

Hamacher v Talve

2018 NY Slip Op 34191(U)

February 2, 2018

Supreme Court, Nassau County

Docket Number: Index No. 610162/16

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 9

STEPHEN HAMACHER,

X

Plaintiff,

Index No. 610162/16
Motion Sequence...01
Motion Date... 12/13/17

-against-

MARK TALVE,

Defendant.

X

Papers Submitted:

Notice of Motion.....X

Affirmation in Opposition.....X

Reply Affirmation.....X

Upon the foregoing papers, the motion by the Plaintiff seeking an Order of this Court, pursuant to CPLR § 3212, granting him summary judgment on the grounds that: i) no issues of fact exist with respect to liability; and ii) his injuries satisfy the “serious injury” threshold requirement of Insurance Law § 5102 (d), is determined as hereinafter provided.

This personal injury action arises out of a motor vehicle accident that occurred on November 19, 2016. The Plaintiff, a bicyclist, was struck by the motor vehicle operated by the Defendant, MARK TALVE (hereinafter “TALVE”).

This Court will first address that branch of the Plaintiff’s motion regarding whether the Plaintiff sustained a fracture, constituting a “serious injury” under Insurance Law § 5102 (d).

The Plaintiff alleges that, as a result of the subject accident, he sustained a “highly comminuted right open olecranon fracture with open reduction internal fixation greater than 5

intercalary segments requiring irrigation and debridement of open fracture down to the bone and placement of pins, screws and an ulnar plate” (See Plaintiff’s Verified Bill of Particulars attached to the Notice of Motion as Exhibit “B”).

In support of his position, the Plaintiff submits a portion of the narrative report of Dr. Leon Sultan, M.D., P.C., F.A.A.O.S (hereinafter “Dr. Sultan”), an orthopedic surgeon who examined the Plaintiff on August 10, 2017 (See the narrative report of Dr. Sultan attached to the Notice of Motion as Exhibit “C”). Dr. Sultan indicates that he reviewed various medical records and reports regarding the Plaintiff’s medical treatment, including a “Right elbow operative report dated 11/19/16”.

In moving for summary judgment, the Plaintiff must make a *prima facie* case showing he sustained a fracture, constituting a “serious injury” within the meaning of the statute. Once this is established, the burden shifts to the Defendant to come forward with evidence to overcome the Plaintiff’s submissions by demonstrating a triable issue of fact that a “serious injury” was sustained (See *Pommels v. Perez*, 4 N.Y.3d 566 [2005]; *Grossman v. Wright*, 268 A.D.2d 79, 84 [2d Dept. 2000]).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff’s injury. The Court of Appeals in *Toure v. Avis Rent A Car Systems*, 98 N.Y.2d 345 (2002), stated that the plaintiff’s proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests (*Toure v. Avis Rent A Car Sys.*, *supra* at 353). However, the MRI and CT scan tests and reports must be paired with the doctor’s observations during his physical examination of the plaintiff (See *Toure v. Avis Rent A Car*

Systems, supra). In addition, unsworn MRI reports are not competent evidence unless both sides rely on those reports (*see Gonzalez v. Vasquez*, 301 A.D.2d 438 [1st Dept. 2003]).

Even where there is ample objective proof of the plaintiff's injury, the Court of Appeals held in *Pommels v. Perez, supra*, that certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of the plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a pre-existing condition, would interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez, supra*).

Here, the Plaintiff failed to meet his burden in establishing that he sustained a fracture under the serious injury statute. The Plaintiff proffers no competent medical evidence with respect to the alleged fracture. Further, the portion of the narrative report of Dr. Sultan is inadmissible and lacks probative value. Notably, the report is not affirmed pursuant to CPLR § 2106. Moreover, Dr. Sultan merely memorializes the findings of other doctors based upon his review of reports and records, none of which were submitted in support of the instant motion. Lastly, it is apparent that page two (2) of Dr. Sultan's narrative report has not been provided in either the moving papers or the reply. As such, the Plaintiff has not met his burden in establishing that he sustained a fracture as a result of the subject accident. Clearly, actual proof of a fracture would satisfy the requirements of Insurance Law § 5102 (d).

This Court will now address that branch of the Plaintiff's motion with respect to liability.

In support of its motion, the Plaintiff proffers his Examination Before Trial (“EBT”) testimony, wherein he testified that the accident occurred at approximately 11:00 a.m. on November 19, 2016, while he was riding his bicycle (*See* the EBT transcript of the Plaintiff attached to the Notice of Motion as Exhibit “E”). He indicated that the roads were “dry” on the date of the accident. At the time of the accident, he was wearing a florescent green jacket, shorts, and a bicycle helmet. His bicycle was equipped with reflectors on the back of it.

Prior to the accident, the Plaintiff was traveling in the shoulder of the southbound lane on Wheatley Road (*Id.* at p. 21). He indicated that there is one lane of travel in each direction on Wheatley Road. His highest rate of speed while traveling on Wheatley Road was approximately eighteen (18) miles per hour. Beginning at approximately one-third of a mile away from the accident location, the Plaintiff decreased his speed.

The accident occurred at an intersection with a driveway of a Country Club (hereinafter the “subject driveway”). The subject driveway was to the right of the Plaintiff as he traveled on Wheatley Road. The Plaintiff indicated that the intersection was controlled by a yellow blinking light for the traffic on Wheatley Road and a red blinking light for the traffic coming from the subject driveway (*Id.* at pp. 26-28).

