Butler v HUD Truck Rental Corp.

2020 NY Slip Op 35645(U)

May 15, 2020

Supreme Court, Bronx County

Docket Number: Index No. 36228/2017E

Judge: Mary Ann Brigantti

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: **PART 15**

---X

Brandon Butler,

Plaintiff,

- against -

HUD Truck Rental Corp., Balter Sales Company, Inc., and John Doe,

Defendants.

---X

Index №. 36228/2017E

Hon. **MARY ANN BRIGANTTI** ,
Justice Supreme Court

The following papers numbered ___ to ___were read on this motion **(Seq. No. _1_)** for **SUMMARY JUDGMENT (DEFENDANT)**, noticed on ______and duly submitted as **No.** __ on the Motion Calendar of __________

	Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	26-40
Cross Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits, Memorandum of Law	45-57
Reply Affidavit	59

Upon the foregoing papers, the motion of defendants for summary judgment on the ground that plaintiff did not sustain "serious injuries," as defined in Insurance Law § 5102(d), is granted in part, in accordance with the annexed decision and order.

Dated: 5/15/20

Hon. ______________________
MARY ANN BRIGANTTI, J.S.C.

1. CHECK ONE.. ☐ CASE DISPOSED IN ITS ENTIRETY ☑ CASE STILL ACTIVE
2. MOTION IS.. ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE........................... ☐ SETTLE ORDER ☐ SUBMIT ORDER

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 15
---X
Brandon Butler,
Plaintiff,

DECISION AND ORDER

- against -

Index No. 36228/2017E

HUD Truck Rental Corp., Balter Sales Company, Inc., and John Doe,
Defendants.
---X

Mary Ann Brigantti, J.

Upon the foregoing papers, the defendants move for summary judgment dismissing the complaint for plaintiff's failure to satisfy the "serious injury" threshold as defined by New York Insurance Law § 5102 (d). Plaintiff opposes the motion.

On or about December 20, 2017, plaintiff commenced this action for personal injuries allegedly sustained as a result of a November 17, 2017 motor vehicle accident that occurred on in the vicinity of 197 3rd Avenue, at or near 18th Street, in the New York County.

Plaintiff alleges that he sustained injuries to his lumbar spine, cervical spine, head, and right knee. Plaintiff alleges "serious injuries" under the categories of significant disfigurement, fracture, permanent loss of use, permanent consequential limitation, significant limitation, and 90/180-day injury.

When a defendant seeks summary judgment alleging that a plaintiff does not meet the "serious injury" threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v Plameri*, 1 NY3d 536 [2003]). "Such evidence includes affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011]). If the defendants fails to meet their prima facie burden, the burden does not shift to plaintiff and the motion for summary judgment can be denied without the need to consider plaintiff's showing in opposition (*see Karounos v Doulalas*, 153 AD3d 1166, 1167 [1st Dept 2017]). However, once defendant's initial threshold is met, the

burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]).

Defendants submit the affirmed reports of an orthopedic surgeon, Lisa Nason, M.D. Dr. Nason's February 21, 2019 examination of plaintiff found no spasm or tenderness to palpation of the cervical or lumbar spine, and no muscle atrophy. Dr. Nason measured limited cervical range of motion but stated, "There was suboptimal effort during the examination." As to the lumbar spine, Dr. Nason noted either severe loss of range of motion as to one plane of motion, and "allows no motion" as to the other planes of motion. Again, Dr. Nason stated suboptimal effort was employed.

Examination of the both knees revealed no tenderness to palpation. There was no effusion. There was no atrophy of the quadriceps. The McMurray test, Lachman test, anterior drawer sign and posterior drawer sign was negative. Patello-femoral crepitus was not present. Varus stress test was stable. Alignment was normal. Range of motion was normal (140/150 degrees).

Dr. Nason found no objective evidence of an orthopedic disability, and diagnosed plaintiff with resolved cervical and lumbar sprain and right knee contusion. She stated that plaintiff has the following pre-existing conditions: (1) morbid obesity; (2) lipomatosis, which impacted on the current injury; (3) left ankle fracture, status post ORIF; and, (4) left eye blindness. She also found that plaintiff's December 11, 2017 spine and right knee MRI's indicated no "herniated nucleus pulposis" and no acute trauma. She concluded that the plaintiff's subjective complaints of pain were subjective and unsupported.

Defendants' evidence demonstrates prima facie that plaintiff did not sustain significant disfigurement, fracture, or permanent loss of use.[1] Defendants also established prima facie that plaintiff did not sustain a significant or permanent consequential limitation of use of his right knee (*see Thompson v Bronx Merchant Funding Servs., LLC*, 166 AD3d 542, 543 [1st Dept 2018]; *Fernandez v Hernandez*, 151 AD3d 581, 582 [1st Dept 2017]; *Ahmed v Cannon*, 129 AD3d 645,

[1] There is no evidence that plaintiff sustained a total loss of use of any body part to support her claim of a "permanent loss of use" (*see Byong Yol Yi v Canela*, 70 AD3d 584, 585 [1st Dept 2010] [evidence of mere limitations of use are insufficient]; *Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001]).

646 [1st Dept 2015]). With respect to plaintiff's alleged spine injuries, however, Dr. Nason alleged that the findings of subjective complaints of pain were exaggerated, and not supported by the objective evidence.

In opposition, plaintiff submits the affirmation of Lulenesh Belayneh, MD, who affirms that her office first treated plaintiff on December 4, 2017 for injuries suffered in the automobile November 17, 2017 accident. On December 4, 2017, she examined plaintiff for complaints of pain in his lower back and right knee. Dr. Belayneh found greatly reduced range of motion limitations of the plaintiff's lumbar spine and right knee, which she measured in degrees and compared to stated normal ranges of motion. On a recent examination on August 23, 2019, she found continued reduced ranges of motion of the lumbar spine as compared to stated norms of in excess of 40% limitation in some planes, and right knee flexion of 110 degrees/135 degrees.

Plaintiff's evidence raises triable issues of fact as to whether plaintiff sustained significant or permanent consequential limitations in the use of his lumbar spine based on a contemporaneous and recent examination (*see Streety v Toure*, 173 AD3d 462, 462 [1st Dept 2019]; *Hayes v Gaceur*, 162 AD3d 437, 438 [1st Dept 2018]; *Moreira v Mahabir*, 158 AD3d 518, 518 [1st Dept 2018]; *Frias v Gonzalez-Vargas*, 147 AD3d 500, 501 [1st Dept 2017]). With respect to plaintiff's alleged knee injury, the recent examination demonstrated only a minor limitation of 110 degrees/135 degrees, which is less than 9%, and thus does not qualify as a serious injury. An expert's finding that a plaintiff had 8% restricted range of motion has been held not to be of sufficient magnitude to qualify as a significant limitation. (*Gordon v Hernandez*, 2020 N.Y. App. Div. LEXIS 1483, *2-3 [1st Dept. 2020].)

Because plaintiff did not submit evidence of a recent knee injury, plaintiff failed to raise an issue of fact as to limitations of a permanent nature as to the right knee. (*De Los Santos v Basilio*, 176 AD3d 544, 545 [1st Dept 2019] [trial court dismissed significant limitation and consequential limitation claims; Appellate Division re-instated significant limitation claim]). The reports detailing continuous treatment for continuing pain and persistent limitations for

a substantial period of time after the accident raise an issue of fact as to whether the injuries were "significant" within the meaning of Insurance Law § 5102(d). [*Id.*])

With respect to plaintiff's claim of "serious injury" under the 90/180-day category, defendant does not clearly point to evidence in plaintiff's deposition which would establish as a matter of law that plaintiff did not sustain a 90/180-day injury (*cf. Abreu v NYLL Mgt. Ltd.*, 107 AD3d 512, 513 [1st Dept 2013] [90/180-day injury claim dismissed where plaintiff did not allege that she was disabled for the minimum duration necessary to state such a claim].)

Accordingly, it is hereby,

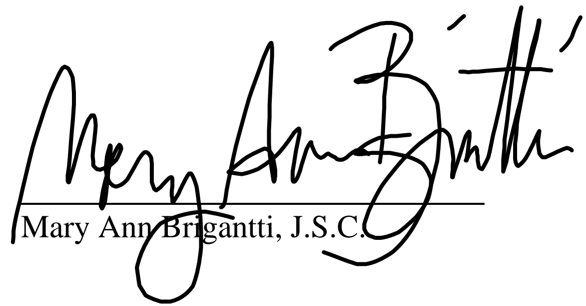
ORDERED, that the motion of defendants is granted dismissing the claims under the categories of significant disfigurement, fracture, permanent loss of use; and it is further

ORDERED, that the motion is granted dismissing the claim for knee injury under the permanent consequential limitation category of serious injury; and it is further

ORDERED that all other claims are dismissed EXCEPT for injury to the lumbar spine under the permanent consequential limitation and significant limitation categories of serious injury, injury to the right knee under the significant limitation category of serious injury, and a "90/180 day" injury.

This constitutes the Decision and Order of this Court.

Dated: 5/15/20



Mary Ann Brigantti, J.S.C.