Lall v Cloonen
2013 NY Slip Op 33058(U)
November 4, 2013
Sup Ct, Queens County
Docket Number: 701581/13
Judge: Kevin J. Kerrigan

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Ganesh Lall,

Plaintiff,

- against -

Thomas M. Cloonen, The City of New York, and MTA Bus Company,

Defendants.

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Index Number: 701581/13

Motion Date: 9/24/13

Motion Cal. Number: 111

Motion Seq. No.: 1

The following papers numbered 1 to 9 read on this motion by plaintiff for summary judgment, to strike affirmative defenses and to compel discovery.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply.....	8-9

Upon the foregoing papers it is ordered that the motion is decided as follows:

That branch of the motion by plaintiff for partial summary judgment on the issue of liability is granted solely to the extent of granting summary judgment on the issue of liability against Cloonen and MTA Bus. That branch of the motion for summary judgment on the issue of liability against the City is denied.

Plaintiff, a pedestrian, allegedly sustained injuries as a result of being struck by a Q6 bus operated by Cloonen at the corner of Sutphin Boulevard and Jamaica Avenue in Queens County on February 13, 2013. Plaintiff avers in his affidavit annexed to the moving papers that he was struck while in the crosswalk of Sutphin Boulevard that runs along the southern side of Jamaica Avenue at 11:00 a.m. on a clear day. He avers that prior to entering the crosswalk, he observed a steady “walk” signal in his favor and that prior to stepping off the curb, he saw the subject bus facing westbound and fully stopped on Jamaica Avenue in its intersection with Sutphin Boulevard with its left-turn signal flashing waiting

for vehicles traveling eastbound on Jamaica Avenue to clear the intersection. Plaintiff looked to his left, right and straight ahead and saw no other vehicles approaching the crosswalk. He thereupon stepped off the curb and entered the crosswalk and proceeded to cross Sutphin Boulevard at a normal pace within the confines of the crosswalk. While still in the crosswalk, he saw the bus turn through the intersection and come toward him. He attempted to run to avoid being struck but was struck by the driver's-side front end and corner of the bus.

In opposition, counsel for the City and MTA Bus submits an affidavit of Cloonen in which he avers that on the date of the accident he was employed as a bus driver by MTA Bus, that he operated a Q6 bus, number 4645, in the course of his employment on said date, that prior to turning left onto Sutphin Boulevard he looked at the crosswalk, did not see anyone in the crosswalk or standing on the sidewalk waiting to enter the crosswalk, and that as he made his left turn he heard a thump, immediately stopped, got out of the bus and found a pedestrian lying to the left side of the bus.

Section 4-03(a)(1) of the New York City Traffic Regulations (34 RCNY) provides, with respect to vehicles proceeding through green traffic signals in their favor, "Green alone: (i) Vehicular traffic facing such signals may proceed straight through or turn right or left unless a sign at such place prohibits any such movement. But vehicular traffic, including vehicles turning right or left, shall yield the right of way to other vehicles and to pedestrians lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited."

Moreover, §4-03(c)(1) provides, with respect to pedestrians crossing streets at walk signals, "Walk, green hand symbol or green walking figure. Pedestrians facing such signal may proceed across the roadway in the direction of the signal in any crosswalk. Vehicular traffic shall yield the right of way to such pedestrians."

Plaintiff has established his prima facie entitlement to summary judgment on the issue of liability by proffering uncontested evidence that Cloonen violated the aforementioned provisions of the Traffic Regulations and that plaintiff was not comparatively negligent (see Moreira v M.K. Travel and Transport, Inc., 106 AD 3d 965 [2nd Dept 2013]; Castro v New York City transit Auth., 95 AD 3d 1056 [2nd Dept 2012]; Klee v Americas Best Bottling Co., Inc., 60 AD 3d 911 [2nd Dept 2009][with respect to Vehicle and Traffic Law §1112(a), the counterpart to §4-03 of the New York City Traffic Regulations, which supercedes §1112(a) in the City of New York pursuant to VTL §1642)). In addition, Cloonen had a common law duty to see that which he should have seen by the proper use of his senses (see Larsen v Spanp, 35 AD 3d 820 [2nd Dept 2006]). His

admission that he did not see plaintiff and that he only saw plaintiff lying on the ground after he heard a thump and stopped his bus and exited to investigate not only fails to constitute an exculpatory explanation for his conduct (see id.), but it also establishes his negligence in this regard as a matter of law.

Counsel for Cloonen, the City and MTA Bus failed to raise any issue of fact in opposition. There is no conceivable action, based upon the record on this motion, that plaintiff should have or could have taken so as to raise an issue of fact as to his comparative negligence. The purported hand-written affidavit of a third-party witness annexed to the opposition papers, although bearing a notary stamp and signature next to her signature, is not sworn and therefore is inadmissible. No other admissible evidence is proffered raising an issue of fact as to plaintiff's comparative negligence. Therefore, plaintiff is entitled to summary judgment on the issue of liability against Cloonen and MTA Bus as a matter of law.

However, the submissions on this motion fail to establish a prima facie entitlement to summary judgment on the issue of liability against the City. The City of New York is a separate and distinct legal entity from the MTA and its subsidiaries (here, MTA Bus)(see Public Authorities Law §1263). Since the MTA (and its subsidiaries) has the power to sue and be sued (see, Public Authorities Law §1265[1]), any action alleging tortious acts committed by the MTA or its subsidiaries must be brought against those entities and not the municipality (see generally Hampton v. State of New York, 168 Misc 2d 1036 [Court of Claims 1995]). Although counsel for Cloonen, the City and MTA Bus fails to raise the issue, this Court, in searching the record, notes, sua sponte, that plaintiff does not dispute Cloonen's averment that he is an employee of MTA Bus and was operating the subject bus in the course of his employment with MTA Bus. Moreover, annexed to the opposition papers are the responses to plaintiff's discovery demands, which include photographs of the accident scene with the subject bus in the photographs. The photographs show that the bus is a Q6 bus, bearing number 4645. This bus also clearly bears the logo of MTA Bus on its side. The aforementioned submissions thus indicate that the bus was owned and operated by MTA Bus. Therefore, plaintiff has failed to establish, on this record, that the City owed any duty of care to plaintiff.

That branch of the motion by plaintiff for partial summary judgment on the issue of serious injury under the 90/180-day category of serious injury under §5102(d) of the Insurance Law is denied.

Plaintiff avers in his affidavit in support of the motion, dated June 21, 2013, that prior to the date of the accident he worked four hours per day, five days a week, as a home care attendant, an additional 6 hours per day providing private home care seven days per week, that since the date of the accident he has been in constant pain and unable to return to any of his employment, that, in addition, "I have been completely incapacitated and prevented from performing any of the material acts which constitute my usual and customary daily activities since the date the bus hit me", that he depends on his wife to do "virtually everything" for me, that she "performs and assists me with virtually all my activities of daily living; whether they be the simple act of dressing myself, using the bathroom, getting food to eat or even getting out of bed" and that he cannot drive, work, sleep or even stand still. Also annexed to the moving papers are an affidavit from plaintiff's manager at Aliah Home Care, dated June 20, 2013, wherein he states that plaintiff has not returned to work since February 5, 2013, and an affidavit from one Jimmy Valdes, dated July 3, 2013, in which he states that he employed plaintiff as his home health aide 7 days per week and that plaintiff has not returned to perform any work for him since February 5, 2013.

