

McCants v Incorporated Vil. of Lynbrook
2017 NY Slip Op 33019(U)
November 16, 2017
Supreme Court, Nassau County
Docket Number: 600362/16
Judge: Sharon M.J. Gianelli
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 26
Present: Hon. Sharon M.J. Gianelli, J.S.C.**

JOLAN McCANTS,

Plaintiff,

Index No. 600362/16

-against-

Mot Seq. No. 001

THE INCORPORATED VILLAGE OF LYNRBOOK,
LYNBROOK POLICE DEPARTMENT, and
JOSEPH E. COSENZA,

Submit Date: 09/28/17

Defendants.

Papers submitted on this motion:

Defendants' Notice of Motion _____ X

Plaintiff's Affirmation in Opposition _____ X

Defendants' Reply Affirmation _____ X

Motion by the attorneys for the Defendants for an order pursuant to CPLR § 3212 granting summary judgment dismissing Plaintiff's complaint on the grounds that Plaintiff did not sustain a "serious injury" as required by Insurance Law § 5102(d) and/or violated VTL § 1150 is DENIED.

Plaintiff brings the within action for personal injuries allegedly sustained in a motor vehicle accident on February 24, 2015.

The accident occurred on Ocean Avenue near the approach to Tanglewood Road and Peninsula Boulevard in Lynbrook, Nassau County, New York. Plaintiff was attempting to cross the street when he was hit by a marked Village of Lynbrook police vehicle driven by Defendant Police Officer Joseph E. Cosenza [Defendant]. Plaintiff was wearing black Vans sneakers, black pants, and a dark cargo jacket with a hood. Plaintiff has testified that after driving to Lakeview and parking his car, he skateboarded to the intersection of

Tanglewood Road and Ocean Avenue, Plaintiff picked up his skateboard in his right arm and observed the red light to his left. The weather was clear, and while it was dark out, the area was lit by streetlights. Plaintiff observed the crosswalk to the left of him and testified that there was snow preventing him from reaching the crosswalk.

Prior to the accident, Defendant observed traffic backed up southbound on Ocean Avenue and looked down Tanglewood Road, which intersects with Peninsula Boulevard and did not observe anyone. Defendant's police vehicle was not responding to any call or emergency at the time of the accident. Defendant testified that prior to impact he was alerted to the accident by Defendant's hitting the left-front fender behind the driver-side wheel, at which point Defendant saw Plaintiff's skateboard flying through the air and stop behind the vehicle. The attorney for Defendant argues that there were no pedestrian crosswalks or signs to cross Ocean Avenue from Tanglewood Road and that Plaintiff should have used the crosswalk on Peninsula Boulevard and Ocean Avenue.

In order to satisfy the statutory "serious injury" threshold, a plaintiff must have sustained an injury that is identifiable by objective proof. Subjective complaints of pain do not qualify as a serious injury within the meaning of Insurance Law § 5102(d) (*see Toure v. Avis Rent A Car Sys., Inc.*, N.Y.2d 345).

On a motion for summary judgment where the issue is whether a plaintiff has sustained a serious injury under the no-fault law, the movant bears the initial burden of presenting competent evidence that there is no cause of action (*Hughes v. Cal*, 31 AD3d 385; *Browdame v. Candura*, 25 AD3d 747). The proof must be viewed in a light most favorable to the non-movants (*Perez v. Exel Logistics, Inc.*, 278 AD2d 213). If the movant satisfies that burden, the burden shifts to the plaintiff to demonstrate, by the

submission of objective proof of the nature and degree of the injury, that she sustained a serious injury, or that there are questions of fact as to whether the purported injury, in fact, is serious (*Flores v. Leslie*, 27 AD3d 220). In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (see *Andre v. Pomeroy*, 35 NY2d 361; *Mosheyev v. Pilevsky*, 283 AD2d 469). Indeed, “[e]ven the color of a triable issue, forecloses the remedy” (*Rudnitsky v. Robins*, 191 AD2d 488). Moreover, “[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate” (*Greco v. Posillico*, 290 AD2d 532; *Judice v. DeAngelo*, 272 AD2d 583; see also *S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 NY2d 338). Further, on a motion for summary judgment, the submissions of the opposing party’s pleadings must be accepted as true [See: *Glover v. City of New York*, 298 AD2d 428 (2nd Dept. 2002)]. Defendants have not made an adequate *prima facie* showing of entitlement to summary judgment.

In support of the motion on the issue of “serious injury,” the attorneys for Defendant submits two [2] affirmations by Jonathan Lerner, M.D., both dated December 19, 2016. Dr. Lerner did not perform a physical examination of Defendant. Dr. Lerner relied on the medical reports submitted by Plaintiff’s attorney. Medical reports [Exhibits O to Notice of Motion; Exhibit A to Affirmation in Opposition] assert that the MRI studies and film indicate “multiple non-displaced fractures of the distal calcaneus.” Charles Milchtein, M.D. opines:

Based on the patient's history of the accident, no prior relevant clinical history to his left foot and ankle, and his findings on my multiple physical examinations outlined in the aforementioned reports, I am on the opinion within a reasonable degree of medical certainty that the aforementioned fractures were causally related to being struck by the car on February 24, 2015.

The records upon which Defendants' based their motion for summary judgment show the Plaintiff to be clinically diagnosed with a fracture as a result of the subject accident thereby raising an issue of fact. *See: Levy v. Zaman*, 95 A.D.3d 585; *Elias v. Mahlah*, 58 A.D.3d 434. A fracture constitutes a "serious injury" under the statute.

Since Plaintiff has established at least one of the serious injury thresholds, he can recover from any and all of the injuries proximately caused by the accident. *See: Linton v. Nawaz*, 14 N.Y.3d 821, 822. "Since plaintiff established that at least some of his injuries meet the 'No Fault' threshold, it is unnecessary to address whether his proof with respect to other injuries he allegedly sustained would have been sufficient to withstand defendants' motion for summary judgment." *See also: Mulligan*, 120 A.D.3d 1155, 1156; *Rubin v. SMS Taxi Corp.*, 71 A.D.3d 548, 549-550. "Accordingly, once an alleged claim meets at least one of the serious injury thresholds, the statute's gatekeeping function, to reduce caseloads by limiting what the courts adjudicate, is satisfied."

The Court will next address the liability issue.

In opposition to the motion, the attorney for Plaintiff argues that Plaintiff was utilizing the green light immediately to his left to cross; and relying on the fact that cars were stopped to his left at the red light on the other side of the intersection. Cars were stopped in front of him, waiting for the red light. Plaintiff further asserts the act of

Defendant, suddenly and without warning, pulling into the turning lane from behind stopped vehicles as Plaintiff was entering that lane where the incident occurred is the sole cause of the accident.

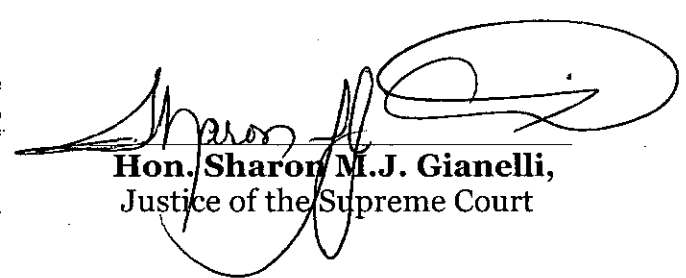
The deposition testimony of all of the parties, submitted by their motion, presents issues of fact as to the manner in which the accident occurred: whether the impact between the Defendant's vehicle and Plaintiff's foot was a foreseeable consequence of Defendant's suddenly pulling his vehicle out from behind stopped cars, entering into a turning lane, accelerating and rapidly approaching an intersection where he had a red light, while the Plaintiff was crossing a few feet from the "corner" that was blocked by a snow bank.

Crossing outside the crosswalk is not negligence as a matter of law. Whether Plaintiff exercised reasonable care under the circumstances is a triable issue of fact for a jury to decide, as is the question of comparative negligence. *Ruggiero v. Lentini*, 123 A.D.3d 998; *Shui-Kwan Lui v. Serrane*, 103 A.D.3d 620; *See also: Tomas v. Ronai*, 189 A.D.2d 635.

The motion for summary judgment is DENIED.

This decision is the Order of the Court.

ENTER: November 17, 2017
Mineola, New York



Hon. Sharon M.J. Gianelli,
Justice of the Supreme Court

ENTERED

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