Tiso v Brown
2020 NY Slip Op 35100(U)
January 30, 2020
Supreme Court, Westchester County
Docket Number: Index No. 69634/2016
Judge: William J. Giacomo
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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 WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

MARCO A. TISO,

Plaintiff,

– against –

LISA B. BROWN and JEFFREY H. BROWN,
Defendants.

Index No. 69634/2016

Sequence No. 1 & 2

DECISION & ORDER

In an action to recover damages for personal injuries (1) the defendants move for summary judgment dismissing the complaint, pursuant to CPLR 3212, on the issue of liability and on the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d); and (2) the plaintiff moves for partial summary judgment on the issue of liability:

Papers Considered

1. Notice of Motion/Affirmation of William A. Fitzgerald, Esq./Affidavit of Lisa B. Brown/Exhibits 1-12;
2. Notice of Motion/Affirmation of Robert W. Folchetti, Esq./Affidavit of Marco A. Tiso/Exhibits A-F;
3. Affirmation of Robert W. Folchetti, Esq. in Opposition/Exhibit A-C;
4. Affirmation of William A. Fitzgerald, Esq. in Opposition;
5. Reply Affirmation of William A. Fitzgerald, Esq.
6. Reply Affirmation of Robert W. Folchetti, Esq.[1]

Factual and Procedural Background

Plaintiff commenced this action to recover damages for personal injuries as a result of a motor vehicle accident that occurred on February 3, 2014, on Croton Point Avenue in Croton-On-Hudson, New York.

Defendant Lisa Brown attests that she was operating her father-in-law's 1997 Toyota Camry at approximately 9:15 a.m. at the time of the accident. The ground was covered with snow. There was sleet or freezing rain falling. Defendant traveled on Route 9 and the surface was slick. She exited southbound 9 at Croton Point Avenue and her

[1] The sur-reply affirmation of Robert W. Folchetti, Esq. has not been considered by this Court as counsel failed to seek permission for leave to file a sur-reply pursuant to the Court's part rules.

intention was to park in the Metronorth lot. The exit ramp has a downward slope. As she traveled down at a speed of 10 to 15 mph, she began to lose traction. Although she applied her brakes the vehicle continued to skid down the ramp approaching a stop sign at the intersection with Croton Point Avenue. She observed plaintiff's truck traveling west on Croton Point Avenue. Defendant attempted to turn her wheel to the right, however, her vehicle continued to slide forward and entered the intersection causing a collision. At the time of the accident, Lisa Brown states that her vehicle was moving at 10 to 15 mph.

Plaintiff attests that he was operating a 2012 Ford F250 Super Duty truck west on Croton Point Avenue at the time of the accident. He was not facing any traffic signal or sign at the intersection with the south 9 exit ramp. He observed the defendant's vehicle moving at a high rate of speed down the ramp. His truck was traveling about 12 to 15 mph. Although he attempted to steer away from defendant's vehicle, there was insufficient time before defendant's vehicle entered the intersection and the accident occurred.

Liability

Defendants move for summary judgment dismissing the complaint on the issue of liability. Defendants argue that Brown was faced with an emergency situation when her vehicle failed to stop at the stop sign due to the snow and icy condition of the road.

Plaintiff moves for partial summary judgment on the issues of liability arguing that the defendant was negligent and that plaintiff neither caused nor contributed to the accident.

Serious Injury

Defendants also move for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5101(d).

Defendants submit an orthopedic expert IME report of Ronald L. Mann, M.D. Dr. Mann's report provides a history of the 57 year old plaintiff who developed radiculopathy after the accident. He initially had an epidural injection and conservative care which failed. Plaintiff returned to work for the MTA after the accident and has since retired.

Plaintiff's prior medical history reveals a motor vehicle accident in 1988 or 1989 from which he experienced cervical spine symptoms that resolved. He had mild neck pain starting in July 2013 (prior to this accident) for which he went to a chiropractor for a month and did maintenance therapy afterwards.

After this accident, on September 15, 2014, plaintiff underwent anterior cervical discectomy and fusion. At the time of the IME examination, plaintiff complained of experiencing neck pain if he was driving too long. He indicated that his arm pain and radicular pain had resolved. Examination of the cervical spine revealed anterior scar consistent with the surgery. Plaintiff was able to forward flex 20 degrees and extend 10

degrees, with normal being 45 degrees. Rotation for right and left was 45 degrees, with normal being 80 degrees.

Dr. Mann determined that plaintiff had a pre-existing degenerative disease of his cervical spine which was aggravated after this accident. No further treatment was necessary and the plaintiff has no disability related to this accident and no permanency related to the cervical spine.

In opposition, plaintiff argues that defendants failed to demonstrate a prima face case of entitlement to summary judgment. In any event, plaintiff argues that issues of fact exist.

Plaintiff submits an orthopedic expert report of James DePuy, M.D. who examined the plaintiff on October 17, 2019. Examination of the cervical spine by Dr. DePuy revealed passive ranges of motion to the right and left of about 50 degrees, with normal being 80; flexion of 45 degrees, with normal being 45; extension of 45 degrees with normal being 45; and bilateral side turn of 25 to 30 degrees, with normal being 45. X-rays taken at the examination show the C4-5 fusion with four-hole plate in a good position. According to Dr. DePuy, plaintiff is at maximum medical improvement. He has a disability to his neck related to his disk pathology as related to the accident cervical spine surgery and residual pain and limitation of motion.

