

Matera v Caisaguano

2021 NY Slip Op 33850(U)

March 24, 2021

Supreme Court, Kings County

Docket Number: Index No. 503301/2018

Judge: Lara J. Genovesi

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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 24th day of March 2021.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

-----X

CHRISTOPHER MATERA,

Plaintiff,

Index No.: 503301/2018

DECISION & ORDER

-against-

LUIS CAISAGUANO, A VA SERVICE CORP
and JAVED SAMPSON,

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

NYSCEF Doc. No.:

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed 16-27, 31-40, 41-50, 53-60

Opposing Affidavits (Affirmations) 30, 78-85, 52, 94, 86-93

Reply Affidavits (Affirmations) 51

Introduction

Defendant, Javed Sampson, moves by notice of motion, sequence number one, pursuant to CPLR §§ 3211 and 3212 for summary judgment on the issue of liability,

dismissing the complaint as against him and all crossclaims. Plaintiff and defendants, Luis Caisaguano and A Va Service Corp., oppose this application.

Defendants, Caisaguano and A Va Service Corp., move by notice of motion, sequence number two, pursuant to CPLR § 3212 and Insurance Law §§ 5104(a) and 5102(d), to dismiss plaintiff's complaint, as plaintiff did not sustain a serious injury. Defendant Sampson cross-moves, sequence number four, for the same relief. Plaintiff opposes these applications.

Plaintiff moves by notice of motion, sequence number three, pursuant to CPLR § 3212 for summary judgment on the issue of liability. Defendants Caisaguano and A Va oppose this application. Defendant Sampson partially opposes the application, as it pertains to himself.

Background

Plaintiff commenced this action for personal injuries as the result of a three-car motor vehicle accident on November 14, 2016. Defendant Javed Sampson (Sampson) was driving his vehicle, with plaintiff as a passenger, (vehicle 1) southbound on 17th Avenue near the intersection with 62nd Street in Brooklyn, New York. The undisputed facts, as provided herein are that Sampson entered the intersection, when his vehicle was struck near the front passenger door by a vehicle owned by defendant A Va Service Corp (A Va) and operated by defendant Luis Caisaguano (Caisaguano) (vehicle 2). Thereafter, vehicle 2 collided with a parked and unoccupied vehicle, owned by non-party Besnik Avdija.

Plaintiff testified at an examination before trial (EBT) on July 18, 2019 (*see* NYSCEF Doc. # 23, 36). He was seated in the rear passenger's side of the vehicle, wearing a seatbelt (*see id.* at 29). He does not know what color the traffic light was at the time of the accident (*see id.* at 20-21). Sampson appeared for an EBT on September 30, 2019 (*see* NYSCEF Doc. # 22). He travelled between 15 and 22 miles per hour at the time of the accident (*see id.* at 33). Sampson testified that the light was green at the intersection of 17th Avenue and 62nd Street, when he first turned onto 17th Avenue. Specifically, he stated that the color of the light did not change from the time he looked at it until the time of the accident (*see id.* at 27-28). Sampson did not see vehicle 2 prior to the accident.

Q. Correct. Now before the accident happened, did you see the other car that you had an accident with? Yes or no. Did you see it? Yes or no.

A. At that time, no. It stopped on the side. I did not see any car.

Q. As you were traveling on 17th Avenue right before 62nd Street, did you see the other car that you had the accident with?

A. No.

Q. Did you ever see the other car that you had the accident with immediately before the accident?

A. No.

(*id.* at 32).

According to the police report, both the driver of vehicle one and vehicle two told the officer at the time of the accident that they had the green light in their favor (*see* NYSCEF Doc. # 18, Certified Police Report). The "Accident Description/ Officers Notes" portion of the report provides,

AT TPO DRIVER OF VH1, AS WELL AS PASSENGER, WERE DRIVING SB ON 17 AVE STATED THEY HAD GREEN LIGHT WHILE CROSSING 62 STREET WHEN VH2 COLLIDED INTO VH1 CAUSING 1 BOTH VEHICLES TO GO OFF THE ROAD ONTO SIDENALK. AS RESULT VH2 COLLIDED INTO VH3 WHICH WAS PARKED AND UNOCCUPIED. VH2 STATES HE HAD GREEN LIGHT WHILE APPROACHING INTERSECTION EB ON 62 STREET. OFFICERS DID NOT OBSERVE.

