Fishman v Isales
2023 NY Slip Op 35080(U)
September 29, 2023
Supreme Court, Bronx County
Docket Number: Index No. 26941/2015E
Judge: Veronica G. Hummel
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 20

MARC FISHMAN,

Plaintiff,

-against-

KAREN ISALES a/k/a KAREN IRIZARRY, US SECURITY ASSOCIATES INC., MALINE PERERA, and TARIQUE PERERA,

Defendants.

Index No. 26941/2015E

HON. VERONICA G. HUMMEL, A.J.S.C.

DECISION & ORDER

Mot. Seq. Nos. 6 & 7

In accordance with CPLR 2219(a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in connection with: (1) plaintiff MARC FISHMAN's ("Plaintiff") motion (Seq. No. 6) seeking an order precluding the testimony of Kevin Tully and Kirk Thibault, experts for defendants KAREN ISALES a/k/a KAREN IRIZARRY ("Isales") and US SECURITY ASSOCIATES INC. ("US Security"; and, together with Isales, the "Isales Defendants"), or, alternatively, that a *Frye* hearing be conducted; and (2) Plaintiff's motion (Seq. No. 7) seeking an order, pursuant to CPLR 3212, granting Plaintiff summary judgment against the Isales Defendants on the issue of liability and against all defendants on the issue of serious injury.

In this action, Plaintiff seeks compensation for alleged personal injuries suffered during two separate motor-vehicle accidents. The first accident occurred on June 10, 2013, when a vehicle driven by Isales and owned by US Security allegedly struck Plaintiff's vehicle in the rear while he was stopped in traffic on Broadfield Road in New Rochelle, New York (the "First Accident"). The second accident occurred less than six months later, on November 20, 2013, when a vehicle driven by defendant MALINE PERERA ("Perera") and owned by defendant TARIQUE PERERA (together with Perera, the "Perera Defendants"; and, together with the Isales Defendants, "Defendants") allegedly sideswiped Plaintiff's vehicle while he was driving on Central Avenue in Yonkers, New York (the "Second Accident"; and, together with the First Accident, the "Accidents").

Motion Sequences 6 and 7 are consolidated herein for purposes of disposition. Oral argument on the motions was heard before the Court virtually via Microsoft Teams on March 9, 2023, at which hearing all parties were represented by counsel.

Plaintiff seeks summary judgment (a) against the Isales Defendants on the issue of liability and (b) against all Defendants on the issue of serious injury.

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidence sufficient to eliminate any material issues of fact from the case." *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Upon such a showing, the burden then shifts to the nonmovant to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v. Metro. Museum of Art*, 27 A.D.3d 227, 228 (1st Dep't 2006).

When deciding a summary judgment motion, a court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957). In making this determination, the court must view the evidence in the light most favorable to the party opposing the motion, and must give that party the benefit of every inference that can be drawn from the evidence. *Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 475 (2013); *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 (2012). Every available inference must be drawn in the nonmoving party's favor. *De Lourdes Torres v. Jones*, 26 N.Y.3d 742, 763 (2016). If there is any doubt as to the existence of a triable issue, summary judgment should be denied. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

A. The Isales Defendants' Liability for the First Accident

A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, *prima facie*, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the accident. *Fernandez v. Ortiz*, 183 A.D.3d 443 (1st Dep't 2020). Such a plaintiff, however, is not required to establish that a defendant's conduct was the *sole* proximate cause of the accident. *Simmons v. Bergh*, 192 A.D.3d 547 (1st Dep't 2021). Nor is such a plaintiff required to demonstrate the absence of fault on his or her own part. *Id.* (citing *Rodriguez v. City of N.Y.*, 31 N.Y.3d 312 (2018)).

It is well settled that "[a] rear-end collision with a stopped or stopping vehicle establishes

a *prima facie* case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate, nonnegligent explanation for the accident." *Urena v. GVC Ltd.*, 160 A.D.3d 467, 467 (1st Dep't 2018) (quoting *Matos v. Sanchez*, 147 A.D.3d 585, 586 (1st Dep't 2017)); *Santos v. Booth*, 126 A.D.3d 506, 506 (1st Dep't 2015); *Woodley v. Ramirez*, 25 A.D.3d 451, 452 (1st Dep't 2006). Under New York Vehicle and Traffic Law ("VTL") § 1129(a), "a driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and traffic upon the condition of the highway." In other words, a driver must maintain a safe distance between his vehicle and the one in front of her. A violation of VTL § 1129(a) is *prima facie* evidence of negligence, and "[t]his rule has been applied when the front vehicle stops suddenly in slow-moving traffic." *Rodriguez v. Budget Rent-A-Car Sys., Inc.*, 44 A.D.3d 216, 223-24 (1st Dep't 2007) (quoting *Johnson v. Phillips*, 261 A.D.2d 269, 271 (1st Dep't 1999)); *Mascitti v. Greene*, 250 A.D.2d 821, 822 (2d Dep't 1998). In a rear-end collision, there is a presumption of non-negligence of the driver of the lead vehicle. *See Soto-Maroquin v. Mellet*, 63 A.D.3d 449, 450 (1st Dep't 2009).

Here, based on his submissions, Plaintiff demonstrates a *prima facie* case of negligence against Isales. Plaintiff establishes that his vehicle was stopped when it was struck in the rear by Isales's vehicle.

Isales, in turn, fails to come forward with a non-negligent explanation for the accident and thus fails to raise a material issue of fact mandating denial of the motion. Isales characterizes the contact between her and Plaintiff's vehicle as the front right corner of her bumper "rub[ing] against" the rear left corner bumper of Plaintiff's vehicle. (NYSCEF Doc. 140 at 15:15-16, 15:20-16:2) But that characterization does not refute that one vehicle impacted the other; rather, even if accepted as true, Isales's characterization merely speaks to the severity of the impact. As a result, Isales effectively concedes that she rear-ended Plaintiff.

Plaintiff also demonstrates a *prima facie* case of vicarious liability against US Security. There is no dispute that US Security owned the vehicle that rear-ended Plaintiff or that the vehicle was being driven with US Security's permission.

US Security, in turn, fails to raise a material issue of fact or law mandating denial of the motion. US Security contends that it cannot be held vicariously liable under VTL § 388 because that section was preempted under federal law by the so-called Graves Amendment. That

contention, however, insofar as applicable to the facts and circumstances at issue in this case, is baseless.

Under the Graves Amendment, the owner of a leased or rented motor vehicle cannot be held vicariously liable "for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if—(1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)." 49 U.S.C. § 30106(a). US Security submits no evidence demonstrating that it was in the trade or business of renting or leasing vehicles, or that it had actually leased the vehicle to Isales. Instead, US Security claims that the Graves Amendment applies to it because it is "an employer supplying its employees with company-owned vehicles," and that the Graves Amendment "bars negligence claims . . . based solely on a theory of vicarious liability." (NYSCEF Doc. 158, ¶¶ 32-33 (quoting *Collazo v. MTA-N.Y.C. Transit*, 74 A.D.3d 642 (1st Dep't 2010))

But both of these claims are incorrect—*as the attorneys for the Isales Defendants should have known based on caselaw that* they *quoted*.

To wit, the attorneys for the Isales Defendants omitted the phrase "car-rental companies" from their opposition brief's quotation from *Collazo*: "[T]he [Graves Amendment] bars negligence claims against *car-rental companies* based solely on a theory of vicarious liability." *Collazo*, 74 A.D.3d at 642 (emphasis added). The Graves Amendment, on its face, does *not* apply to shield employers who supply their employees with vehicles from vicarious liability for their employees' negligence.

