

<b>Salgado v DeMarco</b>
2019 NY Slip Op 34450(U)
June 17, 2019
Supreme Court, Orange County
Docket Number: Index No. EF007543-2017
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

JONATHAN D. SALGADO,

Plaintiff,

-against-

JOSEPH R. DEMARCO,

Defendant.

To commence the statutory time period 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.

Index No. EF007543-2017
Motion Date: May 30, 2019

The following papers numbered 1 to 5 were read on Defendant's motion for summary judgment:

Notice of Motion - Affirmation / Exhibits - Physician Affirmation 1-3
Affirmation in Opposition / Exhibits 4
Reply Affirmation 5

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is a personal injury action stemming from a motor vehicle accident which occurred on July 6, 2017 on Quaker Avenue in Cornwall, New York.

Plaintiff Jonathan D. Salgado testified that his destination was a Woody's restaurant on the right side of Quaker Avenue, where he intended to drop his passenger off for work; that he was proceeding in the right hand lane and activated his right turn signal well in advance of the entrance to Woody's; that, because the driveway was narrow, he swung his vehicle leftward and

partially into the adjacent lane (a left turn only lane) so as to make a broader turn into the driveway; and that, as he was executing the turn, his vehicle was struck by a trailing vehicle operated by defendant Joseph DeMarco and pushed into the steps of the restaurant. Plaintiff claims that as a result of the accident he sustained *inter alia* a fracture of the nasal bones.

Defendant DeMarco testified that he was traveling in the right hand lane on Quaker Avenue; that Plaintiff's vehicle was wholly within the left turn lane; and that, without signaling, Plaintiff suddenly turned right across Defendant's lane whereupon Defendant's vehicle struck Plaintiff's vehicle. Defendant presents supporting evidence from two persons who purportedly watched videotape footage of the accident that was captured by a surveillance camera at the Woody's restaurant. Unfortunately, the videotape itself is no longer available for review.

Defendant moves for summary judgment, asserting that (1) as a matter of law, Plaintiff's negligence was the sole proximate cause of the accident; and (2) Plaintiff did not sustain any "serious injury" within the meaning of Insurance Law §5102(d) as a result of the accident.

**A. Negligence and Proximate Cause**

Defendant's evidence, considered alone, would establish as a matter of law that Plaintiff's negligence in suddenly turning from the left lane across the right lane without signaling was the sole proximate cause of the accident. However, Defendant's evidence does not conclusively refute Plaintiff's account of the accident. Plaintiff, contradicting Defendant, asserts that he was proceeding in the right lane, not the left lane, that he was properly signaling a right turn, and that he swung leftward only to facilitate the signaled right turn. Even if Plaintiff were to be deemed negligent in moving his vehicle leftward and partially into the adjacent lane, there would remain questions of fact whether, if Plaintiff's testimony were credited, Defendant was negligent in

failing to observe and/or to take proper account of Plaintiff's right turn signal. Inasmuch as the parties' conflicting accounts of the accident give rise to triable issues of fact regarding both negligence and proximate cause, Defendant's motion for summary judgment on liability must be denied.

**B. Serious Injury**

A nasal fracture constitutes a threshold "serious injury" for purposes of Insurance Law §5102(d). *See, Estaba v. Quow*, 74 AD3d 734, 735 (2d Dept. 2010); *Poma v. Ortiz*, 2 AD3d 616 (2d Dept. 2003); *Kolios v. Znack*, 237 AD2d 333 (2d Dept. 1997).

In support of his motion for summary judgment, Defendant proffers the December 11, 2018 IME report of otolaryngologist Aaron Spingarn, M.D. Dr. Spingarn notes the allegation of nasal bone fracture in Plaintiff's bill of particulars. He also conducted a medical record review of records from Plaintiff's providers, including Virginia Feldman, M.D. Included among those records is the following:

Dr. Feldman Office Notes of July 13, 2017 (one week post-accident)

Diagnosis upon Nasal Endoscopy: Closed fracture of nasal bone with routine healing

Dr. Spingarn's own impression was:

"Nasal contusion. Non-causally related minimally deviated nasal septum, enlarged inferior turbinates, chronic rhinitis, nasal valve collapse. Suspected tension-type headaches, possibly due to temporomandibular dysfunction, non-causally related."

However, Dr. Spingarn nowhere addresses Dr. Feldman's finding of a fracture of the nasal bone. Consequently, Defendant failed to establish *prima facie* either that Plaintiff did not sustain a fracture of the nasal bone, or that the fracture which Dr. Feldman diagnosed was not causally related to the July 6, 2017 motor vehicle accident. *See, Poma v. Ortiz, supra; Kolios v. Znack,*

*supra*. See also, *Positko v. Krawiec*, 6 AD3d 517, 518 (2d Dept. 2004). Consequently, Defendant's motion for summary judgment must be denied regardless of the sufficiency of Plaintiff's opposing papers. See, *Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 (1985).

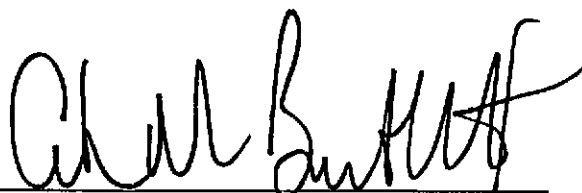
It is therefore

ORDERED, that Defendant's motion for summary judgment is denied.

The foregoing constitutes the decision and order of the Court.

Dated: June 17, 2019  
Goshen, New York

ENTER



HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT  
JUDGE NY STATE COURT OF CLAIMS  
ACTING SUPREME COURT JUSTICE