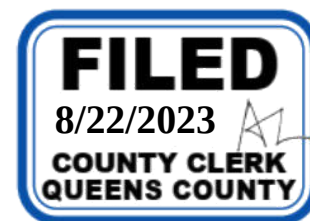


Gonzalez v Islam
2023 NY Slip Op 35299(U)
August 17, 2023
Supreme Court, Queens County
Docket Number: Index No. 721333/2020
Judge: Denis J. Butler
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: HONORABLE DENIS J. BUTLER IAS Part 12
Justice

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RICARDO D. GONZALEZ,

Plaintiff,

-against-

RIAZUL ISLAM, MD,

Defendant.

Index

Number: 721333/2020

Motion Date:

June 27, 2023Motion Seq. No.: 002

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The following papers were read on this motion by plaintiff for an order: (1) granting summary judgment as to liability in favor of plaintiff and dismissing the third and fifth affirmative defenses asserting contributory negligence, assumption of the risk, and failure to wear a seat belt; (2) granting summary judgment that plaintiff sustained a "serious injury" within the meaning of Insurance Law § 5102(d) based upon facial fractures; (3) precluding defendant from producing expert testimony on this motion and/or at trial from Dr. Isaac Seinuk, DDS, and/or any other dentist and/or physician on the issues of plaintiff's facial and dental injuries, and striking defendant's expert witness exchange for Dr. Seinuk; (4) granting pre-judgment interest commencing from the date of the summary judgment order; and (5) determining that all pre-trial discovery is complete and plaintiff may file a Note of Issue.

Papers
Numbered

Notice of Motion, Affirmation, Exhibits.....E24-43
Affirmation In Opposition, Exhibits.....E45-47
Reply Affirmation, Exhibits.....E49-52

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

On February 23, 2018, plaintiff was driving on 86th Street through the intersection with 31st Avenue, in Queens, with a green

light in plaintiff's favor, when defendant, who was driving on 31st Avenue, disobeyed a steady red light causing plaintiff's vehicle to make contact with defendant's vehicle.

The first branch of the motion by plaintiff seeks summary judgment on the issue of liability and dismissal of defendant's third and fifth affirmative defenses asserting contributory negligence, assumption of the risk, and failure to wear a seat belt.

A proponent for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, through the submission of sufficient evidence to demonstrate the absence of any material issues of fact (see Alvarez v Prospect Hosp., 68 NY2d 320, 24 [1986]). Once the movant establishes prima facie entitlement to summary judgment, the burden shifts to the opposing party to produce evidence, in admissible form, sufficient to establish the existence of triable issues of fact (see Id.; Zuckerman v City of New York, 49 NY2d 557, 63 [1980]).

On a motion for summary judgment on the issue of a defendant's liability, a plaintiff is no longer required to show freedom from comparative fault to establish his or her prima facie entitlement to judgment as a matter of law (see Rodriguez v City of New York, 31 NY3d 312, 318 [2018]; Marangoudakis v Suniar, 2022 NY Slip Op 05208 [2d Dept 2022]). "Even though a plaintiff is not required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of liability, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where the plaintiff moves for summary judgment dismissing a defendant's affirmative defense alleging comparative negligence and culpable conduct on the part of the plaintiff" (Kwok King Ng v West, 195 AD3d 1006, 1008 [2d Dept 2021]).

"A driver who enters an intersection against a red traffic light in violation of Vehicle and Traffic Law § 1110(a) is negligent as a matter of law" (Kirby v Lett, 208 AD3d 1174, 1175 [2d Dept 2022] [internal quotation marks omitted]). "The operator of a vehicle with the right-of-way is entitled to assume that others will obey the traffic laws requiring them to yield but a driver traveling with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident" (id. [internal quotation marks and citations omitted]). "Nevertheless, a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision" (id. [internal quotation marks

omitted]; see Rabenstein v Suffolk County Dept. of Pub. Works, 131 AD3d 1145, 1145 [2d Dept 2015]).

Plaintiff, in support, annexed his affidavit wherein plaintiff attested that at the time of the accident plaintiff was driving approximately 20 miles per hour on 86th Street through the intersection with 31st Avenue, with a green light in plaintiff's favor, when defendant's vehicle entered the intersection from 31st Avenue against a steady red light, and drove in front of plaintiff's vehicle, and that plaintiff only had one or two seconds to react to defendant's vehicle. Plaintiff also annexed the affidavit of non-party witness Matthew McNamee, who corroborated plaintiff's affidavit that defendant entered the intersection against a steady red light in front of plaintiff's vehicle.

