

Chan v Hernandez

2020 NY Slip Op 31204(U)

March 20, 2020

Supreme Court, Kings County

Docket Number: 515094/2015

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 515094/2015

Part 91

DECISION/ORDER

AAREN CHAN,

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

Plaintiff,

Papers

against

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

HAROLD HERNANDEZ AND ABC CORP. D/B/A
ENTERPRISE RENTAL,

Defendants.

Upon review of the foregoing documents, defendant Harold Hernandez’s motion for summary judgment as to liability and damages, and plaintiff’s cross-motion for summary judgment as to liability only, are decided as follows:

Factual Background - Liability

Plaintiff commenced this action against the defendants for injuries he claims that he sustained as a result of a motor vehicle accident on June 14, 2014. Plaintiff testified that, on the day of the accident, he was completely stopped at a red light when his vehicle was struck in the rear by the vehicle being driven by defendant Hernandez. Plaintiff testified that he did not stop suddenly nor did he quickly apply his brake when he stopped at the red traffic light.¹

Defendant Hernandez testified at his deposition that, on the day of the accident, he was stopped at a red light behind plaintiff’s vehicle, which was also stopped at the red light.

Defendant Hernandez testified that, when the traffic light changed to green, plaintiff began to

¹ Plaintiff provides a CD which he contends shows the accident, but the court is unable to view the video.

move forward, and defendant Hernandez subsequently moved forward, but then plaintiff stopped suddenly, and defendant Hernandez struck plaintiff's vehicle in the rear. Defendant Hernandez testified that he was not sure why plaintiff stopped suddenly. Non-party Waleska Hernandez, a passenger in defendant Hernandez's vehicle, also gave a deposition. Her testimony about the accident essentially matches the testimony of defendant Hernandez.

Analysis - Liability

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]).

As an initial matter, defendant contends that plaintiff's cross-motion is untimely. Plaintiff does not dispute this, but argues correctly that the cross-motion is proper because it was made on identical grounds as defendant Hernandez's motion (*Paredes v 1668 Realty Assoc., LLC*, 110 AD3d 700, 702 [2d Dept 2013]; *Travelers Indem. Co. v AA Kitchen Cabinet & Stone Supply, Inc.*, 106 AD3d 812, 813 [2d Dept 2013]). Defendant Hernandez moves for summary judgment on the issues of liability and damages, and plaintiff cross-moves for summary judgment on the issue of liability only. As plaintiff's cross-motion is made on grounds that are identical to a portion of defendant Hernandez's motion, the cross-motion is timely.

"A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision"

(*Tumminello v City of New York*, 148 AD3d 1084 [2d Dept 2017]). “A nonnegligent explanation may include a mechanical failure, a sudden, unexplained stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause” (*id.* at 1085). That said, stops which are foreseeable under the circumstances, “even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead” (*id.*, quoting *Brothers v Bartling*, 130 AD3d 554, 556 [2d Dept 2015]).

Plaintiff testified at his deposition that he was stopped at a red light when defendant Hernandez hit him from behind. Defendant Hernandez testified that plaintiff was initially stopped, but moved forward then stopped again suddenly. Defendant Hernandez testified that he tried to stop in time, but was unable to avoid hitting plaintiff. Defendant Hernandez’s claim that plaintiff stopped suddenly was conclusory and insufficient, in and of itself, to provide a non-negligent explanation for the rear-end collision (*Bene v Dalessio*, 135 AD3d 679, 680 [2d Dept 2016]). Accordingly, plaintiff has established that defendant Hernandez is 100% liable for the accident and plaintiff bears no liability for the accident.²

Factual Background - Damages

Plaintiff testified at his deposition that he had subsequent car accidents in 2015 and in 2016, whose impact plaintiff characterized as “soft” or “very light” and in which his body did not move in response to the impact. Plaintiff testified that he did not go to the emergency room or receive medical treatment as a result of the 2015 or 2016 accidents.

² By stipulation and order, dated September 12, 2019, the parties agreed all claims and cross-claims against defendant EAN Holdings LLC, sued herein as ABC Corp. d/b/a Enterprise Rental, were discontinued with prejudice.

Plaintiff also submits an opposing affidavit, in which he states that, when the subject accident occurred, his head hit the headrest and his back hit the seat despite being restrained by a seatbelt. He states that he complained to ambulance and hospital personnel regarding pain in his neck, back, and shoulder. He further states that, following the accident, he saw Dr. Frantz Jasmin and Dr. Arden Kaisman for the pain he was feeling in his head, neck and back. He also complained of difficulty in performing daily activities, such as prolonged standing, sitting, walking, using stairs, lying down, and standing up. Plaintiff states that, at the recommendation of his doctors, he underwent physical therapy and acupuncture. He also states that, on September 17, 2014, Dr. Kaisman performed a cervical discectomy on him. Plaintiff states that he continued to perform physical therapy exercises and stretching exercises at home, but that any professional physical therapy ended because his no-fault benefits terminated.

Plaintiff states that, on or about June 13, 2016, he saw Dr. Andrew Merola. He also states that he continued to complain of pain in his neck and lower back, and had difficulty in performing his regular daily activities. Plaintiff states that Dr. Merola performed surgery on his spine on or about October 6, 2016. Plaintiff states that he last saw Dr. Merola again on July 15, 2019, at which time he complained of neck and back pain. Plaintiff states that, the next day, he was examined by Dr. Kaisman, and he complained to the doctor of neck and back pain and restricted movement.

Plaintiff states that he continues to have neck and back pain. He states that, following the accident, he had to reduce his working hours due to the pain. He also states that, since the accident, he has had difficulty dressing himself, and cannot put on his socks and shoes without sitting in a chair because of decreased flexibility. He also states that, since the accident, he is

unable to jog, do any strenuous exercises or lift anything heavy, and that he has difficulty doing household chores.

Alexis Ward, an emergency medical technician with the New York City Fire Department (“FDNY”), testified at her deposition that she signed a pre-hospital care report summary, a copy of which defendant Hernandez provides. Ms. Ward testified that, as indicated in the report, she offered plaintiff a cervical spine collar at the time of the accident but that plaintiff declined and refused medical attention. Ms. Ward further testified that plaintiff did not have any movement limitations in his neck because no such limitations were noted in the report and she would have included such limitations if they were present. Ms. Ward also contends that plaintiff reported that his car was struck at a low rate of speed. The report also notes that plaintiff complained of pain in his neck and right shoulder.

Defendant Hernandez submits records from Bellevue Hospital, but they are not authenticated, and are therefore, inadmissible (*Bank v Melville Magnetic Resonance Imaging, P.C.*, 294 AD2d 320, 321 [2d Dept 2002]).

Defendant Hernandez submits the affirmed report of Dr. Melissa Sapan Cohn, a radiologist and neuroradiologist, who examined plaintiff’s July 24, 2014 cervical and lumbosacral spine MRIs on behalf of defendant . As stated in the report, Dr. Sapan Cohn found only degenerative changes and no traumatic injury in the cervical spine. Dr. Sapan Cohn also reported her examination of plaintiff’s lumbosacral spine MRI obtained on June 17, 2016. Dr. Sapan Cohn found only degenerative changes, which had not progressed from the condition captured in the MRI two years prior.

Defendant Hernandez also submits an affirmed report of Dr. Edward A. Toriello, an

orthopedic surgeon who examined plaintiff for defendant on or about November 21, 2018. Dr. Toriello notes in the report that plaintiff stated that he lost three to four weeks from work because of the injury he sustained from his accident. Dr. Toriello found that plaintiff had normal range of motion in his cervical spine, thoracic spine, lumbosacral spine, right and left shoulders, right and left elbows, and right and left wrists. Dr. Toriello concluded that plaintiff has resolved injuries to many of those areas, and that those injuries were not caused by the accident.

In addition, defendant Hernandez submits the affirmed report of Dr. Jeffrey Perry, an orthopedist who examined plaintiff for defendant on or about November 26, 2018. In his report, Dr. Perry found that plaintiff had normal range of motion in his cervical spine, and that any injury to the cervical spine was not caused by the accident. Dr. Perry opines that plaintiff is not disabled.

In opposition, plaintiff submits the affirmation of Dr. Frantz Jasmin, who attaches copies of authenticated medical reports and records concerning plaintiff. Dr. Jasmin states that plaintiff began treating with him on June 18, 2014. On that date, plaintiff reported pain to his neck, upper back, middle back, and lower back. Dr. Jasmin performed range of motion tests on that date, and found “up to [a] 33% loss” in plaintiff’s cervical, lumbar, and thoracic spine. Dr. Jasmin states that he recommended to plaintiff that he begin physical therapy. He opines that the accident caused plaintiff’s injuries and that plaintiff was partially disabled through at least November 3, 2014. Dr. Jasmin confirmed that plaintiff’s treatment ended because plaintiff’s no-fault benefits terminated.

Plaintiff also submits the affirmation of Dr. Arden Kaisman. Dr. Kaisman states that he began treating the plaintiff on August 21, 2014. On that day, Dr. Kaisman performed range of

motion tests, using a goniometer, of plaintiff's cervical spine. Dr. Kaisman found that plaintiff's range of motion for his cervical spine was restricted between 10 degrees and 30 degrees depending on the direction of movement. Dr. Kaisman states that he reviewed plaintiff's MRI and concluded that plaintiff has a disc herniation at C3-C4 and a disc bulge at C4-C5, as well as cervical radiculopathy and myofascial pain syndrome. Dr. Kaisman states that, based on these findings, he recommended percutaneous cervical discectomy at the C3-C4 level and performed the operation on September 17, 2014. Dr. Kaisman states that he examined plaintiff's cervical spine again on July 16, 2019. On that day, he measured plaintiff's range of motion using a goniometer and found that plaintiff's range of motion for his cervical spine was either 10 degrees or 20 degrees less than normal, depending on the direction of movement. Dr. Kaisman opines that plaintiff continues to have a disc herniation at C3-C4 and a disc bulge at C4-C5, as well as cervical radiculopathy and myofascial pain syndrome. He also opines that plaintiff has a permanent significant limitation of the use of his cervical spine, and that his injuries are causally related to the accident.

