Islam v Cotter
2022 NY Slip Op 33385(U)
October 6, 2022
Supreme Court, New York County
Docket Number: Index No. 452266/2018
Judge: J. Machelle Sweeting
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

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MOHAMMAD ISLAM,

Plaintiff,

- v -

JOSEPH COTTER, THE CITY OF NEW YORK

Defendants.

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INDEX NO. 452266/2018

MOTION DATE 05/02/2022, 04/27/2022

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 68, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 59, 61, 62, 63, 64, 65, 66, 67, 69, 70, 71

were read on this motion to/for JUDGMENT - SUMMARY.

In the underlying action, plaintiff alleges personal injuries sustained as a result of a motor vehicle accident that occurred on August 30, 2016, at approximately 12:30 PM, when a vehicle bearing License Plate Number 8234, registered to The New York City Police Department and operated by defendant JOSEPH COTTER came in contact with plaintiff's vehicle on Church Street, at or near the intersection of Church Street and Warren Street, in the county and state of New York. Defendants Joseph Cotter and the City of New York are collectively referred to herein as the "City."

Now pending before the court are two motions:

In Motion Sequence #001, plaintiff seeks an order: (1) pursuant to Civil Practice Law and Rules ("CPLR") Section 3212 granting summary judgment to the plaintiff against the City on the issue of liability, as there are no issues of fact; (2) finding that the plaintiff is free from comparative

fault; and (3) dismissing the City's First, Second, Third, Fifth, and Sixth Affirmative Defenses, pursuant to CPLR 3211(b)

In Motion Sequence #002 the City seeks an order, pursuant to CPLR 3212, granting summary judgment to the City on the grounds that plaintiff failed to meet the "serious injury" threshold mandated by Insurance Law § 5102(d).

Arguments Made by the Parties on Serious Injury

In plaintiff's verified Bill of Particulars (NYSCEF Document #32), plaintiff alleges that he suffered a number of injuries to his back and right shoulder.

In its motion, the City seeks summary judgment on the grounds that in New York State, claims for personal injury arising out of motor vehicle accidents are barred by the No-Fault Statute unless the alleged injury meets the threshold requirement of a "serious injury." The City argues that plaintiff here did not sustain a serious physical injury and, therefore, does not meet the threshold requirement of Insurance Law § 5102(d) in order to survive a motion for summary judgment.

The City argues that plaintiff did not suffer a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment. In support of this argument, the City attached plaintiff's 50-h transcript (NYSCEF Document #31), wherein plaintiff testified that he had only missed three days of work after the accident.

The City argues that plaintiff testified that he had two previous motor vehicle accidents, one in 2011 and another in 2014, and that the subject 2016 accident is the third motor vehicle accident in which plaintiff is suing for personal injuries. The City argues that in his prior two motor-vehicle accidents, plaintiff sustained the same injuries to his cervical and lumbar spine as he allegedly sustained in the subject accident.

The City argues that on April 12, 2021, plaintiff underwent an independent physical examination with Dr. Sean Lager, a Board-Certified Physician in the State of New Jersey and New York, who reviewed plaintiff's medical records and performed various tests, including but not limited to, a range of motion test, O'Brien's test, and a cross-over test. The City submitted Dr. Lager's report (NYSCEF Document #32) and argues that in this report, Dr. Lager opined that plaintiff's right shoulder and cervical and lumbar spine sprains/strains, were all objectively resolved, and that plaintiff has no disability.

In opposition, plaintiff argues that in the prior two accidents, he had never sustained an injury to his right shoulder. Plaintiff also argues that the City's expert is biased, which creates a credibility issue that must be left to a jury. In support of his position, plaintiff submits the report of Dr. Brian Haftel, a board certified anesthesiologist (NYSCEF Document # 65). Plaintiff argues that Dr. Haftel conducted objective medical testing and opined that plaintiff's right shoulder injury and current pain and limitations are solely caused by the subject accident on August 30, 2016. Plaintiff argues that Dr. Haftel opined that plaintiff's overall prognosis for a full and complete long-term recovery is poor; that plaintiffs injures are chronic and permanent; and that plaintiff experienced a significant painful functional decrease in range of motion of his right shoulder, cervical, and lumbar spine in all aspects.

