Yupa v Adamowicz
2019 NY Slip Op 33945(U)
December 23, 2019
Supreme Court, Orange County
Docket Number: F003932/2017
Judge: Sandra B. Sciortino
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To commence the statutory time
for appeals as of right (CPLR 5513 [a]),
you are advised to serve a copy of this
order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE
---X

CARLOS O. YUPA,
Plaintiff,

-against-

EWA ADAMOWICZ,
Defendant.
---X

DECISION AND ORDER
INDEX NO.:EF003932/2017
Motion Date: 10/04/19
Sequence No. **4**

SCIORTINO, J.

The following papers numbered 1 to 5 were read on the motion by plaintiff to reargue this Court's Decision and Order dated August 12, 2019 which granted defendant summary judgment dismissing the complaint and denied plaintiff's cross-motion for partial summary judgment on the issue of liability:

PAPERS	**NUMBERED**
Notice of Motion/Affirmations (Cambareri)/Exhibits 1 - 3	1 - 3
Affirmation in Opposition (Maggio)	4
Reply Affirmation (Cambareri)	5

For the reasons which follow, plaintiff's motion to reargue is granted; and, upon such reargument, the Decision and Order dated August 12, 2019 is modified.

"Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision." (*Barnett v. Smith*, 64 A.D.3d 669, 670–671, [2d Dept 2009] quoting *E.W. Howell Co., Inc. v. S.A.F. La Sala Corp.*, 36 A.D.3d 653, 654[2d Dept 2007] [internal quotation marks omitted]; see CPLR 2221[d])

Threshold

Plaintiff first argues the Court incorrectly relied on defendant's "new" gap in treatment argument which was made for the first time in her Reply papers. In the prior summary judgment motion, plaintiff submitted the affirmed report of Dr. Gabriel Dassa who examined plaintiff on May 14, 2019, more than two weeks after submission of the summary judgment motion and more than two years after plaintiff's last medical treatment in or about April 2017. The medical evidence appended to both parties' moving papers at the very least indicated that plaintiff terminated medical treatments in or around April 2017. While the law does not require continued needless treatment to survive summary judgment, "a plaintiff who terminates therapeutic measures following the accident, while claiming serious injury, must offer some reasonable explanation for having done so." (*Pommels v. Perez*, 4 NY 3d 566 [2005]; *Ferraro v. Ridge Car Service*, 49 AD3d 498 [2d Dept 2008])

Prior to Dr. Dassa's examination after the filing of the threshold motion, there was no gap in treatment. Treatment had been terminated. Therefore, defendant could not have reasonably advanced such an argument in the initial moving papers. More significantly, nothing in the voluminous medical records submitted by plaintiff, including Dr. Dassa's narrative, offers any type of explanation for termination of treatment. Although plaintiff contends that he had no opportunity to respond to the "gap" argument, it was plaintiff who created the issue in his opposition. It is disingenuous, therefore, for plaintiff to complain that the issue was only raised in reply.

The plaintiff's arguments that his no-fault coverage was cancelled or that he could not afford to pay, could and should have been raised in the opposing papers. Moreover, although plaintiff argues that the prior Order contained a concession of causation by defendant's expert, a review of

Dr. Hendler's report shows no such finding. Curiously, it is not pinpoint cited by plaintiff, aswere most of his arguments. Nor did the Court overlook an alleged difference in opinion by the experts. While Dr. Episalla's reading of the MRI suggested a rotator cuff tear, Dr. DiFelice, who actually performed plaintiff's surgery, found no such tear. Dr. Hendler opined that there was no mechanism of injury which could have caused such a tear, a finding not significantly refuted by Dr. Dassa. Finally, although plaintiff complains that he "could have" submitted further evidence to respond to the "new" gap in treatment argument, this Court has no record of any application by plaintiff to do so.

Under the circumstances, upon reargument, the Court adheres to the prior decision concerning the dismissal of the injury claims on threshold grounds.

Economic Loss

However, the Court agrees with plaintiff's argument that defendant's failure to address his claim for economic loss in excess of basic economic loss required denial of the prior summary judgment motion as to economic loss. "Although defendant['s] prior motion for summary judgment indeed sought dismissal of the complaint in its entirety, the underlying motion papers were confined to whether [plaintiff] had sustained a serious injury within the meaning of Insurance Law §5102(d)–not whether plaintiff had a valid claim for economic loss in excess of basic economic loss as defined in Insurance Law §5102(a)." (*Jones v. Marshall*, 147 AD3d 1279, 1283 [3d Dept 2017]) While unlike the plaintiffs in *Jones*, plaintiff here did *not* tender proof in support of the claim, the Third Department nevertheless made it clear that "having failed to move for summary judgment as to plaintiffs' economic loss claim, defendants were not procedurally entitled to such relief." (*Id.*)

Liability

Having restored the cause of action for economic loss, the Court must reconsider plaintiff's motion for partial summary judgment on liability, previously denied as moot. The Court notes that neither party addressed this issue on the reargument papers; but inasmuch as plaintiff has properly incorporated all of the arguments submitted on the initial motions, the issue remains open.

A rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the driver of the moving vehicle, in the absence of any negligence on the part of the plaintiff. (*Velazquez v. Denton Limo, Inc.*, 7 AD3d 787 [2d Dept 2004]; *Trombetta v. Cathone*, 59 AD3d 526 [2d Dept 2009]) At his deposition, plaintiff testified that he proceeded through a green light on Schutt Road before coming to a complete stop in his lane of travel, to allow the vehicle in front of him (approximately 6-8 feet away) to make a left turn across traffic. (Exhibit D to Seq. #2 at 38-39) The bump pushed his truck a couple of feet forward. (Exhibit D at 40)

Defendant testified that just, prior to the impact, she was traveling 15 to 20 miles per hour on Schutt Road, one-half to one car length behind the vehicle in front her. She was aware of another, higher vehicle in front of that one. (Exhibit 1 to Seq. #3 at 34-35) She testified that she did not see the brake lights, although the car was stopped for a few seconds. However, she saw the brake lights immediately before the impact. (Exhibit 1 at 39) She moved her foot from the accelerator to the brake pedal at almost the same time as the impact. (Exhibit 1 at 35, 37) When the police arrived at the scene, she told them that she was traveling behind the other car and was unable to brake in time. (Exhibit 1 at 54)

In the matter at bar, plaintiff established *prima facie* entitlement to summary judgment. Such a showing requires defendant to come forward with a non-negligent explanation for the accident.

(*Velazquez, citing Shamah v. Richmond County Ambulance Serv.*, 279 AD2d 564 [2d Dept 2001]) The affirmation of counsel submitted in opposition to the motion was insufficient to rebut the *prima facie* showing. (*Trombetta,* 59 AD3d at 527)

A driver of an automobile is charged with the duty to maintain a reasonably safe rate of speed and control over his vehicle, and to exercise reasonable care to avoid a collision. A driver has a duty to see what should be seen.(*Filippazzo v. Santiago*, 277 AD2d 419 [2d Dept 2000]) Defendant offered no explanation to excuse the collision, such as "a mechanical failure, a sudden stop, an unavoidable skidding or any other reasonable cause." (*Id.* at 419-420 Defendant admits that she did not see plaintiff's brake lights until immediately before the impact. She thus fails to raise a triable issue of fact that her use of the brake or directional signal was a proximate cause. (*Id.*)

On the basis of the foregoing, upon reargument, plaintiff's application for summary judgment on the issue of liability is granted.

In light of the above, it is hereby **ORDERED** that plaintiff's motion to reargue is granted. Upon reargument, the Court adheres to the August 12, 2019 Decision and Order insofar as summary judgment was granted to defendant on threshold grounds. The Court modifies the prior Decision and denies summary judgment on the ground of failure to show economic loss and grants partial summary judgment to plaintiff on liability.

The parties shall appear for conference on January 14, 2020 at 9:00 a.m.

The foregoing constitutes the decision and order of the Court.

Dated: December 23, 2019
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

TO: *Counsel of Record via NYSCEF*