

Peralta v Valdez-Ortiz
2023 NY Slip Op 35146(U)
January 13, 2023
Supreme Court, Bronx County
Docket Number: Index No. 24455/2016E
Judge: Bianka Perez
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14**

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GEOBANI A. PERALTA,

Index No. 24455/2016E

Plaintiff,

-against-

Hon. Bianca Perez

H.R. VALDEZ-ORTIZ and E.R. LIVERY
SERVICE, INC.,

Justice Supreme Court

Defendants.

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The following were read on this motion (Seq 2) noticed on **September 28, 2022**.

Notice of Motion - Exhibits and Affidavits Annexed	Nyscef No(s). 41-51
Answering Affidavit and Exhibits	Nyscef No(s). 52-55
Reply Affidavit and Exhibits	Nyscef No(s). 57

Upon the foregoing papers, plaintiff moves for an Order pursuant to CPLR 3212, granting summary judgment on the issue of liability against defendants, granting summary judgment to the plaintiff against the defendants as no issues of fact exist pertinent to the presence of “serious injuries” as defined under New York State Insurance Law §§ 5102(d) and 5104, and pursuant to CPLR 3211(b), dismissing defendants’ First, Fourth and Fifth Affirmative Defenses. Defendants oppose.

This is a negligence action to recover damages for personal injuries plaintiff allegedly sustained in a pedestrian knockdown accident that occurred on November 22, 2015, on Grand Concourse at or near its intersection with East 178 Street, County of Bronx, State of New York.

Plaintiff now seeks summary judgment on the issue of liability arguing that defendants caused the subject accident and violated section 1146(a) of the VTL when defendant H.R. Valdez-Ortiz (Valdez), who operated a vehicle owned by E.R. Livery Service INC. (E.R.), struck plaintiff Peralta while he crossed Grand Concourse in the middle of the street, and not within the crosswalk.

In addition, plaintiff seeks summary judgment on the issue of “serious injury” threshold, arguing that he should be granted summary judgment because he sustained extensive skull fractures as a result of the accident and that he satisfies the “90 out of 180” category as defined under New York State Insurance Law § 5102(d) since he was hospitalized for over three months immediately following the accident.

Defendants oppose arguing that plaintiff's motion for summary judgment on the issue of liability should be denied because plaintiff failed to establish defendants' negligence and proximate cause for the happening of this accident. In addition, defendants argue that there are triable issues of fact as to what actions plaintiff took to avoid the accident.

Defendants also oppose plaintiff's motion for summary judgment on the threshold issue, arguing that plaintiff has failed to establish that he sustained a serious injury as defined under New York State Insurance Law § 5102(d). Lastly, defendants argue that they are entitled to a trial on the issue of damages.

SUMMARY JUDGMENT MOTION ON LIABILITY

Summary judgment is the procedural equivalent of a trial. (*Mendoza v Highpoint Associates, IX, LLC*, 83 AD3d 1 [1st Dept 2011]). It is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. See (*Rotuba Extruders Inc., v Ceppos*, 46 NY2d 223 [1978]). The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, presenting sufficient evidence, in admissible form, to eliminate any material issues of fact from the case. (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad, supra* at 853.

In support of this motion, plaintiff annexed copies of the pleadings, plaintiff's EBT transcript, and a stipulation signed by all parties precluding defendants "from testifying at trial or authoring and submitting an affidavit on motion."

In this case, plaintiff has failed to make a prima facie showing of entitlement to judgment as a matter of law eliminating all material issues of fact from the case. There is no dispute that plaintiff crossed outside of the designated crosswalk because plaintiff testified in his deposition that he crossed Grand Concourse "in the middle" of the street, not within the crosswalk, and after having "smoked marijuana", taking a pill, and having had about "ten or 12" alcoholic drinks "[t]hree or four hours before" the accident (Exhibit 4). As such VTL § 1152(a) applies. Vehicle and Traffic Law § 1152(a) states that when a pedestrian crosses a roadway at a point other than within a marked crosswalk, he or she shall yield the right of way to all vehicles on that roadway (see VTL § 1152[a]). However, Vehicle and Traffic Law § 1146 places a burden upon every operator of a vehicle on a roadway, specifically that "every driver of a vehicle shall exercise due

care to avoid colliding with any ... pedestrian ... and shall give warning by sounding the horn when necessary” (see VTL § 1146). Here, plaintiff’s deposition transcript does not establish that plaintiff yielded the right of way to defendant Valdez or that he looked both ways before crossing in the middle of the street as required by VTL §1152(a). As such there remain questions of fact as to whether plaintiff yielded the right of way to defendant Valdez as required under VTL §1152(a). In addition, there remain questions of fact as to whether defendant Valdez violated VTL § 1146 by failing to exercise due care to avoid a collision with the plaintiff (see VTL § 1146; *Marquis v. Eisenstein*, 5 A.D.3d 741, 742 (2nd Dept 2004)). The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion, (see *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]). In this case, plaintiff has failed to establish their prima facie burden on their motion for summary judgment on the issue of liability. Thus, it is not necessary to determine whether the papers submitted by defendants in opposition were sufficient to raise a triable issue of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 (1985)). Accordingly, plaintiff’s motion for summary judgment on the issue of liability against defendants is denied.

