

Armstead v Leonick
2021 NY Slip Op 33748(U)
January 29, 2021
Supreme Court, Orange County
Docket Number: Index No. EF001158-2020
Judge: Maria S. Vazquez-Doles
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At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at 285 Main Street, Goshen, New York 10924 on the 29 day of January, 2021.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

MARCUS E. ARMSTEAD,

Plaintiff,

-against-

ADAM A. LEONICK,

Defendant.

VAZQUEZ-DOLES, J.S.C.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

DECISION & ORDER
INDEX EF001158-2020
Motion date: 10/1/2020
Motion Seq. #1

The following papers numbered 1 - 15 were read on plaintiff's motion for partial summary judgment on the issue of liability:

Notice of Motion/Affirmation in Support/Exhibits 1-4.....	1-6
Affirmation in Opposition/Exhibits A-G.....	7-14
Affirmation in Reply.	15

Plaintiff's motion for summary judgment against defendant on the issue of liability and plaintiff's lack of comparative fault is **GRANTED**, and for summary judgment on the issue of plaintiff's injuries meeting the threshold requirements of New York State Insurance Law §5102 is **DENIED**.

Background and Procedural History

In this negligence action, plaintiff seeks to recover damages for personal injuries he allegedly sustained as a result of a motor vehicle accident that occurred on May 26, 2018. Plaintiff was traveling eastbound on Route 211 East and stopped at a yield sign in Town of Wallkill, New York when he was rear-ended by a vehicle operated by defendant.

Plaintiff commenced this action by filing a Summons and Verified Complaint on February 12, 2020 (Exhibit 2 to moving papers). Defendant filed a Verified Answer with Affirmative Defenses, as well as discovery demands, on June 22, 2020.

Liability

Plaintiff asserts he is entitled to summary judgment on liability based on the rear-end collision, which establishes a *prima facie* case of negligence on the part of defendant (see *Raimondo v. Plunkitt*, 102 AD3d 851 [2d Dept 2013]). Plaintiff submits his own affidavit in which he states that he was stopped at a yield sign waiting for traffic to clear before merging onto the ramp, when he was rear-ended by defendant's vehicle (Exhibit 1). Here, defendant failed to oppose plaintiff's relief for summary judgment on liability in his papers, thus he did not raise a triable issue of fact (*Grange v Jacobs*, 11 AD3d 582 [2d Dept 2004]). Additionally, defendant made an admission in the police report, when he stated that "while traveling eastbound on State Route 211 East, vehicle 2 [Leonick] struck vehicle 1 [Armstead]" (Exhibit 1).

On the issue of comparative negligence, the Court of Appeals has held that a plaintiff does not bear the burden of establishing the absence of his own comparative negligence in order to obtain partial summary judgment in a comparative negligence case (*Rodriguez v. City of New York*, 31 NY3d 312 [2018]). In *Rodriguez*, the Court of Appeals reversed the finding of the Appellate Division, First Department, that affirmed the denial of plaintiff's motion for partial summary judgment, on the basis that plaintiff failed to make a *prima facie* showing that he was free of comparative negligence (*See, Rodriguez v. City of New York*, 142 AD3d 778 [1st Dept 2016]).

The Court of Appeals held that Article 14-A of the Civil Practice Law & Rules provides

that comparative negligence does not *bar* recovery, but can act to diminish the amount of damages otherwise recoverable, in the proportion of the claimant's culpable conduct (Civ. Prac. Law & Rules §1411). Moreover, section 1412 provides that such culpable conduct shall be an affirmative defense to be pleaded and proved by the party asserting the same.

The majority thus reasoned that to place the burden on the plaintiff to show an absence of comparative fault is inconsistent with the language of section 1412 (2018 NY Slip Op. at 3). "Comparative fault is not a defense to the cause of action of negligence, because it is not a defense to any element (duty, breach, causation) of plaintiff's prima facie cause of action for negligence...but rather a diminishment of the amount of damages" (Id at 779).

Further, plaintiff has established his prima facie entitlement to judgment as a matter of law by demonstrating that his car was struck from behind by the defendants' car. In opposition, the defendants failed to raise a triable issue of fact. Even if the plaintiff did, in fact, come to a sudden stop, "vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead" (*Shamah v Richmond County Ambulance Service, Inc.*, 279 AD2d 564 [2d Dept 2001]; see Vehicle and Traffic Law §1129[a]). Upon the foregoing it is ordered that plaintiff's motion for summary judgment against defendant on the issue of liability and plaintiff's lack of comparative fault is granted.

Serious Injury Threshold

Plaintiff claims that as a result of the May 26, 2018 accident, he suffered serious injuries under New York State Insurance Law §5102 and §5104, which caused significant, consequential and permanent limitation, inability to perform customary activities of his daily life, and impairment for at least 90 of the first 180 days after the accident.

Pursuant to Insurance Law §5102(d):

“Serious injury” means a 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.

Plaintiff relies on his Verified Bill of Particulars, dated August 6, 2020, on his claim for serious injuries. Armstead alleges to have suffered injuries, such as a fracture to the left ankle and herniations to the cervical and lumbar spine (Exhibit 3, ¶11). However, plaintiff fails to provide medical records that state his injuries were causally related to the accident. In opposition, Defendant attaches medical records that raise a triable issue of fact as to whether plaintiff's injuries were causally related to the accident. He submits a medical record, dated January 23, 2019, where plaintiff “was injured at work in 2001 and has been disabled since 2002 because of a back injury” (Exhibit A). Defendant also argues that this branch of the motion is premature because discovery, such as depositions, independent medical examinations, authorizations, and medical records, was not exchanged between the parties. This Court finds that plaintiff has not proven that his injuries meet the serious injury threshold requirements of Insurance Law §5102. Upon view of the foregoing, plaintiff's motion for summary judgment on serious injuries is denied, without prejudice, as it is premature at this juncture and discovery might lead to relevant evidence (see *Skura v Wojtowski*, 165 AD3d 1196 [2d Dept 2018]).

Conclusion

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on the issue of liability

and plaintiff's lack of comparative fault is **GRANTED**; and it is further

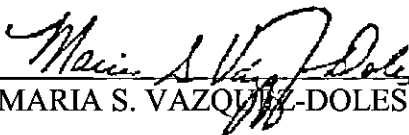
ORDERED that plaintiff's motion for summary judgment on plaintiff's injuries meeting the threshold requirements of Insurance Law §5102 and §5104 is **DENIED**, without prejudice; and it is further

ORDERED that plaintiff's motion limiting the issues to plaintiff's injuries and monetary damages shall be deemed as moot. .

The foregoing constitutes the Decision and Order of this Court.

Dated: January 29th, 2021
Goshen, New York

ENTER :



HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

TO: Counsel of record via NYSCEF