

**Elliott v Contreras**

2019 NY Slip Op 32708(U)

September 12, 2019

Supreme Court, New York County

Docket Number: 452851/2015

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 INDEX NO. 452851/2015

PATRICIA ELLIOTT,

Plaintiff,

- v -

10/23/2018,
12/31/2018,
12/31/2018,
MOTION DATE 03/11/2019

EDDIE CONTRERAS, ADVANCED TRANSIT COMPANY,
NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSIT AUTHORITY, THE CITY OF
NEW YORK, FRANK AUYANG, SANA CAB CORP,
SHAHADAT HOSSEN, JAVIER ECHEVERRIA

MOTION SEQ. NO. 003 004 004
005

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 93

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 94, 95, 96, 99, 100, 101, 108, 109

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 004) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 94, 95, 96, 99, 100, 101, 108, 109

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 97, 98, 102, 103, 104

were read on this motion to/for JUDGMENT - SUMMARY

Before the Court are three motion sequences, Motion Sequence 003, 004, and 005. This matter stems from a five-vehicle chain collision which occurred on May 3, 2014 on the Southbound FDR near the intersection with 23rd Street in the County, City and State of New York, and allegedly led to plaintiff Patricia Elliot's serious injury. Plaintiff's Complaint alleges that her vehicle was the front most vehicle ("Vehicle #1") that was rear ended by a vehicle operated by defendant Eddie Contreras and owned by defendant Advance Transit Company ("Vehicle #2")

that was rear ended by a vehicle operated by defendant Frank Auyang (“Vehicle #3”) which was rear ended by a vehicle operated by defendant Shahadat Hossen and owned by defendant Sana Cab Corp. (“Vehicle #4”) which was rear ended by a vehicle owned and operated by defendant Javier Echeverria (“Vehicle #5”).

In motion sequence 003, defendant Auyang moves for summary judgment for an Order finding defendant Auyang not liable for plaintiff’s injuries and to dismiss plaintiff’s Complaint and all cross claims as against defendant Auyang. Defendant Echeverria Cross-moves for the same relief and plaintiff opposes both the motion and the cross-motion.

“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]).

“A rear-end collision with a stopped vehicle, or a vehicle slowing down, establishes a prima facie case of negligence on the part of the operator of the rear-ending vehicle, which may be rebutted if that driver can provide a non-negligent explanation for the accident” (*Baez v MM Truck and Body Repair, Inc.*, 151 AD3d 473, 476 [1st Dep’t 2017]). Being propelled forward in a chain reaction collision is a non-negligent explanation for a rear-end accident (*Arrastia v Sbordone*, 225 AD2d 375 [1st Dept 1996] [finding that defendant was not liable where there was “no dispute that defendant brought her vehicle to a complete stop prior to the accident and was thereafter unexpectedly forced into plaintiff’s car by a third, unrelated vehicle”]).

Here, defendant Auyang, the operator of Vehicle #3, avers that he was stopped for two seconds when his vehicle was hit in the rear by Vehicle #4. Defendant Auyang testified that his vehicle was struck twice in the rear but that it was not propelled forward into Vehicle #2, the vehicle which ultimately struck plaintiff's vehicle (Mot 001, Exh D at 24-27, 31, & 33-34). Thus, defendant Auyang has established entitlement to summary judgment and the burden shifts to plaintiff and co-defendants to raise a triable issue of fact.

In opposition to defendant Auyang's motion, plaintiff's counsel submits the deposition transcript of Ms. Yvonne Cordero, the road supervisor who worked for Advance Transit on the day of the accident and interviewed defendant Contreras at the scene of the accident approximately two hours after the accident occurred (Aff in Op, Exh 2 at 16). Further attached is the Accident Worksheet filled out by Ms. Cordero at the scene of the accident, which plaintiff argues is admissible under the Business Record Exceptions to the Rule Against Hearsay.

In order to benefit from the Business Record Exceptions to the Rule Against Hearsay, plaintiff must demonstrate that the record was made in the regular course of business, was the regular course of business to make such records, was prepared contemporaneously on the date the accident occurred, and that the person who prepared the record had actual knowledge of the event (*See e.g. In re Breeana R.W.*, 89 AD3d 577, 578 [2011] citing *Matter of Leon RR.*, 48 NY2d 117, 122 [1979] [finding that an agency's contemporaneously recorded report was admissible when it could be shown that "each participant in the chain producing the record, from the initial declarant to the final entrant, was acting within the course of regular business conduct"]).

Here, plaintiff has demonstrated that defendant Contreras reported the events of the incident to Ms. Cordero who both were working within the course of regular business conduct

for Advance Transit Co. Inc. Ms. Cordero testified at deposition that she arrived at the scene in the course of regular business to take a statement from Advance Transit Co. Inc's driver (Mot, Exh F at 13-16, ) Ms. Cordero testified that it was a common occurrence for her to take a statement from Advance Transit Co. Inc's drivers, take photographs, to speak with authorities, and to fill out a form used by the company at the scene of accidents (*id.*, at 30 & 45). The form in question contained statements by defendant Contreras in which he advised her that he was struck in the rear by Vehicle #3 and then propelled forward into the rear of plaintiff's vehicle (*id.*, 43 & 45). Thus, the conflicting versions of whether or not Vehicle #3 struck Vehicle #2 causing it to strike plaintiff's vehicle preclude defendant Auyang's motion for summary judgment and defendant Auyang's motion is denied.

As to defendant Echeverria's Cross-motion for summary judgment on liability, defendant Echeverria's counsel adopts the arguments of defendant Auyang. Defendant Echeverria avers that because defendant Auyang testified that his vehicle never came into contact with the vehicle in front of him, there can also be no liability for this accident on the part of defendant Echeverria as he was a driver behind defendant Auyang. As noted above, plaintiff has raised an issue of fact as to whether defendant Auyang struck Vehicle #2 causing it to strike plaintiff's vehicle. Thus, defendant Echeverria's Cross-motion is denied.

In motion sequence 004, defendants Advance Transit Co., Inc., Eddie Contreras, and Metropolitan Transportation Authority move for summary judgment for an Order dismissing plaintiff's Complaint on the grounds that plaintiff has not sustained a "serious injury" pursuant to Sections 5102 and 5104 of the Insurance Law. Defendant Echeverria Cross-moves for the same relief and plaintiff opposes both the motion and the cross-motion.

“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” (*Linton v Nawaz*, 62 AD3d 434, 439 [1st Dept 2009] citing *Wadford v Gruz*, 35 AD3d 258 [1st Dept 2006]).

Here, defendants submit the Independent Medical Examination conducted by Dr. William J. Kulak, who examined plaintiff on July 25, 2018 (Mot 004, Exh G). In his affirmed report, Dr. Kulak concludes that plaintiff had a small full thickness rotator cuff tear and could not determine its origin (*id.*). Further Dr. Kulak opined that he could not determine that the accident was not the cause of plaintiff’s shoulder injury. Thus, defendants’ motion contains an issue of fact as to whether a serious injury occurred 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” (*Linton v Nawaz*, 62 AD3d 434, 439 [1st Dept 2009] citing *Wadford v Gruz*, 35 AD3d 258 [1st Dept 2006]). Defendants have failed to satisfy their burden as defendants’ doctor’s affirmation contains an issue of fact. Thus, defendants have failed to meet their burden precluding summary judgment and defendants’ motion for summary judgment on the issue of “serious injury” is denied.

As to defendant Echeverria’s Cross-motion for summary judgment on the issue of “serious injury”. Defendant Echeverria’s counsel adopts the arguments of defendants Advance Transit Co., Inc., Eddie Contreras, and Metropolitan Transportation Authority. As demonstrated above, issues of fact exist as to defendants’ medical report. Thus, defendant Echeverria’s Cross-motion is denied.

In motion sequence 005, defendant Auyang moves for summary judgment on the issue of “serious injury”, defendant Auyang’s counsel adopts the arguments of defendants Advance Transit Co., Inc., Eddie Contreras, and Metropolitan Transportation Authority in motion sequence 004. As demonstrated above, issues of fact exist as to defendants’ medical report. Thus, defendant Auyang’s motion is denied.

Accordingly, it is ORDERED that defendant Auyang’s motion, motion sequence 003, for summary judgment for an Order finding defendant Auyang not liable for plaintiff’s injuries and to dismiss plaintiff’s Complaint and all cross claims as against defendant Auyang is denied; and it is further

ORDERED that defendant Echeverria’s Cross-motion for summary judgment for an Order finding defendant Echeverria not liable for plaintiff’s injuries and to dismiss plaintiff’s Complaint and all cross claims as against defendant Echeverria is denied; and it is further

ORDERED that defendants Advance Transit Co., Inc., Eddie Contreras, and Metropolitan Transportation Authority motion, motion sequence 004, for summary judgment for an Order dismissing plaintiff’s Complaint on the grounds that plaintiff has not sustained a “serious injury” pursuant to Sections 5102 and 5104 of the Insurance Law is denied; and it is further

ORDERED that defendant Echeverria’s Cross-motion for summary judgment for an Order dismissing plaintiff’s Complaint on the grounds that plaintiff has not sustained a “serious injury” pursuant to Sections 5102 and 5104 of the Insurance Law is denied; and it is further

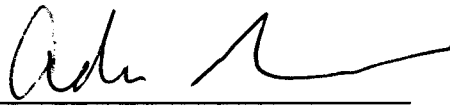
ORDERED that defendant Auyang’s motion, motion sequence 005, for summary judgment for an Order dismissing plaintiff’s Complaint on the grounds that plaintiff has not

sustained a "serious injury" pursuant to Sections 5102 and 5104 of the Insurance Law is denied;  
and it is further

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

This constitutes the Decision/Order of the Court.

9/12/2019  
 DATE

  
 ADAM SILVERA, J.S.C.

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