Woltin v Brennan
2016 NY Slip Op 30090(U)
January 14, 2016
Supreme Court, Suffolk County
Docket Number: 13-21854
Judge: Joseph A. Santorelli

[* 1]

SHORT FORM ORDER

INDEX No. 13-21854
CAL. No. 15-00022MV

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 2-26-15
ADJ. DATE 5-28-15
Mot. Seq. # 001 - MotD
002 - XMG

CHARLES A. WOLTIN,

Plaintiff,

-against-

JAMIE L. BRENNAN, EAN TRUST, ELRAC, INC., d/b/a/ ENTERPRISE RENT-A-CAR and ELRAC, LLC d/b/a ENTERPRISE RENT-A-CAR,

Defendants.

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Upon the following papers numbered 1 to 42 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15 ; Notice of Cross Motion and supporting papers 16 - 37 ; Answering Affidavits and supporting papers 38 - 42 ; Replying Affidavits and supporting papers _____; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion for summary judgment dismissing all claims against defendants EAN Trust, Elrac, Inc., and Elrac, LLC, is granted only to the extent set forth herein, and is otherwise denied; and it is

ORDERED that the cross motion for summary judgment in favor of plaintiff on the issue of defendant Jamie Brennan's negligence is granted.

Plaintiff Charles Woltin commenced this action to recover damages for personal injuries he allegedly suffered as a result of a motor vehicle accident that occurred on Old Town Road, at the intersection with Norwood Avenue, in Setauket, New York. The accident allegedly happened on the

morning of March 7, 2011, in front of the Ward Melville High School, when a vehicle driven by defendant Jamie Brennan, which was traveling northbound on Old Town Road, made a left turn across the path of plaintiff's vehicle as it was traveling through the intersection. The vehicle driven by Brennan at the time of the collision allegedly was rented by Brennan and owned by defendant Elrac, LLC, a successor of defendant Elrac, Inc., and an affiliate of defendant EAN Trust. By his bills of particulars, plaintiff alleges he sustained various injuries and conditions due to the accident, including disc bulges in his lumbar region, radiculopathy, and lumbar facet joint syndrome. Plaintiff, who was a student at Ward Melville High School at the time of the accident, further alleges he was confined to home for more than three months and required home instruction for the remainder of the school year due to his injuries.

Defendants now move for an order granting summary judgment in favor of Elrac, LLC, EAN Trust, and Elrac, Inc., arguing there is no evidence Elrac, LLC, was negligent in renting the vehicle to defendant. Defendants also seek summary judgment dismissing the complaint on the ground plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). Defendants' submissions in support of the motion include copies of the pleadings and the bill of particulars, a magnetic resonance imaging (MRI) report concerning plaintiff's lumbar spine, and sworn medical reports prepared by Dr. Lee Kupersmith and Dr. Richard Lechtenberg. At defendants' request, Dr. Kupersmith, an orthopedist, and Dr. Lechtenberg, a neurologist, examined plaintiff in November 2014 and reviewed various medical records related to the injuries alleged in this action. Defendants also submit an affidavit of Daniel Madden, a risk manager for Elrac, LLC, and the car rental agreement allegedly executed by Brennan.

Plaintiff opposes the motion and cross-moves for an order granting summary judgment in his favor on the issue of Brennan's negligence. Plaintiff does not address the branch of defendants' motion seeking dismissal pursuant to the Graves Amendment (49 USC § 30106). Plaintiff, however, opposes the branch of the motion seeking dismissal for failure to meet the serious injury threshold, asserting defendants' submissions are insufficient to establish as a matter of law that he did not suffer "serious injury" as a result of the subject accident. Alternatively, plaintiff asserts evidence annexed to the cross-moving papers raises a triable issue as to whether he suffered injury within the "significant limitation of use" category or the 90/180 category of Insurance Law § 5102 (d). In support of the cross motion and in opposition to defendants' motion, plaintiff submits, among other things, copies of various medical reports prepared by his treating physicians, the transcript of Brennan's deposition testimony, and his own affidavit. Defendants oppose the cross motion, arguing plaintiff's and Brennan's deposition testimony demonstrates issues of fact as to whether plaintiff entered the intersection against a red traffic light, whether he failed to yield to the vehicle driven by Brennan while it was in the intersection, and whether he failed to take evasive action to avoid the collision. In opposition, defendants submit copies of plaintiff's and Brennan's deposition testimony, and a photograph of the accident site shown to them during their depositions.

