

Brabenec v Rokitko
2020 NY Slip Op 35148(U)
July 27, 2020
Supreme Court, Orange County
Docket Number: Index No. EF002288-2019
Judge: Sandra B. Sciortino
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To commence the statutory time 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 ORANGE

-----X

EMILIE BRABENEC,
Plaintiff,

-against-

HELEN ROKITKO and ANDREW ROKITKO,
Defendants.

-----X

SCIORTINO, J.

DECISION AND ORDER
INDEX NO.: EF002288-2019
Motion Date: 7/10/2020
Sequence No. 1

The following papers numbered 1 to 11 were considered in connection with the application of plaintiff for summary judgment on the issues of liability and “serious injury”:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation (Owen)/Affidavit of Plaintiff/ Exhibits 1-6	1 - 9
Affirmation in Opposition (Chao)	10
Reply Affirmation (Owen)	11

Background and Procedural History

This personal injury action arises out of an accident alleged to have taken place on December 15, 2018 on Hillside Road in the Town of Wawayanda, New York, near the driveway of 11 Hillside Road. Plaintiff commenced this action by the electronic filing of a Summons and Complaint (Exhibit 1) on March 26, 2019. In the Complaint, the plaintiff alleges that, on December 15, 2018, defendant Helen Rokitko (defendant) was operating a 2017 Jeep owned by defendant Andrew Rokitko, when it came into contact with plaintiff, a pedestrian, causing serious injuries. Defendants filed a Verified Answer with Affirmative Defenses on April 5, 2019, together with a Demand of a Verified Bill of

Particulars. Plaintiff's Verified Bill of Particulars (Exhibit 3) was dated June 5, 2019.

Party Depositions

Plaintiff

Emilie Brabenec was deposed on October 29, 2019. (Exhibit 4) On December 15, 2018, she was walking her dog on Hillside Road. (26-27) She was walking slowly down the road when the dog stopped. (30, 32) She stopped approximately 15 to 20 feet down the street from the driveway of 11 Hillside Avenue, which was on her right. She was standing about a foot away from the grassy area opposite the house at that address. (30) The accident took place between 12:00 noon and 12:30. (28)

Plaintiff noticed the vehicle in the driveway of 11 Hillside while she was walking toward the driveway. She believed the car was unoccupied. (29) She never saw anyone get into the car and did not hear the engine start. (31) She was walking at an angle toward the driveway, her back to the street, watching the dog. (35) The vehicle struck her left hip with a heavy impact. She felt pain right away and fell to the ground from the force of the vehicle. (38) She was pushed to the right, toward the grass, and fell on her left side striking the ground with her left hip and left hand. (40)

When plaintiff first saw the vehicle after her fall, it was still backing up toward her. The driver then stopped, came out and asked if she were okay. The driver told the plaintiff that she had been talking to her client. She was still on the road at the time. (42-43) Plaintiff tried to get up but was in too much pain. (44) Defendant drove her home and helped her into the house. (45) While in plaintiff's house, plaintiff asked for defendant's license information and phone number and told her "you hit me with your car." Defendant told her, "I thought you fell." (45)

Later that day, plaintiff's son took her to Urgent Care, and, from there, to the Emergency Room at Orange Regional Medical Center. After x-rays and a CT scan, she was told she had a

fracture of the pelvis. (52-54) She was discharged home and remained there until December 31, 2018, when she went to see Dr. Gitlin, an orthopedist. The doctor did further x-rays and told her she had two fractures in the left hip. (56-57) Plaintiff, a part-time police dispatcher for two municipal police departments, remained out of work until March 15, 2019. (17)

Defendant

Defendant Helen Rokitko was deposed on January 15, 2020. (Exhibit 5) When asked if she had been involved in an accident on December 15, 2018, she answered, "Apparently, yes." (12) That day, defendant was performing her job as an assistant manager for Sullivan ARC of Orange County Developmental Disability at a group residence at 11 Hillside Road in Slate Hill. (8) She arrived at work at 8:00 a.m. (13) Her car was parked on the right side of the residence driveway. At around noon, she helped Ellen Kaeser, a resident, into the vehicle so that she could take Ellen to lunch and shopping. (16) When both were in the vehicle, defendant made sure Ellen was comfortable and that her seat belt was on. They were talking as defendant put the car in reverse and backed out of the driveway. (18) The defendant looked in the rearview mirror (24) and came straight out of the driveway, her wheel turned to the left. She put the car in drive and started down the road. (21) Immediately before putting the car in drive, she was talking to and looking at Ellen. (24-25) Although her car had a backup camera (15), she did not see anything until she was a car's length away from where she had backed out. (19, 23) She stopped quickly upon seeing plaintiff sitting on the road. (19)

