

Caplan v Robbins

2019 NY Slip Op 32302(U)

July 29, 2019

Supreme Court, New York County

Docket Number: 157343/2017

Judge: Adam Silvera

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

-----X

RONALD CAPLAN, ALIZA AVITAL-CAPLAN

Plaintiff,

- v -

RACHEL ROBBINS, RICHARD ROBBINS,

Defendant.

-----X

INDEX NO. 157343/2017

MOTION DATE 11/19/2018

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Before the Court is plaintiffs' motion for summary judgment to establish defendants' negligence as a matter of law and to dismiss defendants' Third Affirmative Defense that the damages allegedly sustained were caused in whole or in part by the culpable conduct of plaintiffs and the Fourth Affirmative Defense that defendant Richard Robbins was confronted with a sudden unforeseen medical emergency at the time of the accident. Defendants oppose the motion and Cross-Move for summary judgment in favor of defendants to dismiss plaintiffs' Complaint on the grounds that defendants are not liable for the accident based on the "Emergency Doctrine"; and on the grounds that plaintiffs have failed to satisfy the requisite serious injury threshold requirements set forth in New York Insurance Law Section 5102(d).

The underlying action stems from a motor vehicle accident which occurred on June 19, 2016, when plaintiffs Ronald Caplan and Aliza Avital-Caplan were traveling southbound on Route 22 in Southeast, County of Putnam, State of New York, in a vehicle that was struck by a

vehicle operated by defendant Richard Robbins and owned by defendant Rachel Robbins which allegedly crossed over a double yellow line and struck plaintiffs' vehicle.

Summary Judgment & VTL

“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]).

Pursuant to Vehicle and Traffic Law 1130(1), “[w]henver any highway has been divided into two or more roadways by leaving an intervening space or by a physical barrier or clearly indicated dividing section so constructed as to impede vehicular traffic, every vehicle shall be driven only upon the right-hand roadway unless directed or permitted to use another roadway by official traffic-control devices or police officers. No vehicle shall be driven over, across, or within any such dividing space, barrier, or section, except through an opening in such physical barrier or dividing section or space or at a crossover or intersection, as established, unless specifically authorized by public authority.” 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 [2018]). Thus, a plaintiff’s motion for summary judgment is appropriate regardless of plaintiff’s potential comparative negligence.

Here, plaintiff has made a prima facie showing of defendants' negligence. Plaintiffs attach the Examination Before Trial of Robert Caplan who testified on August 20, 2018 that defendants' vehicle was traveling in the northbound lane when it suddenly swerved out of the lane and struck the Caplan vehicle (Mot, Exh D at 18, 24-25, & 30-31). Thus, having demonstrated that defendant violated the VTL in crossing the double yellow line and striking plaintiffs' vehicle, plaintiffs have made a prima facie showing of negligence and the burden shifts to defendants to raise a triable issue of fact.

In opposition, defendants claim that defendant Richard Robbins suffered a medical emergency due to syncope and collapsed during the time of the accident which bars a finding of liability against defendants. In support of their assertion defendants attach the February 6, 2018 report of Dr. Carl B. Friedman (Aff in Op, Exh H). Dr. Friedman reviewed plaintiff's past medical records and concluded that defendant "had an episode of loss of consciousness prior to his motor vehicle accident . . . [and that] the acute loss of consciousness could not be anticipated" (*id.*, at 6). Further attached to the opposition is the June 22, 2018 report of Dr. Henry Novack who opined that defendant Richard Robbins has "multiple etiologies of the loss of consciousness including an arrhythmia, seizure, [and] fall in blood pressure" (Aff in Op, Exh I at 4).

Defendants also submit the report of Dr. Kamala Kallur from, June 19, 2016, the date of the accident, which contains defendant Richard Robbins statement against interest that "he was driving near brewster and took right turn at the traffic light and missed the lane" (Aff in Op, Exh I at 37). Dr. Kallur's medical report contradicts defendants' assertion that defendant Richard Robbins lost consciousness at the time of the accident. Thus, an issue of fact exists as to whether or not defendant Richard Robbins suffered a medical emergency such that plaintiffs' motion for

summary judgment on the issue of liability and to dismiss defendants' Third and Fourth

Affirmative Defense is denied.

Cross-Motion

Defendants' Cross-Motion to dismiss plaintiffs' Complaint on the grounds that defendants are not liable as a matter of law for causing the motor vehicle accident based on the "Emergency Doctrine"; and on the grounds that plaintiffs have failed to satisfy the requisite serious injury threshold requirements as a matter of law pursuant to New York Insurance Law Section 5102(d) is granted in part as indicated below.

Defendants allege that they are not negligent as a matter of law because of their claim that Mr. Robbins was faced with an unforeseen and sudden medical emergency. However, for the reasons set forth above, an issue of fact exists as to the alleged medical emergency barring summary judgment on the issue of liability. Thus, the branch of defendants' motion to dismiss plaintiffs' complaint on the grounds that defendants are not liable pursuant to the "emergency doctrine" is denied.

Defendants allege that both plaintiffs have failed to demonstrate the existence of a "serious injury" pursuant to the Insurance Law. 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 allege that plaintiff Ronald Caplan's injuries are pre-existing and not causally related to the accident at issue. In support of their motion, defendants submit the October 30, 2018, independent radiological reviews conducted by Dr. Sheldon Feit (Cross Mot Aff in Support and in Opp, Exh J). Dr. Feit found that plaintiff Caplan had degenerative spondylosis in the cervical spine and in the lumbosacral spine, degenerative disc disease in the lumbosacral spine, and degenerative changes in the left wrist (*id.*). In his report, Dr. Feit concluded that plaintiff's injuries to the lumbosacral spine, cervical spine, and left wrist are degenerative in nature and not causally related to the accident at issue (*id.*). Defendants attach the November 4, 2018 Independent Medical Examination Report of Dr. Elizabeth Ortof who noted that plaintiff had a restricted range of motion to the neck and noted that plaintiff was "injured on June 16, 2016, the date of the accident, and has an "exacerbation of prior underlying conditions as claimant has a history of cervical spondylosis" (*id.*, Exh J). Defendants' motion contains evidence of a serious injury as a result of the accident at issue. "A defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold" Defendants have failed to satisfy their burden as defendants' doctor opines that plaintiff was injured on the date of the underlying accident. Thus, defendants have failed to meet their burden precluding summary judgment.

As to plaintiff Aliza Avital-Caplan, defendants attach the Independent Medical Evaluation report performed by Dr. Pierre J. Ferriter on November 26, 2018 (*id.*, Exh K). Dr. Ferriter found that plaintiff Avital-Caplan suffered from pre-existing degeneration in the lumbar spine but concluded that plaintiff's lumbar spine sprain/strain was causally related to the

accident. Dr. Ferriter further noted that no changes nor abnormalities were identified that could be causally related to the accident.

Defendants also attach the independent radiological film reviews conducted by Dr. Feit on January 6, 2019 (*id.*, Exh L). Dr. Feit noted that plaintiff Avtial-Caplan had conditions attributable to early small vessel disease but noted that there were no posttraumatic changes and that there were no abnormalities causally related to the underlying accident (*id.*). The doctor also noted that a March 15, 2017 MRI revealed no discernible abnormalities (*id.*). A psychological examination of plaintiff Avital-Caplan conducted by Dr. Howard E. Shapiro found that plaintiff Avital-Caplan has a history of migraines and sinusitis that predates the accident (*id.*, Exh K). Dr. Shapiro further noted that at the time he examined plaintiff Avital Caplan she “denied any psychological systems as a result of the accident, the injuries she sustained or the ongoing symptoms she claims” (*id.*). Thus, defendants have made a prima facie showing that plaintiff Avital-Caplan was not seriously injured as a result of the underlying accident and the burden shifts to plaintiffs to raise an issue of fact.

In opposition plaintiffs aver that plaintiff Avital-Caplan suffered a concussion as a result of the accident and that she was told to see a neurologist. Upon review of the medical records have submitted by plaintiffs, the Court finds that plaintiff Avital-Caplan’s treating physicians and psychologist did not make any mention of brain related injuries that occurred as a result of the accident. Thus, plaintiffs have failed to demonstrate that plaintiff Aliza Avital-Caplan suffered a “serious injury” as defined by the Insurance Law. Thus, plaintiff’s motion for summary judgment on the issue of liability is denied and defendants’ cross motion is granted in part solely as to plaintiff Aliza Avital-Caplan on the grounds that plaintiff has failed to satisfy the

requisite serious injury threshold requirements set forth in New York Insurance Law Section 5102(d) as pertaining to plaintiff Avital-Caplan and denied as to plaintiff Ronald Caplan.

Accordingly, it is

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

ORDERED that the branch of defendants' cross-motion for summary judgment to dismiss plaintiffs' complaint based upon the emergency doctrine is denied; and it is further

ORDERED that the branch of defendants' cross-motion for summary judgment to dismiss plaintiffs' complaint on the grounds that plaintiff Ronald Caplan has failed to satisfy the requisite serious injury threshold requirements set forth in New York Insurance Law Section 5102 (d) is denied; and it is further

ORDERED that the branch of defendants' cross-motion for summary judgment to dismiss plaintiffs' complaint on the grounds that plaintiff Aliza Avital-Caplan has failed to satisfy the requisite serious injury threshold requirements set forth in New York Insurance Law Section 5102 (d) is granted; and it is further

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

This constitutes the Decision/Order of the Court.

ADAM SILVERA, J.S.C.

7/29/2019
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	DENIED