Towe v Arif
2019 NY Slip Op 30282(U)
February 5, 2019
Supreme Court, New York County
Docket Number: 155040/2016
Judge: Adam Silvera

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22

----------X

PHILIP TOWE,

Plaintiff,

- v -

MIAH ARIF, JONAH KATZ, UBER TECHNOLOGIES, INC.,

Defendant.

INDEX NO. 155040/2016

MOTION DATE 11/19/2018

MOTION SEQ. NO. 003

DECISION AND ORDER

----------X

HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 104, 105, 106, 107, 108, 109, 110, 111, 112
were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that plaintiff Philip Craig Towe's motion is denied in part and granted in part, and both defendants Jonah Katz and Miah Arif's cross-motions are denied for the reasons set forth below. Before the court is plaintiff's motion, Motion Sequence 003, for (1) an Order pursuant to CPLR §3212 granting summary judgment in favor of plaintiff on the issue of liability as against defendants Jonah Katz and Miah Arif, (2) to dismiss defendant Katz's affirmative defense of serious injury, dismiss defendant Uber's affirmative defenses of assumption of risk, culpable conduct of unknown persons, Vehicle and Traffic Law (VTL) violations, and failure to state a cause of action, and to dismiss the affirmative defenses of defendant Arif for assumption of the risk, failure to state a cause of action, serious injury and acts of third person, (3) to award plaintiff partial summary judgment on the issue of "serious injury", (4) to strike the Answers of defendants Jonah Katz and Miah Arif for failure to comply

with plaintiff's discovery demands, or in the alternative, to compel such defendants to comply with the demands, and (5) to compel defendant Uber to produce Chad Dobbs for a deposition.

Defendant Jonah Katz opposes plaintiff's motion and cross-moves for an order pursuant to CPLR 3212 granting partial summary judgment on the issue of liability against plaintiff Philip Craig Towe. Defendant Miah Arif opposes plaintiff's motion and cross-moves for an order pursuant to CPLR 3212 granting partial summary judgment on the issue of liability and to extend defendant Arif's time to file opposition papers relating to plaintiff's motion for summary judgment. Defendant Uber fully opposes the motion.

BACKGROUND

The suit at bar stems from a motor vehicle accident that occurred on November 13, 2015 on 10th Street between Avenue A and B in the City, County, and State of New York when plaintiff Philip Craig Towe was allegedly seriously injured while riding his bicycle Eastbound in the bike lane when he was struck by the opened rear passenger door of a motor vehicle that was transporting defendant Jonah Katz and operated by defendant Miah Arif under the scope of his employment with defendant Uber.

DISCUSSION

Summary Judgment Liability

The branch of plaintiff's motion for summary judgment on the issue of liability as against defendants 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]).

Violation of the Vehicle and Traffic Law constitutes negligence per se (*See Flores v City of New York*, 66 AD3d 599 [1st Dep't 2009]). Pursuant to VTL § 1231, every person riding a bicycle on a roadway is afforded the same rights and duties applicable to drivers. Under VTL § 1214 "no person shall open the door of a motor vehicle on the side available to moving traffic unless it is reasonably safe to do so and can be done without interfering with the movement of other traffic." A "[p]laintiff's affidavit stating that the rear door of defendants' vehicle 'opened without warning' and struck the left side of his vehicle established that defendant driver violated Vehicle and Traffic Law (VTL) § 1214, and that plaintiff was unable to avoid the accident" (*Tavarez v Herrasme*, 140 Ad3d 453 [1st Dep't 2016] citing *Montesinos v Cote*, 46 AD3d 774 [2nd 2007][finding that "the evidence established that the injured plaintiff violated Vehicle and Traffic Law § 1214 by opening the door on the side of her car adjacent to moving traffic when it was not reasonably safe to do so, and was negligent in failing to see what, by the reasonable use of her senses, she should have seen"]).

In support of their motion, plaintiff submits the deposition of plaintiff, defendant passenger Katz, and defendant driver Arif (Mot, Exh F, G, & H). Plaintiff testified that he was in the bike lane the entire time and saw the door open "a split second" before he made contact with it and "had no time to react" when the accident occurred (Exh F at 17, 22-23). Defendant Katz testified that he did not know that there was a marked bike lane on the south side of the street and that he went to exit the vehicle one second after the Uber stopped (Exh G at 19-20 & 26). Defendant Arif testified that the bike rider came into contact with the door defendant Katz was exiting from (Exh H at 64). Plaintiff has demonstrated that defendants opened the vehicle door

on the side available to moving traffic when it was not reasonably safe to do so, and that plaintiff was unable to avoid the accident. Thus, plaintiff has demonstrated that defendants violated Vehicle and Traffic Law § 1214 which constitutes negligence per se. The burden now shifts to defendants.

In opposition defendants point to the deposition of defendant Arif (Exh G), who testified that he was parked and stopped at the time that the incident took place (*id.* at 43). Defendant Arif claims to have been in a parking space which had a bicycle lane to the left side of the car (*id.*). The impact however, occurred on the right side of the car between the parked car and the curb, where there was a distance of about a foot and a half (*id.*, at 43, 87-88). Arif testified that even if the door was still closed there would not have been enough room between the car and the curb for a bicycle to pass by (*id.* at 92). Further, both defendant Katz and defendant Arif testified at their depositions that the bicycle did not have headlights on at the time of the incident (Arif Cross Mot, Exh 3 at 26-27 & Exh 4 at 74-75). Defendants Arif and Katz have raised an issue of fact as to how the incident occurred and as to whether defendants violated Vehicle and Traffic Law § 1214. Thus, the branch of plaintiff's motion for summary judgment on the issue of liability as against defendants is denied.

Summary Judgment Serious Injury

The branch of plaintiff's motion for an order finding that plaintiff has suffered a "serious injury" as defined in Insurance Law § 5102(d) is granted. 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"]).

In support of his motion plaintiff submits the January 27, 2016, orthopedic defense medical examination performed by Dr. Joseph Margulies (Exh I). The report notes that plaintiff fractured his right tibia and fibula and the right ankle for which he underwent surgery 11 days after the accident at issue on November 24, 2015 (*id.* at 3). Dr. Margulies states that plaintiff's right ankle demonstrated a limited range of motion of 10 degrees dorsiflexion (normal 20 degrees) and plantar flexion of 25 degrees (normal 50 degrees) (*id.* at 2). The report concludes that "the symptoms and injuries sustained by the claimant outlined above were in my opinion causally related to the bicycle accident on November 13, 2015" (*id.* at 3). Defendants' cross-motions and affidavits in opposition do not contain opposition concerning plaintiff's alleged injury. Thus, plaintiff has demonstrated that his injury to the right tibia and fibula and the right ankle meet the "serious injury" threshold.

Dismissal of Affirmative Defenses

The branch of plaintiff's motion seeking to dismiss defendants' affirmative defenses is denied in part and granted in part. Pursuant to CPLR 3018(b) "a party shall plead all matters . . . likely to take the adverse party be surprise." A defense can be waived if it is not included in the answer (*Rich v Lefkovits* 56 NY2d 276 [1982]).

Based upon the above affirmative finding of plaintiff's "serious injury", the branch of plaintiff's motion which seeks to dismiss defendant Katz's affirmative defense of serious injury is granted. The branch of plaintiff's motion for failure to state a cause of action is denied, as given there is an issue of fact as to whether defendants are liable for plaintiff's injuries.

The branch of plaintiff's motion which seeks to dismiss defendants' affirmative defense of assumption of risk is granted. Plaintiff testified that he was a bicyclist operating on the roadway. The First Department Appellate Division has found that "the mere riding of a bicycle does not mean the assumption of risk by the rider that he may be hit by a car" (*Story v Howes*, 41 AD2d 925 [1973]). To allow the jury to consider the question of assumption of risk would be erroneous. Thus, the branch of plaintiff's motion which seeks to dismiss defendant Uber and defendant Katz' affirmative defense of assumption of risk is granted.

Further, upon search of the record the Court finds no existence of unknown persons or third persons. Thus, the branch of plaintiff's motion which seeks to dismiss the affirmative defense of defendant Uber for culpable conduct of unknown persons, and defendant Arif's affirmative defense of acts of third persons, is granted. Lastly, the branch of plaintiff's motion which seeks to dismiss the affirmative defenses of VTL 1150 Pedestrians subject to traffic regulations, VTL 1155 Pedestrians to use right half of crosswalks, and VTL 1156 Pedestrians on roadways is granted. Based on the facts, neither plaintiff nor defendant Katz were pedestrians at the time of the incident. Thus, the branch of plaintiff's motion which seeks to dismiss the affirmative defenses of the above-mentioned VTL sections is granted.

Strike Answer

The branch of plaintiff's motion to strike defendant Uber and defendant Arif's answer for failure to comply with discovery is denied. "It is well settled that a court should not resort to striking an answer for failure to comply with discovery directives unless noncompliance is clearly established to be both deliberate and contumacious. Moreover, even when the proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on

their merits" (*Catarine v Beth Israel Med. Ctr.* AD2d 213, 215 [1st Dept 2002][internal citations omitted]).

Plaintiff claims that it served all defendants on December 8, 2017, with a Notice of Discovery demanding the following documents from defendants:

1. All Uber app documents showing what defendant Katz' destination was on November 13, 2015, or a *Jackson* affidavit regarding the search;
2. That portion of the weekly Uber statement showing the Uber rides defendant Arif did through the Uber app on November 13, 2015, or a *Jackson* affidavit regarding the search;
3. All documents showing when defendant Arif logged on and off the Uber app on November 13, 2015, or a *Jackson* affidavit regarding the search.

Further, plaintiff claims to have served defendant Uber on March 1, 2018 with a Notice of Discovery and Inspection seeking:

1. All Uber documents showing when the program to equip new driver-partners with an I-phone was in effect;
2. A list of all cases in which Chad Dobbs has been deposed in his capacity as an Uber employee;
3. Copy of all exhibits from the June 9, 2017, decision in the State of New York Unemployment Insurance Appeal Board decision in A.L.J. case number 016-23858, by ALJ Michelle Burrowes
4. The data or documents that allows Uber to determine if defendant Katz inputted a destination and if so, what destination.

