Campolo v Ebner
2020 NY Slip Op 34585(U)
April 30, 2020
Supreme Court, Rockland County
Docket Number: Index No. 34059/2018
Judge: Robert M. Berliner
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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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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JAMES CAMPOLO and JANET CAMPOLO,

Plaintiffs,

-against-

RYAN EBNER, DECICCO OF NEW CITY, INC., and DECICCO FAMILY MARKETS, INC.,

Defendants.

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DECISION & ORDER

Index No. 34059/2018
Order Date Apr. 30, 2020
Motion Seq. 1-2

BERLINER, J.

The following papers were read on (1) this Notice of Motion by defendants Ryan Ebner and DeCicco of New City, Inc., for an Order pursuant to CPLR 3212 dismissing this action on grounds that plaintiff James Campolo suffered no serious injury within the meaning of Insurance Law section 5102(d); and (2) this Notice of Cross Motion by plaintiffs for an Order pursuant to CPLR 3212 granting them summary judgment on liability:

Defs' Notice of Motion (#1), Aff in Support, Mem of Law, Exhs. A-I
Pls' Notice of Cross Motion (#2), Aff in Support/Opp, Exhs. A-K
Defs' Aff in Opp to Cross Motion, Exh. A
Pls' Aff in Reply
Post-Briefing Letters of June 2019
Affidavits of Service
NYSCEF File

Upon the foregoing papers, and all prior papers and proceedings in this action, the motions are consolidated for purposes of decision and are determined as follows:

This action arises from a motor vehicle accident in the Town of Clarkstown, New York, on May 16, 2017. Plaintiffs James Campolo and his spouse, suing derivatively, allege that Mr. Campolo's vehicle was sideswiped by a delivery van driven by defendant Ryan Ebner, and

owned by co-defendants DeCicco of New City and/or DeCicco Family Markets, Inc., in a parking lot while Mr. Campolo was attempting to park. After plaintiffs commenced this action in July 2018, defendants Ebner and DeCicco of New City answered asserting 13 affirmative defenses; the parties then completed discovery. Plaintiffs' bill of particulars alleges personal injuries principally affecting Mr. Campolo's right knee, necessitating surgery as a proximate result of the accident; Mr. Campolo's deposition testimony suggests that the principal cause of injury was that Mr. Campolo's right foot slammed on the brake at the time of the accident, causing his right knee to hyper-extend.

After plaintiffs filed a Note of Issue and Certificate of Readiness, defendants Ebner and DeCicco of New City timely brought this CPLR 3212 motion to dismiss on grounds that Mr. Campolo suffered no serious injury within the meaning of Insurance Law section 5102(d). Plaintiffs timely cross moved pursuant to CPLR 3212 for partial summary judgment on liability as to defendants Ebner and DeCicco of New City, asserting that Mr. Campolo's injury satisfies both the permanent / significant consequential limitation and the 90/180-day categories of significant injury pursuant to section 5102(d). During the pendency of these motions, the covid-19 pandemic required the issuance of emergency orders that delayed determination hereof. The applications now come forward for decision.

Prefatory Matters

The Court finds no answer on file from co-defendant DeCicco Family Markets, Inc., despite plaintiff's affidavit of service of the commencement papers on such defendant (NYSCEF Doc. 5). This Court also observes that no party substantially addressed such co-defendant's failure to answer, and that plaintiff did not seek default judgment against the co-defendant within one year after commencement. Accordingly, on this Court's own motion, this action must be dismissed against DeCicco Family Markets, Inc. (*see* CPLR 3215[c]).

Also as a prefatory matter, this Court finds that moving defendants, by bringing this motion only on grounds of its Thirteenth Affirmative Defense that Mr. Campolo suffered no serious injury within the meaning of Insurance Law section 5102(d), thereby waived all other affirmative defenses in their answer (*see e.g. New York Comm'l Bank v J Realty F. Rockaway*

Ltd., 108 AD3d 756, 757 [2d Dept 2013]; *Starkman v City of Long Beach*, 106 AD3d 1076, 1078 [2d Dept 2013]).

Party Contentions

In support of their dismissal application, moving defendants principally rely on Mr. Campolo's deposition testimony and the independent medical examination of orthopedist Dr. Brian Hendler. Moving defendants recite Mr. Campolo's testimony that while vacationing in Bermuda, he sustained a right-knee injury in 2016, for which injury arthroscopic surgery repaired a meniscus tear in late April 2017 – less than four weeks before the instant motor vehicle accident. Mr. Campolo testified that after the accident, he continued to treat with the same physicians, who told him that his continuing knee pain was unrelated to the instant motor vehicle accident. He also testified that he missed no work as a result of the accident. In June 2017, one month after the accident, an MRI indicated spontaneous necrosis of the subject knee; plaintiff then underwent a total knee replacement in September 2017. He then resumed physical therapy and discontinued it in 2018.

Dr. Hendler's independent medical report opined that, at most, Mr. Campolo suffered "a very mild sprain" as a result of the subject motor vehicle accident, and that any such sprain had healed. Dr. Hendler recited his review of plaintiff's extensive medical file on the knee, including the records of Mr. Campolo's treating clinicians, radiological reports and surgical reports all pre-dating the subject accident. He also reviewed Mr. Campolo's extensive post-accident medical file, including the radiological studies showing the degenerative necrosis that indicated total knee replacement that same summer. Dr. Hendler opined, based on all of the foregoing, that there was no mechanism related to the subject accident that could have caused the necrosis or any other corresponding exacerbation of the Mr. Campolo's knee condition; that only a very serious injury might implicate any such sequelae; and that therefore there was no causal connection between Mr. Campolo's injuries and the subject accident. To the contrary, Dr. Hendler explicitly opined that Mr. Campolo's knee condition was entirely due to his pre-existing condition. In any event, Dr. Hendler concluded that Mr. Campolo presented with only minimal range of motion reduction that does not substantially inhibit his gait or performance of life functions.

Defendants submit Mr. Campolo's pre-accident and post-accident medical, surgical and rehabilitative records to support the foregoing recitation. Moving defendants conclude that the foregoing proves that Mr. Campolo suffered no serious injury satisfying either the permanent / significant consequential limitation category or the 90/180-day category of Insurance Law section 5102(d), and in any event that the subject accident did not proximately cause any such injury.

Plaintiffs, in support of their summary judgment motion and in opposition to moving defendants' dismissal application, concedes the 2016 injury and the resulting arthroscopy that Mr. Campolo underwent less than one month before the subject accident. Plaintiffs also concede that on the morning of the accident but prior thereto, Mr. Campolo was experiencing right-knee symptoms. However, they point to his deposition testimony that the pain significantly worsened after the subject accident, that he reported to his treating orthopedist two days later, and that his orthopedist found restricted range of motion and tenderness both at the May 2017 visit and the early June 2017 visit. Approximately two weeks later, Mr. Campolo received a recommendation for total knee replacement, which was conducted approximately two months later.

Plaintiffs argue that the subject accident caused a "fracture" within the meaning of Insurance Law section 5102(d) based on the opinion of Mr. Campolo's knee-replacement surgeon, Dr. Jason Hochfelder (NYSCEF Doc. 65), who wrote that the June 2017 MRI indicated a "large nondisplaced subchrondral insufficiency fracture, also known as spontaneous osteonecrosis of the knee ('SONK')" (Hochfelder Aff., at ¶ 14). He continues that this SONK was "proximately caused by trauma from his car accident on May 16, 2017" (*id.*, at ¶ 26), due to Mr. Campolo "slamming on the brake pedal with his right leg and hyperextending his right knee with an extreme force" (*id.*). He further opines that SONK can occur from even a "minor" trauma sufficient to directly pressure one bone to smash into another, and that the "resultant trauma and fracture disrupted the blood supply leading to the bone (medial femoral condyle) resulting in the death of cells in the bone tissue" (*id.*, at ¶ 27) – thus necessitating the total knee replacement that would not have been necessary "had the [subject motor vehicle] accident not happened" (*id.*, at ¶ 30). As justification for the foregoing conclusions, Dr. Hochfelder indicated that the prior MRI of March 2017 did not indicate SONK, that Mr. Campolo was improving after the arthroscopy until the accident, and that severe pain followed the accident "only by a day or

so" (*id.*, at ¶ 28). Dr. Hochfelder specifically narrated that he disagreed with Dr. Hendler's contrary conclusion as to causation and injury mechanism (*id.*, at ¶ 29).

On the foregoing basis, plaintiffs assert that Mr. Campolo sustained a serious injury within the meaning of Insurance Law section 5102(d). Plaintiffs also point to the deposition testimony of both Mr. Campolo and defendant Ebner that the plaintiff vehicle was stopped at the time of the incident, and thus that defendants are responsible for the accident.

The remaining defendants principally respond that Dr. Hochfelder's expert opinion is deficient because it fails to take into account pre-accident degenerative changes in the knee and thus is impermissibly conclusory within the meaning of *Alvarez v NYLL Management, Ltd.* (120 AD3d 1043 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]). They also argue that Dr. Hochfelder's attribution of causation – slamming on the brake of a stopped car, causing hyperextension of the knee – is irrational. Defendants argue that if Mr. Campolo's vehicle was stopped as he alleged, then Mr. Campolo "could not have applied the brake as a matter of law" (Def's Reply Mem [NYSCEF Doc. 71], at ¶ 17]).

The remaining defendants also challenge plaintiffs' showing as to causation of the subject accident itself. They aver that contrary to Mr. Campolo's recitation that his vehicle was stopped at the time of the collision, Mr. Campolo allegedly told law enforcement officers responding at the scene that he was backing up and was partly in the roadway at the time of the collision. The remaining defendants cite to the police report (NYSCEF Doc. 59), in which the responding police officer reported Mr. Campolo as stating that "he was backing into [a] parking spot with his blinker on when [Ebner's] vehicle collided with him." Moving defendants argue that this police report contradicts Mr. Campolo's deposition testimony that his vehicle was stopped at the time of the collision, and that his deposition testimony also suggests that he was parking in a manner that obstructed the roadway in violation of VTL 1203(a) (Def Mem [NYSCEF Doc. 72], at 3-4). On the foregoing basis, moving defendants assert that a triable issue of material fact exists as to causation of the incident, thus precluding award of summary judgment as to liability.

In reply, plaintiffs assert that the responding officer's description of the accident is hearsay and inadmissible to prove causation under *Watch v Gersten* (126 AD3d 687 [2d Dept 2015]) inasmuch as the officer did not personally witness the accident. As to VTL 1203(a),

plaintiffs assert that defendants did not raise any such violation as an affirmative defense or in their motion, and thus it is waived. In any event, plaintiffs assert that nothing in the deposition testimony or otherwise fairly can be construed to suggest that Mr. Campolo unlawfully obstructed the roadway in violation of that statute. Rather, the evidence is only that Mr. Campolo was in the process of parking when the collision occurred, and therefore that statute does not apply so as to create a triable issue of material fact as to causation.

Analysis

A CPLR 3212 summary judgment movant must tender evidentiary proof in admissible form sufficient to show that there remains no reasonably disputable triable issue of material fact such that judgment should be directed in its favor as a matter of law (*see e.g .Giuffrida v Citibank Corp.,* 100 NY2d 72 [2003], *citing Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Only upon the movant's sufficient prima facie showing does the burden shift to the respondent to rebut such showing (*see id*.). If respondent then adduces record evidence or other materials that create any triable issue of material fact – giving the party adverse to the motion the benefit of every reasonable favorable inference – then summary judgment must be denied (*see id*.).

Insurance Law section 5102(d) defines serious injury as:

> "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

On a defense dismissal motion sounding under this statute, the movant bears the prima facie burden to establish that the plaintiff did not sustain a serious injury within the meaning of Insurance Law section 5102(d) as a result of the accident (*see Toure v Avis Rent A Car System.*,

98 NY2d 345, 352 [2002]). If the moving defendant makes that prima facie showing, the burden then shifts "to plaintiff to come forward with sufficient evidence to overcome defendant's motion by demonstrating that [he or] she sustained a serious injury within the meaning of the No-Fault Insurance Law" (*Gaddy v Eyler*, 79 NY2d 955, 957 [1992] [internal quotations omitted]).

In the Insurance Law section 5102(d) context, summary judgment generally is not appropriate where conflicting medical reports of the parties' respective experts raise a triable issue of fact as to whether the plaintiff sustained a serious injury within the meaning of Insurance Law section 5102(d) (*see Garcia v Long Island MTA*, 2 AD3d 675, 675 [2d Dept 2003]; *see also Wilcoxen v Palladino*, 122 AD3d 727, 728 [2d Dept 2014]). "However, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact" (*Lowe v Japal*, 170 AD3d 701, 702 [2d Dept 2019] [internal citations omitted]). Moreover, if an Insurance Law section 5102(d) plaintiff pleads that a motor vehicle accident attributable to a defendant exacerbated a pre-existing injury, or if such a defendant carries a prima facie burden to show that a pre-existing incident is the proximate cause of the injury for which plaintiff seeks to recover, the plaintiff must demonstrate the alleged exacerbation or rebut defendant's causation showing, as the case may be, by competent medical evidence in a "specific and nonconclusory manner" - and failure to do so is fatal to plaintiff's claim (*Wettstein v Tucker*, 178 AD3d 1121, 1122 [2d Dept 2019]; *Inzalaco v Consalvo*, 115 AD3d 807, 808-809 [2d Dept 2014] [collecting cases]).

Turning first to the parties' dispute as to causation of the subject accident itself, this Court rejects moving defendants' attempt to offer the law enforcement accident report to prove that Mr. Campolo was at least contributorily negligent if not solely negligent. It is well-settled that where a law enforcement officer did not witness a motor vehicle accident but recounts in the accident report what drivers said, those recounts are hearsay and inadmissible to prove causation of the accident (*see Watch*, 126 AD3d at 688; *Cheul Soo Kang v Violante*, 60 AD3d 991, 991-992 [2d Dept 2009] ["statements in the report attributed to the plaintiff and defendant driver constituted inadmissible hearsay"] [citations omitted]). As such, the accident report offers no admissible basis to create a triable issue of material fact as to causation of the accident. This Court also rejects moving defendants' VTL 1203 argument on the independent grounds that such

defendants' waived that argument by failing to move for summary judgment on that basis, and because the argument is based on surmise unsupported by the record and thus insufficient to create a triable issue of material fact.

As to whether the subject accident proximately caused Mr. Campolo to sustain a "serious injury" within the meaning of Insurance Law section 5102(d), moving defendants carried their prima facie burden on their dismissal motion to show that Mr. Campolo's 2016 knee injury and 2017 arthroscopy are the proximate causes of the injuries on which plaintiffs action proceeds. Accordingly, the burden shifted to plaintiffs to rebut that showing by competent medical evidence tending to show that Mr. Campolo's prior injury was not the proximate cause.

Plaintiffs carried that burden. Dr. Hochfelder's affidavit recited at length his expert opinion, based on his review of the relevant pre-accident and post-accident medical records and radiological reports, that Mr. Campolo hard-braking at the time of the incident proximately caused the fracture that necessitated his total knee replacement. This Court rejects moving defendants' effort to characterize Dr. Hochfelder's affidavit as conclusory. Contrary to their argument, Dr. Hochfelder's affidavit squarely addressed alternative theories of causation specifically in light of the 2016 injury and 2017 pre-accident arthroscopy, and he explicated in detail a medical theory of causation for the fracture reasonably supported by plaintiff's medical record. He also specifically related his opinion to Mr. Campolo's objective and subjective presentation before and immediately after the subject incident. As such, Dr. Hochfelder's affidavit is "specific and nonconclusory" as to causation, and thus sufficient for plaintiffs to survive dismissal (*cf. Wettstein*, 178 AD3d at 1122; *Inzalaco*, 115 AD3d at 807-808).

While moving defendants urge this Court to reject Dr. Hochfelder's opinion as irrational on grounds of Mr. Campolo's deposition testimony that his vehicle was stopped at the time of the incident, a reasonable jury could conclude that the collision could impel even a stopped driver to apply the brakes in an exigent manner that could over-extend the right knee. Especially given that a plaintiff is entitled to every reasonable favorable inference from the record upon a CPLR 3212 dismissal motion, moving defendants' dismissal motion therefore must be denied.

It does not follow, however, that plaintiffs' reciprocal motion for partial summary judgment therefore should be granted. To the contrary, defendants' expert proffered a different

medical opinion as to causation of Mr. Campolo's injuries that this Court also finds to be nonconclusory and eminently supportable from the record. Given the medical evidence, the synchronous timing of the prior knee surgery and the scope of the subject accident itself, a reasonable jury might well conclude that Mr. Campolo's pre-existing injury and degenerative changes to the knee were the sole proximate cause of Mr. Campolo's SONK condition that precipitated the total knee replacement, and that the subject accident had – and, in fact, could have – no substantial impact on Mr. Campolo's condition. This classic 'battle of the experts" precludes award of summary judgment as to liability on this record.

This Court has considered all other arguments raised by the parties but not explicitly addressed herein, and finds them to lack merit or to be moot in light of the foregoing. Accordingly it is hereby

ORDERED that moving defendants' dismissal motion (Sequence #1) is DENIED; and is further

ORDERED that plaintiffs' summary judgment motion (Sequence #2) is DENIED; and it is further

ORDERED that this action is dismissed as against non-appearing defendant DeCicco Family Markets, Inc., pursuant to CPLR 3215(c), and the caption is amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
----------X
JAMES CAMPOLO and JANET CAMPOLO,

Plaintiffs,

-against- Index No. 34059/2018

RYAN EBNER and DECICCO OF NEW CITY, INC.,

Defendants.
----------X

and it is further

ORDERED that within 10 days hereof, counsel for plaintiffs shall serve this Decision and Order, with Notice of Entry hereof, on all remaining parties via NYSCEF; and it is further

ORDERED that counsel for all remaining parties shall appear for a pre-trial conference on Monday, June 8, 2020, at 10:00 a.m., in Courtroom 1 of this Courthouse.

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
April 30, 2020

Robert M. Berliner
HON. ROBERT M. BERLINER, J.S.C.