Aguilera v Lasky-Kuehn
2020 NY Slip Op 34881(U)
November 16, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 604824/2018
Judge: Linda J. Kevins

SHORT FORM ORDER

INDEX No. 604824/2018
CAL. No. 201902369MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

Hon. LINDA J. KEVINS
Justice of the Supreme Court

MOTION DATE 6/25/20
ADJ. DATE 9/29/20
Mot. Seq. # 002 MD

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SEBASTIAN K. AGUILERA,

Plaintiff,

- against -

JENNIFER LASKY-KUEHN,

Defendant.

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DELL & DEAN, PLLC
Attorney for Plaintiff
1225 Franklin Avenue, Suite 450
Garden City, New York 11530

MCDONNELL & ADELS, ESQ.
Attorney for Defendant
401 Franklin Avenue, 2nd Floor
Garden city, New York 11530

Upon the following papers read on this e-filed motion for summary judgment : Notice of Motions/Order to Show Cause and supporting papers by defendant, dated May 12, 2020 ; Notice of Cross-Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff, dated July 30, 2020 ; Replying Affidavits and supporting papers by defendant, dated September 10, 2020 ; Other __; it is

ORDERED that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff when his vehicle collided with a vehicle owned and operated by defendant. The accident allegedly occurred on July 10, 2017, at approximately 3:07 p.m., at the intersection of Crystal Brook Hollow Road and Nesconset Highway, in Port Jefferson Station, New York. By his bill of particulars, plaintiff alleges that, as a result of the subject accident, he sustained various injuries and conditions including post-traumatic stress disorder manifested by anxiety, cognitive deficits, and sleep disturbance and sprains and strains in the cervical and lumbar regions. At the time of the accident, while defendant was traveling northbound on Crystal Brook Hollow Road, plaintiff, who had traveled southbound on Crystal Brook Hollow Road, was in the process of making a left-hand turn onto the eastbound Nesconset Highway. The subject intersection is controlled by a traffic light.

Defendant now moves for summary judgment dismissing the complaint on the ground that the accident was solely the result of plaintiff's failure to yield the right of way in violation of Vehicle and Traffic Law § 1141. In support, defendant submits, *inter alia*, the pleadings, her own affidavit, the

uncertified police accident report, and partial and incomplete excerpts of the deposition testimony of the parties. Initially, the Court notes that the uncertified police report submitted with the moving papers is not in admissible form and, therefore, is not considered in the determination of the motion (*see* ***Coleman v Maclas***, 61 AD3d 569, 877 NYS2d 297 [1st Dept 2009]; ***Cheul Soo Kang v Violante***, 60 AD3d 991, 877 NYS2d 354 [2d Dept 2009]).

In her affidavit, defendant avers that while she was traveling northbound on Crystal Brook Hollow Road, passing Nesconset Highway, at 10 to 15 miles per hour, her vehicle collided with plaintiff's vehicle, which turned left in front of her vehicle. She states that she applied her brakes just before the impact, but was unable to avoid the collision.

At her deposition, defendant testified that prior to the accident, she had been traveling northbound on Crystal Brook Hollow Road. When she stopped at the intersection with Nesconset Highway for several seconds, there were two more vehicles in front of her. She testified that when she was in the middle of the intersection, she first saw plaintiff's vehicle, which "came from nowhere." She did not know "which direction he was traveling prior to the accident."

At his deposition, plaintiff testified to the effect that he had been traveling southbound on Crystal Brook Hollow Road at 15 to 20 miles per hour. He testified that as he entered the intersection with Nesconset Highway to attempt to make a left turn, he looked forward and left and did not see any vehicle coming from the opposing lane. He testified that when he completed his turn, his vehicle collided with defendant's vehicle. As a result of the impact, his vehicle was pushed into another vehicle stopped in the left-turning lane of the westbound Nesconset Highway at the intersection. Plaintiff testified that he did not see defendant's vehicle prior to the impact.

A driver who has the right-of-way is entitled to anticipate that other drivers will obey traffic laws that require them to yield (*see* Vehicle and Traffic Law § 1141; ***Rodriguez v Klein***, 116 AD3d 939, 983 NYS2d 851 [2d Dept 2014]; ***Regans v Baratta***, 106 AD3d 893, 894, 965 NYS2d 171 [2d Dept 2013]). Moreover, a driver is negligent where he or she has failed to see that which through proper use of his or her senses he or she should have seen (*see* ***Rodriguez v Klein***, supra; ***Laino v Lucchese***, 35 AD3d 672, 827 NYS2d 249 [2d Dept 2006]). A driver traveling with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident (*see* ***Arias v Tiao***, 123 AD3d 857, 1 NYS3d 133 [2d Dept 2014]; ***Todd v Godek***, 71 AD3d 872, 895 NYS2d 861 [2d Dept 2010]). There can be more than one proximate cause of an accident (*see* ***Jones v Vialva-Duke***, 106 AD3d 1052, 966 NYS2d 187 [2d Dept 2013]; ***Cox v Nunez***, 23 AD3d 427, 805 NYS2d 604 [2d Dept 2005]).

