Hoyte v Davis
2021 NY Slip Op 30974(U)
March 29, 2021
Supreme Court, Kings County
Docket Number: 514581/2017
Judge: Richard Velasquez

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29th day of MARCH, 2021

P R E S E N T:
HON. RICHARD VELASQUEZ, Justice.

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DARREN R. HOYTE,

Plaintiff,

-against-

Index No.: 514581/2017
Decision and Order

GREGORY C. DAVIS, GUARY BAPTISTE and AASIM SAEED PEARSALL,

Defendants,

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The following *papers NYSCEF* Doc #'s 56 to 87 read on this motion:

Papers	*NYSCEF DOC NO.'s*
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	56-62; 66-76
Opposing Affidavits (Affirmations)	64; 81-85
Reply Affidavits (Affirmations)	86; 87

After having heard Oral Argument on MARCH 29, 2021 and upon review of the foregoing submissions herein the court finds as follows:

Plaintiff moves pursuant to CPLR 3212 for summary judgment on liability. (MS#5) Defendant, GREGORY C. DAVIS moves pursuant to CPLR 3212 For an order granting defendants summary judgment dismissing the complaint against them on the basis that plaintiff did not sustain a "serious injury" under Insurance Law §5102(d). (MS#6).

In the present case, the plaintiff's affidavit establishes that while stopped he was hit in the rear by defendant. (*see Hanakis v. DeCarlo,* 98 AD3d 1082, 1084, 951 NYS2d

206; *Napolitano v. Galletta,* 85 AD3d at 882, 925 NYS2d 163). "A rear-end collision with a stopped vehicle creates a prima facie case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision" (*Hauser v. Adamov*, 74 AD3d 1024, 1025, 904 NYS2d 102). Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by demonstrating his vehicle was struck in the rear by the vehicle operated by the defendant, *see Perez v. Robert*s, 91 AD3d 620, 621, 936 NYS.2d 259; *Giangrasso v. Callahan*, 87 AD3d 521, 522, 928 NYS2d 68; *Hauser v. Adamov*, 74 AD3d at 1025, 904 NYS.2d 102; *Hanakis v. DeCarlo*, 98 AD3d 1082, 1084, 951 NYS2d 206, 208 (2012). Allegations regarding plaintiff's comparative fault, if any, does not preclude granting of summary judgment in plaintiff's favor. "To be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault." *Quoting Rodriguez v. City of New York*, 31 NY3d 312, 324–25, 101 NE3d 366, 374 (2018). "Issues of comparative negligence is generally a question of fact for a trier of fact." *Calderon-Scotti v. Rosenstein*, 119 AD3d 722 (2d Dept. 2014). Any issues of comparative fault should be determined at the time of trial on damages. Additionally, in opposition, defendants fail to raise a triable issue of fact because they fail to submit an admissible affidavit by either defendant and instead only submit an attorney affirmation. (*see Sehgal v. www.nyairportsbus.com, Inc.,100 AD3d 860, 955 NYS2d 604, 2012 NY Slip Op.; Hanakis v. DeCarlo,* 98 AD3d at 1084, 951 NYS2d 206; *Perez v. Brux Cab Corp.,* 251 AD2d 157, 159, 674 NYS2d 343). The attorney affirmations submitted defendants are not based on personal knowledge of the facts and have no probative

value (*see, Skinner v. City of Glen Cove,* 216 AD2d 381, 628 NYS2d 719; *Thoma v. Ronai,* 189 AD2d 635, 592 NYS2d 333, *affd.* 82 NY2d 736, 602 NYS2d 323, 621 NE2d 690). *Bendik v. Dybowski*, 227 AD2d 228, 229, 642 NYS2d 284, 286 (1996). Therefore, the defendants have failed to raise a triable issue of fact.

Finally, the court shall address defendant, GREGORY C. DAVIS motion pursuant to CPLR 3212 serious injury threshold. It is well settled, in a soft tissue injury case, a plaintiff alleging a "serious injury", must provide objective medical evidence of a "serious injury" within the meaning of the Insurance Law § 5102(d). A defendant seeking summary judgment on the grounds that plaintiff's injury does not meet the threshold, the defendant must show that there is no question of fact that there is no loss of range of motion.

In the present case, defendant establishes prima facie that there is no "serious injury" as a matter of law because their evaluating doctor finds normal ranges of motion. However, in opposition the plaintiff raises triable issues of fact as Dr. Kaplan finds loss in range of motion in plaintiff as well as differing ranges of motion from the other evaluating doctor. This is similar to the situation in *Knokhinov v. Murray*, 27 Misc.3d 1211(A), 2010 WL 1542529 (N.Y.Sup.), where the evaluating doctors found differing normative values. In *Knokhinov*, the court denied summary judgment because when the findings reported by one doctor are assessed by application of the standard of "normal" stated by the other doctors, the reports present "contradictory proof". *Id*. *See also Dettori v. Molzon*, 306 AD2d 308, 309 [2d Dept 2003]. Therefore, material issues of fact exist precluding the grant of summary judgment including but not limited to conflicting doctors reports, the reports present "contradictory proof" regarding ranges of motion.

See, Knokhinov v. Murray, 27 Misc3d 1211(A), 2010 WL 1542529 (N.Y.Sup.); *See also Dettori v. Molzon,* 306 AD2d 308, 309 [2d Dept 2003]. Therefore, the Court finds that there are triable issues of fact with regard to Plaintiff injuries.

Accordingly, plaintiff's motion pursuant to CPLR 3212 for summary judgment is hereby granted, for the reasons stated above. (MS#5). Defendants, motion pursuant to CPLR 3212 on serious injury threshold is hereby denied, for the reasons stated above. (MS#6).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
MARCH 29, 2021

ENTER FOTHWITH:

HON. RICHARD VELASQUEZ