

Ayitey v New York City Tr. Auth.

2021 NY Slip Op 34160(U)

September 27, 2021

Supreme Court, Queens County

Docket Number: Index No. 701030/2018

Judge: Joseph Risi

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE JOSEPH RISI
A. J. S. C.

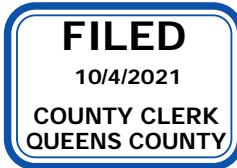
IA PART 3

-----X

SAMUEL AYITEY,

Index Number: 701030/2018

Plaintiff,



Motion Date: February 9, 2021

-against-

Motion Sequence #2

NEW YORK CITY TRANSIT AUTHORITY D/B/A
MTA NEW YORK CITY TRANSIT and CHOUKRY
MAHIEDDINE,

DECISION/ ORDER

Defendants.

-----X

The following numbered papers read on this motion by plaintiff for an Order, pursuant to CPLR §3212, granting summary judgment on the issue of liability and cross-motion by defendants for an Order, pursuant to CPLR §3212, granting summary judgment on the issue of liability and on the grounds that plaintiff’s alleged injuries fail to meet the serious injury threshold of Insurance Law §5102(d).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	EF 28 – 39
Notice of Cross Motion – Affidavits – Exhibits.....	EF 44 – 55
Answering Affidavits - Exhibits.....	EF 59 – 68
Reply Affidavits.....	EF 86 - 90

Upon the foregoing papers, it is ordered that this motion and cross-motion are determined as follows:

Plaintiff commenced this action by the filing of a summons and complaint on January 22, 2018. This is an action to recover damages for personal injuries allegedly sustained by plaintiff, as a pedestrian, due to the defendants’ negligence. The subject accident occurred on August 19, 2017 at the intersection of Sutphin Boulevard at or near its intersection with Archer Avenue, Queens County, City and State of New York.

In support of the motion, plaintiff submits, *inter alia*, a copy of the pleadings and the deposition transcripts of plaintiff and defendant-driver Mahieddine and an uncertified police report.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his or her position (*see Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). Additionally, “a motion for summary judgment shall be supported by affidavit, by a copy of the pleading or by other available proof, such as depositions and written admissions” (CPLR §3212[b]). Plaintiff has established his prima facie entitlement to judgment as a matter of law on the issue of liability (*see Niyazov v Hunter EMS, Inc.*, 154 AD3d 954 [2d Dept 2017]; *Service v McCoy*, 131 AD3d 1038 [2d Dept 2015]).

Annexed to defendants’ cross-motion for summary judgment on the grounds of liability and that plaintiff did not sustain any serious injuries pursuant to Insurance Law §5102(d), are, *inter alia*, a copy of the pleadings, affirmed medical reports, the bus driver’s affidavit and a copy of the video depicting the accident.

Plaintiff testified at his deposition that he waited until the walk sign appeared before walking across Sutphin Boulevard within the crosswalk when the subject bus hit his left side while making a right turn from Archer Avenue. He testified that he was close to the yellow line(s) in the middle of the street before he was impacted by the bus. He did not see the bus prior to the accident.

Defendant Mahieddine testified at his deposition that he was making a right turn onto Sutphin Boulevard from Archer Avenue with the green light in his favor. He did not see any pedestrians in the crosswalk prior to turning. He also testified that plaintiff was in the crosswalk after the impact.

The annexed video depicts the plaintiff walking across Sutphin Boulevard within the crosswalk with the walk signal in his favor. He was approaching the double yellow lines when the subject bus, making a right turn, collided with his left side.

Pursuant to VTL §1146(a), every operator of a motor vehicle has an obligation to keep a proper lookout and to see what can be seen through the reasonable use of his or her senses to avoid colliding with other vehicles or pedestrians (*See Paris v Ferri*, 122 AD3d 814 [2d Dept 2014]; *Lu Yuan Yang v Howsal Cab Corp.*, 106 AD3d 1055 [2d Dept 2013]; *Colpan v Allied Cent. Ambulette, Inc.*, 97 AD3d 776 [2d Dept 2012]). Moreover, VTL §1112 states:

Whenever pedestrians are controlled by pedestrian-control signals exhibiting the words “WALK” or “DON'T WALK”, or exhibiting symbols of a walking person or upraised hand, such signals shall indicate and apply to pedestrians as follows: (a) Steady WALK or walking person. Pedestrians facing such signal may proceed across the roadway in the direction of the signal and shall be given the right of way by other traffic.

Defendants, in opposition, fail to raise any triable issues of fact sufficient to preclude summary judgment. It is undisputed that defendant driver had a green light and that the walk signal was in plaintiff’s favor. Plaintiff also testified that he was within the crosswalk prior to the impact.

Defendants do not provide any evidence or testimony to the contrary. In fact, the defendant driver testified at his deposition that he did not see plaintiff at any point prior to the impact. It is clear that Defendant Mahieddine failed to adhere to VTL §1146(a) by failing to see what there was to be seen to avoid colliding with the pedestrian plaintiff.

Accordingly, the plaintiff's motion for summary judgment on the issue of liability is granted and the affirmative defense of comparative negligence is dismissed.

The Court now turns to the branch of defendants' cross-motion on grounds that plaintiff's alleged injuries fail to meet the serious injury threshold of Insurance Law §5102(d). In his verified bill of particulars ("BP"), plaintiff alleges various injuries including, but not limited to, a concussion, traumatic brain injury, post-concussion syndrome, cognitive and memory impairment/deficits, herniations, and right knee tear of the meniscus.

On a motion for summary judgment dismissing a complaint that alleges a serious injury, defendants have the initial burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 351 [2002]; *Castillo v MTA Bus Co.*, 163 AD3d 620, 622 [2d Dept 2018]). The defendants may satisfy this burden if defendants present the affirmation of a doctor which recites that plaintiff has normal ranges of motion in the affected body parts, and identifies the objective tests performed to arrive at that conclusion (*see Lamb v Rajinder*, 51 AD3d 430 [1st Dept. 2008]). If defendants satisfy this burden, plaintiff must present evidence of 1) contemporaneous treatment - qualitative or quantitative - to establish that plaintiff's injuries were causally related to the accident and 2) a recent examination to establish permanency.

Defendants submitted, *inter alia*, a copy of the pleadings, an affirmed medical report of defendants' examining orthopedic physician, a neurological report from Richard P. DeBenedetto, Ph.D., and plaintiff's deposition transcript. In opposition to the cross-motion, plaintiff submitted, *inter alia*, plaintiff's affirmed medical reports of his examining physicians and other various medical reports.

Defendants failed to establish prima facie that the plaintiff did not sustain a serious injury as a result of the accident, since defendants' own expert found significantly limited ranges of motion in plaintiff's right knee and cervical spine (*see Susino v. Panzer*, 127AD3d 523 [1st Dept. 2015]). Defendants' orthopedist, Rafael A. Lopez Steuart, M.D., stated in his affirmed report that upon examination, he found a significant decreased range of motion in plaintiff's cervical spine. Resultingly, all injuries casually related to the subject accident would be presented to the jury at the time of trial (*Linton v Nawaz*, 14 N.Y.3d 821 [2010]).

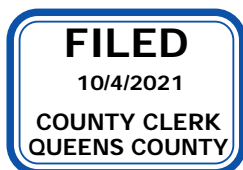
Moreover, the report by Richard P. DeBenedetto, Ph.D., is inadmissible because it is unsworn and fails to meet the requirements of CPLR §2106. A movant cannot rely on evidence submitted for the first time in its reply (*Cotter v Brookhaven Mem. Hosp. Med. Ctr., Inc.*, 97 A.D.3d 524 [2d Dept 2012]).

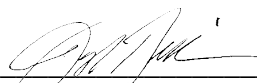
Even if *arguendo*, the Court were to consider the report by Richard P. DeBenedetto, issues of fact would arise as to whether plaintiff's polio survivor syndrome or the subject accident is the cause of the alleged brain injury.

Accordingly, Plaintiff's motion for summary judgment on the issue of liability is granted and defendants' cross-motion for summary judgment is denied in its entirety.

This is the decision and order of the Court.

Date: September 27, 2021





Hon. Joseph Risi, A.J.S.C.