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

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PATRICK JULIEN,

Plaintiff,

- v -

ABOUBACAR DIABATE, FELIX NUNEZ

Defendant.

INDEX NO. 159861/2016

MOTION DATE 12/05/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42
were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that plaintiff Patrick Julien's motion is granted in part and denied in part for the reasons set forth below. Before the court is plaintiff's motion, Motion Sequence 001, for (1) an Order pursuant to CPLR §3212 granting summary judgment in favor of plaintiff on the issue of liability as against defendants Aboubacar Diabate and Felix Nunez, (2) to dismiss defendants' "Second" affirmative defense of culpable conduct, comparative negligence, and assumption of risk, and (3) to award plaintiff partial summary judgment on the issue of "serious injury". Defendants oppose the motion in its entirety.

BACKGROUND

The suit at bar stems from a motor vehicle accident that occurred on September 26, 2016 at the intersection of 48th Street and 11th Avenue the County, City and State of New York when plaintiff Patrick Julien was allegedly seriously injured while lawfully riding southbound on the

roadway when he was struck by the opened driver's door of a motor vehicle owned by defendant Felix Nunez and operated by defendant Aboubacar Diabate.

DISCUSSION

Summary Judgment Liability

The branch of plaintiff's motion for summary judgment on the issue of liability as against defendants is granted. "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 the motion, plaintiff submits his own deposition and that of defendant Aboubacar Diabate (Mot, Exh B & C). Plaintiff testified that he was traveling in the extreme right lane and riding passed the rear door of the vehicle when suddenly the driver's door of the cab opened and struck plaintiff before he could break his bicycle (Mot, Exh B at 46-48). Defendant Diabate testified that at the time of incident his vehicle was stopped, not running, and did not have hazard lights on (Mot, Exh C at 12-13). Defendant testified that he did not observe plaintiff cyclist when he opened his car door and hit plaintiff (*id.*, at 19-21). Plaintiff has demonstrated that defendant Diabate 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 established that defendants violated Vehicle and Traffic Law § 1214 which constitutes negligence per se. The burden now shifts to defendants to raise a triable issue of fact.

In opposition defendants point to the deposition of defendant Diabate who testified that he was parked and stopped with a red light behind his vehicle at the time that the incident took place (Mot Exh C at 13). Defendant testified that there was a five to ten second gap in time between when he opened the door and plaintiff made impact with the door (*id.* at 16). Defendants further point to plaintiff's testimony that at the time of the incident he was taking Atripla medication. Defendants state that the side effects of this medication coupled with a warning not to drive a vehicle or operate machinery while on the medication, "call into question plaintiff's recollection of events, as well as plaintiff's partial or full negligence."

The Court of Appeals has held that a plaintiff is entitled to partial summary judgment on the issue of a defendant's liability even if a defendant raises an issue of fact regarding plaintiff's comparative negligence (*Rodriguez v City of New York*, 31 NY3d 312, 330 [2018]). The issue of a plaintiff's comparative negligence is addressed and determined only when considering the damages that a defendant owes to a plaintiff (*id.* at 3). Plaintiff's motion for summary judgment is appropriate regardless of plaintiff's potential comparative negligence. Pursuant to VTL § 1214, defendant Diabate had a duty, to not open his car door until it was "reasonably safe to do so and can be done without interfering with the movement of other traffic," regardless of plaintiff's ability to operate his bicycle at the time of the accident. Thus, defendant has failed to raise a triable issue of fact and plaintiff's motion for summary judgment is granted as to defendants' liability.

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 October 13, 2016 orthopedic medical examinations performed by Dr. Robert Pae, New York Presbyterian Hospital record and the deposition of plaintiff (Mot Exh B, E, & F). Dr. Pae's reports record that plaintiff was involved

in a bicycle crash in which plaintiff sustained a fractured right little finger and a rotator cuff tear, both requiring surgery (*id.*, Exh F). Evidence of a fracture, by itself, is sufficient to support a finding of serious injury (*Travelers Insurance Company v Job*, 239 Ad2d 289 [1st Dept 1997]). Thus, having demonstrated a fracture and tear arising from the incident at issue, plaintiff has met the "serious injury" threshold and the burden shifts to defendants to raise a triable issue of fact.

In opposition, defendants argue that plaintiff fails to submit evidence in admissible form to establish that plaintiff sustained a "serious injury". Defendants allege that the hospital and doctor reports submitted by plaintiff's counsel are inadmissible as they are neither sworn to nor affirmed pursuant to CPLR § 2106. However, in reply, plaintiff demonstrates that he has submitted proof in admissible form. Plaintiff notes that the records of Dr. Robert Pae have been certified as business records.

Pursuant to CPLR § 3122(a), a non-party producing business records pursuant to a subpoena, accompanied by an affidavit, will be deemed business records and admissible at trial. Plaintiff has attached such a subpoena and an affidavit by Lauren Cipriano certifying the reports of Dr. Pae (Mot, Exh F). Thus, defendants have failed to rebut plaintiff's demonstration that he did suffer a "serious injury" as a result of the underlying accident. Plaintiff's motion for summary judgment on the issue of "serious injury" is granted.

Dismissal of Affirmative Defenses

The branch of plaintiff's motion seeking to dismiss defendants' affirmative defenses in granted in part and denied 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]).

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.

Finally, the branch of plaintiff's motion which seeks to dismiss defendants' affirmative defense of culpable conduct and comparative negligence is denied. As noted above, the issue of plaintiff's contributory negligence is addressed and determined only when considering the damages that a defendant owes to a plaintiff (*Rodriguez,* 31 NY3d 312 at 330). Thus, plaintiff's motion to dismiss defendants' affirmative defenses is granted as to the dismissal of the affirmative defense of assumption of risk and denied as to the affirmative defenses of culpable conduct and comparative negligence.

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 granted; 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 for an Order pursuant to CPLR § 3211(b) to dismiss defendants' affirmative defense of assumption of risk is granted; and it is further

ORDERED that the branch of plaintiff's motion for an Order pursuant to CPLR § 3211(b) to dismiss defendants' affirmative defenses of culpable conduct and comparative negligence 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.

2/14/2019
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