did not suffer any sustained or significant injury as a result of the subject motor vehicle accident. Dr. Caputo further opines, based on his review of the medical records that there was no acute traumatic injury that could be causally related to the subject accident.

Defendants submit the affirmed report of Dr. Thomas P. Nipper, a Board Certified Orthopedic Surgeon, who evaluated the Plaintiff on December 6, 2018, for the injuries sustained in the March 21, 2017 accident. Dr. Nipper also reviewed the MRI reports of Plaintiff's right knee, right shoulder, and lumbar spine taken by Westchester Radiology and Imaging. Dr. Nipper opines that the reports do not reveal acute traumatic injury and all findings are consistent with degenerative changes. He further opines that any injuries sustained as a result of the subject accident have resolved and that Plaintiff has not sustained any significant or permanent injury.

Defendants submit the affirmed report of Dr. Robert S. April, a neurologist, who examined Plaintiff on an unspecified date. Dr. April opined that Plaintiff presented with a normal neurological examination.

Defendants submit a radiological review of the MRI of Plaintiff's right shoulder by Dr. Mark Decker of Musculoskeletal and Spine Radiology. Dr. Decker determines all findings to be degenerative and longstanding and not causally related to the accident of March 21, 2017. Dr. Decker's review of the MRI of Plaintiff's cervical spine reveals straightening of the lordosis,

bulging at C5/6 with broad left herniation at C6/7, Luschka hypertrophy and facet athropathy with foraminal encroachment, all being longstanding and degenerative in nature not causally related to the March 21, 2017 accident.

Plaintiff submits the report of Dr. Jeffery Cohen, an orthopaedic surgeon, who examined the Plaintiff on June 24, 2019. Dr. Cohen finds, upon examining Plaintiff's right knee, loss of range of motion with positive McMurrays, right ankle to have normal range of motion, right shoulder revealed tenderness, loss of range of motion, impingement, along with positive Hawkins and Neer test. His review of the MRI of Plaintiff's right knee dated April 5, 2017 revealed thickened ACL high grade partial tear, complex tear of the anterior horn and body, posterolateral meniscus and joint effusion. His review of the right shoulder MRI dated April 5, 2017, reveals a partial tear of the rotator cuff, capsulitis, tenosynovitis, subacromial bursitis, and subcortical cyst in the humeral head. Dr. Cohen states that Plaintiff was reevaluated on May 5 and 26, 2017 an had not, at that point, responded to conservative treatment including medication, physical therapy and the passage of time. As a result on June 13, 2017 Plaintiff underwent arthroscopic surgery on her right knee at Montefiore Hospital. Dr. Cohen states that Plaintiff underwent PRP (Platelet-enriched plasma) injections to the left ankle to improve healing. Plaintiff's last visit with Dr. Cohen was on on May 30, 2019 at which time he states that Plaintiff was still symptomatic in the right knee and shoulder with decreased ranges of motion. Dr. Cohen opines that the accident of March 21, 2017 was the competent producing cause of Plaintiff injuries.

Plaintiff submits the affirmed report of Dr. Peter C. Kwan who examined the Plaintiff on May 5, 2019. Dr. Kwan examined the MRI of Plaintiff's cervical spine which he states revealed a straightening of the cervical Lordosis causing pain and muscle spasm. His review of the MRI

of Plaintiff's lumbar spine demonstrated mild loss of L2/3 disc height with diffuse disc herniation compressing the thecal sac, bilateral neural foramina and bilateral exiting nerve root and moderate facet and ligamentum hypertrophic changes. At the L3/4, L4/5 Dr. Kwan found disc bulges with encroachment and a L5/S1 central disc herniation with compression on the thecal sac and impingement on the descending nerve roots. EMG/NCV revealed L5/S1 radiculopathy. Dr. Kwan notes status post arthroscopic surgery of the right knee and traumatic injury to the right shoulder. Dr. Kwan causally related the aforementioned injury to the accident of March 21, 2017.

Plaintiff also submits the affirmed report of Dr. R. Hillsman, a Board Certified Orthopedic Surgeon, dated August 30, 2018, and sent to D&D Associates, Garden City, New York. Dr. Hillsman opines that Plaintiff has suffered a mild disability with regard to the right knee and finds a causal relationship between the Plaintiff's documented injuries and the accident of March 21, 2017.

It is settled law that on a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, their right to judgment. The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial. CPLR §3112(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Singer v. Friedman*, 220 A.D.2d 574(2d Dept 1995). Further, issue finding rather than issue determination is the function of the court on motions for summary judgment. *Esteve v. Abad*, 271 A.D. 725 (1st Dept. 1947); *Stillman v. Twentieth Century Fox F. Corp.*, 3 N.Y.2d 395 (1957); *Clearwater Realty Co. v. Hernandez*, 256 A.D.2d 100 (1st Dept. 1998). Additionally the role of the court is not to resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811(4th Dept. 2000) Since summary judgment is a drastic remedy it should not be granted where there is any doubt as to

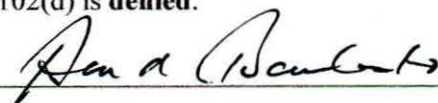
the existence of a triable issue of fact. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223(1978) Thus where the existence of an issue of fact is arguable summary judgment should not be granted. *Stone v. Goodson*, 8 N.Y.2d 8 (1960). In the instant case viewing the evidence in the light most favorable to the party opposing the motion for summary judgment, namely the Plaintiff, there exists a triable issue of material fact for determination by a jury. See: *Bacon v. County of Westchester*, 149 A.D.2d 451 (2nd Dept. 1989); *Mutschnik v. Summit Brokerage Corp.*, 148 A.D.2d 427 (2nd Dept. 1989)

Therefore it is

ORDERED, that Defendants, Rodney Taylor and Jacqueline Y. Pennington, motion for an Order pursuant to CPLR§3212 granting summary judgment awarding Summary Judgment in favor of all Defendants dismissing Plaintiff's Complaint claiming that the Plaintiff cannot meet the serious injury threshold requirement mandated by Insurance Law §§ 5104(a) 5102(d) is **denied** and it is further

ORDERED, that Defendants, CESA Cars, Inc., and Luis Perez-Vargas, motion for an Order pursuant to CPLR§3212 granting summary judgment awarding Summary Judgment in favor of all Defendants dismissing Plaintiff's Complaint claiming that the Plaintiff cannot meet the serious injury threshold requirement mandated by Insurance Law §§ 5104(a) 5102(d) is **denied**.

Dated: June 18, 2020



Hon. Ben R. Barbato, J.S.C.