Defendant left her vehicle and went to plaintiff who was sitting in the middle of the road, holding her dog's leash. (26) Defendant asked plaintiff if she was okay. Plaintiff said that she was looking at her dog. She never said that she fell. (27) Defendant took Ellen back in the house and

took out an ARC minivan to drive the plaintiff to her home. (28) Plaintiff got into the minivan herself and seemed okay. (30) When defendant asked her again if she were okay, plaintiff said that her hip hurt. (30)

At plaintiff's home, plaintiff asked for defendant's name and phone number. When defendant asked why, plaintiff told her, "You hit me." Defendant said she was sorry, but she was not aware that she had hit her. (32)

Later that evening, plaintiff called defendant to tell her she had a hairline fracture. (32) After that, defendant called the Greenville trooper barracks and was told that they had already spoken to the plaintiff. (34-35) A trooper called one evening to ask the defendant questions. When he asked if she had hit plaintiff, she told him she had not. (37-38)

Motion for Summary Judgment

By Notice of Motion electronically filed on June 22, 2020, plaintiff seeks summary judgment on the issues liability and "serious injury." In support of her motion, plaintiff submits her own affidavit, essentially mirroring her deposition testimony. She was a pedestrian on Hillside Road, on the opposite side of the street from the driveway at 11 Hillside, when defendant, suddenly and without warning, backed out of the driveway and struck her. Plaintiff argues that defendant's conduct in backing up into her, a pedestrian, violates Vehicle and Traffic Law §1121 and §1146(a) and creates a rebuttable presumption of defendant's negligence. Defendant testified that she only checked her rearview mirror when she got into the car and admitted to having turned her head to the right to look at her passenger as she was backing out. Under the circumstances, there can be no argument that defendant failed to exercise due care while backing up and is liable as a matter of law for causing the accident.

Further, plaintiff argues that she has demonstrated entitlement to judgment as a matter of law under Insurance Law §5102(d), the “serious injury threshold.” Appended to plaintiff’s motion is the report of Robert C. Hendler, MD (Exhibit 6), defendant’s expert orthopedist. It is asserted that Dr. Hendler confirmed that plaintiff sustained fractures of the left superior and inferior pubic rami. Such fractures qualify as serious injuries under the Insurance Law. That finding entitles plaintiff to recover for all of her injuries.

Opposition

Defendants argue that there are questions of fact whether defendant ever struck plaintiff and how the incident occurred. Not only did defendant testify that she did not hit plaintiff with her car (Exhibit 5 at 38), there are inconsistencies in plaintiff’s testimony that create questions of fact. When defendant first asked plaintiff if she fell, plaintiff replied that she was looking at her dog. (Exhibit 5 at 27). In plaintiff’s home, defendant told the plaintiff that she had no awareness or indication that she had struck plaintiff. (Exhibit 5 at 31) The defendant told the police that she did not strike plaintiff. (Exhibit 5 at 38) Further, there are questions about where plaintiff claims to have been hit given the testimony of both parties that plaintiff wound up in the road. The plaintiff asserted she was a foot away from the edge of the road and defendant testified that she saw plaintiff sitting in the middle of the road. Even if there were not questions of fact, there has been no showing that plaintiff exercised due care in failing to see what there was to be seen and to use reasonable care for her own safety.

Finally, defendants argue that Dr. Hendler’s finding of a fracture was qualified by a preceding statement, “If the history recited by [plaintiff] is correct... .” The doctor’s statement was solely contingent on plaintiff’s veracity.

Reply

Plaintiff replies that defendant never denied striking plaintiff with her vehicle. Rather, her testimony was to a conversation she had with the police. She never swore to the truth of that response. Defendant could have submitted an affidavit in which she denied contact between her vehicle and plaintiff but she did not. Her claim of “lack of awareness” or “indication” of striking the plaintiff is not tantamount to a denial. There is no testimony contradicting plaintiff’s claim that defendant backed out of the driveway onto the street and struck her, a pedestrian.

With respect to Dr. Hendler’s finding, plaintiff replies that Dr. Hendler’s affirmation is not based solely on the contingency of plaintiff’s history but also on his review of the submitted medical records, including films. On all of those bases, Dr. Hendler found that plaintiff had sustained a fracture of the left superior and inferior pubic rami.

The Court has fully considered the submissions of the parties.

Discussion

Summary judgment is a drastic remedy and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact. (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]) The function of the court on such a motion is issue finding, and not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) The court is not to engage in the weighing of evidence; rather, the Court’s function is to determine whether “by no rational process could the trier of facts find for the non-moving party.” (*Jastrzebski v. N. Shore Sch. Dist.*, 232 AD2d 677, 678 [2d Dept 1996])

A plaintiff moving for summary judgment on the issue of liability in a negligence action must establish, *prima facie*, that the defendant breached a duty owed to plaintiff and that defendant’s

negligence was the proximate cause of the alleged injuries. (*Sanders v. Sangemino*, ___ AD3d ___ [2d Dept 2020], 2020 WL 3551668 [July 1, 2020]; quoting, *Tsyganash v. Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033, 1033-34 [2d Dept 2018])

Contrary to defendant's argument, plaintiff's comparative negligence, if any, is not a defense. (*Rodriguez v. City of New York*, 31 NY 3d 312 [2018]) However, in the matter at bar, plaintiff has failed to establish entitlement to judgment as a matter of law on the issue of liability.

The parties' deposition testimony presents conflicting evidence as to how the accident occurred. In determining a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. (*Sanders*, citing *Stukas v. Streiter*, 83 AD3d 18, 22 [2d Dept 2011]) While plaintiff attempts to distinguish a denial by defendant from a statement she gave to the police, the distinction makes no difference here. "A motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility.'" (*Id.*, quoting *Ruiz v. Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010])

The litigating parties have proffered different versions of events. The plaintiff claims she was hit by the defendant; the defendant said she did not think she had hit her. The credibility and the weight to assign their testimony and evidence is a proper matter for a jury to decide. The conflicting statements as to the happening of the accident create a triable issue of fact as to whether defendant's conduct caused or contributed to the accident (*Omrami v Socrates* 227 AD2d 459 [2d Dept 1996]).

It is not only defendant's statements that she did not believe she hit the plaintiff which are at issue. As defendants point out, there are other questions of fact, including plaintiff's position on the street at the time of the alleged incident. Also, the plaintiff testified that she was hit on her left

side, pushed to the right and landed on her left side. The defendants contend that such movement could not have occurred. Such issues must be determined by a jury. (*See, Calico v. Phillips*, 63 AD2d 955 [2d Dept 1978])

For those reasons, summary judgment on the issue of liability is denied.

Plaintiff's motion for summary judgment on the issue of serious injury is conditionally granted upon a finding of liability against the plaintiff. Plaintiff claims, and Dr. Hendler "essentially concur[s]" that plaintiff sustained a fracture of the left superior pubic ramus. Section 5102(d) of the Insurance Law defines serious injury as a personal injury which results in, *inter alia*, a fracture. "The issue of serious injury threshold is an entirely different inquiry from the issue of liability, and thus, must be determined separately." (*Elie v. City of New York*, 33 Misc. 3d 958, 961 [Queens Co. 2011]) Subject to plaintiff's establishment of defendant's liability for the accident, plaintiff has met her burden to establish serious injury under the no-fault law. (*See, e.g., Joyce v. Lacerra*, 41 AD3d 236 [1st Dept 2007])


A virtual settlement conference shall be held on September 2, 2020 at 3:30. A link will be provided in advance of the conference date.

Plaintiff shall file a Note of Issue prior to the next conference.

This decision shall constitute the order of the Court.

Dated: July 27, 2020
Goshen, New York

ENTER:


HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*