

Poddar v McGuire

2021 NY Slip Op 33966(U)

October 1, 2021

Supreme Court, Queens County

Docket Number: Index No. 707197/2019

Judge: Chereé A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**

IAS PART 30

Justice

-----X
APARNA PODDAR ,

Index No.: 707197/2019

Plaintiff,

Motion

Date: September 8, 2021

-against-

Motion Cal. No.: **35 & 36**

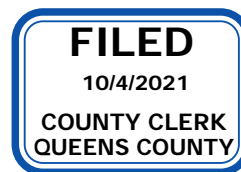
DAVID MCGUIRE,

Defendant.

Motion Sequence No.: **1 & 2**

-----X
DAVID MCGUIRE,

Third-Party Plaintiff,



-against-

TAPAS K. PODDAR,

Third-Party Defendant.

-----X

The following efile papers numbered 11-21, 35, 37-39 submitted and considered on this motion by defendant/third-party plaintiff David McGuire (hereinafter “McGuire”) seeking an Order granting him summary judgment pursuant to Civil Practice Law and Rules (“CPLR”) 3212 dismissing the complaint and cross-claims against him on the basis that he did not breach any duty owed to the plaintiff Aparna Poddar (hereinafter “Poddar”) (Sequence 1); and the following efile papers numbered 22-34,40-47 submitted and considered on this motion by McGuire seeking an Order granting him summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross claims against him on the basis that Poddar did not sustain a “serious injury” under Insurance Law 5102(d), and the cross-motion by third-party defendant Tapas Poddar (hereinafter “Tapas”) seeking the same relief (Sequence 2).

Motion Sequence #1

Papers
Numbered

Notice of Motion-Affidavits-Exhibits.....	EF 11-21
Affirmation in Opposition-Affidavits-Exhibits.....	EF 37, 38
Reply Affirmation-Affidavits-Exhibits.....	EF 35, 39

Motion Sequence # 2

**Papers
Numbered**

Notice of Motion-Affidavits-Exhibits.....	EF 22-31
Cross-Motion-Affidavits-Exhibits.....	EF 32-33
Affirmation in Opposition-Affidavits-Exhibits.....	EF 34, 40-43, 44-46
Reply Affirmation-Affidavits-Exhibits.....	EF 47

Facts and Procedural History

This action arises from a two-car automobile accident which occurred on December 20, 2017 at the intersection of 69th Avenue and 165th Street, County of Queens, State of New York. Poddar filed a summons and verified complaint on April 24, 2019 seeking to recover damages for serious injuries that he alleged that he sustained in the accident. McGuire served a verified answer on June 24, 2019 and filed a verified third party summons and complaint on July 10, 2019 against third-party defendant Tapas K. Poddar, (hereinafter “Tapas”) who was the owner and operator of the vehicle that Poddar was a passenger in, asserting that Tapas was negligent in the ownership, operation, maintenance and control of the vehicle, and that if Poddar sustained injuries, other than due to her own negligence, Tapas was responsible in whole or in part and was obligated to contribute and/or indemnify McGuire for any judgment which Poddar recovered. Tapas served a verified answer to the third-party complaint on August 14, 2019, denying the essential allegations contained in the third-party complaint, and asserting affirmative defenses. Tapas is Poddar’s husband.

McGuire moves for an Order granting him summary judgment pursuant to CPLR 3212 on the issue of liability. In support of the motion, McGuire submitted an attorney affidavit; the pleadings, including the third-party pleadings; plaintiff’s deposition transcript; third-party plaintiff’s deposition transcript; and, a police report. A Note of Issue has not been filed in this matter. Tapas’ opposition papers to Sequence 1 were erroneously filed under seq 2 not 1, and the Court will address the merits of the papers, if necessary.

McGuire’s Motion for Summary Judgment and Statement of Material Facts Pursuant to Uniform Rules 202.8-g

McGuire’s Statement of Material Facts in accordance with Uniform Rule 202.8-g is the following:

1. Plaintiffs filed this lawsuit seeking to recover for alleged injuries they sustained as a result of a motor vehicle accident that occurred on December 20, 2017 (Exhibit A).
2. The defendant McGuire was operating his vehicle on 69 Avenue with the right of way when the third-party defendant Poddar’s vehicle that was exiting a parking lot struck his vehicle (Exhibit H).