Plaintiff claims that, to date, Uber has not responded. Plaintiff asserts that the discovery requested is "material and necessary" and should be fully disclosed pursuant to CPLR § 3101. The "words 'material and necessary' are to be liberally interpreted to require disclosure, upon request, of any facts bearing on the controversy which will assist in preparation for trial by sharpening the issues and reducing delay" (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 404 [1968]). "For this court to uphold a sanction under CPLR 3126(3), however, there must be a conclusive showing that the noncomplying party's conduct was willful, contumacious or due to bad faith" (*Lowitt v Korelitz*, 152 AD2d 506 [1989] citing *Dauria v City of New York*, 127 AD2d 459 [1st Dept 1987]).

The court finds that there is no evidence that defendant Arif's failure to provide the requested discovery was willful, contumacious or due to bad faith. Defendant Arif affirms that he is no longer affiliated with defendant Uber and that the information sought from him is in the hands of defendant Uber. Thus, the branch of plaintiff's motion seeking to strike defendant Arif's answer is denied. As to defendant Uber, plaintiff has failed to establish that defendant's failure to provide the discovery sought was willful, contumacious or due to bad faith. As noted in this Courts Decision/Order of June 18, 2018 Index No. 155040/2016 Motion Sequence 001, "it is undisputed that defendant Uber has responded to plaintiff's discovery requests, albeit with objections and a request for a confidentiality agreement."

In opposition to plaintiff's motion, defendant Uber notes that plaintiff's counsel has appeared at several compliance conferences and has not raised an objection regarding responses to his discovery demands dated December 8, 2017 and March 1, 2018 (Aff in op at 7). Upon search of the record, the Court notes that at the compliance conference on December 15, 2017 the parties stipulated to defendants' responding to the December 8, 2017 post-ebt demands and

the Court Ordered "no adjournments of above dates." Plaintiff could have raised his grievances with the court during compliance conferences before moving for such relief. The Court notes that, despite appearing for a compliance conference on August 8, 2018 and January 28, 2019, plaintiff failed to even allege that defendant uber had not responded to their demands such that the Court did not order defendant Uber to respond. The existence of one Court Order to respond to plaintiff's December 8, 2017 demand, and no court orders to respond to plaintiff's March 1, 2018 demand, does not merit the harsh penalty of striking an answer. Thus, defendant's motion to strike defendant Uber's answer is denied and discovery is ordered below.

Compel

The branch of plaintiff's motion which seeks to compel the further deposition of Chad Dobbs on behalf of Uber is denied. The deposition of Mr. Dobbs was held, and the Court finds it to have been satisfactory for the case at bar. Plaintiff's motion hinges its request for a further deposition on an alleged competition scheme that Mr. Dobbs engaged in against the ride service company Gett. Plaintiff's motion makes no mention of the relevance of the alleged scheme to the underlying accident and the Court can find no connection. Thus, plaintiff's motion for a further deposition of Chad Dobbs is denied.

Defendant Katz' Cross Motion

Defendant Katz cross-moves for an order for summary judgment on the issue of liability. As noted above, an issue of fact exists in the present case precluding a motion for summary judgment on the issue of liability. Thus, defendant's cross-motion is denied.

Defendant Arif's Cross Motion

Defendant Arif cross-moves for an order granting him summary judgment on the issue of liability. Defendant Arif alleges that plaintiff's negligence was the sole proximate cause of this

accident. However, as noted above, an issue of fact exists in the present case precluding summary judgment on the issue of defendant Katz' liability. Thus, defendant Arif's cross-motion is denied.

Accordingly, it is

ORDERED that the branch of plaintiff's motion for an Order pursuant to CPLR §3212 granting summary judgment in favor of plaintiff as against defendants on the issue of liability is denied; and it is further

ORDERED that the branch of plaintiff's motion for an Order pursuant to CPLR§3212 for an affirmative finding that plaintiff has suffered a "serious injury" as defined in Insurance Law § 5102(d) is granted; and it is further

ORDERED that the branch of plaintiff's motion to strike defendant Uber and defendant Arif's answers for failure to comply with discovery is denied; and it is further

ORDERED that defendant Uber Technologies, Inc. shall produce only Item # 1 of plaintiff's December 8, 2017 Notice of Discovery and Items # 2, 3, & 4 of plaintiff's March 1, 2018 Notice of Discovery and Inspection within 30 days from the date of this decision/order; and it is further

ORDERED that the branch of plaintiff's motion to compel the further deposition of Chad Dobbs is denied; and it is further

ORDERED that defendant Arif's cross-motion for an order for summary judgment on the issue of liability is denied; and it is further

ORDERED that defendant Katz' cross-motion for an order for summary judgment on the issue of liability is denied; and it is further

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

This constitutes the Decision/Order of the Court.

2/5/2019
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE