

Rigano v Dinuzzo

2021 NY Slip Op 33376(U)

April 28, 2021

Supreme Court, Westchester County

Docket Number: Index No: 59808/2018

Judge: Joan B. Lefkowitz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

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.

-----X
SALVATORE RIGANO,

DECISION & ORDER

Plaintiff,

Index No: 59808/2018

-against-

Motion Sequence Nos. 1 and 2

FRANCIS DINUZZO and EAN HOLDINGS LLC,

Defendants.
-----X

The following papers (NYSCEF document nos. 22-56; 61-76) were read on: (1) the motion by the plaintiff for an order granting partial summary judgment on the issue of liability (sequence no. 1); and (2) the motion by the defendant, Francis Dinuzzo, for an order granting summary judgment dismissing the complaint (sequence no. 2).

Motion Sequence No. 1

Notice of Motion-Affirmation-Exhibits (A-G)
Affirmation in Opposition-Exhibits (A-F)
Reply Affirmation-Exhibits (A-B)

Motion Sequence No. 2

Notice of Motion-Affirmation-Exhibits (A-V)
Affirmation in Opposition-Exhibits (A-D)
Reply Affirmation

Upon reading the foregoing papers, it is

ORDERED the motion by the plaintiff is denied (sequence no. 1); and it is further

ORDERED the motion by the defendant is denied (sequence no. 2); and it is further

ORDERED the matter is hereby referred to the Settlement Conference Part for a settlement conference. Due to the COVID-19 public health emergency, the Clerk of the Settlement Conference Part shall notify the parties of the date, time, and method of the settlement conference.

Plaintiff sues for personal injuries allegedly sustained in a motor vehicle accident involving three vehicles that occurred on November 13, 2016, on the southbound lanes of

the Hutchinson River Parkway in Harrison, New York. In his bill of particulars, plaintiff alleged he sustained injuries to, *inter alia*, his cervical and lumbar spine and neck as a result of the subject accident. Plaintiff further alleged that he has been totally disabled since February 22, 2018, and underwent cervical fusion surgery on March 9, 2018, as a result of the accident. It is undisputed that plaintiff did not seek medical attention for over one year following the accident.

By stipulation of partial discontinuance filed August 10, 2020, plaintiff discontinued the action against the defendant, EAN Holdings LLC. Following the completion of discovery, plaintiff moves for an order granting partial summary judgment on the issue of liability on his claims for common law negligence and General Municipal Law § 205-e, the latter of which is based on the fact that plaintiff was acting within the scope of his employment as a police detective with the Harrison Police Department at the time of the subject accident (sequence no. 1). Defendant, Francis Dinuzzo, moves for an order granting summary judgment dismissing the complaint upon the grounds that defendant is not liable for the accident and that plaintiff has not sustained a serious injury within the meaning of Insurance Law 5102 (d) (sequence no. 2).

Motion by the Plaintiff for Partial Summary Judgment on Liability
Sequence No. 1

The papers submitted raise triable issues of material fact as to how the subject accident occurred thereby precluding the award of summary judgment on the issue of liability in plaintiff-movant's favor. At deposition, plaintiff testified that after successfully merging onto the Hutchinson River Parkway, he was traveling in the right traffic lane for "a good twenty seconds" when he suddenly heard a vehicle accelerating behind him which caused him to look in his rearview mirror where he saw the defendant's vehicle straddling the right and left lane (*see* Plaintiff deposition tr at 55-56, 64). Shortly thereafter, plaintiff testified that defendant's vehicle struck another vehicle causing that other vehicle to go airborne before defendant struck the rear of plaintiff's vehicle (*see id.* at 56, 58-59, 64-66).

Defendant, however, testified at deposition, in essence, that plaintiff's vehicle cut defendant's vehicle off. Defendant testified that his vehicle was traveling in the right traffic lane when he observed the plaintiff's vehicle traveling in the merger lane parallel to defendant's vehicle (*see* Defendant deposition tr at 33). Defendant testified that he heard his wife, who was a passenger, shout that plaintiff's vehicle was about to collide into defendant's vehicle (*see id.* at 30, 41). Defendant testified that he immediately attempted to veer into the left traffic lane to provide plaintiff room to merge into the right traffic lane, but he was unable to do so (*see id.* generally at 42-55). Defendant testified that plaintiff struck the right passenger side of his (defendant's) vehicle which caused defendant's vehicle to come into contact with another vehicle traveling in the left traffic lane (*see id.*; *see also* non-party deposition tr of Gail Dinuzzo at 43).

The divergent accounts of how and why the accident occurred render summary judgment on the issue of liability inappropriate (*see Richard v Thomas*, 136 AD3d 779, 779-780 [2d Dept 2016]). Accordingly, plaintiff's motion is denied.

Motion by the Defendant for Summary Judgment
Sequence No. 2

Liability

Insofar as the court has determined that triable issues of material fact exist as to how and why the subject accident occurred, this branch of defendant's motion for an order granting summary judgment dismissing the complaint upon the grounds that defendant is not liable for the subject collision is denied.

Serious Injury

The papers submitted raise triable issues of material fact as to whether plaintiff sustained a serious injury within the meaning of Insurance Law 5102 (d) under the "permanent consequential limitation of use" and the "significant limitation of use" categories.

In support of the motion, defendants proffer, among other things, the affirmations of Michael I. Weintraub, M.D., a neurologist, and Jessica F. Berkowitz, M.D., a radiologist. Dr. Weintraub, who performed a physical examination of the plaintiff and reviewed various medical records as well as the plaintiff's bill of particulars, affirmed that plaintiff did not sustain "any actual injury" from the accident. Dr. Weintraub concluded that plaintiff has "obvious congenital spinal canal narrowing in the neck[] [and] has had this chronically over the years." Dr. Berkowitz, who reviewed various radiological studies of the plaintiff's cervical spine which were taken over one year following the accident, concluded, among other things, that there was no evidence of acute traumatic injury to plaintiff's cervical spine. With respect to certain studies reviewed, Dr. Berkowitz found no causal relationship between the alleged accident and the findings on the studies.

In opposition, plaintiff proffers the affirmations of Lisa Nathon, M.D., an orthopedic surgeon, and Scott V. Haig, M.D., an orthopedic surgeon. Dr. Nathon, who performed a physical examination of the plaintiff, and reviewed various medical records of the plaintiff, concluded that plaintiff's injuries were causally related to the subject accident. Dr. Haig, who performed a physical examination of the plaintiff including, range of motion testing with the use of a goniometer, found "severely diminished range of motion" in the cervical spine which he causally related to the subject accident (*cf. Whisenant v Farazi*, 67 AD3d 535, 536 [1st Dept 2009]). Dr. Haig further reviewed, *inter alia*, Dr. Weintraub's report, and disagreed with his conclusions and provided the reasons for same.

Generally, where conflicting affidavits and other contradictory evidence is submitted, summary judgment is not appropriate (*see Webar, Inc. Capra*, 212 AD2d 594, 596 [2d Dept 1995]; *Epstein v Scally*, 99 AD2d 713, 714 [1st Dept 1984]). The reasoning is that conflicting expert opinions raise credibility issues that can only be resolved by the trier of fact (*Roca v Perel*, 51 AD3d 757, 759 [2d Dept 2008]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]). Here, defendant and plaintiff have proffered competing medical affirmations thereby precluding summary judgment on the issue of whether plaintiff sustained a serious injury within the meaning of Insurance Law 5102 (d). Contrary to defendant's contention, plaintiff's failure to seek medical treatment for over one year following the accident is not fatal to plaintiff's claim (*see Perl v Meher*, 18 NY3d 208, 217-218 [2011]). Accordingly, this branch of defendant's motion is denied.

ENTER,

Dated: White Plains, New York
April 28, 2021



HON. JOAN B. LEFKOWITZ, J.S.C.