In Reply, the City argues that the motion loss to plaintiff's cervical spine and lumbar spine were caused by the two prior accidents, and that the injury to plaintiff's right shoulder, even if new, is not significant enough to constitute a "serious injury." The City also argues that the report of plaintiff's expert, Dr. Haftel, should be disregarded because such report was submitted in contravention of CPLR §3101(d), which provides that each party shall identify who the party expects to call as an expert witness, the qualifications of each expert witness, and a summary of the grounds for each expert's opinion. The City argues that no information was provided regarding Dr. Haftel's background, professional license, or experience as a doctor or medical professional, and that neither Dr. Haftel's curriculum vitae nor resume were attached to the report.

Serious Injury: Conclusions of Law

Section 5102 (d) of the Insurance Law defines "serious injury" as:

> a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

Courts have continually held that the question of whether a plaintiff has established a *prima facie* case for a "serious injury," as described in section 5102 (d), remains an issue of law (Licari v Elliott, 57 NY2d 230, 235 [1982]). Claims of "serious injury" are to be supported by objective medical evidence demonstrating a significant physical limitation resulting from the accident (Pommells v Perez, 4 NY3d 566, 574 [2005]).

A moving defendant must first establish *prima facie* entitlement to summary judgment by submitting evidence demonstrating that plaintiff did not sustain a serious injury arising from a car accident involving the parties. Once this is established, the burden then shifts to plaintiff to raise

a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. Failure to raise a triable issue of fact requires the granting of summary judgment and dismissal of the complaint. *See* Gaddy v Eyler, 79 NY2d 955 (NY Ct, of Appeals); Thompson v Abbasi, 15 AD3d 95 (1st Dept 2005).

As a threshold matter, the court addresses the arguments made by both sides regarding the other side's expert witness. With respect to the City's argument that plaintiff failed to properly set forth his expert's credentials, a predicate for the admission of expert testimony is that its subject matter involve information or questions beyond the ordinary knowledge and experience of the trier of the facts. Moreover, the expert should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable (Matott v Ward, 48 NY2d 455 [NY Ct. of Appeals 1979]). Here, Dr. Haftel states that he is a "Board Certified Anesthesiologist" and a "Fellowship Trained Pain Management Specialist." Further, Dr. Haftel conducted a review of plaintiff's medical records, including prior MRI's, and conducted a physical exam that included range of motion measured using a goniometer. Given this, the court finds that Dr. Haftel is capable of imparting expert testimony in this context.

Contrary to the claims made by plaintiff that the City's expert, Dr. Lager listed in great detail the medical records he had reviewed and he, like plaintiff's expert, also conducted a physical exam that included range of motion measured using a goniometer. This court finds that Dr. Lager is capable of imparting expert testimony in this context.

With respect to plaintiff's alleged back injuries, the court credits the City's argument that such injuries could have been caused by plaintiff's prior two accidents. In Pommells v Perez, 4 NY3d 566 (2005), the New York Court of Appeals, concluded that

> *[E]ven where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury—such as* a gap in treatment, an intervening medical problem or *a preexisting condition—summary dismissal of the complaint may be appropriate.*

[…] [internal citations omitted] [emphasis added]

Here, it is undisputed that plaintiff sustained injuries to his cervical and lumbar spine in his prior two motor-vehicle accidents. Accordingly, these injuries may have preexisted prior to the subject accident. It is also undisputed however, that plaintiff did not injure his right shoulder in either of the two prior accidents, and both plaintiff's expert and the City's expert conducted medical testing and found that plaintiff's range of motion with respect to his shoulder was significantly impaired. In addition, plaintiff himself submitted a sworn Affidavit (NYSCEF Document #62) that read, in part:

> 16. Prior to this accident, I never injured my right shoulder. I have also never re-injured my right shoulder after this accident.
>
> 17. I did suffer motor vehicle accidents in 20ll and 2014 where I injured my neck and back. I did not injure my right shoulder in the 2011 or 2014 accidents. I had completed my medical treatment for the 2014 accident prior to the 2016 accident.

With respect to the City's argument that plaintiff's shoulder injury, even if new, is not significant enough to constitute a "serious injury, the court finds this argument to be unavailing, as the report of plaintiff's expert read, in part:

> Mr. Islam has never suffered an injury to his right shoulder prior to the August 30, 2016 accident.
>
> […]
>
> It is my opinion, within a reasonable degree of medical certainty based upon review of his MRI and other medical records, and discussions with my patient, that Mr. Islam's current complaints of pain and limitations to his right shoulder *is caused solely by the accident in question*. Mr. Islam's current pain and limitations are indicative of someone that suffered tears due to traumatic injury consistent with those found on his MRI.
>
> […]

> Due to the nature of the injury that the patient sustained to his right shoulder, cervical spine, and lumbar spine, there can be *permanent disability with a permanent consequential limitation of his right shoulder*, cervical spine, and lumbar spine. Furthermore, the patient suffered *permanent partial and significant functional loss of use of his right shoulder*, cervical spine, and lumbar spine. [emphasis added]

Moreover, in his affidavit, plaintiff averred that:

> 19. Due to the pain that I was experiencing from this 2016 accident, I was unable to work for approximately (3) three days immediately following the accident. Thereafter, when I resumed working, I could only work a limited schedule. I was unable to resume working as a driver for the same number of hours that I worked prior to the 2016 accident. I was only able to work six-to-seven-hour shifts, instead of my usual twelve hour shift.
>
> 20. Due to my injuries and resulting pain and limitations, I have pain in neck, right shoulder, and lower back almost every day. I have significant difficulty driving for long periods without a break. I am unable to walk long distances, unable to stand for long periods of time, I have difficulty walking upstairs, I cannot lift heavy objects, I am unable to assist with the household chores, and I cannot do laundry and I can no longer assist with the grocery shopping.
>
> 21. I also have limitations with my activities of daily living, for example, it takes me substantially longer to get dressed than it used to because it hurts to raise my right arm and to bend at the waist. I am also limited in how long I can sit or stand in one position before I am in too much pain and have to change position.

While the City is correct that the First and Second Departments have found that a tear of the right shoulder, without significant physical limitations, does not constitute a serious injury under Insurance Law, as noted above, plaintiff's expert opined that plaintiff had a "permanent disability with a permanent consequential limitation of his right shoulder" and "suffered permanent partial and significant functional loss of use of his right shoulder." *See, e.g.* Velazquez v City of New York, 200 AD3d 547 (1st Dept 2021) ("[…] plaintiff raised an issue of fact as to whether he sustained a serious injury by submitting his treating physician's findings of significant limitations in range of motion in plaintiff's cervical and lumbar spine within two months of the accident and MRI scans from shortly after the accident showing disc herniations and bulges, which support the physician's findings […]. Plaintiff also raised an issue of fact as to whether his injuries are

permanent by submitting his medical records showing that he continued to exhibit significant limitations in range of motion more than three years after the accident").

Given the above, this court finds that plaintiff has raised a triable issue of fact as to whether he sustained a serious injury under the Insurance Law, and the City's motion is accordingly denied.

Plaintiff's Motion For Summary Judgment and Comparative Fault

Plaintiff seeks an order for summary judgment on the issue of liability, as well as a finding that the plaintiff is free from comparative fault.

Plaintiff argues that he is entitled to summary judgment on the issue of liability because the City vehicle entered the plaintiff's lane and struck the front passenger side of plaintiff's vehicle, in violation of Vehicle and Traffic Law ("VTL") Sections 1128(a) and 1163(a). In support of this argument, plaintiff submits his own EBT transcript (NYSCEF Document #53) as well as the transcript of the City driver (NYSCEF Document #54).

In opposition, the City argues that it was not the City vehicle that struck plaintiff's vehicle, but it was *plaintiff's vehicle* that struck the City's vehicle. The City references the deposition transcript of the City driver as evidence in support of the City's account of the alleged incident.

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]).

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The 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, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, the New York Court of Appeals has "repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement to tender evidence in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Here, summary judgment is inappropriate, as plaintiff and the City each give contradictory accounts of the incident. Relevant portions of the transcripts are as follows:

EBT of Plaintiff:

> Q. In your own words, can you tell me what happened on August 30, 2016?
> A. I was going up from Church Street and then other car came from the opposite side and hit my car.
>
> […]
>
> A. The car hit my car from the right front side.
>
> […]
>
> A. I told the police the car came from the right side and hit me.