Here, defendant has failed to sustain the initial burden of establishing prima facie entitlement to judgment as a matter of law. The deposition testimony of the parties conflict as to the happening of the accident (*see* ***Charlery v Allied Tr. Corp.***, 163 AD3d 914, 915, 81 NYS3d 523 [2d Dept 2018]; ***Pyke v Bachan***, 123 AD3d 994, 999 NYS2d 508 [2d Dept 2014]). Plaintiff testified that he did not see defendant's vehicle prior to the collision, and that the subject accident happened as he completed his left turn. Defendant testified that when she was in the middle of the intersection, she was hit by plaintiff's vehicle which came from nowhere. Under these circumstances, there are questions of fact as to how the

accident happened, including which vehicle entered the intersection first prior to the collision, the speed of defendant's vehicle, her attentiveness and care as she drove, and whether comparative negligence on defendant's part contributed to the subject accident (*see* ***Charlery v Allied Tr. Corp.***, *supra*; ***Ruthinoski v Brinkman***, 63 AD3d 900, 882 NYS2d 165 [2d Dept 2009]; ***Gonzalez v County of Suffolk***, 277 AD2d 350, 716 NYS2d 404 [2d Dept 2000]). Thus, the branch of defendant's motion for summary judgment dismissing the complaint on the issue of liability is denied.

Defendant also seeks summary judgment on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.,*** 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 N YS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]).

Here, defendant failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Cheour v Pete & Sals Harborview Transp., Inc.***, 76 AD3d 989, 907 NYS2d 517 [2d Dept 2010]; ***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). On September 25, 2019, approximately two years and two months after the subject accident, defendant's examining orthopedist, Dr. Matthew Skolnick, examined plaintiff and performed certain orthopedic and neurological tests, including the Spurling's test, the straight leg raising test, and the O'Brien's test. Dr. Skolnick found that all the test results were negative or normal, and that there was no spasm or tenderness in plaintiff's spine. Dr. Skolnick also performed range of motion testing on plaintiff's spine, shoulders, and ankles, using a goniometer to measure his joint movement. Although Dr. Skolnick found that plaintiff exhibited normal joint function in the spine and ankles, he found that plaintiff had significant range of motion restrictions in the shoulders: 90 degrees of abduction (normal 180 degrees), 25 degrees of adduction (normal 30 degrees), 90 degrees of forward flexion (normal 180 degrees), and 70 degrees of internal rotation (normal 80 degrees) (*see* ***Jean v New York City Tr. Auth.***, 85 AD3d 972, 925 NYS2d 657 [2d Dept 2011]; ***Reitz v Seagate Trucking, Inc.***, *supra*).

On October 16, 2019, defendant's examining neurologist, Dr. Mathew Chacko, examined plaintiff and performed certain orthopedic and neurological tests, including the straight leg raising test and the Romberg sign. Dr. Chacko found that all the test results were negative or normal, except for the positive straight leg raising test for the right leg. Dr. Chacko also performed range of motion testing on plaintiff's cervical and lumbar regions, using a goniometer to measure his joint movement. Dr. Chacko found that plaintiff had significant range of motion restrictions in his cervical region: 40 degrees of flexion (normal 50 degrees), 50 degrees of extension (normal 60 degrees), 60 degrees of rotation (normal 80 degrees), and 30 degrees of lateral flexion (normal 45 degrees). He also found that plaintiff had significant range of motion restrictions in his lumbar region: 40 degrees of flexion (normal 60 degrees), 15 degrees of lateral flexion (normal 25 degrees), and 15 degrees of extension (normal 25

degrees). It is also noted that although Dr. Chacko indicated that the range-of-motion limitations in plaintiff's cervical and lumbar regions were self-imposed, he failed to explain or to substantiate, with objective medical evidence, the basis for that conclusion (*see* ***Mercado v Mendoza***, 133 AD3d 833, 834, 19 NYS3d 757 [2d Dept 2015]; ***Uvaydov v Peart***, 99 AD3d 891, 951 NYS2d 912 [2d Dept 2012]; ***Iannello v Vazquez***, 78 AD3d 1121, 911 NYS2d 654 [2d Dept 2010]). While Dr. Chacko found that plaintiff had significant restriction in his cervical and lumbar regions, Dr. Skolnick found that plaintiff exhibited normal joint function in those regions. The conflicting medical opinions of the experts raise issues of credibility to be resolved by a jury (*see* ***Romano v Persky***, 117 AD3d 814, 985 NYS2d 633 [2d Dept 2014]; ***Kalpakis v County of Nassau***, 289 AD2d 453, 735 NYS2d 427 [2d Dept 2001]). In view of the foregoing, the reports of Dr. Skolnick and Dr. Chacko are insufficient to establish a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

Inasmuch as defendant failed to meet her prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiff in opposition to the motion were sufficient to raise a triable issue of fact (*see* ***McMillian v Naparano***, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]). Accordingly, the branch of defendant's motion for summary judgment dismissing the complaint on the issue of serious injury is denied.

Dated: 11/16/2020

LINDA KEVINS, JSC

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION