

Baptiste v Jackson

2020 NY Slip Op 35602(U)

November 30, 2020

Supreme Court, Queens County

Docket Number: Index No. 705377/19

Judge: Robert I. Caloras

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Short Form Order

**NEW YORK SUPREME COURT - QUEENS COUNTY
PRESENT: HON. ROBERT I. CALORAS PART 36
Justice**

FILED

**2/1/2021
10:23 AM**

-----X
**BRENTON BAPTISTE,
Plaintiff,
-against-
TAMEKA S. JACKSON,**

**Index No. 705377/19
Seq. No. 1**

**COUNTY CLERK
QUEENS COUNTY**

Defendant.

-----X
The following papers numbered E13-E30 read on this motion by Plaintiff for an order granting the following: summary judgment on the issue of liability; summary judgment on the issue of “serious injury”; and striking Defendant’s first and second affirmative defenses.

Notice of Motion-Affirmation-Exhibits.....
Affirmation in Opposition-Exhibits.....
Reply Affirmation-Exhibits.....

**PAPERS
NUMBERED
E13-E26
E27-E29
E30**

Upon the foregoing papers, it is ordered that Plaintiff’s motion is determined as follows:

In the Complaint, Plaintiff alleges on December 1, 2016 Defendant’s vehicle struck his vehicle on Mexico Street at or near its intersection with Dormans Road in Queens County.

In the first branch of the motion, Plaintiff moves for summary judgment against Defendant on the issue of liability. Plaintiff has submitted, among other things, the following: the police report; Bill of Particulars; Plaintiff’s deposition transcript; and Defendant’s deposition transcript. Plaintiff claims the police report contains statements from Defendant wherein she acknowledged making a left turn into the path of an oncoming vehicle and failed to see his vehicle.

Plaintiff’s deposition testimony was he had been wearing his seat belt prior to the accident and was traveling on Mexico Street at a speed of about 25 to 30 miles per hour. As he entered the intersection with Dormans Road and was continuing straight, Defendant’s vehicle, traveling on Mexico Street in the opposition direction, made a left turn in front of his vehicle. Plaintiff immediately slammed down on his brakes; however, he was unable to prevent his vehicle from striking Defendant’s vehicle on its rear passenger side. Plaintiff noted that there is no traffic control device on Mexico Street and that only seconds passed from the time he first saw her vehicle and the accident occurred. He also testified the first time he saw Defendant’s vehicle was when she made a left turn in front of him,

At her deposition, Defendant testified that prior to the accident she was traveling on Mexico Street. Before entering the intersection with Dormans Road to make a left turn, she did not see any oncoming vehicles. She had started to make her turn prior to the accident. The first time she saw Plaintiff’s vehicle was when the accident occurred. She claims she finished making a left turn when Plaintiff’s vehicle struck the rear quarter panel of the passenger side of her vehicle.

Based upon the foregoing, Plaintiff argues he is entitled to summary judgment against Defendant on the issue of liability.

In opposition, Defendant argues numerous issues of fact exist which preclude granting Plaintiff summary judgment on the issue of liability. Defendant claims Plaintiff violated VTL 1180, which provides the New York City speed limit is 25 miles per hour. As such, Defendant argues

issues of fact exist as to whether the accident was caused by Plaintiff speeding prior to and at the time of the accident, and his failure to enter the intersection at a reduced speed. Defendant also claims her vehicle entered the intersection first and she had completed making a left turn when Plaintiff's vehicle failed to yield the right of way and struck her vehicle in violation of VTL 1140(a). Consequently, Defendant argues an issue of fact exists as to whether Plaintiff's failure to yield the right of way to her vehicle caused the accident.

In reply, Plaintiff argues, among other things, there is no evidence speed played a role in this accident, and that Defendant failed to submit any evidence showing speed was a proximate cause of this accident.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Pursuant to Vehicle and Traffic Law 1140(a) provides “[t]he driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway”. Pursuant to Vehicle and Traffic Law 1141, the operator of a vehicle intending to turn left within an intersection must yield the right-of-way to any oncoming vehicle which is within the intersection or so close to it as to constitute an immediate hazard (*see Attl v Spetler*, 137 AD3d 1176 [2d Dept. 2016]; *Ducie v Ippolito*, 95 AD3d 1067, 1067-1068 [2d Dept. 2012]; *Ahern v Lanaia*, 85 AD3d 696 [2d Dept. 2011]). A violation of this statute constitutes negligence per se (*see Katikireddy v Espinal*, 137 AD3d 866, 867 [2d Dept. 2016]; *Vainer v DiSalvo*, 79 AD3d 1023, 1024 [2d Dept. 2010]). The operator of an oncoming vehicle with the right-of-way is entitled to assume that the opposing operator will yield in compliance with the Vehicle and Traffic Law (*see Attl v Spetler*, *supra* at 1176; *Arias v Tiao*, 123 AD3d 857, 858 [2d Dept. 2014]).

Initially, the Court notes Plaintiff submitted an uncertified police report in support of the instant motion. The Appellate Division, Second Department, recently held in *Yassin v Blackman*, 188 AD3d 62 (2d Dept. 2020) that “a party's admission contained within a police accident report may not be bootstrapped into evidence if a proper foundation for the admissibility of the report itself has not been laid”. Consequently, the uncertified police report Plaintiff has submitted is not admissible.

The Court finds Plaintiff has failed to demonstrate his prima facie entitlement to summary judgment. The parties' deposition transcripts contain conflicting testimony regarding whether Plaintiff or Defendant entered the intersection first (*Elusma v Jackson*, 186 AD3d 1326 [2d Dept. 2020]), thereby creating issues of fact as to who had the right of way. Accordingly, the branch of the motion seeking summary judgment on the issue of liability is denied.

The branch of the motion seeking to dismiss Defendant's second affirmative defense alleging he failed to use or misused his seat belt is granted, without opposition.

The branch of the motion seeking an order striking Defendant's first affirmative defense alleging comparative fault is denied. The Court finds Defendant's claims Plaintiff is negligent per se for violating VTL 1180 is without merit. VTL 1180(a) does not state that the speed limit in New York City is 25 miles per hour. Rather the speed limit in New York City is set forth in 34 RCNY(a) which provides “No person shall drive a vehicle at a speed greater than twenty-five miles per hour

except where official signs indicate a different maximum speed limit". In any event, a violation of a regulation or ordinance is only some evidence of negligence (PJI 2-29). Consequently, Plaintiff's testimony regarding the speed he was traveling at prior to the accident creates an issue of fact as to whether he contributed to happening the accident.

In the last branch of the motion, Plaintiff seeks an order granting him summary judgment on the issue of whether he sustained a serious injury within the meaning of Insurance Law 5102. At his deposition, Plaintiff testified, after the accident he had pain in his right abdomen and right shoulder. He went to LIJ Hospital. Thereafter, he commenced therapy at a facility known as Fiss. He went five days a week for nine months for treatment. He initially received treatment for his left shoulder. Five months after the accident, Plaintiff began receiving treatment for his right shoulder. Plaintiff also went for an MRI test. He stopped going for treatment when his benefits were exhausted. Although his orthopedic surgeon recommended surgery for his shoulder, he has not undergone surgery.

Plaintiff has also submitted the medical report issued by Dr. Steven A. Renzoni, an orthopedic surgeon. At the request of Defendant, Dr. Renzoni examined Plaintiff on December 3, 2019. During his exam, Dr. Renzoni used a goniometer to measure range of motion. His exam of Plaintiff's right shoulder showed forward flexion at 135 degrees (180 degrees normal), abduction at 135 degrees (180 degrees normal), and rotation at 65 degrees (80 degrees normal). Also, Hawkins-Kennedy, Neers, Jobe's, and Painful Arc tests of Plaintiff's right shoulder were positive. Based upon his exam of the Plaintiff, Dr. Renzoni opined the sprains/strains to Plaintiff's cervical spine, lumbar spine, thoracic spine, and left shoulder have resolved, and there is no disability to these body parts. Dr. Renzoni did not find the sprains/strains to Plaintiff's right shoulder were resolved. He was unable to determine the level of objective disability for Plaintiff's right shoulder without diagnostic studies after the accident. He also was unable to determine the level of permanency for Plaintiff's right shoulder without diagnostic studies done after the accident.

