

Sokolnykov v Cohen
2020 NY Slip Op 31189(U)
April 30, 2020
Supreme Court, Kings County
Docket Number: 503346/2015
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Index Number 503346/2015

Part 91

DECISION/ORDER

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

OLGA SOKOLNYKOV,

Plaintiff,

against

THEDA COHEN AND JACK COHEN,

Defendants.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed.....	<u> </u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u> </u>
Other.....	<u> </u>

Upon review of the foregoing documents, defendants’ motion for summary judgment as to liability and damages is decided as follows:

Factual Background

Plaintiff commenced this action against the defendants for injuries she claims that she sustained as a result of a motor vehicle accident on October 11, 2013. At her deposition, plaintiff testified that she was parked alongside the curb on Avenue U, which is a two-way street with one traveling and one parking lane in each direction. She testified that she looked behind her to see if there were any vehicles coming from behind and, about a minute later, she looked around her again. Seeing no other vehicles, she then pulled out of the spot while looking forward. She testified that when she was about a quarter of the way out of the spot, her vehicle made contact with defendants’ vehicle. She testified that she did not see defendants’ vehicle before the impact. She testified that the impact was “very heavy” and that she was travelling between zero and three miles per hour at the time of the impact. Plaintiff testified that she did not recall which part of her vehicle made contact with defendants’ vehicle, but she later acknowledged, after viewing photographs of her vehicle after the accident, that her front driver-side headlight was

damaged.

Defendant Theda Cohen, the driver of defendants' vehicle, testified that, prior to the accident, she was travelling on Avenue U, but then stopped for a traffic light at the intersection of Avenue U and MacDonald Avenue. She testified that, when she was stopped, she felt an impact to her vehicle. Defendant testified that the impact was "light" and there was damage to the front passenger-side bumper of her vehicle.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

With regard to liability, defendants contend that plaintiff was negligent per se because, they claim, plaintiff violated VTL § 1143 (*Green v Masterson*, 172 AD3d 826, 827 [2d Dept 2019]). Section 1143 states that "[t]he driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed." Here, defendant testified that she was stopped at traffic light when plaintiff hit her front bumper on the passenger side. Plaintiff testified that she looked for vehicles twice – one of those times just prior to pulling out of her parking spot – and did not see any vehicles. She further testified that her driver-side headlight was damaged. Given the conflicting narratives of the accident and the point of impact, there are triable questions of fact

concerning who had the right of way.¹

Defendants also move for summary judgment to dismiss this action on that basis that plaintiff cannot prove she has injuries that satisfy one or more of the “serious injury” categories set forth in NY Insurance Law §5102(d) (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002]). In her bill of particulars, plaintiff alleges she suffered disc herniations and bulges in the cervical and lumbar spines, sprain of the thoracic spine, and injury to her shoulders.

Defendant submits the “affirmed” report of Dr. Edward Toriello, dated October 31, 2018. However, the Second Department currently does not permit electronic signatures on sworn statements (*Vista Surgical Supplies, Inc. v Travelers Ins. Co.*, 50 AD3d 778, 778 [2d Dept 2008]). Therefore, the court cannot consider this report.

Defendant also submits the affirmed report of Dr. Richard Lechtenberg, dated October 29, 2018. Dr. Lechtenberg, a neurologist, states in his report that he examined plaintiff on that day. He states that he conducted range of motion tests, using a goniometer, on plaintiff’s cervical, lumbar and thoracic spines, as well as her shoulders, elbows, wrists, hips, knees and ankles. He states that plaintiff’s range of motion for each of these areas was normal. He further states that MRIs taken of plaintiff’s spine show degenerative changes. He opines that plaintiff has no neurological deficits, is not disabled, and has no need for further neurological care.²

¹ Plaintiff also submits a copy of the police report, which states that “At TPO [defendant] states while trav[eling] E/B on Ave U [plaintiff] pulled out of parking spot hitting her car”. The statement is admissible even though the report is not certified (*Gezelter v Pecora*, 129 AD3d 1021, 1022-23 [2d Dept 2015]). Plaintiff contends that the defendant’s statement described her in motion rather than stopped, which would be construed as a statement against interest in these circumstances.

² Defendants also submit plaintiff’s certified medical records, but they do not reference any specific documents in those records, which amount to 53 pages.

In opposition, plaintiff submits the affirmation of Dr. Yury Koyen, plaintiff's treating physician. Dr. Koyen states that he examined plaintiff on October 18, 2013 and again on April 4, 2019.³ He states that, at both examinations, he performed range of motion testing using a goniometer on plaintiff's cervical and lumbar spines and found decreased range of motion. He also found injury to plaintiff's shoulders. He also states that he reviewed MRIs of plaintiff's cervical and lumbar spines and found disc bulges and herniations. Defendants contend that Dr. Koyen did not factor in plaintiff's prior injuries when rendering his opinion. However, Dr. Koyen specifically states in his report that he was aware of plaintiff's prior injuries and took them into account in his opinion. He opines that plaintiff's injuries were caused by the accident.

In addition, plaintiff testified at her deposition that she needs her daughter's help to "do everything", such as shopping, cooking, and reaching behind her back.

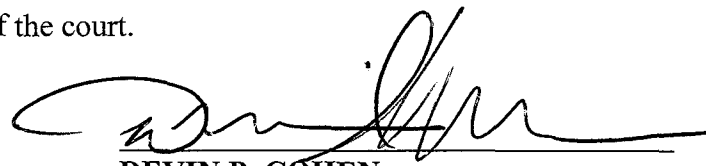
Each side offers conflicting expert reports of medical examinations about whether the accident could have caused plaintiff's injuries. Accordingly, there are triable issues of fact as to whether plaintiff's accident-related injuries meet the "serious injury" threshold (*Chul Koo Jeong v Denike*, 137 AD3d 1189, 1190 [2d Dept 2016]; *Kanic Realty Assoc., Inc. v Suffolk County Water Auth.*, 130 AD3d 876, 878 [2d Dept 2015].)

Conclusion

For the foregoing reasons, defendants' motion for summary judgment is denied. This constitutes the decision and order of the court.

April 30, 2020

DATE



DEVIN P. COHEN
Justice of the Supreme Court

³ The first examination in Dr. Koyen's affirmation appears to refer to the October 18, 2013 examination. Plaintiff also provides Dr. Koyen's affirmed report of this examination.