3. At the time of the accident, the third-party defendant, Tapas Poddar, was exiting the Key Food Parking lot and attempting to turn left onto 69th Avenue (Exhibit F, p. 23; Exhibit G, pp. 15-17).
4. Defendant McGuire appeared at a deposition on November 30, 2020 and testified that he was traveling on 68th Avenue when the passenger's front fender of the third-party defendant's vehicle struck the driver's front fender by the headlight of his vehicle (Exhibit E, pp. 10-11, 13-14, 20-22).
5. Plaintiff appeared at a deposition on November 24, 2020 and testified that her husband was exiting the Key Food parking lot on 69th Avenue and intended to turn left when this accident happened (Exhibit F, pp.17, 20, 23). She does not know on which portion of the roadway this accident occurred (Exhibit F, p. 27).
6. Third-part(y) defendant, Tapas Poddar, appeared at a deposition on November 24, 2020 and testified that he did not observe the defendant McGuire's vehicle before this accident happened (Ex. G, p. 23). The front passenger's side of his vehicle contacted the driver's side of the defendant McGuire's vehicle (Exhibit G, pp. 23-24).
7. As the defendant McGuire was traveling with the right of way and the third-party defendant Tapas failed to yield the right of way the defendant McGuire is free from liability.
8. As defendant, David McGuire, was not negligent and was not a proximate cause of the accident, he is not liable and the action against him must be dismissed.

Poddar's Deposition Testimony relevant to liability

Poddar testified on November 24, 2020. She testified in sum and substance that she was a passenger in her husband, Tapas' vehicle. She related that she was involved in an accident on December 20, 2017 at about 11:00 A.M. when she and her husband were exiting a shopping mall parking lot heading home. She described the street of travel as a one way street where opposite lanes of travel were separated by a double-yellow line. The street had a parking lane on each side of 69th Avenue. Poddar testified that the traffic was light and her vehicle was stopped for about five minutes in traffic waiting to proceed. She claimed her husband was looking left and right and he intended to make a left turn onto 69th Avenue. She was not aware of how long he looked to his left or right prior to the accident. Looking to her right she related that she could see about two blocks down from where her vehicle was located. She was wearing her seatbelt. She claimed that she did not see the other car before the impact but recalled that it was speeding and that it came into contact with her vehicle, but later she testified that she saw other vehicles also traveling along the street and that she did not know if the car she saw speeding was the same car which came into contact with her husband's vehicle. She testified that at the time of the accident her vehicle was stopped and the impact was heavy.

McGuire's Deposition Testimony

McGuire gave sworn testimony in this matter on November 30, 2020. He stated that on the date of the accident, December 20, 2017, he was driving a Nissan SUV. The accident happened before noon. He was driving from home and on his way to a local pharmacy. He described 69th Avenue as a two-way road with a double line separating the opposite directions, with one lane for moving traffic in either direction and parking lanes on both sides. He testified that there is not traffic control device at the intersection of 69th Avenue at 165th Street. According to McGuire, his highest rate of speed before the accident was ten to fifteen miles an hour. He related that the parking lot that Tapas and Poddar were exiting was located on the other side of the street from the lane he was traveling in.

McGuire testified that prior to the accident he looked to his left to see if any vehicles were exiting the parking lot and about 30 seconds passed. He saw a vehicle attempting to exit the parking lot, but it was stopped in the driveway. He did not see any vehicle stopped on the other side to allow a car to exit the parking lot. He stated that he made a left hand turn and saw Tapas' vehicle in the driveway stopped, with the front end extending onto 69th Avenue. He testified that when the accident occurred his car was still moving at a rate of ten miles per hour. At the time of the occurrence he claimed that the front right fender of the other vehicle was over the yellow line. He claimed that he told the police that he was making a left turn onto 69th Avenue and he saw Poddar's vehicle exiting the driveway and while he was looking straight ahead of him he felt the collision. He said he did not tell the police that Tapas' vehicle was exiting the lot at a "high speed". He believed Tapas and Poddar's vehicle was traveling about ten to fifteen miles per hour at the time of the accident. He claimed that about fifteen seconds passed from the time he saw Tapas' car stopped exiting the driveway and the collision. McGuire claimed that there was a post office truck in the parking lane facing the driver's side of Tapas' vehicle, which he stated the front end was extended "beyond to give the driver an eyesight to see if he had clearance." He did not use his horn or apply his brakes, and following the accident he took pictures of the cars and the driveway.

Tapas Deposition Testimony

Tapas gave sworn testimony in this matter on November 24, 2020. Tapas testified that he is married to Poddar. He was involved in the accident on December 20, 2017. He was driving with Poddar and they were coming out of a Key Food grocery store parking lot near the intersection of 164th or 165th Road or Avenue and 69th Avenue and he was headed back home to drop off the groceries and Poddar so that he could go to work. He intended to make a left onto 69th Avenue. He described 69th Avenue as a two-way street with lanes for parking on each side. He stated that the in the area where the accident occurred the opposite lanes of travel are divided by a yellow double line. He stated that traffic conditions on 69th Avenue by Key Food were light. He stopped for traffic which was traveling from his left to his right and looked to his right side and left side. He believed he was stopped for two to three minutes. A car to his left stopped to let him proceed, and as he was passing he claimed that the other car hit his vehicle. He stated that he looked to his right and did not see a vehicle which is why he proceeded to move his car. He testified that he was on the yellow line when the impact occurred to the front passenger side of his vehicle.

Discussion

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering admissible evidence to eliminate any material issues of fact from the case. (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). It is well settled that “[t]here can be more than one proximate cause of an accident” (see *Mu-Jin Chen v Cardenia*, 138 AD3d 1126 [2d Dept 2016]; *Jones v Vialva-Duke*, 106 AD3d 1052 [2d Dept 2013] citing *Cox v Nunez*, 23 AD3d 427 [2d Dept 2005]).

“In order for a defendant driver to establish entitlement to summary judgment on the issue of liability in a motor vehicle collision case, the driver must demonstrate, prima facie, inter alia, that he or she kept the proper lookout, or that his or her alleged negligence, if any, did not contribute to the accident.” (See *Elkholy v Dawkins*, 175 AD3d 1487 [2d Dept 2019]; see also *Hurst Belome*, 142 AD3d 642 [2d Dept 2016].) “Since there can be more than one proximate cause of an accident, a defendant moving for summary judgment is required to make a prima facie showing that he or she is free from fault” (*Sage v Taylor*, 195 AD3d 971 [2d Dept 2021] citing *Carias v Grove*, 186 AD3d 1484 [2d Dept 2020]; see also *Boulos v Lerner-Harrington*, 124 AD3d 709 [2d Dept 2015]).

Existing case law in the Appellate Division Second Department dictates that in a case where a party affirmatively proffers a police accident report in support of a motion for summary judgment, the report must be in admissible form and satisfy two levels of hearsay. A properly certified police report is admissible if “the report is made based upon the officer’s personal observations and while carrying out police duties.” (See *Yassin v Blackman*, 188 AD3d 62 [2d Dept 2020]; see also *Memenza v Cole*, 131 AD3d 1020 [2d Dept 2015].) The criteria for the foundation of the admissibility of business records of a department or bureau of a municipal corporation or of the State can be made with a certification (see CPLR 2306; 4518[c]). Such certification must state that the business record “was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.” (CPLR 4518[a]; *Id.*). Assuming that the police report is certified, the statement contained in the police report must still satisfy a hearsay exception. (See *Johnson v Lutz*, 253 NY 124 [1930]; *Shehab v Powers*, 150 AD3d 918 [2d Dept 2017]; *Pavane v Marte*, 109 AD3d 970 [2d Dept 2013]; *DeLuca v Blanco*, 31 AD3d 600 [2d Dept 2006]; *Noakes v Rosa*, 54 AD3d 317 [2d Dept 2005]).

The Court finds that the police report is not admissible as it is not certified, and moreover, McGuire testified that statements contained therein were incorrect in relation to his version of how the accident occurred.

A driver has a duty to see what there is to be seen and the failure to do so constitutes negligence (see *Abbas v Salavel*, 73 AD3d 1100 [2d Dept 2010]; *Laino v Lucchese*, 35 AD3d 672 [2d Dept 2006]). Here, McGuire failed to demonstrate that he kept a proper lookout and that his

alleged negligence did not contribute to the happening of the accident. He testified that he was looking straight. Both drivers testified that they did not see each vehicle moving prior to the accident, and both were making intending to make left turns, although McGuire's vehicle was proceeding in the lane which Tapas intending to make the left turn.

New York State Vehicle and Traffic Law section §1141 states the following:

“Vehicle turning left. The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard.”

New York State Vehicle and Traffic Law section §1163(a) states the following:

“Turning movements and required signals. No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in section eleven hundred sixty, or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate signal in the manner hereinafter provided.”

“A driver who has the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring them to yield to the driver with the right of way. A driver traveling with the right-of-way may nevertheless be found partially responsible for an accident if he or she did not use reasonable care to avoid the accident. Although a driver with the right-of-way...has a duty to use reasonable care to avoid a collision... a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision.” (*See Jeong Sook Lee-Son v Doe*, 170 AD3d 973 [2d Dept 2019]; *see also Adobea v Junel*, 114 AD3d 818 [2d Dept 2014]; *see also Fried v Misser*, 115 AD3d 910 [2d Dept 2014].) McGuire claimed that he was looking straight at the time of the accident and that Tapas' vehicle was stationary. Based upon the differing versions of events as stated by the parties, the Court finds that McGuire failed to establish his entitlement to judgment as a matter of law on the issue of liability (*see Aponte v Vani*, 155 AD3d 929 [2d Dept 2017]; *Katikireddy v Espinal*, 137 AD3d 866 [2d Dept 2016].)

Turning next to the motion and cross-motion, sequence 2, on April 22, 2021 McGuire filed a motion for summary judgment, sequence 1, on the issue of liability, and then on the next day, on April 23, 2021, McGuire filed a motion for summary judgment on the issue of serious injury. The Court finds that notwithstanding the fact that McGuire could have made one application to the

Court, addressing Sequence 2 on the merits of the motion and cross-motion, the Court finds that both McGuire and Tapas failed to establish their entitlement to judgment as a matter of law that Poddar did not sustain a serious injury under the Insurance Law as a result of the accident (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). In support of the motion, movant and cross-movant relied upon the pleadings, verified bill of particulars. In her verified bill of particulars, Poddar alleged that she sustained serious injuries to her cervical, thoracic and lumbar spine; right shoulder and right knee. She alleged that she was confined to her home and house for two days following the accident. She claimed that she suffered a serious injury under Section 5102(d) of the Insurance Law in that she sustained a personal injury which resulted in 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; and also a serious injury under the 90/180 day category.

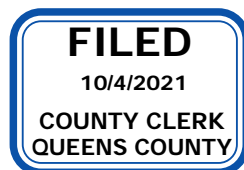
Further documentary evidence submitted in support of the motion and cross-motion was the Independent Medical Examination Report of Dr. R. Hillsman, Board Certified Orthopaedic Surgeon dated January 4, 2021. The doctor reported that Poddar was not currently working. He reviewed the verified bill of particulars and various medical records and performed an examination. Range of motion was taken with a goniometer, and Dr. Hillsman stated that range of motion on examination of Poddar's cervical, thoracic and lumbar spine was normal, as well as her right shoulder and right knee. Dr. Hillsman opined that Poddar suffered cervical, thoracic and lumbar sprains/strains which had resolved and also a right knee sprain/strain which had resolved. However, Poddar testified and alleged in her verified bill of particulars that she sustained injuries from the accident, and that she sustained a serious injury under the 90/180 day category. Poddar testified that she had been confined to her home for three months following the accident. Movant and cross-movant failed to demonstrate that Poddar did not sustain a serious injury under the 90/180 day category. (*See Gaddy v Eyster* 79 NY2d 955 [1992]); *Licari v Elliott*, 57 NY2d 230 [1982]).

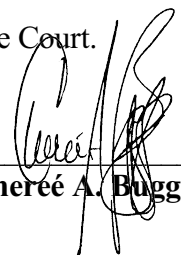
Since the movant and cross movant on Sequence 2 failed to satisfy their burden on summary judgment pursuant to CPLR 3212 on the issue of serious injury under Insurance Law §5102(d), the Court need not address the sufficiency of the opposition papers (*see Kraska v Puleo*, 299 AD2d 397 [2d Dept 2002]).

Therefore, motion sequence 1 is denied. The motion and cross-motion, under sequence 2 are both denied.

The foregoing constitutes the decision and Order of the Court.

Dated: October 1, 2021




Hon. Chereé A. Buggs, JSC