EBT of City Driver:

> Q. Can you describe the sum and substance of your conversation with the officers at the scene of the accident?
>
> A. He asked if anybody was hurt and then he asked what happened.
>
> Q. What was your response?
>
> A. That I was moving into the left lane, all the vehicles were stopped at the light and as I moved into the left lane with all the vehicles stopped at the light, the *passenger of the taxicab hit me on the left side, the driver's side.* [emphasis added]

Accordingly, this branch of plaintiff's motion seeking summary judgment with respect to liability is denied.

Plaintiff's Motion to Dismiss Defendant's Affirmative Defenses

The City's Affirmative Defenses were set forth in their Answer, (NYSCEF Document #30), as follows:

AFFIRMATIVE DEFENSE(S)

[FIRST AFIRMATIVE DEFENSE] 7. Plaintiff(s)' culpable conduct caused or contributed, in whole or in part, to his/her/their injuries and or damages.

[SECOND AFIRMATIVE DEFENSE] 8. At all times mentioned in the complaint, plaintiff(s) knew or should have known in the exercise of due/reasonable care of the risks and dangers incident to engaging in the activity alleged. Plaintiff(s) voluntarily performed and engaged in the alleged activity and assumed the risk of the injuries and/or damages claimed. Plaintiff(s) failed to use all required, proper, appropriate and reasonable safety devices and/or equipment and failed to take all proper, appropriate and reasonable steps to assure his/her/their safety. Plaintiff(s)' primary assumption of risk solely caused his/her/their injuries and/or damage and defendants) owed no duty to the plaintiff(s) with respect to the risk assumed. Plaintiff(s)' express assumption of risk solely caused his/her/their injuries and/or damage and defendants) owed no duty to the plaintiff(s) with respect to the risk assumed. Plaintiff(s)' implied assumption of risk caused or contributed, in whole or in part to his/her/their injuries. In any action for injuries arising from the use of a vehicle in, or upon which plaintiff'(s) were riding; it will be claimed that the injuries and/or damages sustained were caused by the failure of the plaintiffs) to use available seat-belts and/or other safety devices.

[THIRD AFIRMATIVE DEFENSE] 9. Defendants are immune from suit for their exercise of discretion in the performance of a governmental function and/or their exercise of professional judgment.

[FOURTH AFIRMATIVE DEFENSE] 10. The amounts recoverable by plaintiffs) are subject to limitation pursuant to Section 1601 of the Civil Practice Law and Rules, by reason of the culpable conduct of other person(s) who are, or with reasonable diligence could have been made party defendant(s) to this action, or pursuant to Section 15-108 of the General Obligations Law, by reason of a prior settlement between plaintiffs) and said person(s), or pursuant to Section 4545 of the Civil Practice Law and Rules are subject to reduction by collateral sources received by plaintiff(s), or by reason of the fact that punitive damages are not recoverable against municipal defendant(s).

[FIFTH AFIRMATIVE DEFENSE] 11. In cases involving authorized emergency vehicle(s) engaged in an emergency operation, or persons, teams, motor vehicles, and other equipment, while actually engaged in work on a highway, or hazard vehicles while actually engaged in hazardous operations on or adjacent to a highway, defendants) were not reckless

> in the manner in which they acted, and are entitled to the benefits of VTL sec. 1103 and/or VTL sec. 1104.[1]

With regard to the City's last affirmative defense, it is clear from the transcript of the City driver that the City vehicle was not engaged in an emergency operation at the time of the accident. Accordingly, this affirmative defense is dismissed. With regard to the City's affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of the plaintiff, such defenses are not dismissed, as there remain issues of fact as to whether plaintiff's conduct contributed to the accident. *See also* Berger v New York City Hous. Auth., 82 AD3d 531 (Sup. Ct. App. Div. 1st Dept 2011) (finding that genuine issues of material fact precluded summary judgment in case involving a five-car accident).

[1] While plaintiff seeks dismissal of the City's "First, Second, Third, Fifth, and *Sixth* Affirmative Defenses" the City has only listed five affirmative defenses.

Conclusion

For all the aforementioned reasons, it is hereby:

ORDERED that the branch of plaintiff's Motion (Motion Sequence #001) dismissing the City's affirmative defense with respect to authorized emergency vehicle(s) engaged in an emergency operation is GRANTED, and the remaining parts of plaintiff's motion is otherwise DENIED; and it is further

ORDERED that the City's motion for summary judgment in the City's favor (Motion Sequence #002) is DENIED.

This is the Decision and Order of the Court.

10/6/2022
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE