Ellis v Negri
2022 NY Slip Op 33387(U)
October 6, 2022
Supreme Court, Kings County
Docket Number: Index No. 504068/2020
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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MARK ELLIS,

Plaintiff,

-against-

ELISE D. NEGRI and EITAN Y. NEGRI,

Defendants.

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DECISION / ORDER

Index No. 504068/2020
Motion Seq. No. 1
Date Submitted: 6/16/22

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	17-38
Affirmation in Opposition and Exhibits Annexed.....	41-48
Reply Affirmation.....	49-51

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

This is a personal injury action arising out of a motor vehicle accident that took place on December 23, 2019, at approximately 10 a.m. at the intersection of Beverley Road and Ocean Avenue in Brooklyn, NY. According to the testimony of the parties, immediately prior to the happening of the accident, both the plaintiff and the defendant Eitan Negri were driving their vehicles[1] on Beverley Road, in opposite directions, with the intention of turning onto Ocean Avenue. Beverley Road in the area where the accident occurred is a two-way road with one lane for moving traffic in each direction. There are no turning lanes for traffic in either direction on Beverley Road. The intersection is controlled by a traffic signal. The plaintiff was travelling westbound on Beverley Road and intended to make a left turn to head southbound on Ocean Avenue. The defendant was

[1] Defendant Eitan Negri was operating a vehicle owned by his mother, defendant Elise Negri.

traveling eastbound on Beverley Road intended to make a right turn to go southbound on Ocean Avenue. There is no dispute that the traffic signal was green for both the plaintiff and the defendant when the cars collided. The plaintiff testified that when he was making his left turn onto Ocean Avenue, he did not see any cars coming at him from the opposite direction on Beverley Road [Doc 25, Page 61]. He provides an affidavit that states that he had completed his turn and was fully on Ocean Avenue when defendant hit him. He didn't say this at his EBT. The defendant testified that there was one car in front of his car when the light turned green for traffic on Beverley Road [Doc 26, Page 17]. He didn't recall whether that car turned at the intersection or went straight through, but testified that as soon as that vehicle had moved, he turned right and plaintiff hit his 1999 pickup truck on the driver's side, behind his driver's door [Doc 26, Page 29]. The plaintiff testified that the front right corner of his car, near the bumper and directional signal, were damaged as a result of the impact [Doc 25, Page 72]. The plaintiff left the scene with a friend who came and drove the plaintiff and his car from the scene. Plaintiff testified that he then took an Uber to Kings County Hospital.

In the plaintiff's bill of particulars and supplemental bill of particulars, he alleges that as a result of the accident, he sustained injuries to his cervical and lumbar spine, his right knee and right shoulder. The court notes that, in addition to these claimed injuries, the plaintiff claims exacerbation of prior injuries to all of the same parts of his body. At the time of the accident, the plaintiff was fifty-four years old. Plaintiff testified that he missed three days from his job as a personal assistant following the accident [Doc 25, Pages 22, 27].

Defendants move for summary judgment dismissing the complaint on the issue of liability, and alternatively contend that the complaint should be dismissed as plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d).

In support of the motion, defendants submit the pleadings, an attorney's affirmation, plaintiff's bill of particulars and supplemental bill of particulars, plaintiff's and defendant's EBT transcripts, photos claimed to be of the accident location and of the purported damage to the plaintiff's vehicle, medical records from three prior motor vehicle accidents that the plaintiff was in (2012, 2013 and 2017), a copy of the bill of particulars from the plaintiff's 2017 accident, wherein he made claims of injuries to his cervical and lumbar spine, his left shoulder and his right knee, and a certified report from an orthopedic surgeon, Dr. Jeffrey Passick, who examined the plaintiff on behalf of the defendants for the subject accident.