Dr. DePuy opines, with a reasonable degree of medical certainty, that the C4-5 herniated disc which was demonstrated on the March 31, 2014 MRI was caused by the accident in question. Although plaintiff had prior neck pain, that pain was non-radicular as documented by the chiropractic records. Dr. DePuy notes that the pre-accident X-ray of July 20, 2013, was completely negative for any pathology at C4-5. Plaintiff's radicular complaints commenced after the accident in question and were confirmed by a positive MRI documenting the C4-5 herniation, and were alleviated by the C4-5 laminectomy, fusion, and instrumentation performed on September 15, 2014.

Dr. DePuy opines that in addition to the herniation which was caused by the accident, the mild pre-existing cervical strain and degenerative condition was aggravated by the accident. Dr. DePuy opines that plaintiff sustained the injuries due to the accident and that the injuries were significant and resulted in losses of use and significant limitations of use of his cervical spine. The limitations were significant or consequential in that they were moderate in degree and continued through his examination. The moderate limited ranges of motion had practical effects in that they limited the use of all of his neck movement functions and his ability to use his neck for any sustained exertion. In addition, due to the surgical fusion and instrumentation of C4-5, the motion function at the C4-5 intervertebral joint has been completely lost.

According to Dr. DePuy, given the limitations and total loss of use without resolution, plaintiff's cervical spine injuries are permanent. He will always have symptoms upon exertion and upon being in the same position for too long. He will always have

functional limitation of his neck motion and complete loss of use of the motion between the C4-C5 vertebrae.

Discussion

The proponent of a motion for summary judgment 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 (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a prima facie showing of entitlement to summary judgment (*see Zuckerman v New York*, 49 NY2d at 562).

I. Liability

Plaintiff argues that defendant Lisa Brown violated Vehicle and Traffic Law 1142(a) as a matter of law by failing to stop her vehicle at a stop sign.

Defendants argue that Lisa Brown was faced with an emergency situation and therefore, is not liable as a matter of law.

Plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating that defendant failed to stop her vehicle at the stop sign and failed to yield the right of way to plaintiff and that such actions were a proximate cause of the accident (*see Ashby v Estate of Encarnacion*, ___ AD3d ___, 111 NYS3d 894 [2d Dept December 11, 2019]).

Defendants failed to demonstrate entitlement to summary judgment on the issue of liability and failed to raise a triable issue of fact that Lisa Brown was confronted with an emergency situation. Since Lisa Brown admitted in her affidavit that the ground was covered with snow and she was aware of the wet and snowy road conditions, the emergency doctrine is not applicable (*see Caristo v Sanzone*, 96 NY2d 172 [2001] [holding that, as a matter of law, there was no qualifying event which justified issuance of the emergency instruction. Given defendant's admitted knowledge of the worsening weather conditions, there was no reasonable view of the evidence that would lead to the conclusion that the ice and slippery road conditions were sudden and unforeseen]; *Mughal v Rajput*, 106 AD3d 886 [2d Dept 2013]).

However, "[e]vidence of skidding out of control is only prima facie evidence of negligence on the part of the driver, it does not mandate a finding of negligence. Such

evidence, together with the explanation given by the driver, presents factual questions for determination by the jury" (*King v Car Rentals, Inc.*, 29 AD3d 205, 219 [2d Dept 2006] *quoting Copeman v Moran*, 236 AD2d 507, 508 [2d Dept 1997]). Here, Lisa Brown testified that she traveled down the exit ramp at a speed of 10 to 15 mph when she began to lose traction. Although she applied her brakes, she continued to skid down the ramp as she approached the intersection. She attempted to turn her wheel to the right to avoid entering the intersection, however, her vehicle continued to slide forward and collided with plaintiff's truck. Thus, the Court finds that in opposition to plaintiff's prima facie showing, defendants raised an issue of fact as to whether the skid was unavoidable.

II. Serious Injury

On a motion for summary judgment in a personal injury action arising from a motor vehicle accident, the defendants are required to establish that the 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 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Licari v Elliott*, 57 NY2d 230 [1982]).

Defendants have failed to meet their prima facie burden of demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 955-956 [1992]). The evidence demonstrates that defendants' experts found limitations in the range of motion in the cervical spine (*see Mercado v Mendoza*, 133 AD3d 833 [2d Dep't 2015]). Defendants' expert failed to adequately explain that the restrictions in the range of motion were objectively resolved (*see India v O'Connor*, 97 AD3d 796 [2d Dep't 2012] *c.f. Gonzales v Fiallo*, 47 AD3d 760 [2d Dept. 2008]).

Since defendants failed to meet their prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (*see Mercado v Mendoza*, 133 AD3d 833; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dep't 2011]). In any event, plaintiff's expert raised a triable issue of fact as to whether she sustained a serious injury.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment dismissing the complaint, pursuant to CPLR 3212, on the issue of liability and on the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) is DENIED (motion sequence #1); and it is further

ORDERED that the plaintiff's motion for partial summary judgment on the issue of liability is DENIED (motion sequence #2).

The parties are directed to appear in the Settlement Conference Part, room 1600, on **March 17, 2020, at 9:15 a.m.** for further proceedings.

Dated: White Plains, New York
January 30, 2020

HON. WILLIAM J. GIACOMO, J.S.C.

H: ALPHABETICAL MASTER LIST – WESTCHESTER/Tiso v. Brown