

Davlatova v Silber

2020 NY Slip Op 35429(U)

December 10, 2020


Supreme Court, Kings County

Docket Number: Index No. 524316/2017

Judge: Reginald A. Boddie

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 KINGS COUNTY CLERK

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At an IAS Trial Term, Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 10th day of December 2020.

P R E S E N T:

Honorable Reginald A. Boddie, JSC

-----X
 GAVHAR DAVLATOVA,

Plaintiff,

Index No. 524316/2017

Cal. No. 10 MS 2

-against-

DECISION AND ORDER

JOSEPH SILBER and JOEL H. LIPSHITZ,

Defendants.

-----X
Papers Numbered
 MS 2 Docs. # 20-46

Upon the foregoing cited papers, the decision and order on defendants' motion for summary judgment, pursuant to CPLR 3212, is as follows:

Plaintiff commenced this action to recover for personal injuries allegedly sustained in a motor vehicle accident on July 10, 2017, on Dahill Road in Brooklyn, New York. Plaintiff allegedly sustained injuries to her cervical and lumber spine, left shoulder and left knee. On November 16, 2017, Dr. Paul Akerman performed arthroscopic surgery on plaintiff's left knee.

Defendants Joseph Silber (Silber) and Joel Lipshitz (Lipshitz) moved for summary judgment seeking dismissal of the complaint in its entirety. Defendants argued plaintiff was solely liable for causing the accident and failed to satisfy the serious injury threshold, pursuant to Insurance Law §§ 5102 and 5104.

Defendant Silber was operating a grey mini-van with the permission of its owner, defendant Lipshitz. Silber testified he was leaning into his parked vehicle through the open driver's

side door when plaintiff's vehicle struck his open door. Plaintiff testified that as she passed Silber's vehicle, he suddenly opened his driver's side door causing contact between the edge of his door and the front passenger door of her vehicle. Plaintiff testified she did not remember seeing Silber next to the car. She testified she did not see Silber open his door, sound her horn, or swerve prior to contact.

Defendants proffered the report of Stephen Lastig, MD, a radiologist who conducted MRI film reviews of plaintiff's left knee, lumbar spine and left shoulder. He concluded there were no findings related to the left shoulder or left knee which were causally related to the July 10, 2017 accident. As to the lumbar spine MRI, Dr. Lastig noted the examination was very limited due to patient motion and sagittal T1-weighted and axial T1-weighted images were of very poor quality due to motion artifact. He concluded the evidence of disc degeneration was not related to the July 10, 2017 accident, but the straightening of the lumbar spine was a non-specific finding which may be related to muscle spasm or to how the patient was positioned in the MRI unit.

Defendants also proffered the report of Edward Toriello, MD, an orthopedist who conducted a physical examination of plaintiff on September 25, 2019. He concluded cervical and lumbar strains and left shoulder and left knee contusions were resolved. He further concluded claimant revealed no objective evidence of permanency or disability, was able to return to work and normal daily living activities without restriction, and did not require further orthopedic care. He opined, based on his review of the left knee MRI and operative photos, that plaintiff did not sustain an injury to her left knee on July 10, 2017, that would have required surgical intervention.

In opposition, plaintiff proffered the affirmation and report of Paul Ackerman, MD, her treating orthopedic surgeon, who examined plaintiff's left knee, left shoulder and lower back on October 19, 2020. Dr. Ackerman noted limited ranges of motion in these body parts. He opined

that plaintiff's injuries were permanent in nature, already in the chronic stage, will worsen, and the amount of pain and discomfort will increase. He advised plaintiff to undergo a pain management consultation. He further opined that resuming physical therapy may be of some benefit to plaintiff.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact, but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman*, 49 NY2d at 562). Further, in a "serious injury threshold" motion for summary judgment, as here, defendant must initially submit competent medical evidence establishing that plaintiff did not suffer a "serious injury" and the injuries are not causally related to the accident (*see Insurance Law* 5102 [d]; *see Kelly v Ghee*, 87 Ad3d 1054, 1055 [2d Dept 2011]; *see Winegrad*, 64 NY2d at 853).

As to liability in this case, plaintiff and defendant Silber alleged different versions of how the accident happened. "The function of a court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757, 759 [2d Dept 2019] [citations omitted]). Therefore, questions of fact preclude summary judgment on the issue of liability.

As to the issue of damages, Dr. Toriello's report of his September 25, 2019 independent medical examination of plaintiff is sufficient to establish defendants' prima facie case. However,

in opposition, Dr. Ackerman's report of his October 19, 2020 examination of plaintiff raised triable issues of fact. Accordingly, defendants' motion for summary judgment is denied in entirety.

ENTER:



HON. REGINALD A. BODDIE
J.S.C.

Honorable Reginald A. Boddie
Justice, Supreme Court



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