Plaintiff also submits the affirmation of Dr. Andrew Merola. In his affirmation, Dr. Merola refers to plaintiff's testimony which described his vehicle accidents in 2015, 2016 or 2017. Dr. Merola examined plaintiff for the first time on June 13, 2016, at which time plaintiff complained of persistent and worsening pain in his neck and back. On that day, Dr. Merola performed range of motion tests using a goniometer. Dr. Merola found that the range of motion in plaintiff's cervical spine was between 15 degrees and 60 degrees less than normal depending on the direction of movement. Dr. Merola ordered a new MRI and had plaintiff return for examination on July 18, 2016. Dr. Merola performed range of motion tests using a goniometer

on plaintiff's lumbar spine. Dr. Merola found that plaintiff's range of motion was between 5 degrees and 40 degrees less than normal, depending on the direction of movement.

Dr. Merola determined that the June 17, 2016 lumbar MRI revealed a disc herniation at L5-S1 with "bilateral neuroforaminal impingement and descending S1 nerve root impingement." He opines that the herniation was causally related to the accident. Dr. Merola concluded that plaintiff should undergo a "decompressive lumbar laminectomy, medial facetectomies, decompression of neurological elements and nerve roots, L5-S1; [and] segment partial discectomy, L5-S1 segment", which the doctor performed on October 6, 2016 (Dr. Merola's affirmation at ¶¶ 14-17).

Dr. Merola states that he examined plaintiff most recently on July 15, 2019. He notes that plaintiff continued to complain of neck and back pain. Dr. Merola found that plaintiff's range of motion in his lumbar spine was between 0 degrees and 55 degrees less than normal, depending on the direction of movement. Based on his findings, Dr. Merola opines that plaintiff has "chronic permanent residual loss of range of motion and chronic permanent residual loss of neurological function involving the L5 and S1 roots" (*id.* at ¶ 22). He further opines that plaintiff's accident, and not any other accident or degenerative condition, caused plaintiff's injuries, and that plaintiff's restrictions of movement are permanent.

Defendant submits the affidavits of two accident reconstructionists. The first is by Stephen Emolo, who states in his sworn report that he reviewed several items, including a police accident report, photographs of the vehicles, video of the accident, pleadings and deposition testimony. He also inspected plaintiff's vehicle and the IIHS bumper evaluation crash test reports. Mr. Emolo opines that the damage to plaintiff's vehicle was minor and cosmetic, and

did not involve any structural components or energy absorbing structures on the vehicle. Mr. Emolo further opined that, based on the damage done, that the speed of defendant Hernandez's vehicle was no more than 4.99 miles per hour (Mr. Emolo's report at 31-32).

The second reconstructionist, Dr. Richard A. Bandstra, states in his sworn report that the accident did not generate forces and injury mechanisms that could have caused any cervical or lumbar disc injury. He further opines that the make and model of plaintiff's car is very protective of its occupants and that plaintiff's seatbelt would have prevented any contact between plaintiff and the interior of the car (Dr. Bandstra's report at 20-21).

In opposition, plaintiff submits the affidavit of James Pugh, who states that he is an expert in biomedical engineering. Mr. Pugh states that he reviewed the vehicles involved, the accident site, and plaintiff's medical records. He opines that the damage to the vehicles indicate an impact that could produce motions damaging to the human body. He further opines that the motions caused by the accident could have caused the injuries of which plaintiff complained, including because plaintiff was not expecting the accident and therefore could not have prepared his body for it (Mr. Pugh's affidavit at ¶¶ 13-16).

Analysis - Damages

Defendant Hernandez moves for summary judgment to dismiss this action on that basis that plaintiff cannot prove he 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 his bill of particulars, plaintiff alleges he suffered herniations and bulges to his cervical and lumbosacral spine, which required surgery on his cervical and lumbar spine, as well as sprain of his thoracic spine, and right and left shoulders.

In short, each side offers multiple affirmed medical examinations and affidavits from experts who opine upon whether the accident could have caused plaintiff's injuries. The physicians and experts do not agree. 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, defendant Harold Hernandez's motion for summary judgment is denied and plaintiff's cross-motion for summary judgment is granted to the extent that defendant Hernandez is found 100% liable for the accident.

This constitutes the decision and order of the court.

March 20, 2020

DATE



DEVIN P. COHEN

Justice of the Supreme Court