Civitarese v Gaylin
2021 NY Slip Op 33574(U)
February 8, 2021
Supreme Court, Ulster County
Docket Number: Index No. EF2019-3095
Judge: James P. Gilpatric

STATE OF NEW YORK
SUPREME COURT **ULSTER COUNTY**

MARK CIVITARESE,

Plaintiff,

- against -

MARISSA A. GAYLIN and
MICHAEL A. GAYLIN,

Defendants.

DECISION

Index No.: EF2019-3095

Supreme Court, Ulster County
R.J.I. No.: 55-19-01699

Present: James P. Gilpatric, J.S.C.

Appearances:

DALL VECHIA & KRAFT, PC
Attorneys for the Plaintiff
115 Green Street
Kingston, New York 12401
By: Christopher R. Kraft, Esq.

LAW OFFICES OF BRIAN RICHARDSON
Attorneys for Defendants
4 Airline Drive, Suite 105
Albany, New York 12205
By: Brian D. Richardson, Esq.

Gilpatric, J.:

This action arises from a motor vehicle accident that occurred on August 6, 2019 while the plaintiff was proceeding east on Route 28 and struck the defendant's vehicle in the plaintiff's lane of travel. The plaintiff alleges that the defendant entered Route 28 from adjacent parking lot that was not controlled by a stop sign and failed to yield right of way to him. The plaintiff further alleges that the defendant was negligent in failing to operate the vehicle with reasonable care by failing to prevent the accident from happening on the roadway. Alleging that he suffered a serious

injury, as defined by the New York Insurance Law, the plaintiff commenced the instant personal injury action on September 20, 2019. In his complaint, and, later in his bill of particulars, plaintiff alleges that he sustained, *inter alia*; (1) a fracture; (2) serious disfigurement; (3) a permanent consequential limitation of a body organ or member; (4) a significant limitation of use of a body member; and (5) a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety (90) days during the hundred eighty (180) days immediately following the injury. Following joinder of issue, discovery, and the filing of issue, the plaintiff moves for summary judgment granting judgment, pursuant to CPLR § 3212, on the issue of liability and serious injury as defined by New York State Insurance Law § 5102 The defendants oppose the motion.

To obtain summary judgment, a movant must establish his or her position "sufficiently to warrant the court as a matter of law in directing judgment" in his or her favor (Friends of Fur Animals, Inc. v Associated Fur Mfrs., Inc., 46 NY2d 1065, 1067 [1979], quoting CPLR 3212 [b]). The 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 eliminate any genuine material issues of fact from the case (see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The failure to make such a showing mandates 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]).

Where a *prima facie* showing is made, the burden shifts to the party opposing the motion for summary judgment to come forward with evidentiary proof, in admissible form, to establish the existence of material issues of facts which require a trial (*see* Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied.

As to the issue of liability, the plaintiff alleges, *inter alia,* that the defendant driver was negligent in that she failed to yield the right of way to the plaintiff and her conduct was the sole proximate cause of the accident. Here, the plaintiff submits his affidavit, a copy of defendant Marissa Gaylin's deposition testimony and a copy of the accident report. The plaintiff avers that on August 6, 2019, he was proceeding east on Route 28 towards the City of Kingston which is a two-lane highway in each direction (Plaintiff's Exhibit "F"). He further averred that, from his right,

the defendant Marissa Gaylin pulled out directly in front of his vehicle with no time to take evasive action (Plaintiff's Exhibit "F"). The plaintiff also submits the deposition testimony of defendant Marissa Gaylin as evidence of the defendant's culpability. Ms. Gaylin testified that the impact between the plaintiff's vehicle and her vehicle was on her driver's side, back seat and occurred in the plaintiff's lane of travel (Plaintiff's Exhibit "G"). She also testified that she saw the plaintiff's vehicle 100-200 feet away before attempting to make a left hand turn across two lanes of east bound traffic on Route 28 and was familiar with the accident site (Plaintiff's Exhibit "F"). As such, the plaintiff argues that the facts support that the plaintiff had the right of way and the defendant's failure to yield to his vehicle was the sole proximate cause of the accident.

In opposition to the motion, the defendants argue that there are material issues of fact as to whether the plaintiff was negligent. Here, the defendants submit that the deposition testimony of Ms. Gaylin raises questions of fact as to whether the plaintiff was comparatively at fault in the operation of his vehicle, and therefore in the happening of the accident.

Nonetheless, the defendant's argument against plaintiff's summary judgment on the issue of liability based upon the question of plaintiff's comparative negligence, must fail. On April 3, 2018, the New York State Court of Appeals ruled precisely on this issue. Previously, the Court of Appeals had held that before a plaintiff could establish liability in a summary judgment motion, it must be determined, as a matter of law, that he or she is free from comparative fault (*see* Thoma v Ronai, 62 NY2d 736). However, on April 3, 2018, in Rodriquez v City of New York, the Court held that to obtain partial summary judgment on defendant's liability the plaintiff does not have to demonstrate the absence of his own comparative fault. Here, as in Rodriquez, *supra,* the issue of contributory/comparative negligence shall not bar recovery, but the amount of damages recoverable shall be diminished in the proportion which the plaintiff's culpable conduct may have caused the damages (*see* CPLR 1411). CPLR 1412 further states that culpable conduct claimed in the diminution of damages, in accordance with CPLR 1411, shall be an affirmative defense to be pleaded and proved by the party asserting the defense (CPLR 1412). Therefore, while the plaintiff's comparative or contributory fault, if any, may diminish her recovery after trial, it shall not bar her ability to establish liability against the defendants.

Additionally, as to the plaintiff's motion for summary judgment for serious injuries, in New York State, a party alleging negligence in a motor vehicle accident may only recover damages for

pain and suffering if they have suffered a "serious injury" pursuant to Insurance Law § 5102 (d) (*see* Insurance Law § 5104 [a]; Pommells v Perez, 4 NY3d 566, 570[2005]). As relevant here, a serious injury is defined by Insurance Law § 5102 (d) as:

> personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Here, the plaintiff contends that he suffered a serious injury as he sustained a fracture to his right wrist. In support of his motion as to this issue he submits, *inter alia*, a copy of the medical records from WMC Health Alliance Kingston Hospital ER records, dated August 6, 2019, the business record certification from Orthopedic Associates of Dutchess County, dated August 17, 2020 and the affirmation of Gabriel L. Dassa, D.O., dated August 5, 2020 with attachments. The plaintiff submits that the plaintiff sought treatment after the accident at Westchester Medical Center/Health Alliance/Kingston Hospital (Plaintiff's Exhibit "H"). The plaintiff asserts that the records show he had complaint of his right hand and an x-ray taken was negative (Plaintiff's Exhibit "H"). However, the plaintiff further submits that an MRI on his right hand at Orthopedic Associates of Dutchess County on September 7, 2019 revealed a right wrist fracture (Plaintiff's Exhibit "I" and "J"). Dr. Dassa affirmed that he evaluated the plaintiff on February 11, 2020 and that he reviewed the plaintiff's September 7, 2019 MRI and the report of Orthopedic Associates of Dutchess County (Plaintiff's Exhibit "J"). Dr. Dassa stated that his impression from reading the MRI revealed a non-displaced distal radial epiphyseal fracture of right radius with edema (Plaintiff's Exhibit "J"). Dr. Dassa also stated that it is his opinion, within a reasonable degree of medical certainty, the September 7, 2019 MRI is more definitive than an x-ray and that epiphyseal fracture is difficult to visualize on x-ray. (Plaintiff's Exhibit "J"). He also stated that it was his impression, post evaluation, the plaintiff had a right wrist distal radial fracture related to the August 6, 2019 motor vehicle accident that was confirmed per MRI (Plaintiff's Exhibit "J"). Dr. Dassa concluded that in his opinion, within reasonable degree of medical certainty based on history,

physical examination, review of ER records, review of interpretation of September 7, 2019 right arm MRI images, the plaintiff sustained causally related right wrist fracture that is related to the August 6, 2019 motor vehicle accident (Plaintiff's Exhibit "J").

Based on the above discussed submissions, the plaintiff has established a *prima facie* showing that the plaintiff did suffer a serious injury with regard to a fracture (*see* Houston v Hoffman, 75 AD3d 1046, 1047 [3rd Dept 2010]; Ketz v Harder, 16 AD3d 930, 932 [3rd Dept 2005]).

In opposition to serious injury, the defendants assert that the plaintiff's medical records reveal no evidence of a fracture on the date of the accident (Plaintiff's Exhibit "H"). They further argue that the plaintiff was not diagnosed with a fracture until more than a month after the accident with the MRI at Orthopedic Associates of Dutchess County (Plaintiff's Exhibit "J"). The defendants argue that the radiographic reports with respect to whether there was a fracture related to the August 6, 2019 accident are in conflict with each other, and occurred at a significant duration in time to raise a question of fact as to whether there was causation as a result of the subject accident. In reply, the plaintiff submits a copy of the defendants IME on the plaintiff conducted by John J. Cambareri, M.D. on August 25, 2020 (Plaintiff's Reply). Here, Dr. Cambareri notes a diagnosis of non- displaced right distal fracture and that the fracture was so mild that it was not visible on plain x-rays (Plaintiff's Reply). Therefore, the defendants have failed to raise questions of fact regarding whether the plaintiff sustained a serious injury, a fracture from the accident on August 6, 2019 (Coston v McGray, *supra; see also* Tompkins v Burtnick, 236 AD2d 708 [3rd Dept 1997]; Parker v Defontaine-Stratton, 231 AD2d 412, 413 [3rd Dept 1996]). Additionally, as to the 90/180 category of serious injury, the defendants have failed to present *any* [emphasis added] evidence of their entitlement to judgment as a matter of law (*see* D'Auria v Kent, 80 AD3d 956 [3rd Dept 2011]). Thus, the Court finds that they are unable to adequately address all of the objective findings in the plaintiff's medical records that would presumptively raise a question of fact whether he suffered a non-permanent injury that substantially prevented him from performing his usual and customary daily activities for at least 90 of the first 180 days following the accident (*see* Colavito v Steyer, 65 AD3d 735, 736 [3rd Dept 2009]; Haack v Kriss, 47 AD3d 1007, 1009 [3rd Dept 2008]; Ames v Paquin, 40 AD3d 1379, 1380 [3rd Dept 2007]).

Consequently, in view of the Court's findings in the submissions set forth hereinabove, the Court grants the plaintiff's motion for summary judgment on the issue of serious injury, pursuant to NYS Insurance Law §5102 and, pursuant to CPLR § 3212 on the issue of liability. Otherwise, the Court has considered the remaining arguments and finds them either unavailing or unnecessary to reach.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgement is granted in its entirety.

This shall constitute the decision of the Court. The original decision and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this decision shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED!

Dated: February 8, 2021
Kingston, New York

ENTER,

JAMES P. GILPATRIC, J.S.C.

Papers considered:

1.) Notice of motion dated September 11, 2020;
2.) Affirmation in Support by Christopher R. Kraft, Esq., with exhibits, dated September 11, 2020;
3.) Affirmation in Opposition, dated October 23, 2020;
4.) Reply Affirmation by Christopher R. Kraft, Esq., with exhibit, dated October 28, 2020.