

Diaz v Fee Transp. Servs., Inc.
2019 NY Slip Op 32977(U)
October 3, 2019
Supreme Court, New York County
Docket Number: 155206/2016
Judge: Adam Silvera
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

-----X **INDEX NO. 155206/2016**

BISMARK DIAZ, DENISE RODRIGUEZ **MOTION DATE 04/02/2019,**

Plaintiff, **MOTION DATE 05/31/2019**

- v - **MOTION SEQ. NO. 002 003**

FEE TRANSPORTATION SERVICES, INC., HOWARD HUNTER,

DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 70, 71, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 109 were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 106, 107, 108, 110 were read on this motion to/for JUDGMENT - SUMMARY.

Before the court is plaintiffs' motion, motion sequence 002, for an Order granting summary judgment on the issue of liability as against defendants and defendant FFE Transportation Services, Inc.'s ("FFE") motion, motion sequence 003, for an Order granting summary judgment to dismiss plaintiffs' complaint on the grounds that plaintiffs have not sustained a "serious injury" as defined in the New York Insurance Law.

The matter at issue stems from a motor vehicle accident which occurred on January 22, 2016, on Interstate 87 in the County of Westchester, City of Yonkers, and State of New York, when a vehicle operated by defendant Howard Hunter and owned by defendant FFE Transportation Services, Inc. entered into the opposite lane of travel and struck a vehicle operated by plaintiff Bismark Diaz and transporting plaintiff Denise Rodriguez which allegedly led to the serious injury of both plaintiffs.

Plaintiffs' motion, motion sequence 002, on the issue of liability is denied. Plaintiffs allege that defendant driver Howard Hunter (now deceased independently of this accident), lost control of his vehicle and hit plaintiffs' vehicle causing a chain collision.

"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 ("VTL") constitutes negligence per se (See *Flores v City of New York*, 66 AD3d 599 [1st Dep't 2009]). Pursuant to VTL § 1128 (a) "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Pursuant to VTL § 1180 "[n]o person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing . . . no person shall drive a vehicle at a speed in excess of fifty-five miles per hour."

In support of their motion, plaintiffs submit the deposition of both plaintiff Bismark Diaz and plaintiff Denise Rodriguez (Mot, Exh E & F). Plaintiff Diaz testified at deposition that he witnessed a tractor trailer screeching to a halt and veering into the left lane and hit the passenger side of plaintiffs' vehicle (49-51, 59, 69, 71, 73, 74, 76, 77). Diaz further testified that he was going between 50 and 55 miles per hour in what he believes to be a 55 mile per hour speed limit

zone when he noticed the speed of defendants' vehicle when it drove by him (*id.*, at 61 & 74). Plaintiff Rodriguez testified that light snow had just begun to fall at the time of the accident when she saw the front truck braking, saw smoke, and then the end of the truck "fishtailed us . . . and hit us on our passenger side" (Mot, Exh F at 21-22, 41). Plaintiffs have demonstrated that defendants violated the VTL and have made a prima facie showing of entitlement to summary judgment on this issue of liability as against defendants. The burden now shifts to defendants to raise an issue of fact or provide a non-negligent excuse for the accident at issue.

In opposition, defendants raise an issue of fact on the issue of liability. Though no deposition was held of defendant driver Howard Hunter before he passed away, an accident report was conducted at the scene of the accident, in the usual course of business by defendant owner FFE Transportation Services, Inc. The report contained Hunter's statements which state that he was rear ended by a vehicle (nonparty, Dominic Duggan) and that another vehicle (plaintiff's vehicle) spun ahead of defendants' vehicle (Aff in Op Exh 3). At no point did Hunter record in the report that the defendant vehicle struck plaintiffs' vehicle. Defendants claim that based on this report, that there is evidence that their vehicle did not strike plaintiffs' vehicle. Thus, an issue of fact as to whether defendants' vehicle came into contact with plaintiffs' vehicle exists precluding summary judgment on the issue of liability and plaintiffs' motion, motion sequence 002, is denied.

Defendant FFE's motion, motion sequence 003, for an Order granting summary judgment to dismiss plaintiffs' complaint on the grounds that plaintiffs have not sustained a "serious injury" as defined in the New York Insurance Law is denied. 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 the injuries plaintiffs are seeking relief for are not causally related to the underlying accident and do not rise to the level of “serious injury”. As to plaintiff Diaz, defendants attach the report of Dr. Mark Heyligers (Mot 003, Exh L). Dr. Heyligers notes that plaintiff Diaz suffered a decrease in range of motion in the cervical spine and lumbar spine (*id.*). In regard to plaintiff Rodriguez, Dr. Heyligers noted that plaintiff Rodriguez suffered a decrease in range of motion to the cervical spine and lumbar spine in addition to suffering tears to the medial and lateral menisci and ligament tears (*id.*, Exh M).

“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 Dr. Heyligers’ report is deficient and contains issues of fact as to plaintiff Diaz’s cervical spine and lumbar spine range of motion and plaintiff Rodriguez’s meniscal and ligament tears, cervical spine and lumbar spine range of motion. Thus, defendants have failed to meet their burden precluding summary judgment on the issue of “serious injury” as to both plaintiffs and defendants’ motion is denied.

Accordingly, it is

ORDERED that plaintiffs’ motion, motion sequence 002, for an Order granting summary judgment on the issue of liability as against defendants is denied; and it is further

ORDERED that defendant FFE Transportation Services, Inc.'s ("FFE") motion, motion sequence 003, for an Order granting summary judgment to dismiss plaintiffs' complaint on the grounds that plaintiffs have not sustained a "serious injury" as defined in the New York Insurance Law; and it is further

ORDERED that within 30 days of entry plaintiffs serve defendants with a copy of this Decision/Order with notice of entry.

This Constitutes the Decision/Order of the Court.



10/3/2019
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE