Trowell v Cabral
2020 NY Slip Op 33182(U)
September 23, 2020
Supreme Court, Kings County
Docket Number: 524998/2018
Judge: Richard Velasquez

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23th day of SEPTEMBER, 2020

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

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KESHAWN TROWELL,

Plaintiff,

-against-

Index No.: 524998/2018
Decision and Order

ALEXANDER CABRAL, ACTION CARTING ENVIRONMENTAL SERVICES, INC., and ANITA SMITH-BENNETT,

Defendants,

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The following *papers NYSCEF* Doc #'s 37 to 73 read on this motion:

Papers	*NYSCEF DOC NO.'s*
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	37-45; 48-55
Opposing Affidavits (Affirmations)	58-64; 65-71
Reply Affidavits	72; 73

After having heard Oral Argument on SEPTEMBER 23, 2020 and upon review of the foregoing submissions herein the court finds as follows:

Defendant ANITA SMITH-BENNETT, moves this court pursuant to CPLR 3212, for an Order granting Defendant summary judgment and dismissing the Complaint of the Plaintiff, upon the ground that Plaintiff has failed to meet the "serious injury" threshold requirement mandated by Insurance Law 5102(d); and granting such other

further relief as this Court deems just and proper. (MS#3) Defendant, ALEXANDER CABRAL, ACTION CARTING and defendant ENVIRONMENTAL SERVICES, INC. and also move pursuant to CPLR 3212, for an Order granting Defendant summary judgment and dismissing the Complaint of the Plaintiff, upon the ground that Plaintiff has failed to meet the "serious injury" threshold requirement mandated by Insurance Law 5102(d); and granting such other further relief as this Court deems just and proper. Plaintiff opposes the same contending there are material issues of fact.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trail of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR 3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.*

In a soft tissue injury case, a plaintiff alleging a "serious injury", must provide objective medical evidence of a "serious injury" within the meaning of the Insurance Law 5102(d). "Both the defendant who seeks to make a prima facie showing, and the plaintiff who attempts to raise a triable issue of fact, must provide quantitative, numerical, range of motion findings and compare those findings to "normal"." *Knokhinv v. Murray*, 27 Misc3d 1211(A), 2010 WL 1542529 (N.Y.Sup.). A defendant seeking summary judgment on the grounds that plaintiff's injury does not meet the threshold, the defendant must show that there is no question of fact that there is no loss of range of motion.

In the present motions all defendants established that there is no "serious injury" because the evaluating doctors find no loss in ranges of motion. However, in opposition the plaintiff raises a triable issue of fact as to serious injury threshold. The sworn reports annexed by the plaintiff do state what means were used to take any alleged measurements where abnormal ranges of motion were found, creating material issues of fact with these conflicting doctors' reports. This is similar to the situation in *Knokhinov v. Murray*, 27 Misc3d 1211(A), 2010 WL 1542529 (N.Y.Sup.), where the defendants evaluating doctors found differing normative values. In *Knokhinov*, the court denied summary judgment because when the findings reported by one doctor are assessed by application of the standard of "normal" stated by the other doctors, the reports present "contradictory proof". *Id. See also Dettori v. Molzon*, 306 AD2d 308, 309 [2d Dept 2003]. As Judge Battaglia noted in *Knokhinov supra.,* in the Second Department, measuring a plaintiff's range of motion and comparing it to a normal range of motion has become the linchpin of determining if a soft tissue injury is a "serious injury." Therefore, in a case

such as this where the ranges of motion observed by one of the doctors is less than the range of motion sworn to by another of the doctors, the defendant has failed to sustain its burden for summary judgment on the threshold.

Accordingly, defendant, ANITA SMITH-BENNETT motion for summary judgment dismissing the complaint for failure to establish serious injury pursuant to New York State Insurance Law Section 5102(d)is hereby denied (MS#3); and defendants cross-motion for summary judgment dismissing the complaint for failure to establish serious injury pursuant to New York State Insurance Law Section 5102(d) is hereby denied, for the reasons stated above. (MS#4)

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
September 23, 2020

HON. RICHARD VELASQUEZ

SO ORDERED

Hon. Richard Velasquez

SEP 23 2020

KINGS COUNTY CLERK
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