The Plaintiff testified that, when he first observed the Defendant’s vehicle, he was approximately four hundred (400) feet away from the intersection. The Defendant’s vehicle was approximately two hundred (200) feet away from the intersection. He testified that the Defendant’s vehicle was traveling northbound on Wheatley at a speed of approximately forty (40) miles per hour. Prior to the accident, the Plaintiff did not observe a directional or blinker signal coming from the Defendant’s vehicle. The Plaintiff observed the Defendant’s vehicle slow

down and then stop. The Plaintiff was approximately twenty (20) feet away from the Defendant's vehicle and ten (10) feet away from the driveway when he observed the Defendant's vehicle begin to make a left hand turn from the northbound lane. When the Plaintiff observed the Defendant's vehicle begin making a left-hand turn, the Plaintiff applied heavy pressure to his hand brakes. The Plaintiff testified that he traveled approximately ten (10) feet before coming to a complete stop at the front of the driveway. The front wheel of his bicycle "locked up" and the Plaintiff went over his front handlebars, falling on to the ground.

Immediately prior to impact, the Plaintiff did not hear the sound of a horn or tires or brakes screeching. Notably, the Plaintiff testified that he never came in contact with the Defendant's vehicle.

The Plaintiff also submits the EBT transcript of the Defendant, TALVE, conducted on June 8, 2017 (*See* the EBT transcript of the Defendant attached to the Notice of Motion as Exhibit "G"). The Defendant testified that, prior to the accident, he was traveling northbound on Wheatley Road at a speed of approximately thirty to thirty-five (30-35) miles per hour. Mr. TALVE testified that he first observed the Plaintiff when the Plaintiff was approximately fifty to sixty (50-60) yards away from the Defendant's vehicle. He indicated that the Plaintiff was traveling southbound on Wheatley Road.

Mr. TALVE stated that, when he was approximately fifty to one hundred (50-100) yards away from the subject driveway, he turned on his left directional. He then reduced his rate of speed to approximately five to ten (5-10) miles per hour. He attempted to make a left-hand turn into the subject driveway, but stopped when he observed the Plaintiff approximately ten to fifteen (10-15) feet away from his vehicle. Mr. TALVE testified that the Plaintiff, who had his

head facing down, was coming “directly at” his vehicle when he came to a stop. Mr. TALVE testified that, when the Plaintiff looked up, he brought his bicycle to a stop and flew over his handlebars.

The Plaintiff argues that the Defendant was solely liable for the subject accident, as he negligently failed to yield to the Plaintiff, constituting an immediate hazard. Counsel for the Plaintiff cites to New York Vehicle and Traffic Law (“VTL”) § 1141, which states that:

“The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard.”

Counsel contends that the Defendant was negligent, as a matter of law, by making a left-hand turn, directly into the path of the Plaintiff, who had the right of way.

In opposition, counsel asserts that the Plaintiff failed to have his bicycle under reasonable control and failed to keep a proper look out prior to the accident. Counsel highlights that the subject intersection was controlled by a blinking yellow light. Pursuant to VTL § 1113 (b), “Vehicular traffic facing a circular yellow signal or yellow arrow with rapid intermittent flashes may proceed through the intersection or past such signal only with caution.” Counsel submits that the Plaintiff failed to take proper caution, as he testified that he proceeded through the intersection at a speed of approximately eighteen (18) miles per hour. Further, the Defendant testified that he observed the Plaintiff proceed through the intersection with his head down. As such, counsel for the Defendant argues that issues of fact exist as to whether the Plaintiff was comparatively negligent or was the proximate cause of the subject accident

It is well established that “drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident” (*See Johnson v. Phillips*, 261 A.D.2d 269 [1st Dept. 1999]). A driver is bound by a duty to see what is there to be seen through the proper use of his or her senses and is negligent in failing to do so (*See Cook v. Gomez*, 138 A.D.3d 675 [2d Dept. 2016] *citing Lu Yuan Yang v. Howsal Cab Corp.*, 106 A.D.3d 1055 [2d Dept. 2013]).

Considering the testimony of the parties, clear issues of fact exist with respect to whether the Defendant was the proximate cause of the subject accident and whether the Plaintiff caused or contributed to the subject accident. As such, summary judgment is inappropriate in the instant matter.

Accordingly, it is hereby

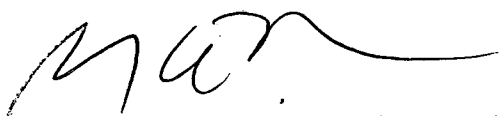
ORDERED, that the branch of the Plaintiff’s motion seeking an Order pursuant to CPLR § 3212, granting him summary judgment on the issue of liability, is **DENIED**; and it is further

ORDERED, that the branch of the Plaintiff’s motion seeking an Order pursuant to CPLR § 3212, granting him summary judgment on the grounds that his injuries satisfy the “serious injury” threshold requirement of Insurance Law § 5102 (d), is **DENIED, without prejudice**.

This shall constitute the decision and Order of this Court.

DATED: Mineola, New York
February 2, 2018

ENTERED
FEB 05 2018
NASSAU COUNTY
COUNTY CLERK’S OFFICE


Hon. Randy Sue Marber, J.S.C.

HON. RANDY SUE MARBER