

Cheeks v Echeverria
2021 NY Slip Op 30766(U)
March 1, 2021
Supreme Court, Kings County
Docket Number: 515931/2017
Judge: Lara J. Genovesi
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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 1st day of March 2021.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

-----X
TAHIRAH SH-SHONNA CHEEKS,

Index No.: 515931/2017

Plaintiff,

DECISION & ORDER

-against-

EDWIN ECHEVERRIA

Defendant.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>NYSCEF Doc. No.:</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	<u>29, 30; 39, 40</u>
Opposing Affidavits (Affirmations) _____	<u>50; 57</u>
Reply Affidavits (Affirmations) _____	<u>55; 76</u>

Introduction

Defendant, Edwin Echeverria, moves by notice of motion, sequence number two, pursuant to CPLR § 3212, for summary judgment on the issue of liability. Plaintiff Tahirah Sh-Shonna Cheeks opposes this portion of the motion. Defendant further moved to consolidate this case with a related action, index number 505482/2019. This portion of

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the motion was granted by separate order, without opposition. Defendant also moves by notice of motion, sequence number three, pursuant to CPLR § 3212, for summary judgment on the grounds that plaintiff did not sustain serious injury within the meaning of Insurance Law § 5102(d). Plaintiff opposes this motion.

Background

This action involves a motor vehicle accident that took place on September 14, 2016, near the intersection of Atlantic and Rochester Avenue in Brooklyn, New York. Atlantic Avenue has six lanes, three east bound and three west bound. Rochester Avenue has two lanes, one north bound and one south bound. The intersection is controlled by a traffic signal.

Plaintiff testified at an Examination Before Trial (EBT) on July 5, 2019. Plaintiff testified that on September 14, 2016, she was the front seat passenger in a vehicle driven by a man named Randy (*see* NYSCEF Doc. # 37, Cheeks EBT at 19). They left a nightclub where the driver was drinking and smoking hookah (*see id.* at 23, 24). They traveled west on Atlantic Avenue and towards Rochester Avenue (*see id.* at 22, 23, 27). When the vehicle was about one car length away from the intersection, the traffic control signal turned yellow (*see id.* at 31). As the vehicle was passing through the intersection, it made contact with defendant's vehicle. The defendant was turning left "real quick" through the intersection (*see id.* at 33, 34). Plaintiff further testified that defendant did not have the light to make the left turn (*see id.* at 33, 34). At the time of impact, defendant was approximately halfway through the intersection (*see id.* at 36). Plaintiff testified that she does not remember what parts of the vehicles made contact during the collision (*see*

id. at 38). After the collision, Randy left the scene, and continued to drive to Hunterfly Place, which is near plaintiff's residence (*see id.* at 39, 40).

Defendant testified at an EBT on July 5, 2019. Defendant testified that he was traveling east bound on Atlantic Avenue in the middle lane (*see* NYSCEF Doc. # 36, Echeverria EBT at 15, 18). He was stopped at the red light waiting to make a left turn on to Rochester Avenue (*see id.* at 19, 20). The traffic control signal has a turning arrow for vehicles to make a left turn (*see id.*). He waited approximately one minute, and the arrow turned to green (*see id.* at 22). As he turned left, he noticed two other vehicles on Atlantic Avenue facing west that were stopped in the left lane at a red light (*see id.* at 24, 25). Defendant saw Randy's vehicle "coming really fast" in the middle (*see id.* at 25). Defendant was approximately "halfway" through the left turn when Randy's vehicle made contact on the right side of defendant's vehicle (*see id.* at 26, 28). Randy's vehicle was traveling "at least 60 miles per hour" at the time of the impact (*see id.* at 27). The passengers inside of the vehicle were saying "run, run, run, let's go, go, go, go" and Randy's vehicle fled the intersection (*see id.* at 29, 48).

New York City Police Officer Jackson Chan reported to the scene. Chan testified at an EBT on April 23, 2018. When he arrived at the scene, he only saw defendant's vehicle at the intersection, and found Randy's vehicle parked outside of 22 Hunterfly Place, three or four blocks away (*see* NYSCEF Doc. # 36, Chan EBT at 12, 15). He completed two accident reports; the second reported that a motorist left the scene of an accident (*see id.* at 25, 26). Defendant annexed a copy of the police report to his motion as exhibit E (*see* NYSCEF Doc. # 35, Police Accident Report).

This action was commenced by the filing of the summons and complaint on August 16, 2017 (*see* NYSCEF Doc. # 1). Issue was joined on September 13, 2017 (*see* NYSCEF Doc. # 4). The note of issue was filed on February 28, 2020 (*see* NYSCEF Doc. # 28).

Discussion

Summary Judgment

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh*, 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra*; *see also Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

Liability

A violation of the Vehicle and Traffic Law constitutes negligence per se (*see Vainer v. DiSalvo*, 79 A.D.3d 1023, 914 N.Y.S.2d 236 [2 Dept., 2010]). Vehicle and Traffic Law § 1141 provides that the “driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard” (VTL § 1141). Vehicle and Traffic Law § 1128(a) provides that “a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver first ascertained that such movement can be made with safety” (VTL § 1128(a)). While a driver is required to “see that which through proper use of [his or her] senses [he or she] should have seen, a driver who has the right-of-way is entitled to anticipate that the other motorist will obey the traffic law requiring him or her to yield” (*see Vainer v. DiSalvo*, 79 A.D.3d 1023, 914 N.Y.S.2d 236 [2 Dept., 2010] (quoting *Bongiovi v. Hoffman*, 18 A.D.3d 686, 795 N.Y.S.2d 254 [2 Dept., 2005]); *see also Platt v. Wolman*, 29 A.D.3d 663, 816 N.Y.S.2d 121 [2 Dept., 2006]). “A driver with the right-of-way who only has seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision” (*Yelder v. Walters*, 64 A.D.3d 762, 883 N.Y.S.2d 290 [2s Dept., 2009]).

