

Shustter v McGahee

2024 NY Slip Op 31124(U)

March 20, 2024

Supreme Court, Kings County

Docket Number: Index No. 527144/2022

Judge: Francois A. Rivera

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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of March 2024

HONORABLE FRANCOIS A. RIVERA

-----X
DONOVAN SHUSTTER

Plaintiff,

- against -

LOREN MCGAHEE and KIRK MCFARLENE

Defendants.
-----X

DECISION & ORDER

Index No.: 527144/2022

Motion Seq: No.1 and No.2

Recitation in accordance with CPLR 2219(a) of the papers considered on notice of motion filed on October 16, 2024 under motion sequence number one, by plaintiff Donovan Shustter (hereinafter Shustter) for an order pursuant to CPLR 3212: (1) granting plaintiff summary judgment on the issue of liability; and (2) dismissing defendant’s affirmative defense of culpable conduct asserted by defendants Loren McGahee and Kirk Mcfarlene; and (3) pursuant to CPLR 3212(g) granting plaintiff partial summary judgment on the issue of serious injury within the meaning of New York State Insurance Law 5102(d). The motion is opposed.

- Notice of motion
- Affirmation in support
 - Exhibits 1-9, 10A, 10B, 10C, and 11
- Statement of material facts
- Affirmation in opposition
 - Exhibits A
- Counter statement of material facts
- Memorandum of law in opposition
- Affirmation in reply
 - Exhibits 1-13

Recitation in accordance with CPLR 2219(a) of the papers considered on notice of cross motion filed on January 2, 2024 under motion sequence number two, by defendants for an order pursuant to CPLR 3212: (1) granting summary judgment in defendants’ favor on the issue of liability and dismissing plaintiff’s complaint and (2) dismissing the plaintiff’s complaint on the basis that plaintiff did not sustain a serious injury as defined in one or more of the subsections within New York State Insurance Law 5102(d). The cross motion is opposed.

- Notice of cross motion
- Counter statement of material facts
- Affirmation in support
 - Exhibits A
- Affirmation in opposition
 - Exhibits 1-13
- Affirmation in reply

After reviewing the parties' motion papers and hearing oral argument, plaintiff's motion for partial summary judgment, pursuant to C.P.L.R. §3212, on the issue of liability is granted in part and denied in part.

Plaintiff has made a prima facie showing by submission, inter alia, deposition transcripts, and photographs, that defendant-driver Loren McGahee failed to see what there is to be seen when defendant-driver failed to look over her right shoulder and through her passenger side mirror to avoid making contact with the plaintiff and his bicycle. Drivers have a duty to see what is there to be seen and to exercise reasonable care under the circumstances to avoid a collision. (*Staton v. Ilic*, 69 A.D.3d 606 [2d Dept., 2010]).

Defendant-driver made a right turn into the parking garage of All City Medical, located on Nostrand Avenue at or near its intersection with Avenue W in the County of Kings State and City of New York, when it was not safe to do so in violation of N.Y. V.T.L §1163. Defendants' opposition did not raise a triable issue of fact.

"To be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault. Comparative negligence is not a defense to the cause of action of negligence, because it is not a defense to any element (duty, breach, causation) of plaintiff's prima facie cause of action for negligence, and as C.P.L.R. 1411 plainly states, is not a bar to plaintiff's recovery,

but rather a diminishment of the amount of damages. (*Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018]).

However, plaintiff's portion of the motion seeking dismissal of the defendants' affirmative defense of culpable conduct is hereby denied. Defendants submitted evidence, inter alia, defendant driver Loren McGahee's additional affirmation, showing defendant-driver had her right turn signal on approximately 550 feet to warn others that she was attempting to make a right hand turn into the parking light prior to the time of impact. Plaintiff testified she did not have her right turn signal on prior to entering the parking garage. As a result, a question of fact remains as to plaintiff's comparative fault.

Additionally, after oral argument, plaintiff has met his burden pursuant to Insurance Law §5102(d) that plaintiff has suffered a serious injury. This portion of plaintiff's motion is granted in its entirety.

Plaintiff has made a prima facie showing by submission, inter alia, Defendants' independent medical examination report from Matthew S. Mendez-Zfass, M.D. along with Vadim Abramov, M.D.'s affirmation, medical records and disability notes, which show plaintiff suffered from a medically determined injury or impairment of a non-permanent nature, which prevented him from performing substantially all of the material acts which constitutes such person's usual or customary daily activities for not less than ninety days during the one hundred eighty days immediately follow the occurrence. (N.Y. Insurance Law Section §5102[d]).

The independent medical examination report prepared by Matthew S. Mendez-Zfass, M.D. opines plaintiff suffered a significant limitation and impairment to his cervical spine greater than 33%. The affirmation, medical records, presented on behalf of the plaintiff by treating physician Vadim Abramov, M.D., show significant limitations and impairment, measured by a

goniometer, on July 12, 2022 to his cervical spine extension as well as right and left sided rotation of 50%. On August 9, 2022, his examination demonstrated significant limitations and impairment, measured by a goniometer to his cervical spine extension and right and left sided rotation of 50%. On September 2, 2022, his examination demonstrated a significant limitation and impairment to his cervical spine extension as well as right and left sided rotation of 50%. On September 23, 2022, his examination demonstrated a significant limitation and impairment of 36% to his left knee after his surgical procedure. On November 22, 2022, his examination demonstrated a significant limitation and impairment to his cervical spine extension of 50%. Combined with the corresponding disability notes submitted by Vadim Abramov, M.D. from July 10, 2022 until January 17, 2023 show plaintiff suffered a serious injury pursuant to N.Y. Insurance Law Section §5102(d)(9).

Furthermore, the independent medical examination report prepared by Matthew S. Mendez-Zfass, M.D. and Vadim Abramov, M.D. causally relate the plaintiff's injuries to the motor vehicle accident which occurred on July 10, 2022. As a result, no question of fact exists to raise a triable issue of fact.

CONCLUSION

The branch of the motion by plaintiff Donovan Shustter for an order pursuant to CPLR 3212 granting plaintiff summary judgment on the issue of liability as asserted against defendants Loren McGahee and Kirk Mcfarlene is granted.

The branch of the motion by plaintiff Donovan Shustter for an order pursuant to CPLR 3212 dismissing defendant's affirmative defense of culpable conduct is denied.

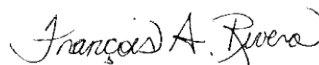
The branch of the motion by plaintiff Donovan Shustter for an order pursuant to CPLR 3212 granting plaintiff summary judgment on the issue of serious injury within the meaning of New York State Insurance Law 5102(d) is granted.

The branch of the cross motion by defendants Loren McGahee and Kirk Mcfarlene for an order pursuant to CPLR 3212 granting summary judgment in favor of the defendant on the issue of liability and dismissing plaintiff's complaint is denied.

The branch of the cross motion by defendants Loren McGahee and Kirk Mcfarlene for an order pursuant to CPLR 3212 dismissing the plaintiff's complaint on the basis that the plaintiff did not suffer a serious injury as defined in Insurance Law 5102(d) is denied. Order.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.