(*id.*).

Defendant Caisaguano has not appeared for an examination before trial.¹ In opposition, no affidavit from Caisaguano was provided. Rather, an affidavit of an investigator was provided, stating that they cannot locate defendant's counsel attempted to locate the driver Caisaguano on May 27, 2020, but he was not home. On May 28 and 29th, the investigator appeared again and there was no answer. (*see* NYSCEF Doc. # 27).

In the bill of particulars, plaintiff alleged injuries to his head, cervical spine, lumbar spine, left knee, left ankle and left hip (*see* NYSCEF Doc. # 34 at ¶ 11). Plaintiff further alleges that the injuries sustained meet the following categories of Insurance Law § 5102: (1) permanent consequential limitation, (2) a significant limitation, and (3) a non-

¹ In support of his motion for summary judgment on the issue of liability, Sampson alleges that Caisaguano and A Va have not appeared in violation of three court orders but failed to annex the orders. Based on co-defendant's failure, Sampson requests, pursuant to CPLR § 3216, that co-defendants be precluded from offering testimony in this matter; relief that was not sought in the notice of motion (*see* NYSCEF Doc. # 17, Affirmation in Support at ¶¶ 23-25). Plaintiff provided the court orders in support of his motion (*see* NYSCEF Doc. # 46). Defendant's deposition was scheduled in the preliminary conference order dated May 15, 2018, the compliance conference order dated December 14, 2018, and the Final Pre-Note Order dated July 12, 2019. The Final Pre-Note Order includes the form language "failure to strictly comply with this order, without leave of the court, will result in preclusion, the striking of a pleading and/or sanctions as may be appropriate" (*id.*).

permanent medically determined injury which prevented him from his usual and customary activities for 90 out of the first 180 days following the accident (*see id.* at ¶ 20).

Plaintiff testified that, as a result of the accident, he missed two days of work (*see* Plaintiff EBT at 12). He required five-minute breaks to sit for approximately 6-7 months after the accident (*see id.* at 12-13). His present complaints interfere with his ability to play sports with his son, walk up stairs, stand for long periods of time and sleep (*see id.* at 61-62). Plaintiff was injured in a prior automobile accident in 2003 or 2004 but could not recall what injuries he sustained (*see id.* 64-65). When asked about treatment, he mentioned heat massage on shoulders (*see id.* at 65).

Plaintiff appeared for an independent medical examination with orthopedist Dr. Alan Zimmerman, M.D on February 26, 2020 (*see* NYSCEF Doc. # 37). Dr. Zimmerman measured plaintiff's range of motion with a goniometer. In the sworn medical report following the examination, Dr. Zimmerman noted normal range of motion in plaintiff's cervical spine, lumbar spine, hips, knees and ankles (*see id.*). The doctor opined that "based on the medical records provided, causal relationship is established", but opined that plaintiff had no orthopedic disability and the sprains to his cervical spine, lumbar spine, left hip, left knee and left ankle are resolved (*see id.*).

Soon after the accident, plaintiff underwent MRIs to his cervical spine, lumbar spine, left hip and left ankle. Audrey Eisenstadt, M.D., DABR, reviewed plaintiff's MRIs taken contemporaneously with the accident, and generated a sworn report of her findings (*see* NYSCEF Doc. # 38). Dr. Eisenstadt opined that the "bony productive changes" noted

in plaintiff's cervical spine 16 days after the accident have no traumatic etiology, as they could not have developed in such a short time and are degenerative (*see id.*). She found similar degeneration in plaintiff's lumbar spine and left ankle and found no evidence of trauma in plaintiff's left hip (*see id.*).

Dr. Bernard P. Chang, M.D., reviewed the medical records, as well as the police accident report and the bill of particulars in this action and generated a sworn medical report (NYSCEF Doc. # 40). In this report, Dr. Chang opined that

There is no indication that the plaintiff sustained any significant injury as a result of the MVA. After review of the records, it is my conclusion that the injuries claimed in the Bill of Particulars are inconsistent with the initial presentation and the documentation in the medical records.

...

The records reviewed are inconsistent with the injuries alleged in the Bill of Particulars and show that the claimed injuries do not have an acute traumatic origin and so could not be causally related to the accident on 11/14/2016. It is my opinion, within a reasonable degree of medical certainty, that there were no acute traumatic findings to causally relate the subject accident on 11/14/2016 and the claimed injuries"

(*id.*).

At an examination on October 21, 2020, Dr. Thomas S. Mathew, M.D., found loss in range of motion in plaintiff's cervical and lumbar spines (*see* NYSCEF Doc. # 92). Dr. Mathew opined that "the injuries are significant, partial and permanent" and there is a direct causal relationship between plaintiff's injuries and the accident on November 14, 2016 (*see id.*).

The note of issue and certificate of readiness was filed on March 17, 2020 but returned for correction.

Discussion

Summary Judgment

“[T]he 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 demonstrate the absence of any material issues of fact” (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2d Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh*, 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra*; *see also Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

Serious Injury (Mot. Seq. two and four)

Defendants move for summary judgment on the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Both Sampson and Caisaguano and A Va, provided the sworn reports of Dr. Zimmerman, Dr. Eisenstadt, and Dr. Chang, in support of their motions. Caisaguano and A Va, provided plaintiff's EBT transcript.²

Here, defendants failed to meet their burden and establish that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Here, defendant's submissions fail to eliminate issues of fact. Defendant's submitted the report of Dr. Zimmerman, who opined that plaintiff had full range of motion and no orthopedic disability. Dr. Zimmerman opined that although plaintiff's sprains/strains were healed, he opined that they were causally related to the accident. However, defendant also submitted the report of Dr. Chang, who opines that "there is no indication that plaintiff sustained a significant injury" and that plaintiff's claimed injuries have "no acute traumatic origin" and are therefore not causally related to the accident (NYSCEF Doc. # 40). Further, "[t]he papers submitted by the defendant failed to eliminate triable issues of fact regarding the plaintiff's claim, set forth in the bill of particulars, that he sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d)" (*Reid v. Edwards- Grant*, 186 A.D.3d 1741, 129 N.Y.S.3d 798 [2 Dept., 2020]).

² As Sampson cross-moved, the EBT transcript submitted in support of motion sequence two will also be considered for motion sequence four.

"While the defendant relied upon the transcript of the plaintiff's deposition testimony to establish her prima facie entitlement to judgment as a matter of law with respect to the 90/180-day category, this evidence failed to identify the plaintiff's usual and customary daily activities during the specific relevant time frame, and did not compare the plaintiff's pre-accident and post-accident activities during that relevant time frame" (*id.*). Here, plaintiff testified that he missed two days of work, and that he had difficulty playing sports, sleeping, walking and standing for long periods of time (*see* Plaintiff EBT, *supra*).

As defendants did not meet their burden, this Court need not examine the sufficiency of plaintiff's opposition papers. However, even assuming, arguendo, that defendants met their burden, plaintiff provided credible medical evidence sufficient to raise a triable issue of fact on the significant limitation and permanent consequential limitation categories of Insurance Law 5102(d). The sworn report of Dr. Thomas S. Mathew, M.D., who examined plaintiff on October 21, 2020, found loss in ranger of motion of plaintiff's cervical spine up to 25% and lumbar spine up to 33% and causally relates the loss to this accident (*see* NYSCEF Doc. # 92).

Accordingly, defendants' motions for summary judgment (sequence number two and four) pursuant to Insurance Law § 5102(d) are denied.

Liability (Mot. Seq. one and three)

Plaintiff and defendant Sampson move for summary judgment on the issue of liability. "An accident can have more than one proximate cause, and although it is

generally for the trier of fact to determine the issue of proximate cause, it may be decided as a matter of law where only one conclusion may be drawn from the established facts (*Elusma v. Jackson*, 186 A.D.3d 1326, 130 N.Y.S.3d 500 [2 Dept., 2020], citing *Estate of Cook v. Gomez*, 138 A.D.3d 675, 30 N.Y.S.3d 148 [2 Dept., 2016]). “Thus, [a] defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident [internal quotation marks omitted]” (*Tornabene v. Seickel*, 186 A.D.3d 645, 129 N.Y.S.3d 110 [2 Dept., 2020], quoting *M.M.T. v. Relyea*, 177 A.D.3d 1013, 114 N.Y.S.3d 385 [2 Dept., 2019]; see also *Boulos v. Lerner–Harrington*, 124 A.D.3d 709, 2 N.Y.S.3d 526 [2 Dept., 2015]).

In the instant case, Sampson met his burden and established entitlement to summary judgment as a matter of law. Sampson provided his deposition testimony that he was travelling on 17th Avenue at approximately 20-22 miles per hour and proceeded into the intersection with the green light in his favor. In opposition, defendants and plaintiff failed to raise a triable issue of fact.

Defendants’ contention in opposition that the instance in Sampson’s testimony where he testified that that he had a green “sign” instead of “light”, is without merit. This Court will grant the movant latitude with respect to such insignificant misstatements, as Sampson testified with the use of an interpreter. Similarly, defendant’s testimony that co-defendant’s vehicle was “stopped on the side” does not create a question of fact as to whether he saw vehicle 2 before the accident. Notwithstanding that comment, Sampson

answered no to that question three separate times (*see* NYSCEF Doc. # 22 at p 32).

Again, this Court will grant latitude, given the use of an interpreter to take Sampson's testimony.

Defendants further contend that the statement made to the officer from drivers of both vehicles, memorialized in the police report that they had the green light, creates a triable issue of fact.

The use of a statement recorded in a police accident report involves two levels of hearsay, each of which must fit within a hearsay exception to render the statement contained within the report admissible (*see Memenza v. Cole*, 131 A.D.3d at 1022, 16 N.Y.S.3d 287, citing *Murray v. Donlan*, 77 A.D.2d 337, 346, 433 N.Y.S.2d 184). At the first level of hearsay, the report itself must be admissible. A properly certified police accident report is admissible where "the report is made based upon the officer's personal observations and while carrying out police duties" (*Memenza v. Cole*, 131 A.D.3d at 1021, 16 N.Y.S.3d 287) ... At the second level of hearsay, assuming a properly certified police accident report, the statement recorded within the police accident report by the police officer must satisfy a hearsay exception. This Court has held that, even where a police report is properly certified, the hearsay statements of nonparties or unknown sources contained therein may not be admitted for their truth (*see Noakes v. Rosa*, 54 A.D.3d 317, 318, 862 N.Y.S.2d 573

(*Yassin v. Blackman*, 188 A.D.3d 62, 131 N.Y.S.3d 53 [2 Dept., 2020]).

"Although hearsay evidence may be considered in opposition to a motion for summary judgment, it is insufficient to bar summary judgment if it is the only evidence

submitted" (*Roldan v. New York Univ.*, 81 A.D.3d 625, 916 N.Y.S.2d 162 [2 Dept.,

2011], quoting *Stock v. Otis El. Co.*, 52 A.D.3d 816, 861 N.Y.S.2d 722 [2 Dept., 2008] *cf.*

Xuezhen Dong v. Cruz-Marté, 189 A.D.3d 613, 134 N.Y.S.3d 710 [1 Dept., 2020]; *see also Yassin v. Blackman*, 188 A.D.3d 62, *supra*). Here, the police report is the only evidence provided in opposition by defendants and is therefore insufficient to raise a triable issue of fact. As stated above, defendants failed to appear for an examination before trial, and an affidavit was not provided in opposition.³

“With respect to the plaintiff’s motion, a plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, *prima facie*, that the defendant breached a duty owed to the plaintiff and that the defendant’s negligence was a proximate cause of the alleged injuries” (*Poon v. Nisanov*, 162 A.D.3d 804, 79 N.Y.S.3d 227 [2 Dept., 2018], quoting *Rodriguez v. City of New York*, 31 N.Y.3d 312, 76 N.Y.S.3d 898 [2018]).⁴ Here, plaintiff established, through submission of Sampson’s examination before trial, that Caisaguano and A Va were a proximate cause of his alleged injuries. However, plaintiff failed to establish that Sampson breached a duty owed to him. The arguments set forth in support of plaintiff’s motion, merely state that no questions of fact exist.

Conclusion

Accordingly, motions sequence two and four for summary judgment on the issue of damages are denied. Sampson’s motion for summary judgment on the issue of


³ As Sampson did not move to preclude co-defendants, this Court, in its discretion, declines to entertain the application made in counsel’s application in support.

⁴ This Court notes that based on the papers submitted plaintiff does not seek partial summary judgment on the issue of his own potential comparative negligence.

liability, sequence number one, is granted. Plaintiff's motion for summary judgment on the issue of liability, sequence number three, is granted only as to Caisaguano and A Va.

The foregoing constitutes the decision and order of this Court.

ENTER:



Hon. Lara J. Genovesi
J.S.C.

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