Initially, the court notes that, with regard to liability, the only proof offered is the testimony of the two drivers and some photos. Despite the fact that the parties testified that the police came to the scene and prepared a report, the police accident report is not offered by either of the parties. Even if the police did not witness the accident, at the very least the report would have identified the points of impact on the two vehicles. There is only one photo submitted, of the alleged damage to the plaintiff's car, and no photos are offered of the defendant's vehicle. The plaintiff testified that the impact was heavy [Doc 25, Page 66], but the defendant testified that the impact was "mild and light" and that there was no damage to his vehicle [Doc 26, Pages 30, 39]. The plaintiff testified that he never saw the defendant's vehicle before the impact and that defendant hit him. The defendant testified that he saw the plaintiff entering his lane "a fraction of a second" before

the impact occurred, and plaintiff hit his vehicle. Both parties testified that there were no witnesses to the accident.

Based on the testimony of the parties, questions of fact and credibility exist regarding which vehicle reached the intersection first and started to turn, and whether the other party yielded the right of way. In addition, although the defendant had the right to assume that vehicles, such as the plaintiff's vehicle, attempting to make a left turn at this intersection, would yield the right of way and would obey the provisions of the Vehicle and Traffic Law, in particular, Section 1141, the defendant was still required to use reasonable care and was not permitted to proceed to make his right turn in total disregard of a vehicle approaching from the opposite direction, which may have already entered the intersection, which he should have seen. In this case, particularly in light of the fact that the plaintiff testified that he never saw the defendant's vehicle prior to the impact, and the defendant's testimony that he only saw the plaintiff for a split-second before the impact occurred, an issue of material fact exists as to whether, at the time the plaintiff initiated his left-hand turn, the defendant was so close to the intersection as to constitute an immediate hazard. This precludes awarding summary judgment on the issue of liability (see *Brodney v Picinic*, 172 AD3d 673 [2d Dept 2019]; *Hartsuff v Michaels*, 139 AD3d 1005 [2d Dept 2016]). There is clearly a question of fact regarding whether the parties failed to see what there was to be seen (*Gardner v Smith*, 63 AD3d 783 [2d Dept 2009]). Based on the foregoing, the branch of the defendants' motion seeking summary judgment on the issue of liability is denied. The court notes that to demonstrate entitlement to summary judgment, the defendants must prove that they were completely free of any comparative fault for the happening of the accident.

Turning to the branch of the defendants' motion which seeks summary judgment regarding the "serious injury" threshold as defined in the Insurance Law, the court notes that Dr. Passick, the defendants' examining orthopedic surgeon, examined the plaintiff on August 2, 2021, a year and a half after the accident. Dr. Passick examined plaintiff and tested the range of motion in plaintiff's cervical and lumbar spine, as well as in both of his shoulders and his right knee. In his report, he states that, in addition to the plaintiff's bill of particulars, supplemental bill of particulars and second supplemental bill of particulars (which is not in the motion papers), he reviewed the plaintiff's medical records and he then lists the plaintiff's medical records, reports and tests that he claims he reviewed in conjunction with this exam. Of the seventy-seven medical records listed, only six are annexed for the court to review, and those are all from treatment that plaintiff received after plaintiff's prior motor vehicle accidents in 2012, 2013 and 2017. The remainder of the records that he states he reviewed were for treatment that the plaintiff received for the subject accident as well as for his prior accidents.

Although the range of motion tests for the right shoulder and right knee produced normal results, when measuring the plaintiff's range of motion in his cervical and lumbar spine, Dr. Passick notes reduced ranges of motion in all planes, when compared to the "normals." He also notes paraspinal tenderness and trapezii tenderness to light touch in the plaintiff's cervical spine, as well as paraspinal tenderness to light touch in the lumbar spine. Although Dr. Passick reported that the plaintiff had normal range of motion in his right knee, he also notes that there was tenderness. He concludes that the plaintiff sustained strains to his cervical spine, lumbar spine, right shoulder, and right knee, all of which have "resolved." Dr. Passick points out that the plaintiff has been in several prior

motor vehicle accidents, and notes that the records that he reviewed from those accidents show degenerative disc disease. He opines that "[t]here is no evidence of sequelae of this accident," that "[t]he claimant's subjective complaints were not correlated by objective findings during today's physical examination. No ongoing physical therapy or orthopedic treatment would be reasonable or medically necessary for the accident of record" and concludes that "[t]here is no permanency with regard to this accident and prognosis is good."

