Park v Singh
2023 NY Slip Op 35099(U)
November 14, 2023
Supreme Court, Queens County
Docket Number: Index No. 713692/2019
Judge: Anna Culley
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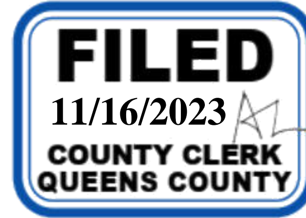
Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ANNA CULLEY IA Part 27
Justice



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PAUL PARK,

Plaintiff,

-against-

RANJIT SINGH,

Defendant.

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Index Number 713692 2019

Motion Date February 7, 2023

Mot Seq. No. 1

The following numbered papers read on this motion by defendant for an order 1) Pursuant to CPLR 3212 granting defendants' summary judgment and dismissing the complaint of the plaintiff, Paul Park, in its entirety, on the grounds that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement mandated by Insurance Law §§ 5104 (a) and 5102 (d), and on this cross motion by plaintiff for an order 1) pursuant to CPLR 3212 granting partial summary judgment on the issue of liability against the defendant herein; 2) dismissing the defendant's affirmative defenses of culpable conduct on the part of the plaintiff.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF 15-23
Notice of Cross Motion - Affidavits - Exhibits	EF 25-41
Answering Affidavits	EF 43-44
Reply on Cross Motion	EF 46-47

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

Plaintiff commenced this action seeking damages for personal injuries allegedly sustained in a motor vehicle accident on October 4, 2018, in front of plaintiff's residence, at 41-05 158th Street, Flushing, Queens County, New York, when defendant driver drove over plaintiff's left foot after he exited from the rear driver's side door of defendant's vehicle and was reaching in with his left hand to retrieve his belongings. Plaintiff testified that when the vehicle stopped on his foot, he

banged on the car window to alert the driver, who was on his cell phone. Plaintiff testified that the vehicle also came into contact with his right hip. Plaintiff alleges that he sustained serious injuries to his left foot, left ankle, left wrist, right hip and cervical spine.

Defendant now moves for summary judgment dismissing plaintiff's complaint on the grounds that plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff opposes the motion and cross-moves for partial summary judgment against defendant on the issue of liability and for summary judgment dismissing defendant's affirmative defenses of culpable conduct on the part of plaintiff.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by offering sufficient evidence to demonstrate the absence of any material issues of fact. (*See Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980].) Therefore, on the instant motion, defendant bears the initial burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of the Insurance Law. (*See Toure v Avis Rent a Car Sys.*, 98 NY2d 345 [2002]; *see also Gaddy v Eyler*, 79 NY2d 955 [1992].)

Defendant herein failed to meet his prima facie burden. While defendant's submissions, which include the affirmed medical reports of Dr. Louis McInytre, an orthopedic surgeon, and Dr. Mark J. Decker, a radiologist, established, prima facie, that the alleged injuries to plaintiff's cervical spine, left wrist, left foot, left ankle and right hip did not constitute serious injuries under the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102 (d), they failed to adequately address the injured plaintiff's claim, set forth in the bill of particulars, that he sustained a serious injury under the 90/180–day category of Insurance Law § 5102 (d). (*See DeVille v Barry*, 41 AD3d 763 [2d Dept 2007].) Thus, defendant failed to meet his prima facie burden of showing that the injured plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident. (*See Toure v Avis Rent A Car Sys.*, *supra.*)

Since defendant did not sustain his prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition are sufficient to raise a triable issue of fact. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) In any event, even if defendant had met its initial burden on the motion, plaintiff, in opposition, has submitted competent evidence raising triable issues of fact as to whether plaintiff sustained serious injury from the subject accident under the 90/180–day category of Insurance Law § 5102 (d), as well as, a permanent consequential limitation of use and significant limitation of use of his left foot, left ankle, left wrist, right hip and cervical spine, within the meaning of Insurance Law § 5102 (d), as a result of the subject accident. (*See Toure v Avis Rent A Car Systems, Inc.*, *supra*; *see also Grigore v Kourounis*, 112 AD3d 579 [2d Dept 2013]; *Wagenstein v Haoli*, 64 AD3d 584 [2d Dept 2009].) This evidence includes, *inter alia*, plaintiff's examination before trial testimony and affidavit of confinement to bed and home for eight months immediately following the date of the subject accident; the certified records of plaintiff's treating facility, Universal Pain Management, PC and podiatrist, Paul Koslow, DPM; the

affirmed report of plaintiff's treating physician, Kioomars Moosazadeh, MD, who began treating plaintiff in February of 2020, after a subsequent accident on January 11, 2020, and reexamined plaintiff on September 8, 2022; and affirmed MRI reports.