Based upon the foregoing, Plaintiff argues as a result of this accident he sustained a serious injury under the categories of significant limitation and permanent consequential limitation. As such, Plaintiff argues he is entitled to summary judgment on his claims of a serious injury pursuant to Insurance Law 5102(d).

In opposition, Defendant argues Plaintiff has failed to submit competent medical evidence demonstrating his alleged injuries are serious and causally related to the accident. Defendant argues Dr. Renzoni's medical report is insufficient to satisfy Plaintiff's burden of proof, and merely shows Plaintiff sustained a sprain/strain to his right shoulder which is insufficient to qualify as a serious injury. Defendant has also submitted a report from Dr. Steven M. Peyser, a radiologist. At Defendant's request Dr. Peyser, reviewed the MRI of film taken of Plaintiff's right shoulder by SouthWest Medical Imaging on January 26, 2017. Dr. Peyser opined the MRI showed mild hypertrophic change of the acromioclavicular joint. Dr. Peyser concluded this is most consistent with pre-existing degenerative joint disease, and no post traumatic etiologies related to the accident can be determined.

A Plaintiff moving for summary judgment on the issue of serious injury on the basis that Plaintiff's injuries meet the serious injury threshold requirement of Insurance Law 5102 (d) bears the initial burden of proving that he or she sustained an injury pursuant to Section 5102 (d) of the

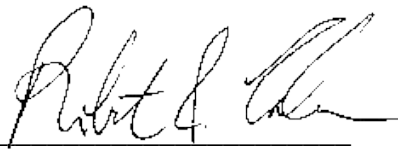
Insurance Law and that the injury was causally to the subject accident (see Damas v Valdes, 84 AD3d 87 [2d Dept 2011]; Elshaarawy v U-Haul Co. of Miss., 72 AD3d 878 [2d Dept 2010]), and must tender evidence sufficient to eliminate all material issues of fact (see generally Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once the Plaintiff meets this burden, the burden then shifts to the Defendant to demonstrate that there are material issues of fact, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (see Zuckerman v City of New York, 49 NY2d 557 1980]).

Here, the Court finds Plaintiff has failed to meet his prima facie burden of proof demonstrating he sustained a significant limitation and/or a permanent consequential limitation injury as a result of the subject accident. The only medical evidence Plaintiff submitted was Dr. Renzoni's report, wherein he found Plaintiff had sprains and strains to his right shoulder. It is well settled that "[s]prains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d)" (Rabolt v Park, 50 AD3d 995 [2d Dept. 2008]). Moreover, a permanent consequential limitation requires proof of permanency (Vasquez v Almanzar, 107 AD3d 538 [1st Dept. 2013]). Here, Dr. Renzoni was unable to address the level of permanency in Plaintiff's right shoulder. Furthermore, Plaintiff failed to submit competent medical evidence that was contemporaneous to the accident demonstrating significant limitations to any of the body parts he claimed were injured (Menakar v White Exp. Cab Corp., 68 AD3d 1069 [2d Dept. 2009]).

Since Plaintiff failed to establish a prima facie case, it is unnecessary to consider Defendant's opposition (see Smith v Rodriguez, 69 AD3d 605 [2d Dept. 2010]; Washington v Asdotel Enters., Inc., 66 AD3d 880 [2d Dept. 2009]). Accordingly, the branch of the motion seeking summary judgment on the issue of whether Plaintiff sustained a serious injury is denied.

Based upon the foregoing, the motion is denied in part and granted in part.

Dated: November 30, 2020



ROBERT I. CALORAS, J.S.C.

FILED

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QUEENS COUNTY