In the case at bar, the movant failed to make a prima facie showing of entitlement to summary judgment. Plaintiff testified that as Randy’s drove west bound on Atlantic Avenue and approached the intersection, the traffic signal turned yellow, and defendant did not have a green light to make a left turn. Defendant testified that he had a green

turning arrow giving him the right of way to make a left turn, and that as he turned, Randy's vehicle went through a red light at a speed of approximately 60 miles per hour. Since "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", the uncertified report cannot be considered (*Yassin v. Blackman*, 188 A.D.3d 62, 131 N.Y.S.3d 53 [2 Dept., 2020]; see CPLR § 4518(a)). Further, Officer Chan's deposition testimony is unpersuasive since he did not witness the accident.

Insurance law § 5102(d)

In the bill of particulars, plaintiff alleged injuries to her cervical and thoracic spine, lumbosacral spine, right shoulder, including tears, left knee, including tears and arthroscopy on July 7, 2017 (see NYSCEF Doc, # 42 at ¶ 11). Plaintiff further alleges that the injuries sustained meet the following categories of Insurance Law § 5102: (1) significant disfigurement, (2) permanent loss of body function/system, (3) permanent consequential limitation, (4) a significant limitation, and (5) a non-permanent medically determined injury which prevented him from his usual and customary activities for 90 out of the first 180 days following the accident (see *id.* at ¶ 20).

Defendants failed to meet their burden and establish that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Defendant provided the sworn medical report of Dr. Jeffrey Guttman, M.D., who examined plaintiff on December 13, 2018 and found that range of motion was normal in her cervical spine, lumbar spine, right shoulder and left knee. The doctor opined that plaintiff's alleged injuries to her back, right shoulder and left knee were resolved and that "[b]ased on today's examination

there is no objective medical evidence in the medical chart and imaging which substantiates that the examinee had incurred traumatic injuries to their body, in the vehicle during the accident. There are no objective clinical findings indicative of a present disability, and functional impairment, which prevents the examinee from engaging in ADL, and usual activities including work, school, and hobbies. There is no permanency as a result of the claimed injuries listed on the bill of particulars” (*see* NYSCEF Doc. # 47).

Defendant further provided a sworn report from trauma doctor Timothy G. Haydock, M.D., F.A.C.E.P., who reviewed the records and opines that “the records reviewed are inconsistent with the alleged injuries in the Bill of Particulars and show that the claimed injuries do not have an acute traumatic origin related to the accident on September 14, 2016. It is my opinion within a reasonable degree of medical certainty that there were no acute traumatic findings to causally relate the plaintiff’s accident and the claimed injury other than musculoskeletal neck pain and low back pain” (NYSCEF Doc. # 46). Finally, defendant provided a sworn radiological review from Dr. Mark J. Decker, M.D., who opines that plaintiff’s injuries to her left knee and lumbar spine are degenerative, longstanding, and not causally related to the accident (*see* NYSCEF Doc. # 48). Dr. Decker was silent as to causation when discussing the bulges in plaintiff’s cervical spine and did not review her right shoulder.

However, “[t]he papers submitted by the defendant failed to eliminate triable issues of fact regarding the plaintiff’s claim, set forth in the bill of particulars, that she sustained a serious injury under the 90/180–day category of Insurance Law § 5102(d)”

(*Ali v. Williams*, 187 A.D.3d 1107, 131 N.Y.S.3d 578 [2 Dept., 2020]). Here, defendant failed to set forth specific arguments related to the 90/180 category. While defendant provided plaintiff's deposition transcript as an exhibit, this is insufficient to meet the burden on summary judgment as "this evidence failed to identify the plaintiff's usual and customary daily activities during the specific relevant time frame, and did not compare the plaintiff's pre-accident and post-accident activities during that relevant time frame" (*Reid v. Edwards- Grant*, 186 A.D.3d 1741, 129 N.Y.S.3d 798 [2 Dept., 2020]). Plaintiff testified that since the accident she can no longer play basketball, dance, model, run and play with her son (*see* NYSCEF Doc. # 44 at 69). While she testified that she regularly played basketball, she did not belong to clubs or teams. While she testified that she can no longer model, she was not signed up with any modeling agencies (*see id.* at 70-71).

Further, the medical reports provided and discussed above fail to relate the findings to the 90/180 category for the period of time immediately following the accident (*see Rouach v. Betts*, 71 A.D.3d 977, 897 N.Y.S.2d 242 [2 Dept., 2010]; *Pearsall v. Cha*, 114 N.Y.S.3d 176 [App. Term, 2019]). As defendants did not meet their burden, this Court need not examine the sufficiency of plaintiff's opposition papers.

Conclusion

Accordingly, defendant Edwin Echeverria's motions for summary judgment, sequence numbers two and three, are denied. Defendant's motion to consolidate is addressed in a separate order. This constitutes the decision and order of this case.

ENTER:


Hon. Lara J. Genovesi
J.S.C.

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