Dr. Moosazadeh reviewed the affirmed MRI reports of plaintiff's 2018 MRI tests and agreed with the findings therein of sprain of the ATFL and small joint effusion in the left ankle; tendinosis of the first digit flexor tendon, first MPJ joint effusion, and partial tear of the first MPJ plantar plate of the left foot; tear in the volar component of scapholunate ligament and tendinosis of extensor carpi ulnaris tendon of the left wrist; multilevel degenerate disc changes including disc osteophyte complexes at C3-C4, C4-C5, C5-C6, and C6-C7; canal narrowing C4-C5 and C5-C6; right foraminal narrowing C4-C5 and bilateral foraminal narrowing C5-C6 of the cervical spine; and tendinosis of gluteus medius with trochanteric bursitis of the right hip. Dr. Moosazadeh also affirms that said injuries are related to the subject accident and that plaintiff remained with a temporary total disability from his line of job activity. To the extent that Dr. Moosazadeh affirms that plaintiff's injuries are also causally related to the accident of January 11, 2019, same raises additional triable issues.

Based on his review of the certified and affirmed medical records as well as, on his own examinations, including his most recent examination of plaintiff on September 8, 2022, in which he noted decreased range of motion in the cervical region of plaintiff's spine, left wrist, left foot and left ankle,[1] and right hip, with the use of a goniometer, as well as diminished achilles reflex in the left foot, Dr. Moosazadeh opined that the injuries and noted limitations in plaintiff's cervical spine, left foot and left ankle, left wrist and right hip are permanent and were caused by the subject accident. (*See Johnson v Cristino*, 91 AD3d 604 [2d Dept 2012]; *see also Wagenstein v Haoli*, *supra*; *Parker v Singh*, 71 AD3d 750 [2010].)

Accordingly, defendant's motion for summary judgment dismissing the complaint on the ground that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) is denied.

Plaintiff cross-moves for partial summary judgment in his favor and against defendant on the issue of liability and for summary judgment dismissing defendant's affirmative defenses of culpable conduct on the part of the plaintiff.

It is well settled that "[a] violation of the Vehicle and Traffic Law constitutes negligence as a matter of law." (*Vainer v DiSalvo*, 79 AD3d 1023, 1024 [2d Dept 2010].) Plaintiff here established his prima facie entitlement to judgment on liability as a matter of law by presenting uncontroverted evidence that defendant driver started to move the vehicle while plaintiff was reaching into the vehicle, causing the wheel to roll onto plaintiff's foot and him to sustain injuries

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[1]Although Dr. Moosazadeh did not quantify the noted limitations in the range of motion of left foot and left ankle, at his most recent examination, he quantified dorsiflexion strength as 4 over 5.

to his left ankle, left foot, left wrist, right hip and cervical spine. (*See* Vehicle and Traffic Law § 1162; *see also Edwards v J&D Express Serv. Corp.*, 180 AD3d 871 [2d Dept 2020]; *Irwin v Mucha*, 154 AD2d 895, 545 NYS2d 863 [1989].) Thus, the burden shifts to defendant to present competent evidence to raise a triable issue of fact. (*See Zuckerman v City of New York*, *supra*.)

Defendant failed to meet this burden. Defendant did not submit an affidavit of defendant driver, or an affidavit from a person with personal knowledge to raise a triable issue of fact. In opposition, defendants submit an attorney affirmation. A mere "attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance" (*Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2d Dept 2006]), and is thus incapable of raising a triable issue of fact.

Accordingly, plaintiff's cross motion seeking partial summary judgment against defendant on the issue of liability and summary judgment dismissing defendant's affirmative defenses of culpable conduct on the part of plaintiff is granted.

Movant is not relieved from the applicable provisions of CPLR 2220 and 202.5b (h) (2) of the Uniform Rules of Supreme and County Courts insofar as it relates to service and notice of entry of the filed document upon all other parties to the action/proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

The foregoing constitutes the decision and order of this court.

ANNA CULLEY, J.S.C.

Dated: November 14, 2023