

Perez v Bobcar Media LLC
2022 NY Slip Op 31696(U)
May 11, 2022
Supreme Court, Kings County
Docket Number: Index No. 509339/2018
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

-----X Index No.: 509339/2018
ANGEL PEREZ, Motion Seq. No. 01 & 02

Plaintiff,

- against -

DECISION AND ORDER

BOBCAR MEDIA LLC and BENNY M. COHEN,

Defendants.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the defendants’ motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 01) 26-40, 64-70, 76-79 and (Motion 02) 41-54, 71-75 were read on this motion for summary judgment.

The defendants seek an order granting summary judgment and dismissal of the plaintiff’s complaint (Motion 01), pursuant to CPLR § 3212, claiming that the plaintiff’s injuries fail to meet the “serious injury” threshold as required by Insurance Law § 5102(d). The plaintiff seeks an order, pursuant to CPLR § 3212, granting summary judgment on liability (Motion 02) against all defendants and dismissal of the defendants’ first affirmative defense asserting based on the plaintiff’s alleged culpable conduct in causing the accident. After oral argument, and upon careful consideration of the parties’ submissions, the defendants’ motion is denied and the plaintiff’s motion is granted.

This action arises from a motor vehicle accident that occurred on February 14, 2017 at the intersection of Coney Island Avenue and Avenue O in the County of Kings, City and State of New York. The plaintiff, who was 24 years of age at the time of the accident, alleges that he was struck by the defendants’ vehicle while making a left turn. According to the plaintiff’s bill of particulars, the plaintiff alleges that as a result of the accident he sustained injuries to the lumbar spine in the form of disc bulges of L2/3 through L4/5, disc herniation at L5/S1 and lumbar radiculopathy, requiring surgical intervention for a lumbar discectomy. Prior to the surgery the plaintiff alleges that he underwent three lumbar epidural steroid injections, trigger point injections and epidurograms, and three cervical medial branch blocks and trigger point injections.

In support of their motion, the defendants submit the pleadings, an uncertified copy of the police report, note of issue, the plaintiff’s deposition transcript, the affirmed report of Dr. Alan

Zimmerman, a board-certified orthopedic surgeon, dated February 25, 2020, and the affirmed report of Dr. Michael J. Carciente, a board-certified neurologist, dated July 6, 2020. Dr. Zimmerman examined the plaintiff on February 25, 2020, and conducted objective testing of the plaintiff's cervical and lumbar spine. He determined that the plaintiff had normal range of motion and other objective tests were normal. Dr. Zimmerman opined that the multiple disc bulges and herniations of the lumbar spine were degenerative caused by degeneration and were not traumatic in nature. He also opined that there was no medical necessity for the percutaneous discectomy procedure that was performed. Dr. Zimmerman's diagnosis was resolved cervical and lumbar sprain. Dr. Carciente conducted a neurological examination that included the cervical and thoracic/lumbar spine which he concluded was normal with no neurological deficits. He concluded that there was no correlation between the findings on the lumbar spine CT scan and MRI reports, dated February 24, 2017 and June 11, 2017 respectively, and his examination of the plaintiff, and that there was no ongoing neurological injury, disability or permanency.

The plaintiff opposes the motion, and submits the affirmed report of Dr. Sebastian Lattuga, an orthopedic surgeon, dated January 29, 2021, the affirmation of Dr. Demetrios Mikelis, sworn to on March 8, 2022, who is board eligible in the fields of Internal Medicine and Physical Medicine and Rehabilitation, plaintiff's medical records relating to care and treatment of the plaintiff at New York Community Hospital, S & R Medical, P.C., where the plaintiff received physical therapy, and Metropolitan Medical and Surgical, which include the affirmed reports of Dr. Mark Gladstein.

Dr. Lattuga performed the L5/S1 discectomy on the plaintiff on April 17, 2018, and continued to treat the plaintiff throughout the years, 2018 and 2019. According to the medical records, Dr. Lattuga last examined the plaintiff on January 27, 2021. He conducted approximately 13 pre and post-operative examinations of the plaintiff, all of which indicated abnormal objective findings of the plaintiff's lumbar spine.

Dr. Mikelis examined the plaintiff on May 21, 2018, after the operative procedure, and a plan of physical therapy and a home exercise plain was devised. On August 20, 2018, Dr. Mikelis examined the plaintiff and upon percussion and palpation he noted spasms of the lumbar spine, and decreased motor strength in the quadriceps, hamstrings, tibialis anterior, and right extensor hallucis longus, as well as altered sensation in the right L4/5 dermatomes. He examined the plaintiff again on November 27, 2018, January 9, 2019, March 12, 2019, June 25, 2019, December 17, 2019, March 30, 2021, June 1, 2021, and August 31, 2021, and November 30, 2021. Dr. Mikelis found abnormal objective testing at each examination, and opined that the plaintiff's back condition is permanent, and that four years postoperatively the plaintiff continues to experience significant qualitative limitations and restrictions of use concerning his back. He further opined that the limitations constitute a substantial loss of functional use of the plaintiff's spine, which was causally related to the accident and traumatic in nature.

A motion for summary judgment is granted in favor of the moving party where there are no material issues of fact, and as a result, the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). As the proponent of the summary judgment motion, the defendants have the initial burden of establishing that the plaintiff did not sustain a serious injury under the categories of injury claimed in his Bill of Particulars. *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002). A defendant can satisfy the initial burden by relying on statements of defendants' examining physician, or plaintiff's sworn testimony, or by the affirmed reports of plaintiff's own examining physicians. *See Pagano v Kingsbury*, 182 AD2d 268 (2d Dept 1992). Once the defendants have made a prima facie showing that the plaintiff did not sustain a serious injury, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating that a triable issue of fact exists that the plaintiff sustained a serious injury. *See Gaddy v Eycler*, 79 NY2d 955 (1992).