B. Plaintiff's Claims of Serious Injury

Plaintiff claims that, as a result of the Accidents, he suffered serious injuries within the meaning of Insurance Law § 5102(d). Specifically, for the purposes of this motion, Plaintiff claims to have suffered occipital neuralgia, cubital tunnel syndrome, and fracture of the right temporomandibular joint ("TMJ"). He further claims that these injuries qualify as a "serious injury" under the following Insurance Law § 5102(d) categories: (1) a 90/180-day medically determined injury or impairment impacting substantially all of the usual and customary daily activities; (2) permanent consequential limitation of use of a body organ or member; (3) significant limitation of use of a body function or system; (4) fracture; and (5) significant disfigurement.

As the proponent of the motion, Plaintiff bears the burden of making a *prima facie* showing that he suffered a serious injury pursuant to Insurance Law § 5102(d) and that his injuries were causally related to the Accidents. *Elshaarawy v. U-Haul Co. of Miss.*, 72 A.D.3d 878, 881 (2d Dep't 2010) (citations omitted).

In support of the motion, Plaintiff submits, among other things, a Statement of Material Facts; a copy of the transcripts of his and Isales's depositions; a Google Maps photograph of the scene of the First Accident; a photograph of Plaintiff's arm following surgery on March 26, 2014; and the affirmations and affirmed reports of Cristian Brotea, M.D., an orthopedic and spinal surgeon, Alain de Lotbiniere, M.D., a neurosurgeon, Michael L. Gelb, DDS, MS, a dentist, Paul D. Gittelman, M.D., F.A.C.S., an otolaryngologist, Ari B. Lerner, M.D., a pain-management physician and anesthesiologist, Allen G. Zippin, M.D., a neurosurgeon, Robert E. Costello, D.C., a chiropractor, and Benjamin Berenfeld, M.D., an orthopedic surgeon.

In opposition to the motion, the Isales Defendants submit, among other things, a Counter-Statement of Material Facts; a copy of the investigative report of iUnlimited Investigative Services concerning the First Accident; a copy of the transcript of the deposition of Mandy Tim, an alleged third-party eyewitness to the First Accident; a copy of a property-damage assessment for Plaintiff's vehicle performed on June 19, 2013, following the First Accident; the affirmed reports of Eial Faierman, M.D., an orthopedic surgeon, Ashok Anant, M.D., M.P.H., F.A.C.S., a neurosurgeon; and John R. Denton, M.D., an orthopedic surgeon; the unsworn reports of Kevin S. Tully, B.E. Mech. Eng., a partner at SKE Forensic Consultants LLC, and Kirk L. Thibault, Ph.D. D-IBFES, a biomechanical engineer and President of Thibault Scientific, LLC; and the progress notes of Dr. Berenfeld from July 21, 2014.

i. *Occipital Neuralgia*

Based on his submissions, Plaintiff demonstrates, *prima facie*, that his alleged occipital neuralgia diagnosis is causally related to the Accidents.

Initially, it is true that Plaintiff's own experts acknowledge that he was involved in three prior motor-vehicle accidents on, respectively, July 14, 2010, July 15, 2010, and May 12, 2012 (together, the "Prior Accidents"). (NYSCEF Doc. 143, ¶ 3; *id.* Doc. 147 at 2; *id.* Doc. 149 at 1-2). And it is also true that neither Dr. Brotea nor Dr. de Lotbiniere state that they reviewed any records concerning the Prior Accidents—a fact that the Court determines renders their opinions as to

causation speculative and thus insufficient, on their own, to establish Plaintiff's *prima facie* case of serious injury.

Plaintiff, however, also submits his own deposition testimony and the sworn report of Dr. Costello in support of the motion. In his testimony, Plaintiff denies having had neck pain prior to the First Accident. (*Id.* Doc. 139 at 53:2-12) And Dr. Costello, a chiropractor who examined Plaintiff during an independent medical examination ("IME") on January 17, 2013, states that he found that Plaintiff was not suffering from any cervical pain or restriction in range of motion. (*Id.* Doc. 149 at 2) These submissions show that Plaintiff was not suffering from any symptoms of occipital neuralgia prior to the First Accident and, as a result, demonstrate, *prima facie*, that the First Accident caused Plaintiff's occipital neuralgia.

Nevertheless, viewing the evidence in the light most favorable to the Isales Defendants, the Court concludes that the Isales Defendants' submissions raise issues of fact requiring denial of the motion as to Plaintiff's occipital neuralgia. The Isales Defendants rely, in part, on the affirmed reports of Drs. Faierman and Anant. Dr. Faierman, who examined Plaintiff during an IME conducted on December 13, 2019, opines that Plaintiff's occipital neuralgia is not causally related to the Accidents. (*See id.* Doc. 163 at 7-9) Dr. Anant, who examined Plaintiff during an IME conducted on February 3, 2020, reaches the same conclusion of no causal connection. (*Id.* Doc. 164 at 16-18) Contrary to Plaintiff's contention, neither Dr. Faierman's nor Dr. Anant's conclusions in their reports concerning causation are equivocal. And, again contrary to Plaintiff's contention, Drs. Faierman's and Anant's conclusions are founded not only in a personal examination of Plaintiff but also a review of extensive medical records from both before and after the Accidents, including records related to the Prior Accidents. That both doctors *may* have performed their examinations of Plaintiff while his neurostimulator was activated, as Plaintiff argues, is not contrary to the doctors' conclusions to the extent they are based in review of relevant medical records.

Even if the reports of Drs. Faierman and Anant were inadequate to raise an issue of fact, other submissions on the motion independently raise issues of fact requiring denial of the motion. Isales and third-party witness Ms. Tim both testified that the impact between Isales's and Plaintiff's vehicles was very light. (*See id* Doc. 140 at 15:15-16, 15:20-16:2, 31:4-11; *id.* Doc. 160 at 26:22-27:5, 58:24-59:2, 59:11-15) Indeed, as previously mentioned, Isales characterized the impact as a mere rubbing of one bumper against another. (*Id.* Doc. 140 at 15:15-16, 15:20-16:2) Ms. Tim, likewise, testified that she was standing near Plaintiff's vehicle at the time of the First

Accident, did not hear an impact, and did not even realize that an accident had occurred until after the fact, when Plaintiff exited his vehicle and claimed that Isales had struck it.[1] (*See id.* Doc. 160 at 58:7-18, 59:3-8, 115:18-116:6) Ms. Tim also testified that, after Plaintiff had reentered his vehicle, she went to the rear of Plaintiff's vehicle and observed no damage. (*Id.* at 33:8-15, 116:7-24) Furthermore, the Isales Defendants submit a property-damage appraisal and photographs of Plaintiff's vehicle, both of which constitute circumstantial evidence of the severity of the First Accident. The appraisal did not find evidence of an impact, and the photographs do not show any visible damage to the rear of Plaintiff's vehicle. (*See id.* Doc. 161) These submissions, when viewed in the light most favorable to the Isales Defendants, raise questions as to the severity of the First Accident and whether it could have resulted in the serious injury allegedly suffered by Plaintiff. The Court need not consider the Isales Defendants' proferred expert reports of Tully and Thibault in order to reach this conclusion and, accordingly, leaves the determination of those reports' admissibility to the trial judge.

Plaintiff also contends that the Second Accident "aggravated" his alleged occipital neuralgia. (NYSCEF Doc. 136, ¶ 9) As there is a question of fact as to whether the First Accident caused the alleged occipital neuralgia, there is necessarily a question of fact as to whether the Second Accident could have aggravated it.

ii. *Cubital Tunnel Syndrome and TMJ Fracture*

The Perera Defendants oppose those portions of the motion concerning Plaintiff's alleged cubital tunnel syndrome and right TMJ fracture diagnoses on the ground of. They argue that the motion is premature because their physical examinations of Plaintiff were not yet conducted when the instant motion was filed. Plaintiff does not dispute that the physical examinations were, as the Perera Defendants argue, put off pending the resolution of a prior motion (Seq. No. 5) that sought to compel Plaintiff to produce authorizations for the release of certain of his medical records. The Court decided the motion to compel in defendants' favor by a Decision and Order (NYSCEF Doc.

[1] While Plaintiff argues that Ms. Tim testified to observing an accident in the afternoon of June 10, 2013, even though all parties agree that the First Accident occurred in the morning thereof, Plaintiff is well aware that Ms. Tim was, later in her deposition for purposes of refreshing her memory, presented with a recorded statement that she gave to an insurance inspector significantly closer in time to the First Accident than her deposition, which was conducted on October 6, 2020. (*See* NYSCEF Doc. 160) After refreshing her memory based on that statement, Ms. Tim testified that she had indeed witnessed the accident in the *morning* of June 10, 2013. (*Id.* at 110:12-111:22) Additionally, any other alleged inconsistencies in Ms. Tim's testimony go to her credibility, which the Court does not consider or decide on this motion for summary judgment.

197) issued subsequent to the Perera Defendants' submission of their opposition to the instant motion.

Further, the Perera Defendants point out that no note of issue has yet been filed in this action indicating that discovery is complete.

Because significant discovery potentially relevant to the Perera Defendants' defense of the motion is still outstanding, and because such discovery is still outstanding (at least as the filing of the date of the opposition) *not* because of any apparent improper delay by the Perera Defendants, the Court finds that the instant motion is, in fact, premature. Accordingly, the motion is **DENIED, with leave to renew**, to the extent that it concerns Plaintiff's alleged cubital tunnel syndrome and right TMJ fracture diagnoses.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the parties was not addressed by the Court, it is hereby denied.

Accordingly, it is hereby:

ORDERED that plaintiff MARC FISHMAN's ("Plaintiff") motion (Seq. No. 6) seeking an order precluding the testimony of Kevin Tully and Kirk Thibault, experts for defendants KAREN ISALES a/k/a KAREN IRIZARRY ("Isales") and US SECURITY ASSOCIATES INC. ("US Security"; and, together with Isales, the "Isales Defendants"), or, alternatively, that a *Frye* hearing be conducted is **DENIED with leave to renew before the trial judge**; and it is further

ORDERED that Plaintiff's motion (Seq. No. 7) seeking an order, pursuant to CPLR 3212, granting Plaintiff summary judgment against the Isales Defendants on the issue of liability and against all defendants on the issue of serious injury is decided as follows

- **GRANTED** with respect to that portion of the motion seeking summary judgment on the issue of liability against the Isales Defendants;
- **DENIED** with respect to that portion of the motion seeking summary judgment on serious injury with respect to Plaintiff's alleged occipital neuralgia diagnosis;
- **DENIED, with leave to renew**, with respect to that portion of the motion seeking summary judgment on serious injury with respect to Plaintiff's alleged cubital tunnel syndrome diagnosis; and

- **DENIED, with leave to renew**, with respect to that portion of the motion seeking summary judgment on serious injury with respect to Plaintiff's alleged right TMJ fracture

; and it is further

ORDERED that the Clerk shall mark the motions (Seq. Nos. 6 & 7) disposed in all court records.

This constitutes the Decision and Order of the Court.

Dated: September 29, 2023 **Hon.** s/Hon. Veronica G. Hummel/signed 09/29/2023
VERONICA G. HUMMEL, A.J.S.C.

1.	CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY		☒ CASE STILL ACTIVE	
2.	MOT SEQ 6 IS.....	☐ GRANTED	☒ DENIED	☐ GRANTED IN PART	☐ OTHER
3.	MOT SEQ 7 IS.....	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART	☐ OTHER
4.	CHECK IF APPROPRIATE.....	☐ SETTLE ORDER	☐ SUBMIT ORDER	☐ SCHEDULE APPEARANCE	
		☐ FIDUCIARY APPOINTMENT		☐ REFEREE APPOINTMENT	