The evidence offered by plaintiff demonstrated, prima facie, that "[defendant's] conduct was the sole proximate cause of the accident," that "[plaintiff], who had the right-of-way, was entitled to assume that [defendant] would obey the traffic law requiring [defendant] to yield, and that "[plaintiff] was not negligent for failing to avoid the collision (Kirby v Lett, 208 AD3d 1174, 1175-76; see Foley v Santucci, 135 AD3d 813, 814 [2d Dept 2016]).

Contrary to defense counsel's assertion raised in opposition, photographs of the accident do not raise triable issues of fact whether plaintiff had an opportunity to observe defendant's vehicle prior to the accident and thus whether plaintiff is comparatively at fault in the happening of the accident.

As such, the first branch of the motion by plaintiff seeking summary judgment on the issue of liability and dismissal of defendant's third and fifth affirmative defenses asserting contributory negligence, assumption of the risk, and failure to wear a seat belt, are granted.

The second branch of the motion by plaintiff seeks summary judgment that plaintiff sustained a "serious injury" within the meaning of Insurance Law § 5102(d) based upon facial fractures.

Under New York's "no-fault" insurance law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained (Licari v Elliot, 57 NY2d 230 [1982]). Insurance Law § 5102(d) defines "serious injury" as follows:

[A] personal injury which results [1] in death; [2] dismemberment; [3] significant disfigurement; [4] a

fracture; [5] loss of a fetus; [6] permanent loss of use of a body organ, member, function or system; [7] permanent consequential limitation of use of a body organ or member; [8] significant limitation of use of a body function or system; [9] or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety [90] days during the one hundred eighty days [180] immediately following the occurrence of the injury or impairment.

Plaintiff, in support, annexed the report of Dr. Evan P. Mondshine, D.D.S., who opined that diagnostic testing revealed "multiple fractures of the right zygomatic arch." Dr. Mondshine, however, failed to opine that the aforementioned fractures were causally related to the accident, and thus plaintiff failed to demonstrate, prima facie, that he sustained a "serious injury" within the meaning of Insurance Law § 5102(d) (see generally Pommells v Perez, 4 NY3d 566, 580 [2005]).

As such, the second branch of the motion by plaintiff seeks summary judgment that plaintiff sustained a "serious injury" within the meaning of Insurance Law § 5102(d), is denied.

The third branch of the motion by plaintiff seeks an order precluding defendant from producing expert testimony on this motion and/or at trial from Dr. Isaac Seinuk, D.D.S., and/or any other dentist and/or physician on the issues of plaintiff's facial and dental injuries, and striking defendant's expert witness exchange for Dr. Seinuk, on the ground Dr. Seinuk's report contains "multiple failures." Plaintiff, however, has failed to demonstrate that Dr. Seinuk's report is subject to preclusion based upon "multiple failures," or that defendant should be precluded from producing expert testimony from Dr. Seinuk, or any other dentist or physician.

As such, the third branch of the motion by plaintiff seeking an order precluding defendant from producing expert testimony on this motion and/or at trial from Dr. Isaac Seinuk, D.D.S., and/or any other dentist and/or physician on the issues of plaintiff's facial and dental injuries, is denied.

The fourth branch of the motion by plaintiff seeking an order awarding plaintiff pre-judgment interest commencing from the date of this Decision and Order is granted in the absence of opposition to this specific branch of the motion by plaintiff (see CPLR §

5002; Van Nostrand v Froehlich, 44 AD3d 54, 58 [2d Dept 2007]).

The fifth branch of the motion by plaintiff seeking leave to file the Note of Issue is denied as their remains outstanding discovery requested by defendant.

As such, it is

ORDERED that the first branch of the motion by plaintiff seeking summary judgment on the issue of liability in favor of plaintiff and against defendant, and dismissal of defendant's third and fifth affirmative defenses asserting contributory negligence, assumption of the risk, and failure to wear seat belt is GRANTED; and it is further

ORDERED that the second branch of the motion by plaintiff seeking summary judgment that plaintiff sustained a "serious injury" within the meaning of Insurance Law § 5102(d) is DENIED; and it is further

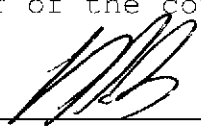
ORDERED that the third branch of the motion by plaintiff seeking an order precluding defendant from producing expert testimony on this motion and/or at trial from Dr. Isaac Seinuk, D.D.S., and/or any other dentist and/or physician on the issues of plaintiff's facial and dental injuries, is denied; and it is further

ORDERED that the fourth branch of the motion by plaintiff seeking an order awarding plaintiff pre-judgment interest commencing from the date of this Decision and Order is GRANTED; and it is further

ORDERED that the fifth branch of the motion by plaintiff seeking leave to file the Note of Issue is DENIED.

This constitutes the decision and order of the court.

Dated: August 17, 2023



Denis J. Butler, J.S.C.