To satisfy the threshold serious injury requirement under the 90-180/day category, plaintiff must establish that substantially all of his usual activities were curtailed for 90 out of the first 180 days after the accident (see Gaddy v Eyler, 79 NY 2d 955 [1992]). Proof must be submitted detailing what the usual activities were (see Delfino v Davey, 159 AD 2d 604 [2nd Dept 1990]). Here, other than showing proof of his employment, plaintiff only sets forth in mere conclusory terms clearly reflecting the phraseology of his attorney that he was unable to perform his usual and customary activities. The addition of the catch-all qualifying phrase, "whether they be the simple act of dressing myself, using the bathroom, getting food to eat or even getting out of bed" and his averment that he also cannot drive do not constitute proof of his inability to perform all of his usual activities. Even if the items listed could be deemed as encompassing "virtually all" of his customary and usual activities, merely stating in an affidavit what activities were curtailed in conclusory fashion without showing proof of those activities is insufficient to qualify under this category of serious injury (see Jean-Mehu v Berbeck, 215 AD 2d 440 [2nd Dept 1995]).

Here, other than plaintiff's conclusory affidavit, no other proof is submitted as to his usual and customary activities and to what extent, if any, those activities were curtailed. While plaintiff avers that he requires the assistance of his wife to help him perform activities, no affidavit from his wife is submitted.

Moreover, no medical proof establishing any restrictions of movement is submitted. Even if plaintiff details what his usual and

customary activities were pre-accident and avers that he was unable to perform those activities for 90 out of the first 180 days after the accident, in order to satisfy his prima facie burden of establishing a serious injury under this category, he must also submit competent medical evidence of his alleged limitations in ability to function during this period (see Nunez v MVIAC, 96 AD 3d 917 [2nd Dept 2012]). In this regard, the affirmation of plaintiff's treating physician, Dr. Raj Tolat, annexed to the moving papers is insufficient to establish that plaintiff sustained a serious injury. Tolat merely lists plaintiff's injuries without setting forth what objective tests he performed to determine those injuries, and he states that his conclusions are based upon his review of medical records, MRI reports and "other tests", without setting forth what medical records he reviewed, what specific MRI reports of which physicians he relied upon or what "other tests" he performed or reviewed. No restrictions in ranges of motion are reported, with comparison to normal ranges of motion and no objective tests are set forth. Tolat's conclusory affirmation is insufficient to establish a prima facie entitlement to summary judgment on the issue of serious injury under the 90/180-day category of serious illness.

That branch of the motion to strike the City's affirmative defenses interposed in its answer as to comparative negligence, assumption of risk, governmental immunity and prior settlement is granted. Since plaintiff has established that he was not comparatively negligent, the City's affirmative defense of "culpable conduct" on the part of plaintiff must be dismissed. Moreover, the affirmative defenses of assumption of risk, governmental immunity and prior settlement must be dismissed as these affirmative defenses have no relevance to the present matter. The Court notes that the City's answer appears to be a mere boilerplate answer including defenses that have no bearing on the present action.

That branch of the motion to strike the first, second, third and fifth affirmative defenses contained in the answer of Cloonen, the City and MTA Bus is granted solely to the extent that the first, third and fifth affirmative defenses contained in said answer are stricken. The first affirmative defense alleging comparative fault must be dismissed inasmuch as plaintiff has prevailed on his motion for summary judgment on the issue of liability, providing unrebutted evidence that he was not comparatively negligent for the accident. Likewise, the third affirmative defense based upon limited joint tortfeasor liability under CPLR Article 16 is inapplicable to the present matter. The fifth affirmative defense asserting assumption of risk is also irrelevant to the present matter. However, since plaintiff has failed to establish a prima facie entitlement to summary judgment on the issue of serious injury, the second affirmative defense asserting that the action is barred by §5102 of the Insurance Law

must be denied.

The remaining branch of the motion to compel defendants to respond to plaintiff's discovery demands is denied as moot, inasmuch as defendants' counsel represents in his opposition that a response to plaintiff's discovery demands was served upon plaintiff's counsel on September 5, 2013, and annexes a copy of the response to the opposition papers. Indeed, plaintiff's counsel, in his reply, does not dispute defendants' counsel's representation that defendants have complied with plaintiff's discovery demands.

Accordingly, the motion is granted to the extent heretofore provided, and is denied in all other respects.

Dated: November 4, 2013

KEVIN J. KERRIGAN, J.S.C.