The branch of defendants' motion for summary judgment dismissing plaintiff's claims against Elrac, Inc., Elrac, LLC, and EAN Trust (hereinafter collectively referred to as Elrac) is granted. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), a comprehensive transportation bill that includes the Graves Amendment and is codified at 49 USC § 30106 (***Graham v Dunkley***, 50 AD3d 55, 57-58, 852 NYS2d 169 [2d Dept], *appeal dismissed* 10 NY3d

835, 859 NYS2d 607 [2008]), provides as follows:

> (a) In general. An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if
>
> (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
>
> (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)

(49 USC § 30106 [a]; *see e.g.* ***Khan v MMCA Lease, Ltd.***, 100 AD3d 833, 954 NYS2d 595 [2d Dept 2012]; ***Ballatore v Hub Truck Rental Corp.***, 83 AD3d 978, 922 NYS2d 180 [2d Dept 2011]). "The section applies to all actions commenced on or after August 10, 2005 (*see* 49 USC § 30106 [c]), and has been enforced as preempting the vicarious liability imposed on commercial lessors by Vehicle and Traffic Law § 388" (***Graham v Dunkley***, 50 AD3d at 58, 852 NYS2d 169). Here, Elrac established a prima facie case of entitlement to summary judgment with evidence that it is engaged in the business of renting vehicles, and that no allegation of direct negligence is asserted against it (*see* ***Eisenberg v Cope Bestway Exp., Inc.***, 131 AD3d 1198, 17 NYS3d 457 [2d Dept 2015]; ***Byrne v Collins***, 77 AD3d 782, 910 NYS2d 449 [2d Dept 2010], *lv denied* 17 NY3d 702, 929 NYS2d 92 [2011]; ***Gluck v Nebgen***, 72 AD3d 1023, 898 NYS2d 881 [2d Dept 2010], *lv denied* 16 NY3d 703, 919 NYS2d 118 [2011]). As mentioned earlier, plaintiff does not oppose Elrac's claim that it is shielded from liability under the Graves Amendment.

The branch of the motion for summary judgment dismissing the complaint on the ground plaintiff is precluded under Insurance Law § 5104 from recovering for non-economic loss, as he did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d), is denied. It is for the court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established a prima facie case that he or she sustained "serious injury" and may maintain a common law tort action (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). 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 moving for summary judgment on the ground that a plaintiff's negligence claim is barred by 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 Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of a 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***, 182 AD2d 268, 587 NYS2d 692). 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***, 79 NY2d 955, 582 NYS2d 990; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Further, to qualify as a serious injury within the 90/180 category, there must be objective medical evidence of a medically-determined injury or impairment of a non-permanent nature, as well as evidence that plaintiff's activities were significantly curtailed due to such injury (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Hamilton v Rouse***, 46 AD3d 514, 846 NYS2d 650 [2d Dept 2007]; ***Ocasio v Henry***, 276 AD2d 611, 714 NYS2d 139 [2d Dept 2000]). In addition to demonstrating an inability to perform "substantially all" usual activities for at least 90 days of the 180 days following the accident, a plaintiff asserting a 90/180 claim must show through competent medical evidence that his or her inability to perform such activities was medically indicated and causally related to the subject accident (*see* ***Penaloza v Chavez***, 48 AD3d 654, 852 NYS2d 315 [2d Dept 2008]; ***Hamilton v Rouse***, 46 AD3d 514, 846 NYS2d 650; ***Roman v Fast Lane Car Serv., Inc.***, 46 AD3d 535, 846 NYS2d 613 [2d Dept 2007]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]).

Defendants failed to present admissible evidence negating the elements of plaintiff's 90/180 claim. Significantly, despite the allegation in the supplemental bill of particulars that plaintiff was confined to home and unable to attend high school for more than three months due to his injuries, neither Dr. Kupersmith nor Dr. Lechtenberg addressed the claim that plaintiff suffered an injury within the 90/180 day category (*see* ***Reynolds v Wai Sang Leung***, 78 AD3d 919, 911 NYS2d 431 [2d Dept 2010]; ***Menezes v Khan***, 67 AD3d 654, 889 NYS2d 54 [2d Dept 2009]; ***Takaroff v A.M. USA, Inc.***, 63 AD3d 1142, 882 NYS2d 265 [2d Dept 2009]; ***Rahman v Sarpaz***, 62 AD3d 979, 880 NYS2d 125 [2d Dept 2009]; ***Greenidge v Righton Limo, Inc.***, 43 AD3d 1109, 841 NYS2d 791 [2d Dept 2007]). Contrary to the assertion of defense counsel, the vague hearsay statement in Dr. Lechtenberg's report that, during the independent medical examination conducted in November 2014, plaintiff advised such doctor that "[h]e was a student at the time of the accident and he continues as a student," is insufficient to establish prima facie that plaintiff did not suffer injury within the 90/180 category (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595). Thus, defendants failed to make a prima facie showing that plaintiff's claim for damages is barred under the No-Fault Insurance Law (*see* ***Reynolds v Wai Sang Leung***, 78 AD3d 919, 911 NYS2d 431; ***Negassi v Royle***, 65 AD3d 1311, 885 NYS2d 760 [2d Dept 2009]; ***Ismail v Tejeda***, 65 AD3d 518, 882 NYS2d 915 [2d Dept 2009]; ***Takaroff v A.M. USA, Inc.***, 63 AD3d 1142,

882 NYS2d 265).

Finally, plaintiff's cross motion for summary judgment in his favor on the issue of Brennan's negligence is granted. The Vehicle and Traffic Law establishes standards of care for motorists, and an unexcused violation of such standards of care constitutes negligence per se (*see* ***Shui-Kwan Lui v Serrone***, 103 AD3d 620, 959 NYS2d 270 [2d Dept 2013]; ***Barbieri v Vokoun***, 72 AD3d 853, 900 NYS2d 315 [2d Dept 2010]; ***Coogan v Torrisi***, 47 AD3d 669, 849 NYS2d 621 [2d Dept 2008]). A driver who has the right-of-way is entitled to anticipate that other drivers will obey traffic laws requiring them to yield (*see* ***McPherson v Chanzeb***, 123 AD3d 1098, 999 NYS2d 521 [2d Dept 2014]; ***Ismail v Burnbury***, 118 AD3d 756, 987 NYS2d 183 [2d Dept 2014]; ***Kann v Maggies Paratransit Corp.***, 63 AD3d 792, 882 NYS2d 129 [2d Dept 2009]). Pursuant to Vehicle and Traffic Law § 1141, a driver attempting a left turn at an intersection is required to yield the right of way to a vehicle approaching from the opposite direction "which is within the intersection or so close as to constitute an immediate hazard." Concomitantly, every driver, including one with the right of way, has a common law duty to see that which should be seen through the proper use of his or her senses and to exercise reasonable care to avoid colliding with another vehicle (*see* ***Cicalese v Burier***, 123 AD3d 1078, 1 NYS3d 210 [2d Dept 2014]; ***Shui-Kwan Lui v Serrone***, 103 AD3d 620, 959 NYS2d 270; ***Colpan v Allied Cent. Ambulette, Inc.***, 97 AD3d 776, 948 NYS2d 124 [2d Dept 2012]; ***Pollack v Margolin***, 84 AD3d 1341, 924 NYS2d 282 [2d Dept 2011]). Moreover, as there may be more than one cause of an accident, a plaintiff in a personal injury action seeking summary judgment on liability has the burden of presenting prima facie evidence that the defendant was negligent, and that he or she was free from comparative fault (*see* ***Anjum v Bailey***, 123 AD3d 852, 999 NYS2d 454 [2d Dept 2014]; ***Gorenkoff v Nagar***, 120 AD3d 470, 990 NYS2d 604 [2d Dept 2014]; ***Lanigan v Timmes***, 111 AD3d 797, 975 NYS2d 148 [2d Dept 2013]; ***Pollack v Margolin***, 84 AD3d 1341, 924 NYS2d 282).

The evidence submitted in support of the cross motion is sufficient to establish a prima facie case that Brennan violated Vehicle and Traffic Law § 1141 by making a left turn into the path of plaintiff's oncoming vehicle when it was not reasonably safe to do so, and that such negligence was the sole proximate cause of the accident (*see* ***Galagotis v Armenti***, 133 AD3d 818, 2015 NY Slip Op 08705 [2d Dept 2015]; ***Choi v Schwabenbauer***, 124 AD3d 574, 1 NY3d 276 [2d Dept 2015]; ***Ahern v Lanaia***, 85 AD3d 696, 924 NYS2d 802 [2d Dept 2011]; ***King v Dalton***, 267 AD2d 208, 699 NYS2d 465 [2d Dept 1999]). It is undisputed that at the scene of the accident, Old Town Road had two travel lanes, one running north and one running south, as well as a turning lane situated between the northbound and southbound lanes for vehicles making a left turn into Ward Melville High School. According to Brennan's deposition testimony, as she approached the intersection of Old Town Road and Norwood Avenue on the day of the accident, she moved her vehicle into the left turning lane, in which two or three vehicles were preparing to turn into the high school. She testified that two traffic lights at the intersection control vehicles traveling north on Old Town Road, and that when she moved into the turning lane the traffic light controlling such lane was illuminated with a green arrow and the other traffic light, which controls through travel in the northbound lane, was red. Brennan, who described the traffic conditions that morning as busy, testified that as she waited to make the turn, the traffic light for the turning lane changed, and that it was red when it was her turn to go left. She further testified that, while she was stopped at the intersection, preparing to turn, she saw plaintiff's vehicle traveling south on Old Town Road when it was approximately three car lengths away from her vehicle. Brennan testified

that, though the traffic light controlling the turning lane was red and plaintiff's vehicle was nearing the intersection, she made a left turn, and that the right front bumper of her vehicle collided with the front of plaintiff's vehicle.

The burden, therefore, shifted to defendants to raise a triable issue of fact as to plaintiff's comparative fault (*see generally* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). According to his deposition testimony, plaintiff was traveling south on Old Town Road, at approximately 10 miles per hour, immediately before the accident. Plaintiff testified that as he approached the intersection with Norwood Avenue he was looking straight ahead, that he observed plaintiff's vehicle moving in the through travel lane from the opposite direction, and that he kept her vehicle under observation as he neared the intersection. He further testified that the traffic light controlling traffic traveling south on Old Town Road was green as he entered the intersection, and that the front of his vehicle was in the intersection when it was hit by the vehicle driven by Brennan after it made a sudden left turn from the through travel lane.

Contrary to the assertion by defendants' counsel, neither Brennan's testimony that she believes the traffic light controlling cars traveling south on Old Town Road was red at the time of the collision nor plaintiff's testimony that prior to the impact he observed the vehicle driven by Brennan approaching the intersection from the opposite direction raises a triable issue of fact as to plaintiff's comparative negligence (*see* ***Carroll-Batista v Bennett***, 122 AD3d 661, 995 NYS2d 718 [2d Dept 2014]; ***Lupowitz v Fogarty***, 295 AD2d 576, 744 NYS2d 480 [2d Dept 2002]; *cf.* ***Delasoudas v Koudellou***, 236 AD2d 581, 654 NYS2d 659 [2d Dept 1997]). The speculative assertion by defense counsel that plaintiff failed to take reasonable actions to avoid the accident also is insufficient to defeat the cross motion (*see* ***Carroll-Batista v Bennett***, 122 AD3d 661, 995 NYS2d 718; ***Mateiasevici v Daccordo***, 34 AD3d 651, 825 NYS2d 502 [2d Dept 2006]; ***Maloney v Niewender***, 27 AD3d 426, 812 NYS2d 585 [2d Dept 2006]). As plaintiff had the right of way, he was entitled to anticipate that Brennan would obey the traffic rules requiring her to yield to oncoming vehicles and not make a left turn when it was unsafe to do so (*see* ***Hyo Jin Yoon v Guang Chen***, 127 AD3d 1023, 7 NYS3d 471 [2d Dept 2015]; ***Ismail v Burnbury***, 118 AD3d 756, 987 NYS2d 183; ***Yelder v Walters***, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]).

Dated: JAN 14 2016

HON. JOSEPH A. SANTORELLI
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**