

Desimone v Canecchia
2020 NY Slip Op 34412(U)
December 1, 2020
Supreme Court, Richmond County
Docket Number: 150407/2019
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART TR-2

-----X
ANNA DESIMONE and JOSEPH DESIMONE

Plaintiffs,

HON. THOMAS P. ALIOTTA

-against -

DECISION & ORDER
Motion Seq. Nos. 004, 006

JAMES V. CANECCHIA, ROBERT SIMINSON,
NEW YORK CITY TRANSIT AUTHORITY,
ACCESS-A-RIDE, STARCRUISER TRANS-
PORTATION, INC., and EDMOND ROLLERSON,

Index No: 150407/2019

Action #1

Defendants.

-----X
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
DENISE CASSANO,

Plaintiff,

Index No: 150472/2019

-against-

Action #2

JAMES VINCENT CANECCHIA, ROBERT
SIMONSON, EDMOND A. ROLLERSON,
STARCRUISER TRANSPORTATIONS, INC.,
NEW YORK CITY TRANSIT AUTHORITY and
METROPOLITAN TRANSIT AUTHORITY,

Defendants.

-----X

Recitation of the following papers numbered "1" through "6" as required by CPLR

2219(a) were fully submitted on the 21st day of October 2020:

Papers
Numbered

[MS_004] Notice of Motion for Summary Judgment,
Affirmation, Memorandum of Law in Support,
with Supporting Exhibits by Defendant,
James V. Canecchia (NYSCEF 62-75)
(Dated: March 10, 2020).....1, 2

[MS_004] Plaintiff’s Affirmation in Opposition
to Motion for Summary Judgment, Memorandum
of Law and Expert Affirmation (NYSCEF 110-113)
(Dated: October 12, 2020)3

[MS_006] Notice of Motion for Summary
Judgment by Defendant Robert Siminson,
and Affirmation in Support with Supporting
Exhibits (NYSCEF 82-89)
(Dated: May 20, 2020).....4, 5

[MS_006] Plaintiff’s Affirmation in Opposition
to Motion [006] for Summary Judgment
with Supporting Exhibit (NYSCEF 114-116)
(Dated: October 12, 2020)6

Upon the foregoing papers, the motions for summary judgment of defendants James V. Canecchia and Robert Siminson, to dismiss the complaint of plaintiff, Joseph DeSimone, on the ground that this plaintiff’s injuries fail to meet the threshold of “serious injury” as defined in Insurance Law §5102(d) are denied.

This matter arises out of a three-vehicle chain collision occurring on October 4, 2018, in the northbound lanes of Richmond Avenue near the intersection of Forest Hill Road, Staten Island, New York. At the time of the accident, the ninety-three-year-old plaintiff and his wife, Anna, were rear-seat passengers in an Access-A-Ride SUV operated by defendant, Edmond Rollerson, en route to optometry appointments. The parties do not dispute that a Jeep, owned and operated by defendant, Robert Siminson, struck the rear of plaintiffs’ host vehicle. Siminson,

however, maintains that a vehicle owned and operated by defendant, James V. Canecchia, struck the rear of Siminson's Jeep and pushed it into the Access-A-Ride. Canecchia does not apparently dispute this position, but instead maintains that he rear-ended Siminson because a "speeding Corvette cut [Canecchia] off" causing him to "swerve" into the rear of Siminson's Jeep (*see* Police Report dated October 4, 2018; NYSCEF 13).

The October 4, 2018 accident led to the commencement of three separate actions¹ involving four plaintiffs. This Court issued orders on June 5, 2019 and November 20, 2019 joining the three cases for purposes of joint trial.²

Joseph DeSimone claims that as a result of the accident he sustained "severe and permanent" injuries (NYSCEF 39) all of which are "serious" within the meaning of Insurance Law §5102(d) by way of "permanent consequential limitation of use of a body organ or member" and/or "significant limitation of use of a body function or system". More particularly, plaintiff alleges to have suffered, *inter alia*, a permanent restriction in the use and range of motion of his cervical spine. It is noted that any and all claims for damages arising from plaintiff's "fractured ribs" have been withdrawn by a Stipulation dated August 12, 2020 (NYSCEF 104).

Defendants submit affirmed medical reports from an orthopedic surgeon and neurologist to support their motions for summary judgment. Dr. Satish Kashyap, an orthopedic surgeon, found during a December 2, 2019 physical examination that plaintiff sustained "sprains" to his cervical spine, left shoulder and left elbow, all of which had "resolved" (NYSCEF 74).

¹ In addition to the DeSimone plaintiffs (Index No. 150407/2019), actions have been commenced by plaintiffs Denise Cassano (Index No. 150472/2019) and Gilda M. Siminson (Index No. 151829/2019).

² *See* this Court's Decision and Orders dated June 5, 2019 (NYSCEF Doc. No. 31) and November 20, 2019 (NYSCEF Doc. No. 58).

Dr. Michelle Molina, a neurologist, conducted a physical examination on December 10, 2019, and found no permanent effects from any “sprains” to plaintiff’s cervical and lumbar spine.

Dr. Molina, like Dr. Kashyap, concluded that plaintiff’s injuries had “resolved” (NYSCEF 75).

Plaintiff opposes the motions seeking summary judgment by submitting an affirmation prepared by Dr. Gregory Montalbano, an orthopedist (NYSCEF 111). Dr. Montalbano, who began treating plaintiff four days after the accident, disagrees with the assessments provided by Drs. Kashyap and Molina, and finds that plaintiff suffers from ongoing and significant deficits as a direct result of the October 4, 2018 accident. Dr. Montalbano performed a physical examination on June 13, 2019, where he quantified significant deficits in the range of motion in plaintiff’s shoulders and cervical spine. Similar deficits quantified and documented through plaintiff’s last visit on September 9, 2019, form the basis for Dr. Montalbano’s opinion, upon “a reasonable degree of medical certainty,” that plaintiff suffered “permanent partial disability” to his cervical spine as a “direct” result of the October 4, 2018 accident.

It is well settled that in dismissal motions of a serious injury claim, the defendant bears the *prima facie* burden of proving that the plaintiff did not sustain a serious injury within the meaning of the Insurance Law §5102(d) (*see Brown v. Achy*, 9 AD3d 30, 31 [1st Dept. 2004]). Defendant’s burden may be met through the submission of “affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings” support the claimed serious injury (*see Shinn v. Catanzaro*, 1 AD3d 195, 197 [1st Dept. 2003]). Once that burden is met, the plaintiff must submit evidence raising a triable issue of fact as to the seriousness of the injury.

In the opinion of this Court, the defendants have established a *prima facie* case that plaintiff's purported injuries were not serious within the meaning of §5102(d) of the Insurance Law, through the affirmations of Drs. Kashyap and Molina who, following their examinations of plaintiff (1) detailed the objective tests they performed; (2) found plaintiff to exhibit normal ranges of motion in the areas he claimed were injured, and (3) opined that plaintiff had fully recovered from the types of sprain and/or strain suffered as a result of the accident (*see Nagbe v. Minigreen Hacking Group*, 22 AD3d 326 [1st Dept. 2005]).

Therefore, the burden shifted to plaintiff to come forward with sufficient evidence demonstrating the existence of a triable issue of fact that he sustained a "serious injury" (*see Gaddy v. Eyler*, 79 NY2d 955 [1992]), by providing objective medical proof of a "significant limitation of the use of a body function or system" or "a permanent loss of use of a body function or system" (*see Eisen v. Walter & Samuels, Inc.*, 215 AD2d 149, 150 [1st Dept. 1995]). Objective medical proof that can create a triable issue includes evidence of a physical limitation from conducting an objective range-of-motion test or the straight-leg test (*see Toure v. Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]; *Kim v. Cohen*, 208 AD2d 807 [2d Dept. 1994]).

Here, the affirmation of Dr. Montalbano serves to raise a triable issue of fact to defeat summary judgment. Specifically, Dr. Montalbano's use of objective range-of-motion testing to find and quantify significant limitations in plaintiff's normal ranges of motion of his shoulders and cervical spine, coupled with his expert medical conclusion that those limitations are causally related to the accident, suffice to raise the issue of fact. Considered in the light most favorable to plaintiff (*see Toure v. Avis Rent A Car Sys.*, 98 NY2d at 353), plaintiff's objective medical evidence mandates trial of this matter. Moreover, while the parties' experts are in obvious

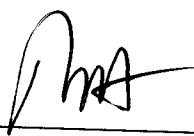
disagreement as to the extent of plaintiff's injuries, "[i]t is well established that conflicting expert opinions may not be resolved on a motion for summary judgment" (*Corbett v. County of Onondaga*, 291 AD2d 886, 887 [4th Dept. 2002] [*quoting Williams v. Luciantelli*, 259 AD2d 1003, 1003 [4th Dept. 1999][*internal quotations omitted*]).

Nevertheless, it is apparent that so much of plaintiff's claims as are predicated upon the alleged "permanent" loss of use of a body organ, member, function or system must be dismissed, as none of his alleged injuries have been shown to be "total" (*see Oberly v. Bangs Ambulance, Inc.*, 96 NY2d 295, 299 [2001]).

Accordingly, it is hereby

ORDERED that defendants' motions for summary judgment under CPLR 3212 are denied.

ENTER,



HON. THOMAS P. ALIOTTA, J.S.C.

Dated: December / , 2020