

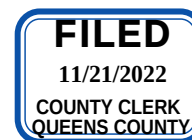
LaRoche v Aungpe
2022 NY Slip Op 35184(U)
November 10, 2022
Supreme Court, Queens County
Docket Number: Index No. 719810/2022
Judge: Karina E. Alomar
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK-QUEENS COUNTY

Present: Honorable Karina E. Alomar
Justice

IAS Part 23

-----X
JEAN LAROCHE,

Plaintiff,

Index No.: 719810/2021

Motion Submitted: 10/06/2022

-against-

Motion Sequence No.: 1

JENNIFER A. AUNGPE,

Defendant.
-----X

The following numbered papers were read on this motion by plaintiff for an order pursuant to CPLR § 3212 granting plaintiff summary judgment on the issue of liability and the issue of compliance with Insurance Law § 5102 (d); and further dismissing the defendants' affirmative defense alleging culpable conduct on the part of the plaintiff.

PAPERS

NUMBERED

Notice of Motion, Affirmation in Support, Affidavits and Exhibits ----- EF 16-37

Affidavit in Opposition and Exhibits----- EF 41-42

Reply----- EF 43

Upon the foregoing papers it is ordered that plaintiff's motion, is determined as follows:

Plaintiff commenced the instant action to recover for injuries he allegedly sustained as result of an accident that occurred on April 13, 2021, in Wheatley Heights located in Babylon, New York. In support of its application for summary judgment on the issue of liability the plaintiff submits both his and defendant's deposition transcripts, a copy of the police report and his affidavit.

Plaintiff states in both in his deposition and his affidavit that at the time of the accident he was fully stopped at a stop sign on Hadley Drive, facing east. That as he was in a stopped position, observing traffic conditions at the subject intersection, the defendant's vehicle was traveling northbound on Conklin Street, when the defendant executed a left-hand turn attempting to enter Hadley Drive, at which point her vehicle came into violent and direct contact with the entire front end of plaintiff's vehicle, causing the airbags to deploy. Moreover, he was caused to sustain severe injuries as a result of the impact.

Defendant testified that the accident occurred a few feet outside of the intersection of Conklin Street and Hadley Drive. She stated that she came to a full stop at a three way stop sign on Conklin Street and that as she was making a left turn from Conklin Street onto Hadley Drive

the front of her vehicle came into contact with the front of plaintiff's vehicle. Defendant testified that she was unaware if plaintiff's vehicle had been moving or was stopped at the time of impact.

In the instant matter, plaintiff as the party moving for summary judgment is required to make prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]). The failure to make such prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851[1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof inadmissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, supra at 324, citing to *Zuckerman v City of New York*, supra at 562).

"A violation of the Vehicle and Traffic Law [VTL] constitutes negligence as a matter of law" (*Kaziu v Human Care Services for Families & Children, Inc.*, 167 AD3d 588, [2d Dept 2018], quoting *Vainer v. DiSalvo*, 79 AD3d 1023, 1024 [2d Dept 2010]). Pursuant to VTL § 1142 (a), a driver entering an intersection controlled by a stop sign, after stopping at said stop sign, must yield the right-of-way to any other vehicle that is already in the intersection or that is approaching so closely as to constitute an immediate hazard (see *McPherson v Chanzeb*, 123 AD3d 1098, 1099 [2d Dept 2014]; *Mohammad v Ning*, 72 AD3d 913, 914-15 [2d Dept 2010]). Furthermore, a driver who has the right-of-way is entitled to anticipate that other drivers will obey traffic laws that require them to yield (*id.*).

Pursuant to Vehicle and Traffic Law § 1141, "[t]he driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." Additionally, a driver with the right of way is entitled to anticipate that the other motorist will obey the traffic law requiring her to yield (see *Francavilla v Doyno*, 96 AD3d 714, 715 [2d Dept 2012]).

The plaintiff herein has made prima facie showing of his entitlement to judgment as a matter of law on the issue of liability through the submission of his affidavit and deposition transcript, which demonstrated that the defendant violated Vehicle and Traffic Law § 1142 (a) and § 1141, by making a left turn from Conklin Street into Haley Drive, and that these violations were the sole proximate cause of the accident. The plaintiff, who was stopped at a stop sign in the eastbound lane of a two-way roadway, could not have been expected to anticipate that a driver executing a left turn in order would turn directly into his lane (see *Fawcett v Suffolk Transportation Service, Inc.*, 55 AD3d 535 [2d Dept 2008]).

In opposition, the defendant was required to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). They failed to adduce any evidentiary proof, and their speculation that plaintiff may have been inattentive or could have avoided the accident was insufficient to raise a triable issue of fact (see *Marsch v Catanzaro*, 40

AD3d 941 [2d Dept 2007]; *Gajjar v Shah*, 31 AD3d 377[2d Dept 2006]; *Sheppard v Murci*, 306 AD2d 268, [2d Dept 2003]. As such plaintiff's motion for summary judgment on the issue of liability is granted.

As to the issue of serious injury threshold, in support of plaintiff's motion, plaintiff relies on his affidavit and further submits the affirmation of Andrew Miller, M.D., along with his operative report dated September 17, 2021. According to the report as a result of the accident plaintiff was diagnosed with left shoulder impingement syndrome, a complete rupture of the rotator cuff and a partial articular supraspinatus tendon avulsion lesion of the supraspinatus, and a superior labrum anterior and posterior lesion of the left shoulder, which the doctor found to be casually related to the accident.

Plaintiff further states in his affidavit that due to the accident he now has difficulty in running, bending, and working out; that he can no longer carry heavy items, stretch, sleep on his left side and can no longer play basketball, softball or jog. Plaintiff states that these limitations were present in the three months immediately following the accident and continue to present.

In opposition, defendant submits the report of Dr. William Walsh, orthopedic surgeon. He stated that he performed the medical evaluation on April 12, 2022. He noted that there are no restrictions in range of motion as to the cervical spine, thoracic spine, lumbar spine, left shoulder and left hip. In addition, he notes that the plaintiff can work without restrictions and is not disabled.

Dr. Walsh's examination took place outside of the scope of the first 180 days following the subject accident, and he did not address the claim set forth in the bill of particulars, that plaintiff sustained a medically determined injury 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 subject accident (see e.g. *Pinder v Salvatore*, 69 AD3d 823, 823-24 [2010]; see also *Jocelyn v Singh Airport Serv.*, 35 AD3d 668, 669 [2007]). A physician's normal examination results coupled with deposition testimony that plaintiff had no restriction in activity can sometimes overcome this obstacle (see *Kouros v Mendez*, 41 AD3d 786, 788 [2007]). Here, however, when the plaintiff was asked what curtailments he experienced after the accident, he proclaimed limitations to numerous customary activities.

Thus, the court finds that plaintiff has met his prima facie burden and as defendant has not presented any evidence to establish the existence of material fact, plaintiff is entitled to summary judgment on the issue that he suffered a serious injury as defined by Article 51 of the Insurance Law Sections 5104(a) and 5102(2).

With respect to the striking of the first the first affirmative defense of comparative negligence and second affirmative defense for failure to use a seatbelt, the court finds as follows:

The plaintiff, who was stopped at a stop sign, could not have been expected to anticipate that a driver executing a left turn in order would turn directly into his lane. (See. *Fawcett v Suffolk Transportation Service, Inc.*, 55 AD3d 535, [2d Dept 2008]) as such, the first affirmative defense of comparative negligence is stricken.

The second affirmative defense for failure to use a seatbelt is also stricken in light of defendant's failure to rebut plaintiff's assertion that he was wearing his seatbelt.

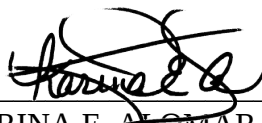
Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment is granted in its entirety; and it is further

ORDERED that plaintiff shall serve a copy of this order, together with notice of entry, on the defendants within 30 days of the date of entry of this order.

This constitutes the decision and order of the Court.

Dated: November 10, 2022



KARINA E. ALOMAR, J.S.C.

