

DiGiacomo v Carey

2021 NY Slip Op 33810(U)

January 25, 2021

Supreme Court, Westchester County

Docket Number: Index No. 61043/2020

Judge: Joan B. Lefkowitz

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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
JOHN G. DIGIACOMO,

DECISION & ORDER

Plaintiff,

Index No: 61043/2020

-against-

Motion Return Date:

CHRISTOPHER M. CAREY and MATTHEW L. CAREY,

January 22, 2021

Sequence No. 1

Defendants.
-----X

The following papers (NYSCEF document nos. 6-16; 19-23) were read on the motion by the plaintiff for an order: (a) granting partial summary judgment on the issue of liability; and (b) consolidating this action with a separate action entitled *John G. DiGiacomo v Patricia Joan Toolan and The Plan Collection LLC*, presently pending in Supreme Court, Westchester County, under index no. 67671/2019, for the purposes of joint discovery and trial.

Notice of Motion-Affirmation-Exhibits (A-H)
Affirmation in Opposition-Exhibit (A)
Reply Affirmation-Exhibit (A)

Upon reading the foregoing papers, it is

ORDERED the branch of the motion which seeks an order granting partial summary judgment on the issue of liability is granted, and plaintiff is awarded partial summary judgment on the issue of liability and the trial of this matter shall be on the issue of damages only; and it is further

ORDERED the branch of the motion which seeks an order consolidating this action with a separate action entitled *John G. DiGiacomo v Patricia Joan Toolan and The Plan Collection LLC*, presently pending in Supreme Court, Westchester County, under index no. 67671/2019, for the purposes of joint discovery and trial is granted; and it is further

ORDERED the caption shall hereinafter read as follows:

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
JOHN G. DIGIACOMO,

Index No. 67671/2019
Action No. 1

Plaintiff,

-against-

PATRICIA JOAN TOOLAN and THE PLAN
COLLECTION LLC,

Defendants.

-----X
SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
JOHN G. DIGIACOMO,

Index No. 61043/2020
Action No. 2

Plaintiff,

-against-

CHRISTOPHER M. CAREY and MATTHEW L.
CAREY,

Defendants.

-----X

ORDERED that each action shall retain its separate caption and each shall have a separate verdict, separate judgment, and separate costs; and it is further

ORDERED that upon the payment of the appropriate fees and filing of separate notices of issue in each case, the clerk shall place the instant action and the action pending under index no. 67671/2019 upon the trial calendar for a joint trial; and it is further

ORDERED that the parties to both actions shall appear for a compliance conference on January 29, 2021, at 9:30 a.m. which shall be conducted virtually via Microsoft Teams.

Plaintiff sues to recover damages for injuries purportedly sustained in a motor vehicle accident that occurred on September 16, 2020, on New Rochelle Road at its intersection with Parkway Plaza in Eastchester, New York. The accident allegedly occurred when the motor vehicle operated by the plaintiff was struck in its rear by a motor vehicle operated by the defendant, Christopher M. Carey, and owned by the defendant, Matthew L. Carey.

Prior to the completion of discovery, plaintiff moves for an order granting partial summary judgment on the issue of liability and for an order consolidating the instant action with a separate action previously commenced by plaintiff herein which is presently pending in Supreme Court, Westchester County, under index no. 67671/2019 (Action No. 1). In Action No. 1, plaintiff alleges he sustained personal injuries as a result of a pedestrian knockdown accident that occurred on August 6, 2019. Plaintiff was awarded partial summary judgment on the issue of liability by order of the Court (Giacomo, J.) dated and filed May 8, 2020.

Defendants oppose both branches of plaintiff's motion. Defendants contend that summary judgment on the issue of liability is inappropriate at this stage of the proceeding where discovery has not yet commenced. As to the portion of plaintiff's motion seeking consolidation, defendants argue, among other things, that because the actions involve two separate accidents which occurred at different times and with different defendants, consolidation is inappropriate.

Partial Summary Judgment on Liability

Plaintiff demonstrated his *prima facie* entitlement to judgment as a matter of law on the issue of liability by establishing that defendants' vehicle struck the rear of plaintiff's vehicle while the latter vehicle had just begun to slowly move forward as a result of the traffic light turning from red to green (*see Buchanan v Keller*, 169 AD3d 989, 991-992 [2d Dept 2019]). Accordingly, the burden of going forward shifted to defendants to raise a triable issue of material fact (*see Zuckerman v City of New York*, 49 NY2d 557, 560, 562 [1980]).

In opposition, defendants failed to raise a triable issue of material fact (*see CPLR 3212 [b]*). Defendants' contention that plaintiff's motion should be denied as premature is without merit. "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery

process is insufficient to deny the motion” (*Leak v Hybrid Cars, Ltd.*, 132 AD3d 958, 959 [2d Dept 2015] [internal quotation marks and citation omitted]). Accordingly, that portion of plaintiff’s motion for an order granting partial summary judgment on the issue of liability is granted.

Consolidation

Plaintiff demonstrated that the interests of justice and judicial economy would be best served by a joint trial of the two personal injury actions. Although the actions arise out of two separate automobile accidents which occurred approximately thirteen months apart, “[t]hese actions present a common issue of fact (CPLR 602[a]), i.e., the extent to which plaintiff’s injuries were caused by the negligence of the defendants in each case” (*Megyesi v Automotive Rentals*, 115 AD2d 596, 597 [2d Dept 1985]).

In both actions, plaintiff has been awarded partial summary judgment on the issue of liability. Thus, the only issue to be tried in both actions is damages. Significantly, in this action, plaintiff claims exacerbation of injuries allegedly sustained in the pedestrian knockdown accident thereby warranting consolidation of both actions for the purposes of joint discovery and trial (*see Heck v Waldbaum’s Supermarkets*, 134 AD2d 568, 569 [2d Dept 1987]; *cf. Suarez v Home Dynamix, LLC*, 148 AD3d 429 [1st Dept 2017]). Further, defendants have failed to demonstrate that a joint trial would result in their suffering prejudice to a substantial right (*see Chiacchia v National Westminster Bank*, 124 AD2d 626, 628-629 [2d Dept 1986]). Accordingly, this portion of the plaintiff’s motion is granted.

E N T E R,

Dated: White Plains, New York
January 25, 2021

Joan B. Lefkowitz

Digitally signed by Joan B. Lefkowitz
DN: CN=Joan B. Lefkowitz, E=jlcfkowi@nycourts.gov
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HON. JOAN B. LEFKOWITZ, J.S.C.