

Spillane v Tunca

2019 NY Slip Op 34932(U)

April 29, 2019

Supreme Court, Kings County

Docket Number: Index No. 519216/2017

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29th day of April, 2019.

P R E S E N T:

HON. CARL J. LANDICINO, Justice.

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MATTHEW SPILLANE,
Plaintiff,

Index No.: 519216/2017

DECISION AND ORDER

- against -

Motions Sequence #1

SEFER H. TUNCA,
Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2, _____
Opposing Affidavits (Affirmations).....	3, _____
Reply Affidavits (Affirmations).....	4, _____

After a review of the papers and oral argument, the Court finds as follows:

Plaintiff Matthew Spillane commenced the subject action by filing of the summons and complaint on the 4th day of October, 2017. Plaintiff alleges that on May 9, 2017, the vehicle owned and operated by Defendant Sefer H. Tunca collided with the Plaintiff while the Plaintiff was riding his bicycle. Plaintiff also alleges serious injury as a result of that collision.

The Plaintiff now moves for that following:

- 1) summary judgment on the issue of liability,
- 2) the striking of the Defendant's answer for failure to comply with Court Ordered discovery,
- 3) summary judgment on the issue of serious injury, and
- 4) dismissal of the Defendant's affirmative defenses of comparative negligence, culpable conduct, assumption of risk, failure to sustain a serious injury and the Defendant's claim that the Plaintiff was negligent by riding a bicycle without proper seating capacity and without wearing a helmet.

The Defendant opposes the motion.

Generally, the Plaintiff contends that the Defendant has failed to attend a number of scheduled and Court ordered depositions of the Defendant, the latest being December 4, 2018. Plaintiff also contends that IME reports of two physicians establish that the Plaintiff sustained a right knee fracture and that one of those two physicians found a causal relationship between the fracture and the subject accident. Additionally, the Plaintiff avers that on the date of the accident he was proceeding, on his bicycle, south bound on Chrystie Street in Manhattan, in a bike lane through the intersection of Chrystie Street with Delancey Street. The Plaintiff stated that he had a green light in his favor, when the Defendant, traveling northbound on Chrystie Street, made a right hand turn onto Delancey and struck the Plaintiff. The Plaintiff concludes that the Defendant was the sole proximate cause of the accident, the Defendant did not use a turning signal and that the Defendant admitted to the police officer at the scene that he did not see the Plaintiff prior to his turn. The Plaintiff represents that he was wearing bright clothing and was not using head phones.

Defendant in opposition argues that Plaintiff's motion should be denied in that the Plaintiff has failed to provide an affirmation of good faith in compliance with NYCRR 202.7(c). The Defendant contends that Plaintiff frustrated the Defendant's attempt to appear at his February 25, 2019 deposition because the Defendant was running an hour late and the Plaintiff would not wait. The Defendant also states that the striking of a pleading is a drastic remedy and unwarranted, since the Defendant's actions were not willful or contumacious. The Defendant contends that summary judgment on liability in favor of the Plaintiff is unfounded in that material issues of fact exist. The Defendant further contends that Plaintiff's unsigned deposition is inadmissible, and that, in any event, Defendant's own affidavit (Defendant's Opposition, Exhibit A) contradicts the Plaintiff's version of the accident. Finally, the Defendant contends that in light of the above, the Defendant's affirmative defenses should not be dismissed .

Striking a Pleading

As an initial matter, the Court denies the Plaintiff's application made pursuant to CPLR 3126 to strike the Defendant's answer for failure to comply with Court Ordered discovery. The moving party on a motion seeking resolve a discovery dispute has the burden of demonstrating that they have satisfied the requirements of 22 NYCRR §202.7[c]. Said rule provides as follows:

The affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held. 22 NYCRR §202.7[c].

The purpose of the rule requiring an affirmation in good faith is to ensure that the parties can attempt to resolve disputes prior to the Court's involvement so as to narrow the focus of the dispute and potentially eliminate the Court's involvement. In the instant proceeding, the Plaintiff does not provide an affirmation of good faith. As a result, the Plaintiff's application to strike the Defendant's answer made pursuant to CPLR 3126 is denied. However, the Court does recognize the importance of obtaining the deposition testimony of the Defendant. Accordingly, the Defendant is compelled to appear for a deposition within thirty (30) days of the date of this Decision and Order.

CPLR 3212

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff*, 14 AD3d 493 [2nd Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See*

Sheppard-Mobley v. King, 10 AD3d 70, 74 [2nd Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; see *Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Turning to the merits of the Defendant’s application for summary judgment on the issue of liability, the Court finds that even assuming, *arguendo*, that the Plaintiff met his *prima facie* burden, there are issues of fact that should be resolved at trial. In support of his motion, the Plaintiff relies on the deposition testimony of the Plaintiff and a Police Accident Report. First, it must be noted that the Police Accident Report attached to the Plaintiff’s motion is not admissible, given that although it is certified the Police Officer did not witness the alleged incident. See *Adobea v. Junel*, 114 A.D.3d 818, 980 N.Y.S.2d 564 [2nd Dept, 2014]. Further, in his deposition, the Plaintiff was asked (Plaintiff’s Motion, Exhibit “G”, Page 37) how far into the intersection he was when the accident occurred and he answered “[t]hree quarters of the way through.” Later in the deposition (Plaintiff’s Motion, Exhibit “G”, Page 40) the Plaintiff was asked whether he saw the Defendant’s vehicle making a right turn and answered “[a]s it was

driving into me, correct.”¹ However, in his affidavit, the Defendant states (Affirmation in Opposition, Exhibit “A”) that “[w]ith a steady green traffic light in my favor, I moved to the middle of the intersection.” The Defendant further states that “I’m stationary waiting for the pedestrians to cross when this bicyclist southbound on the northbound bike lane strikes my vehicle.” These sworn statements from the Defendant, taken together, are sufficient to create a material issue of fact with respect to liability that must be resolved at trial. *See Espinoza v. Coco-Cola Bottling Co. of New York*, 121 A.D.3d 640, 641, 993 N.Y.S.2d 721, 722 [2nd Dept, 2014]. Further, based upon this conflicting testimony this Court cannot as a matter of law determine that the Defendant was negligent and a proximate cause of the accident. *See Rodriguez v. City of New York*, 31 N.Y.3d 312, 317, 101 N.E.3d 366, 368 [2018].

However, the Court does grant the Plaintiff’s application made pursuant to Insurance Law §5101(d). In support of this application, the Plaintiff has submitted reports from Dr. Jay W. Eneman and Dr. Dorothy Scarpinata. Dr. Eneman notes in his report (Plaintiff’s Motion, Exhibit “D”) that the Plaintiff suffered a right knee fracture. Dr. Dorothy Scarpinata also notes in her report (Plaintiff’s Motion, Exhibit “E”) that there was a right knee tibial fracture and states that “there is a direct correlation between the claimant’s initial complaints of pain and the accident of record.” Even assuming, arguendo, that the report by Dr. Eneman is insufficient to establish causation between the Plaintiff’s right knee fracture and the alleged incident, Dr. Scarpinata does establish that causation. As a result the Court finds that the Plaintiff has met its *prima facie* burden. *See Shamsodeen v. Kibong*, 41 A.D.3d 577, 578, 839 N.Y.S.2d 765, 766 [2nd Dept, 2007]; *Grossman v Wright*, 268 AD2d 79 [2nd Dept, 2000]. In opposition, the Defendant has failed to present any evidence in the form of medical reports that there are triable issues of fact as

¹ The deposition testimony of the Plaintiff is admissible given that it was “submitted by the party deponents themselves and, accordingly, those transcripts were adopted as accurate by those deponents.” Moreover, the Plaintiff’s deposition transcript was certified and its accuracy was not otherwise challenged. *Pavane v. Marte*, 109 A.D.3d 970, 970, 971 N.Y.S.2d 562, 564 [2nd Dept, 2013].

to whether the Plaintiff suffered serious injuries. See *Manceri v. Bowe*, 19 A.D.3d 462, 463, 798 N.Y.S.2d 441, 442 [2nd Dept, 2005]. As a result, the Plaintiff's application made pursuant to Insurance Law §5101(d) is granted.

Based on the foregoing, it is hereby ORDERED as follows:

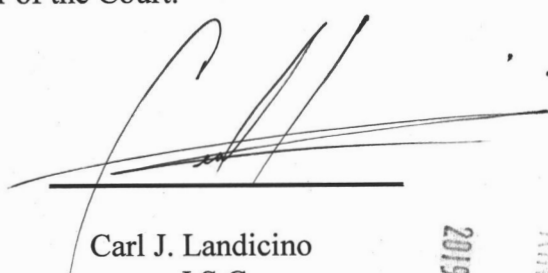
Plaintiff's Motion (motion sequence #1) is granted solely to the extent that:

- 1) the Defendant is compelled to appear for a deposition within thirty (30) days of the date of this Decision and Order and,
- 2) the Plaintiff's motion for summary judgment on the issue of whether the Plaintiff has sustained a serious injury pursuant to Insurance Law §5101(d), is granted.

The remaining relief sought is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



 Carl J. Landicino
 J.S.C.

2019 MAY -2 AM 8:30
 KINGS COUNTY CLERK
 FILED

