

Santillan v New World Serv. Inc.

2022 NY Slip Op 31849(U)

May 26, 2022

Supreme Court, Kings County

Docket Number: Index No. 519867/2018

Judge: Carl J. Landicino

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.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, On the 26th day of May, 2022.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X
RAUL SANTILLAN,

Index No.: 519867/2018

Plaintiff,

- against -

DECISION AND ORDER

THE NEW WORLD SERVICE INC. and
MANA M. WAIBA,

Motion Sequence #3, #4

Defendants.

-----X

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

Papers Numbered

(NYSCEF)

Notice of Motion/Cross Motion and

Affidavits (Affirmations) Annexed..... 53-59, 65-74,

Opposing Affidavits (Affirmations)..... 61, 80-93,

Reply Affidavits (Affirmations)..... 76-78, 96-97

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This action concerns a motor vehicle accident that occurred on May 6, 2018. The Plaintiff, Raul Santillan (hereinafter the "Plaintiff"), claims that he was injured when his vehicle was involved in a collision with a vehicle owned by Defendant The New World Service, Inc. and operated by Defendant Mana W. Waiba (hereinafter "the Defendants"). The Plaintiff alleges that the collision occurred at the intersection of Wyckoff Avenue at or near Eldert Street in Brooklyn, New York. The Plaintiff claims in his Verified Bill of Particulars (See Defendants' Motion Exhibit

B, Paragraph 10), that he sustained a number of serious injuries, *inter alia*, injuries to his cervical spine and lumbar spine. The Plaintiff also alleges (See Defendant's Motion Exhibit B, Paragraph 20) that he sustained "a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence complained of." The Plaintiff alleges in his Bill of Particulars that after confinement to bed for 3 days following the accident he was confined "to home for approximately 4 months thereafter..." Plaintiff also states in his affidavit that although he was not working prior to the accident he was caring for his daughter daily, but was unable to continue doing that after the accident. (See Plaintiff's Affidavit in Opposition to Motion Sequence #4).

The Defendants now move (motion sequence #4) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint on the ground that none of the injuries allegedly sustained by the Plaintiff meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of this application, the Defendants rely on the deposition of the Plaintiff and the report of Dr. Salvatore Corso.

The Plaintiff opposes the motion and moves (motion sequence #3) for an order pursuant to CPLR 3212 granting him summary judgment on the issue of liability. In opposition to the Defendants' motion, the Plaintiff argues that Defendants have failed to meet their *prima facie* evidentiary showing. In support of his motion for summary judgment, the Plaintiff contends that summary judgment should be granted because Defendant's vehicle was negligent and the sole proximate cause of the collision. Specifically, the Plaintiff contends that summary judgment should be granted given that there is *prima facie* evidence that "just as I came to the intersection with Eldert Street and was about to pass the Defendant's vehicle, the Defendant's vehicle suddenly,

without any signal or warning, pulled away from the curb and began making a U-turn in the middle of the roadway, striking my vehicle.” (See Plaintiff’s Motion, Plaintiff’s Affidavit, Paragraph 12). In support of his application, the Plaintiff relies on his own deposition and a certified Police Accident Report.

Motions Sequence #4 (Defendants Summary Judgment Motion-Insurance Law § 5102(d))

In support of their motion (motions sequence #4) the Defendants proffer the affirmed medical reports from Dr. Salvatore Corso. Dr. Corso conducted an orthopedic medical examination of Plaintiff on December 5, 2020, approximately two and a half years after the collision at issue. In his report, Dr. Corso detailed his findings based upon his review of Plaintiff’s Bill of Particulars, his personal observations and objective testing. Dr. Corso performed an orthopedic examination of the Plaintiffs cervical spine and lumbar spine and found no limitation in the Plaintiff’s range of motion in relation to these areas. Dr. Corso does not state whether he used an instrument for objective testing. Dr. Corso opined that “[t]he claimant did not sustain any significant or permanent injury as a result of the motor vehicle accident.” Dr. Corso also stated that “[t]here are no objective clinical findings indicative of a present disability.” (See Defendants’ Motion, Report of Dr. Corso, Exhibit F).

Turning to the merits of the motion made by the Defendants, the Court finds that the Defendants have failed to meet their *prima facie* burden. The Plaintiff was examined by the defendants’ examining orthopedist Dr. Corso, more than two and a half years after the accident, and he failed to relate his findings to the 90/180 category of serious injury for the relevant period of time immediately following the accident. Dr. Corso also failed to address this claim specifically. See *Owens-Stephens v. PTM Mgmt. Corp.*, 191 A.D.3d 691, 137 N.Y.S.3d 734 [2d Dept 2021];

Rouach v. Betts, 71 AD3d 977, 977, 897 N.Y.S.2d 242, 243 [2d Dept 2010]; *see also Epstein v. MTA Long Island Bus*, 161 AD3d 821, 823, 75 N.Y.S.3d 532, 534 [2d Dept 2018]; *Stead v. Serrano*, 156 AD3d 836, 837, 67 N.Y.S.3d 244 [2d Dept 2017]; *Nembhard v. Delatorre*, 16 AD3d 390, 791 N.Y.S.2d 144 [2d Dept 2005]; *Peplow v. Murat*, 304 AD2d 633, 758 N.Y.S.2d 160, 161 [2d Dept 2003]; *Frier v. Teague*, 288 AD2d 177, 732 N.Y.S.2d 428 [2d Dept 2001].

It is true that where a Bill of Particulars contains conclusory allegations of a 90/180 claim and the Deposition and/or affidavit of Plaintiff does not support, or reflects that there is no, such claim, Defendant movant may utilize those factors in support of its motion. *See Master v. Boiakhtchion*, 122 AD3d 589, 590, 996 N.Y.S.2d 116, 117 [2d Dept 2014]; *Kuperberg v. Montalbano*, 72 AD3d 903, 904, 899 N.Y.S.2d 344, 345 [2d Dept 2010]; *Camacho v. Dwelle*, 54 AD3d 706, 863 N.Y.S.2d 754 [2d Dept 2008].

However, in the instant proceeding, the Plaintiff sets forth in his verified Bill of Particulars that he sustained a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. The Plaintiff's Bill of Particulars also indicates that "Plaintiff was confined to bed for approximately 3 days following the occurrence and to home for approximately 4 months thereafter, and intermittently thereafter, to date." (See Defendant's Motion Exhibit B, Paragraph 12). As stated above his affidavit and deposition testimony supports his allegation. As a result, the Defendants have failed to meet their *prima facie* burden regarding this claim. *See Owens-Stephens v. PTM Mgmt. Corp.*, 137 N.Y.S.3d 734, 735 [2d Dept 2021]; *Hall v. Stargot*, 187 AD3d 996, 996, 131 N.Y.S.3d 250, 251 [2d Dept 2020]; *Che Hong Kim v. Kossoff*, 90 AD3d 969, 969, 934 N.Y.S.2d 867 [2d Dept 2011].

“Since the moving defendants failed to meet their prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact.” *Williams v. Maleachern*, 186 AD3d 1462, 1464, 128 N.Y.S.3d 851, 852 [2d Dept 2020]; see also *Rouach v. Betts*, 71 AD3d 977, 977, 897 N.Y.S.2d 242, 243 [2d Dept 2010].

Motions Sequence #3(Plaintiff's Summary Judgment Motion)

Turning to the merits of the instant motion, the Court finds that sufficient evidence has been presented by the Plaintiff to establish his *prima facie* burden. In support of his application, the Plaintiff relies primarily on his affidavit and a certified Police Report. The Police Accident Report reflects that “Driver 1 [Defendant Waiba] states he pulled over to the side of the road to let a passenger out of the vehicle, and then he pulled off the curb when vehicle 2 [Plaintiff] struck vehicle 1.” The Defendant’s statement is admissible because the Police Accident Report is certified, and Defendant’s statement constitutes an admission. See *Yassin v. Blackman*, 188 AD3d 62, 64, 131 N.Y.S.3d 53, 55 [2d Dept 2020]. Even assuming, *arguendo*, that the Police Accident Report was not admissible, the Plaintiff’s affidavit is sufficient to show that the Defendant was a proximate cause of the accident. In his affidavit, Plaintiff states that “[j]ust as I came to the intersection with Eldert Street and was about to pass the Defendant's vehicle, the Defendant's vehicle suddenly, without any signal or warning, pulled away from the curb and began making a U-turn in the middle of the roadway, striking my vehicle.” (See Plaintiff’s Motion, Affidavit of the Plaintiff, Paragraph 6). This statement is sufficient for the Plaintiff to establish a *prima facie* showing that the Defendant driver was negligent and a proximate cause of the accident. See *Martinez v. Allen*, 163 AD3d 951, 82 N.Y.S.3d 130 [2d Dept 2018].

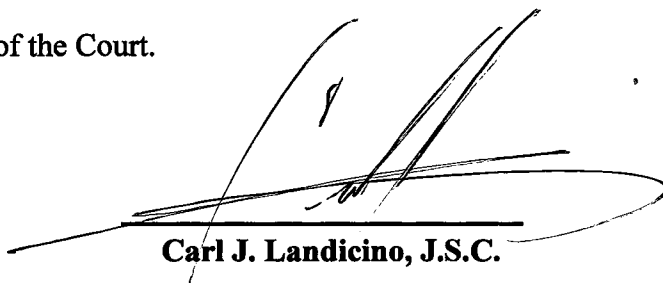
In opposition to the motion, the Defendant has failed to raise a material issue of fact that would prevent this Court from granting the motion. The Defendant does not submit an affidavit or any other admissible evidence in support of his opposition. As such the Plaintiffs' motion for summary judgment on the issue of liability is granted. *See Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018]. The movant did not seek to have affirmative defense(s) relating to culpable conduct dismissed. *See Diamond v. Comins*, 194 AD3d 784, 785 [2d Dept 2021].

Based on the foregoing, it is hereby ORDERED as follows:

The Plaintiffs' motion (motion sequence #3) for summary judgment on the issue of liability is granted to the extent that the Defendant driver was negligent and a proximate cause of the accident. The issue of Plaintiff's comparative negligence, if any, shall be addressed at trial. The Defendants' motion (motion sequence #4) for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
FILED
2022 JUN - 8 AM 9:14