

Matuk v Dolan

2013 NY Slip Op 31104(U)

May 6, 2013

Sup Ct, Suffolk County

Docket Number: 46059/2010

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

 Jay H. Matuk,

Index No.: 46059/2010

Plaintiff,

Motion Sequence No.: 001; MDMotion Date: 9/21/12Submitted: 2/6/13

-against-

Michael A. Dolan and Arthur T. Dolan,

Motion Sequence No.: 002; XMDMotion Date: 11/16/12Submitted: 2/6/13

Defendants.

Attorney for Plaintiff:

Ewall & Ewall
946 Park Avenue
Huntington, NY 11743

Attorney for Defendants:

Richard T. Lau & Associates
P.O. Box 9040
Jericho, NY 11753

Clerk of the Court

Upon the following papers numbered 1 to 55 read upon this motion and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 15; Notice of Cross Motion and supporting papers, 16 - 26; Answering Affidavits and supporting papers, 27 - 49; 50 - 51; Replying Affidavits and supporting papers, 52 - 53; 54 - 55; it is

ORDERED that the motion by defendants Michael Dolan and Arthur Dolan for summary judgment dismissing the complaint on the ground that plaintiff did not sustain "serious injury" within the meaning of Insurance Law § 5104 (d) is denied; and it is

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ORDERED that the cross motion by plaintiff Jay Matuk for summary judgment in his favor on the issue of liability is denied.

Plaintiff Jay Matuk commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred near the intersection of Route 110 and Livingston Drive in the Town of Huntington on June 4, 2009. The accident allegedly occurred when plaintiff's vehicle came in contact with a vehicle operated by defendant Michael Dolan and owned by defendant Arthur Dolan. By his bill of particulars, plaintiff alleges that he suffered various injuries, including a tear of the medial meniscus in his left knee; disc bulges at levels L4/L5, L5/S1, C3/C4, C5/C6, C7/T1; and disc herniations at levels L5-S1, C5/C6, C6/C7, and C7/T1.

Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Defendants' submissions in support of the motion include, among other things, copies of the pleadings, a transcript of plaintiff's deposition testimony, hospital records relating to plaintiff's emergency room treatment after the subject accident, hospital records relating to plaintiff's treatment after a subsequent injury during a softball game, medical records from Sound Neurology of Port Jefferson, and affirmed medical reports of Dr. Vartkes Khachadurian and Dr. Peter Berman.

Plaintiff opposes the motion for summary judgment, arguing that defendants' submissions are insufficient to demonstrate *prima facie* that he did not sustain a serious injury as a result of the subject accident. Alternatively, plaintiff argues that the evidence presented in opposition to the motion raises a triable issue of fact. In opposition, plaintiff submits hospital records relating to his emergency room treatment at Huntington Hospital after the subject accident, affirmed medical reports of Dr. Martin Ehrlich, Dr. Thomas Dowling, Jr., Dr. Scott McWilliams and Michael Franchia, and an affidavit of Cindi Prentiss-Lattanzio, a physical therapist. Plaintiff also submits magnetic resonance imaging (MRI) reports of Dr. Mark Decker and Dr. Gurmeet Dhillon, an affidavit of Robert Colascione, a chiropractor, an affidavit of Herbert Feinstein, a non-party witness to plaintiff's subsequent accident, medical records from John T. Mather Memorial Hospital, certified medical records from St. Charles Rehabilitation, affirmed medical reports of Dr. Rocco Caruso and Dr. Robert Lippe, and his own affidavit.

Plaintiff also cross-moves for summary judgment in his favor on the issue of liability, arguing that no triable issues of fact exist as to defendants' negligence in causing the accident. In support of his cross motion, plaintiff submits transcripts of the parties' deposition testimony, photographs of the parties' vehicles, and his own affidavit. Defendants oppose the cross motion, arguing that the parties' deposition testimony raises triable issues of fact as to how the accident occurred and whether plaintiff's conduct contributed to the accident.

