Ouattara v IPS Plumbing Corp.
2020 NY Slip Op 31028(U)
April 21, 2020
Supreme Court, New York County
Docket Number: 161089/2017
Judge: Adam Silvera

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ADAM SILVERA** **PART** **IAS MOTION 22**

Justice

----------X

IBRAHIM OUATTARA,

Plaintiff,

- v -

IPS PLUMBING CORP. and LUIS ALBERTO QUIZHPILEMA-GUAMAN,

Defendant.

----------X

INDEX NO. 161089/2017

MOTION DATE 3/16/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 54, 55, 56, 57, 58

were read on this motion to/for JUDGMENT - SUMMARY.

Before the Court is defendants' motion for summary judgment pursuant to CPLR 3212 to dismiss plaintiff, Ibrahim Quattara's Complaint on the grounds that no material, triable issues of fact remain. Defendants allege that plaintiff was the sole proximate cause of the accident and that plaintiff has failed to demonstrate that plaintiff has suffered a "serious injury" as defined under Section 5102(d) of the Insurance Law. Plaintiff opposes the motion.

This matter stems from a motor vehicle incident, which occurred on October 17, 2017, on West 85th Street at or near its intersection with Amsterdam Avenue in the County and State of New York, which allegedly led to plaintiff's serious injury. Defendants' motion for summary judgment to dismiss plaintiff's Complaint is denied.

Summary Judgment (Serious Injury)

"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]).

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 plaintiff has failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law. Defendants allege that the injuries plaintiff is seeking relief for do not rise to the level of a "serious injury." Defendants attach the independent medical report of Dr. Pierce J. Ferriter, Dr. Herbert Sherry, and Dr. Adam Bender (Mot, Exh J, K, L). Dr. Ferriter found that plaintiff had not suffered any loss of range of motion to the cervical spine, lumbar spine, right knee, and right great toe (Mot Exh J). Dr. Ferriter concluded that plaintiff suffered a sprain/strain to the cervical spine, lumbar spine, right knee, and right great toe (*id.).* Dr. Sherry examined plaintiff and concluded that physical examination failed to reveal evidence of an injury directly related to the underlying accident (Mot, Exh J). Dr. Sherry lists plaintiff's range of motion of the hips, shoulders, cervical spine, and thoracolumbar spine, but does not list what the normal ranges of motion for those body parts are supposed to be.

The Appellate Division, First Department, has consistently held that "[t]he report of the doctor…is deficient because he…failed to indicate what the normal range of motion would be" (*Nagbe v Minigreen Hacking Group*, 22 AD3d 326, 327 [1st Dept 2005]). Thus, the Court deems Dr. Sherry's report as deficient and defendants have failed to meet its burden and the branch of defendants' motion for summary judgment on the issue of "serious injury" is denied.

Liability

The branch of defendants' motion for summary judgment on the issue of liability finding plaintiff liable as the sole proximate cause of the accident is denied. 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 § 1231, every person riding a bicycle on a roadway is afforded the same rights and duties applicable to drivers. Defendants allege that plaintiff violated the VTL and struck defendants' vehicle causing the accident. Defendants allege that plaintiff failed to keep proper distance between his bicycle and defendants' vehicle.

In opposition plaintiff raises an issue of fact as to the occurrence of the incident. Plaintiff testified that defendant was behind him and made a right turn striking plaintiff in violation of the VTL (Mot Exh, D at 35). Plaintiff notes that as he testified to being ahead of defendants' vehicle, that defendant had a duty to see what there is to be seen and that a violation of that duty raises an inference of negligence on the part of the operator (*Johnson v Phillips,* 261 AD2d 269, 271 [1st Dept 1999]). Thus, an issue of fact exists barring a finding of summary judgment on the issue of liability and defendants' motion is denied.

Accordingly, it is

ORDERED that the branch of defendants' motion for summary judgment to dismiss plaintiff's Complaint on the grounds that plaintiff allegedly has not sustained a "serious injury" as defined in 5102 of the Insurance Law is denied; and it is further

ORDERED that the branch of defendants' motion to dismiss plaintiff's Complaint on the grounds that plaintiff is the sole proximate cause for the underlying motor vehicle accident is denied; and it is further

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

This constitutes the Decision/Order of the Court.

4/21/2020
DATE

ADAM SILVERA, J.S.C.

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