In the instant case, the reports of Drs. Zimmerman and Carciente were sufficient to meet defendants' prima facie burden of demonstrating that plaintiff's injuries were not caused by the subject accident. *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eycler*, 79 NY2d 955; *Fest v Agnew*, 68 AD3d 1051 (2d Dept 2009). The defendant has submitted competent medical evidence establishing prima facie that the plaintiff's alleged injuries do not constitute a serious injury within the meaning of Insurance Law § 5102(d). *See Hayes v Vasilios*, 96 AD3d 1010 (2d Dept 2012); *Staff v Yshua*, 59 AD3d 614 (2d Dept 2009); *Rodriguez v Huerfano*, 46 AD3d 794 (2d Dept 2007).

However, in opposition, the plaintiff's submissions raise a triable issue of fact as to whether he suffered a serious injury as a result of the accident. *See Lopez v Senatore*, 65 NY2d 1017 (1985); *see also Khorami v Gizmo Cab Corp.*, 240 AD2d 470 (2d Dept 1997). Specifically, the plaintiff has raised issues of fact concerning the injury to his lumbar spine, which he alleges required surgical intervention that included a discectomy, as well as several epidural injections preoperatively. According to the plaintiff's submissions, the plaintiff received consistent medical treatment and physical therapy for the lumbar injury, and that even post-operatively he continues to exhibit limitations and abnormal objective testing more than four years after the accident. Dr. Zimmerman's finding that the lumbar herniations and bulges indicate a preexisting degenerative disc disease is conclusory, and fails to explain why the plaintiff, who was 24 years old at the time of the accident, failed to have any symptoms of degenerative disc disease prior to the accident, and experienced persistent pain and limitations after the accident. In any event, Dr. Zimmerman's opinion that the plaintiff's injury is not traumatic in nature raises an issue of fact. *See Jaramillo v Lobo*, 32 AD3d 417 (2d Dept 2006).

Turning to the plaintiff's motion seeking summary judgment on liability (Motion 02), the plaintiff submits an uncertified copy of the police report, the deposition transcripts of the

plaintiff, defendant Benjamin M. Cohen, non-party witness Guillermina Perez, and police officer Maria Landy, the memo book and handwritten police report of police officer Maria Landy, and a Google Maps image of the intersection where the accident occurred.

According to the deposition testimony of the plaintiff, he was attempting to cross the street with the green traffic light in his favor, when the defendants' vehicle, operated by defendant Benny M. Cohen (Cohen), was making a left turn and struck the plaintiff. The plaintiff's mother, Guillermina Perez, witnessed the accident, and she testified that she observed the plaintiff starting to cross the street with the green light, and saw the defendants' vehicle, which was turning left, strike the plaintiff. The responding police officer, Maria Landy, was shown the police report at her deposition, and confirmed, based on her report, that the defendant told her that his vehicle struck the plaintiff in the marked crosswalk as Cohen was making a left turn onto Coney Island Avenue.

In opposition, the defendant submits an attorney affirmation disputing that the defendants' vehicle made contact with the plaintiff. The defendant testified that he saw the plaintiff fall to the ground, and that he looked like he "tripped down," however when asked at his deposition if his vehicle made contact with a human being on February 24, 2017, he responded, "I don't recall."

Although a driver facing a green traffic light is entitled to proceed, he or she has a duty to yield the right-of-way to pedestrians lawfully within a crosswalk. *See Barbieri v Vokoun*, 72 AD3d 853, 855 (2d Dept 2010); *see also* VTL § 1111(a)(1). The plaintiff has demonstrated that he entered the crosswalk after exercising reasonable care and that the defendant was negligent in failing to yield the right of way. *See Moreira v M.K. Travel and Transp., Inc.*, 106 AD3d 965 (2d Dept 2013); *see also Gomez v Novak*, 140 AD3d 831 (2d Dept 2016). Pursuant to VTL § 1146(a), "the defendant had a statutory duty to use due care to avoid colliding with pedestrians on the roadway, and a common-law duty to see that which he should have seen through the proper use of his senses." *See Barbieri*, 72 AD3d at 856. A violation of a standard of care imposed by the VTL constitutes negligence per se. *See Moore v City of New York*, 197 AD3d 93 (2d Dept 2021).

The plaintiff's submissions, in the form of his deposition, as well as that of his mother, Guillermina Perez, and police officer Maria Landy, who testified concerning the contents of the police report she authored, establish the plaintiff's prima facie entitlement to judgment as a matter of law on the issue of liability and freedom from comparative fault. The deposition testimony demonstrates that the plaintiff entered the crosswalk after exercising reasonable care and was walking within the crosswalk, and that the defendant was negligent in failing to yield the right of way as he made a left turn. *See Moreira v M.K. Travel & Transp., Inc.*, 106 AD3d 965; *see also Gomez v Novak*, 140 AD3d 831. Moreover, the plaintiff was entitled to anticipate

that the defendant would obey traffic laws requiring him to yield. *See Rossani v Rana*, 8 AD3d 548 (2d Dept 2004).

In opposition, the defendant has failed to submit admissible evidence sufficient to raise a triable issue of fact. The affirmation of the defendants' attorney alone is insufficient to raise a triable issue of fact. *See Browne v Castillo*, 288 AD2d 415 (2d Dept 2001).

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment based on serious injury (Motion 01) is **DENIED**, and it is further

ORDERED, that the plaintiff's motion for summary judgment on liability (Motion 02) and for dismissal of the defendants' first affirmative defense is **GRANTED**.

This constitutes the decision and order of the Court.

DATED: May 11, 2022



HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.