At his examination before trial, plaintiff testified that at the time of the accident he was traveling southbound on Route 110, approaching the intersection with Livingston Avenue, when he first observed defendants' vehicle. He testified that Route 110 in Huntington, which runs north and south, has three lanes of travel including a turn lane in each direction, and that his vehicle was

traveling in the left lane. He testified that he was traveling at a speed of 40 miles per hour and that defendants' vehicle was 50 to 60 feet away when he first observed it. He testified that when he observed defendants' vehicle crossing into his lane of travel, he took his foot off the gas and looked to see if he "could veer into the right lane." Plaintiff stated that he attempted to steer his vehicle into the right lane, but collided with defendants' vehicle within seconds. He testified that defendants' vehicle was traveling about 20 to 25 miles an hour, and that it had exited a gas station immediately prior to the accident. He stated that the front driver's side of his vehicle collided with the rear of defendants' vehicle.

Plaintiff's affidavit stated that defendants' vehicle suddenly pulled out from a gas station on the west side of the road, and across his lane of travel. It states that he observed defendants' vehicle 50 to 60 feet ahead of him, and that plaintiff took his foot off the accelerator and steered to the right in order to avoid striking defendants' vehicle. The affidavit further states that the traffic light controlling southbound travel at the intersection of Route 110 and Livingston Avenue was green, and that there was a solid white line separating the left turn lane and the left lane which defendants' vehicle crossed over.

At his examination before trial, defendant Michael Dolan testified that prior to the accident, he was exiting a gas station and entering southbound Route 110. He testified that while he was stopped at the driveway of the gas station waiting to enter the roadway, another vehicle stopped for him on the right lane and waved him on. He explained that the intersection was two to three car lengths to his right, and that a vehicle was stopped at the yellow light. He testified that he proceeded towards the left turn lane of southbound Route 110, and that two-thirds of his vehicle was in the left turn lane when plaintiff's vehicle struck the rear of his vehicle. He further stated that he did not observe plaintiff's vehicle prior to the accident.

Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a *prima facie* case that the plaintiff did not sustain a "serious injury" (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may

establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Pagano v Kingsbury*, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see Gaddy v Eyler*, *supra*; *Pagano v Kingsbury*, *supra*; *see generally Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Here, the medical report of Dr. Khachadurian states that range of motion testing of plaintiff's lumbar spine reveals forward flexion to 60 degrees (normal 90 degrees), backward extension to 30 degrees (normal 30 degrees), side to side tilt to the right and left to 30 degrees (normal 30 degrees), and side to side rotation to the right and left to 40 degrees (normal 45 degrees). It states that an examination of plaintiff's left knee reveals patella-femoral crepitation and tibia-femoral crackling. Range of motion testing reveals flexion to 110 degrees (normal 120 degrees). The medical report states that range of motion of plaintiff's cervical spine reveals forward flexion to 50 degrees (normal 70 degrees), extension to 40 degrees (normal 60 degrees), tilt to the right and left to 30 degrees (normal 30 degrees), and rotation to the right and left to 40 degrees (normal 45 degrees). Dr. Khachadurian opines that plaintiff's prognosis is guarded due to the existence of underlying degenerative disease and obesity, but that he is able to return to pre-loss activity levels without restrictions.

Contrary to the assertions by defendants' counsel, the medical report of Dr. Khachadurian is insufficient to shift the burden of proof to plaintiff (*see Kim v Orourke*, 70 AD3d 995, 893 NYS2d 892 [2d Dept 2010]; *Dux v Maddaloni*, 51 AD3d 967, 861 NYS2d 672 [2d Dept 2008]; *Norme v Ajons*, 57 AD3d 749, 870 NYS2d 91 [2d Dept 2008]). Significantly, the medical report of Dr. Khachadurian indicates a substantial limitation in the range of motion of plaintiff's cervical and lumbar spine was observed during his examination of plaintiff, which took place over two years after the subject accident (*see Joseph v Hampton*, 48 AD3d 638, 852 NYS2d 335 [2d Dept 2008]; *Joissaint v Starrett-1 Inc.*, 46 AD3d 622, 848 NYS2d 259 [2d Dept 2007]; *Zamaniyan v Vrabeck*, 41 AD3d 472, 835 NYS2d 903 [2d Dept 2007]). While Dr. Khachadurian states in his medical report that plaintiff suffers from underlying degenerative disease, no MRI reports or other medical evidence showing a degenerative condition in plaintiff's spine are included in defendants' motion papers. Inasmuch as defendants failed to establish their *prima facie* entitlement to judgment as a matter of law based on whether plaintiff sustained a serious injury to his spine, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact on that matter (*see Penoro v Firshing*, 70 AD3d 659, 897 NYS2d 110 [2d Dept 2010]; *Umar v Ohrnberger*, 46 AD3d 543, 846 NYS2d 612 [2d Dept 2007]). Accordingly, defendants' motion for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is denied.

As to plaintiff's cross motion, a driver who has the right of way is entitled to anticipate that other vehicles will obey the traffic laws that require them to yield (*see Jenkins v Alexander*, 9 AD3d 286, 780 NYS2d 133 [1st Dept 2004]; *Namisnak v Martin*, 244 AD2d 258, 664 NYS2d 435 [1st

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Dept 1997]). Pursuant to New York Vehicle and Traffic Law §1143 (a), the driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed. A driver with a right of way has a corresponding duty to use reasonable care to avoid a collision (*see Cox v Nunez*, 23 AD3d 427, 805 NYS2d 604 [2d Dept 2005]). A driver who has the right-of-way, however, also has a duty to keep a proper lookout to avoid colliding with other vehicles (*see Boodlall v Herrera*, 90 AD3d 590, 933 NYS2d 886 [2d Dept 2011]; *Bonilla v Calabria*, 80 AD3d 720, 915 NYS2d 615 [2d Dept 2011]). Further, a driver is required to see what, by the proper use of his or her senses, he or she might have seen (*see Levy v Town Bus Corp*, 293 AD2d 452, 739 NYS2d 459 [2d Dept 2002]; *Gonzalez v County of Suffolk*, 277 AD2d 350, 716 NYS2d 404 [2d Dept 2000]). Finally, there can be more than one proximate cause of an accident (*see Matamoro v City of New York*, 94 AD3d 722, 941 NYS2d 684 [2d Dept 2012]; *Tapia v Royal Tours Serv., Inc.*, 67 AD3d 894, 889 NYS2d 225 [2d Dept 2009]).

Here, plaintiff failed to establish a *prima facie* entitlement to judgment as a matter of law that he was free from comparative negligence (*see Roman v Al Limousine, Inc.*, 76 AD3d 552, 907 NYS2d 251 [2d Dept 2010]; *Cali v Mustafa*, 68 AD3d 700, 888 NYS2d 912 [2d Dept 2009]; *Scibelli v Hopchick*, 27 Ad3d 720, 810 NYS2d 924 [2d Dept 2006]). Plaintiff testified that he observed defendants' vehicle 50 to 60 feet prior to the accident, and that the traffic light controlling the intersection of Route 110 and Livingston Ave was green. He also testified that he took his foot off the accelerator and attempted to steer to the right to avoid coming into contact with defendants' vehicle. It is undisputed that the front driver side portion of plaintiff's vehicle collided with the rear of defendants' vehicle. Defendant Dolan, however, testified that the traffic signal controlling the intersection was yellow, that two-thirds of his vehicle was in the left turn lane when the accident occurred, and that he did not observe plaintiff's vehicle before the collision. Thus, triable questions of fact exist as to whether plaintiff exercised due care, and whether his conduct was a proximate cause of the accident (*see Tapia v Royal Tours Serv., Inc.*, *supra*; *Gorham v Methun* 57 AD3d 480, 869 NYS2d [2d Dept 2008]). Furthermore, as there is conflicting deposition testimony regarding the facts surrounding the accident, plaintiff failed to establish *prima facie* that defendants' conduct was the sole proximate cause of the accident (*see Todd v Godek*, 71 AD3d 872, 895 NYS2d 861 [2d Dept 2010]; *Borukhow v Cuff*, 48 AD3d 726, 851 NYS2d 374 [2d Dept 2008]). Accordingly, plaintiff cross motion for summary judgment in his favor is denied.

Dated: 5/6/2013



HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION