

Kelso v Rogers
2018 NY Slip Op 31180(U)
June 12, 2018
Supreme Court, New York County
Docket Number: 153429/16
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Adam Silvera **Part 22**

DAVID KELSO,

Plaintiffs,

-against-

STEVE J. ROGERS and BURAMBIBAS, INC.

Defendants,

DECISION/ORDER

INDEX NO. 153429/16
MOTION SEQ NO 003

ADAM SILVERA, J. :

Upon the foregoing papers, it is ordered that plaintiff David Kelso's motion is denied for the reasons set forth below. Before the court is plaintiff's Motion Sequence 003 for summary judgment in favor of plaintiff on the issues of liability and "serious injury" as defined by Insurance Law § 5102(d). Defendants oppose the motion.

BACKGROUND

The suit at bar stems from an incident which occurred on December 17, 2014, while plaintiff was allegedly a lawful pedestrian crossing Park Avenue from east to west in the crosswalk on the north side of East 74th Street in the County, City, and State of New York, with the light in his favor, when he was struck by defendants' turning vehicle.

DISCUSSION

Summary Judgment (Serious Injury)

The branch of plaintiff's motion, for summary judgment, pursuant to CPLR 3212, in favor of plaintiff on the issue of "serious injury" as defined under Section § 5102(d) of the Insurance Law is denied. "The proponent of a summary judgment motion must make a prima

facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the “serious injury” threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a “permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system”]).

Defendants’ opposition alleges that plaintiff has failed to demonstrate the existence of a “serious injury” as defined under Section 5102(d) of the Insurance Law. In support of his argument, plaintiff submits a signed letter by Dr. Stuart Kahn. The letter is not a sworn affidavit. Further, the doctor’s observations recorded in the letter speak to plaintiff’s condition three years after the incident. The letter makes mention of plaintiff’s prior treatment for the alleged serious injury which includes treatment at the following facilities: Cornell Hospital under the care of “Dr. Lorich”, by “Neurology and Orthopedics”, at “Hebrew Home in Westchester County”, “Hospital for Special Surgery outpatient facility in Jupiter Florida”, with podiatrist “Dr. Positano”, and physical therapy with “a physical therapist called Charles Weingroff.” (Plaintiff’s Mot., exh 4 at 1-2). Dr. Kahn also relies on a “summary of his surgeries which included four separate surgical dates” (*See id.*) Aside from Dr. Kahn’s unsworn letter, which relies on his

communications with plaintiff, plaintiff has provided no official record or affidavits concerning the above-mentioned treatment. Thus, there exists an issue of fact and the branch of plaintiff's motion for summary judgment in favor of plaintiff on the issue of "serious injury" as defined by Insurance Law § 5102(d) is denied.

Summary Judgment (Liability)

The branch of plaintiff's motion for summary judgment on the issue of liability is denied. Plaintiff's motion, which alleges that he was in the crosswalk with the light in his favor when he was struck by defendants' turning vehicle, has made out a prima facie case of negligence, and the burden shifts to defendants to raise a triable issue of fact. (*See Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *see also Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). A pedestrian who demonstrates that they were walking within a crosswalk, with the light in their favor when struck by a turning vehicle, is entitled to a judgment as a matter of law on the issue of liability. (*Perez-Hernandez v M. Marte Auto Corp.*, 104 AD3d 489, 490 [1st Dep't 2007] [Finding that plaintiff could not have avoided the accident and noticed the car only moments before being struck]).

Here, defendants' opposition disputes plaintiff's allegations and raises an issue of fact with respect to liability. Plaintiff testified that he was in the crosswalk, with the light in his favor, walking westbound when he was struck by defendants' vehicle. Defendants however, provide the affidavit of defendant driver Steven J. Rogers, who affirms that plaintiff was not walking westbound. Further, defendant Rogers affirms that plaintiff was wearing headphones at the time and "distracted while walking towards my car" (Aff in Op. Exh C at 5). Thus, defendants raise issues of fact as to the actual occurrence of the accident and plaintiff's ability to have avoided the accident and notice defendants' car before being struck. Thus, plaintiff's motion for summary

judgment on the issue of liability is denied.

Accordingly, it is

ORDERED that the branch of plaintiff's motion for summary judgment on the issue of liability as against defendants is denied; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment in favor of plaintiff on the issue of "serious injury" as defined under Section § 5102(d) of the Insurance Law is denied; and it is further

ORDERED that within 30 days of entry, defendants shall serve a copy of this decision/order upon plaintiff with notice of entry.

This constitutes the Decision/Order of the Court.

Dated: 6/12/18

ENTER:



Hon. Adam Silvera, J.S.C.

HON. ADAM SILVERA
J.S.C.