Discussion

With regard to the 90/180-day category of injury, as previously indicated, the plaintiff's deposition testimony and bill of particulars are clear that he only missed three days from his job as a personal assistant. As such, the court finds that the defendants have made a prima facie case with regard to the 90/180 category of injury. The affirmed report from Dr. Passick also establishes that the plaintiff has not sustained a permanent loss of use of a body organ, member, function or system.

However, the court finds that the defendants have not made a *prima facie* showing of their entitlement to summary judgment with regard to the other applicable categories of injury claimed by the plaintiff in his bill of particulars (*see Toure v Avis Rent A Car Sys*., 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]).

As the court previously noted, out of seventy-seven records that Dr. Passick claims he reviewed, only six are annexed for the court to review, and all relate to prior accidents. The court notes that the records and/or reports from the plaintiff's EMGs and MRIs are conspicuously absent, even though Dr. Passick specifically mentions the EMGs in his report, opining that a comparison of the EMG study from 2017 with the study performed

after this accident demonstrates an improvement in the plaintiff's condition. He also specifically mentions the plaintiff's prior MRIs, on which he bases his conclusion that the plaintiff's condition is a result of degenerative disc disease. He offers no opinion on the MRIs that were conducted after the subject accident, or on the differences between those and the prior films. He is silent on the plaintiff's claim of a "Grade II intrameniscal horizontal tear involving the posterior horn of the medial meniscus, approaching the inferior articular surface" of the right knee.

As such, the court finds that the report of Dr. Passick is insufficient to establish that the plaintiff did not sustain a "serious injury" to his right shoulder, right knee, neck or back, with regard to the categories "a permanent consequential limitation of use of a body organ or member" or "a significant limitation of use of a body function or system," the remaining applicable categories of injury in Insurance Law § 5102(d) claimed by the plaintiff in his bill of particulars.

When a defendant has failed to make a prima facie case with regard to all of the plaintiff's claimed injuries and all of the applicable categories of injury, the motion must be denied, and it is unnecessary to consider the papers submitted by plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

Even if the defendants had met their prima facie burden for summary judgment, plaintiff would have been found to have overcome the motion, as there are triable issues of fact raised by his submissions in opposition to the motion. Plaintiff's doctors' affirmations create a "battle of the experts" sufficient to overcome the motion and raise an issue of fact. In particular, Dr. Mohamed Elessawy, a physical medicine and rehabilitation doctor who treated the plaintiff for his accident in 2017 as well as for the subject accident, opines in his narrative report [Doc 46] that "the impingement of the supraspinatus outlet, subacromial/subdeltoid bursitis, biceps tenosynovitis, grade I sprain of the ACL, grade II intrameniscal horizontal tear involving the posterior horn of the medial meniscus, approaching the inferior articular surface, closed flap tear, diffuse tendinitis involving the patellar tendon, medial meniscus tear of right knee, C5-C6 central disc herniation impressing on the ventral cord and C6-C7 central disc herniation on the thecal sac sustained by the patient were directly caused by the accident of December 23, 2019." He further opines that it is his "expert medical opinion that the C2-C3 central disc herniation impresses on the thecal sac, C3-C4 central disc herniation impresses on the thecal sac, C4-C5 central disc herniation impressing on the ventral cord, and joint effusion of the right knee, were exacerbated by the accident of December 23, 2019." Finally, he opines that [i]t is my expert medical opinion that I believe the patient has reached his maximum medical rehabilitation potential by following conservative physical therapy program. There is a permanent impairment due to the motor vehicle accident and range of motion for his joints and extremities are reduced. The normal activities of daily living and work can increase his pain level. He may be capable of performing light duty and was

educated regarding activities that can increase his pain. He was advised to continue with home exercise to help maintain his ability to function and was released from care."

Accordingly, it is **ORDERED** that the defendants' motion is denied.

This constitutes the decision and order of the court.

Dated: October 6, 2022

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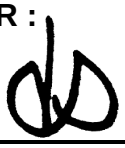

Hon. Debra Silber, J.S.C.