FILED Mar 29 2016 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX - PART IA-24

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WAYNE KRAUSE,

Plaintiff,

MEMORANDUM DECISION
Index No. 310349/08

-against-

Z. ZINDEL, INC., MALU PROPERTIES, INC., and BP PRODUCTS NORTH AMERICA, INC.,

Defendants,

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HON. SHARON A.M. AARONS:

Defendants' motion for summary judgment is decided as follows:

Plaintiff alleges that, on October 18, 2008 at approximately 10:15 pm, he tripped and fell in a hole on the sidewalk next to the BP gas station, located at 296 West Fordham Road, Bronx, New York. FDNY emergency was called by an unknown witness regarding plaintiff's suspected unconscious condition. Once the ambulance arrived, the emergency medical technicians (EMTs) found plaintiff at the corner of Cedar Avenue and West Fordham Road.

The EMTs' report states that plaintiff was intoxicated and unable to provide any personal information. They noted a presumptive diagnosis of intoxication and plaintiff was transported to St. Barnabas Hospital, where his chief complaint was that he "wanted detox." He was confirmed intoxicated by blood testing[1] and admitted for ethanol alcohol intoxication and dependence.

On the morning of October 19, 2008 plaintiff was transferred to a medical floor, due

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[1]Notably, plaintiff's levels were 303mg [Reference Range - none detected (< = 5mgldl)].

to his complaints of neck pain. The physician progress note documents plaintiff's complaint as "neck pain s/p fall? assult." A CT scan of the cervical spine was ordered and performed, revealing a fracture at the base of the odontoid; the findings were suggestive of an pre-existing fracture. Significantly, plaintiff had a past medical history of ankylosing spondylitis.[2] The recommendation was an MRI; however, on October 21, 2008 at 3:00pm, it was noted that plaintiff refused to stay and get the MRI. Plaintiff instead signed out against medical advice.

The next morning on October 22, 2008 at approximately 10:30am, plaintiff called an FDNY ambulance to 1391 Stebbings Avenue, Bronx, New York. When the EMTs responded, plaintiff was complaining of neck pain from a fall earlier that week and stated that he had been at Barnabas Hospital, where he was given only a neck brace and aspirin. It was noted plaintiff was seeking stronger pain medication and refused to wear the recommended c-spine immobilization collar.

Plaintiff was brought to Lincoln Hospital for his complaints of neck pain and underwent a second CT scan, which revealed the presence of a pre-existing non-displaced traverse fracture in the base of the odontoid process. Based on this, an MRI was recommended to rule out cervical spine compression. The MRI performed October 24, 2008 revealed an os odontoideum, which the report states may be the result of a remote C2 fracture. Neurosurgery recommended spinal fusion of C1 - C2, which was performed

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[2]An inflammatory disease that can cause vertebrae in the spine to fuse together making the spine less flexible.

October 29, 2008 by Dr. Das.[3] Plaintiff was discharged in stable condition on November 3, 2010.

Defendants seek summary judgment on the grounds that the alleged sidewalk defect was not a proximate cause, or even the cause in fact, of plaintiff's fall, and there is no evidence that plaintiff sustained an injury as a result of the alleged fall.

In support of the motion defendants provide the FDNY pre-hospital care report prepared by the EMTs, dated October 18, 2008, which confirms that plaintiff was extremely intoxicated when the EMTs arrived and unable to give any personal information. The report does not reflect or document that plaintiff suffered any trauma, only that he was intoxicated. The hospital record relating to plaintiff's first day in St. Barnabas confirms these findings; it was not until later, the next day, that plaintiff complained of neck pain.

In further support are radiological studies that indicate that plaintiff's injury was a pre-existing chronic fracture (a Type II Odontoid Fracture) that could severely compromise the upper cervical spine. Lastly, defendants submit affidavits by two medical experts that support their argument that there is no evidence the plaintiff sustained an injury as a result of the alleged fall, and that this fracture was either due to a prior trauma or a developmental abnormality.

Plaintiff opposes defendants' motion on the grounds that a question of fact exists as to whether he suffered an aggravation of his pre-existing injury as a result of the October 18, 2008 trip and fall. Plaintiff submits an affidavit by his expert, Dr. Post, a Board

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[3]The operative report states: " Indication: This is 45 year old gentleman who presented after a fall with neck pain. Imaging study showed a type-II odontoid fracture with nonunion. The patient denied previous trauma. Imaging was consistent with a chronic nonunion of the C2 fracture therefore a posterior approach was recommended."

Certified Orthopedic surgeon. Dr. Post opines that although plaintiff's odentoid fracture pre-existed, his October 18, 2008 was the precipitating factor that resulted in aggravation of the prior odontoid fracture.

In addition, plaintiff argues that there is a question of fact as to the date of the accident - - notably, however, he averred in his affidavit that the accident occurred on October 18, 2008.

Plaintiff argues too that defendants offered no evidence denying the existence of the hole in the sidewalk that caused plaintiff to trip and fall. Plaintiff relies on his affidavit, which sets forth that, at the time of the accident, he was not intoxicated and was in control of his faculties. Further, plaintiff's expert (Dr. Post) opines that alcohol, regardless of the amount consumed, does not automatically result in loss of balance and inability to ambulate.

On a motion for summary judgment, the moving party has the burden to establish "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact." Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

Defendants made a prima facie showing of entitlement to judgment as a matter of law dismissing the complaint on the ground that any alleged negligence on their part was not a proximate cause of plaintiff's injuries. The medical record and defendants' expert's affidavit support the conclusion that plaintiff's cervical spine fracture was the result of a prior trauma or a developmental abnormality. Moreover, the EMT's report and the hospital record demonstrate that plaintiff suffered no trauma as a result of the alleged trip and fall.

In opposition, plaintiff failed to raise a triable issue of fact. The theory that plaintiff's

pre-existing spinal condition was exacerbated by the alleged trip and fall is supported only by the conclusory affidavit of his medical expert; that affidavit is bereft of a detailed, meaningful treatment of the central issue in this litigation - - whether plaintiff's alleged trip and fall accident exacerbated a pre-existing injury. Thus, the affidavit is insufficient to establish a material issue of fact.

Accordingly, it is hereby ordered that the defendant's motion for summary judgment is granted; and it is further,

Ordered that the complaint is dismissed.

The clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: March 24, 2016

SHARON A.M. AARONS, J.S.C.