SUMMARY JUDGMENT MOTION ON SERIOUS INJURY THRESHOLD

Plaintiff also moves for summary judgment on the issue of “serious injury,” alleging that plaintiff sustained a “fracture” within the meaning of the Insurance Law. The role of the Court is to determine whether bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tollman*, 278 A.D.2d 811 [4th Dept. 2000]). The moving party must tender evidence sufficient to establish as a matter of law that there exist no triable issues of fact to present to a jury (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]). A fracture constitutes a “serious injury” under Insurance Law § 5102(d) (see *Perez-Hernandez v. M. Marte Auto Corp.*, 104 A.D.3d 489, 490, [1st Dept 2013]).

In support of the motion, plaintiff annexed affirmed CT reports by Dr. Thomas Kolb, where Dr. Kolb reported that plaintiff’s CT scans of the head and brain showed an acute left temporal bone fracture extending to the left parietal skull as well as extensive skull fracture extending to the base and ethmoid air cells. In the instant case plaintiff’s submissions confirm the existence of a fracture, and Insurance Law §5102(d) dictates that fractures constitute a “serious injury.”

However, although the affirmation by Dr. Kolb states that plaintiff suffered multiple fractures, Dr. Kolb's affirmation failed to establish a causal connection between the accident and plaintiff's diagnosed fractures. Therefore, plaintiff has failed to establish prima facie, that he sustained a fracture as a result of the subject accident as required within the meaning of the Insurance Law. Accordingly, this branch of plaintiff's motion is denied.

As to plaintiff's branch of the motion arguing that he satisfies the "90 out of 180" category as defined under New York State Insurance Law § 5102(d), plaintiff has failed to establish his entitlement to summary judgment under this category. Although plaintiff testified at his deposition that he was hospitalized for over three months immediately following the accident, and that he has been unable to work since the accident, plaintiff's own statements are insufficient to demonstrate a 90/180-day injury without objective support in the record (*Abreu v. Miller*, 181 A.D.3d 435 [1st Dept 2020]; *Tarjavaara v. Considine*, 188 A.D.3d 509 [1st Dept. 2020]). Thus, that branch of the motion is also denied.

With respect to plaintiff's branch of the motion dismissing defendants' First affirmative defense, that branch of the motion is also denied as plaintiff has failed to make a prima facie showing that he sustained a "fracture" within the meaning of the Insurance Law 5102(d).

With respect to plaintiff's branch of the motion dismissing defendants' Fourth affirmative defense, that defense is dismissed as the record does not demonstrate that plaintiff or any party to this lawsuit has proceeded to arbitration with respect to any issues relevant to this action.

With respect to plaintiff's branch of the motion asking this Court to strike defendants' affirmative defense alleging the "emergency doctrine" is granted. The emergency doctrine recognizes that "when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context," provided the actor had not created the emergency (*Rivera v. New York City Tr. Auth.*, 77 N.Y.2d 322, 327, 567 N.Y.S.2d 629, 569 N.E.2d 432 [1991], *rearg. denied* 77 N.Y.2d 990, 571 N.Y.S.2d 916, 575 N.E.2d 402 [1991]; *see also Caristo v. Sanzone*, 96 N.Y.2d 172, 174, 726 N.Y.S.2d 334, 750 N.E.2d 36 [2001]). Here, the defendants failed to annex an affidavit detailing any sudden move or unexpected circumstances to warrant the assertion of the emergency doctrine defense, and as a result, that branch of the motion is granted.

The Court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED, that plaintiff's motion on the issue of defendants' liability is denied, it is further

ORDERED, that plaintiff's motion for an Order pursuant to CPLR § 3212 granting summary judgment on the issue of "serious injury" pursuant to Insurance Law 5102(d) is denied in its entirety, it is further

ORDERED, that defendants' Fourth and Fifth affirmative defenses are dismissed, it is further

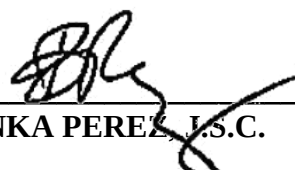
ORDERED, that plaintiff's motion for summary judgment is otherwise denied, and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants and against the plaintiff dismissing defendants' Fourth and Fifth affirmative defenses.

This constitutes the Decision and Order of this Court.

Dated: January 13, 2023

Hon. _____


BIANKA PEREZ, J.S.C.

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| 1. CHECK ONE..... | ☐ CASE DISPOSED IN ITS ENTIRETY | ☐ CASE STILL ACTIVE |
| 2. MOTION IS..... | ☐ GRANTED | ☐ DENIED ☐ GRANTED IN PART ☐ OTHER |
| 3. CHECK IF APPROPRIATE..... | ☐ SETTLE ORDER | ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE |
| | ☐ FIDUCIARY APPOINTMENT | ☐ REFEREE APPOINTMENT |