

Reyes v James

2024 NY Slip Op 31640(U)

May 9, 2024

Supreme Court, New York County

Docket Number: Index No. 158368/2020

Judge: James G. Clynes

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

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DANIEL REYES, INDEX NO. 158368/2020
Plaintiff, MOTION DATE 01/09/2023
MOTION SEQ. NO. 001

- v -

DARNELL D. JAMES, ZION KING DECISION + ORDER ON MOTION
Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and following oral argument, the motion by Defendants for summary judgment on the grounds that Plaintiff has failed to satisfy the serious injury threshold requirement of Insurance Law 5102 (d) and the cross-motion by Plaintiff for summary judgment on the issue of liability in favor of Plaintiff and against Defendants are decided as follows:

This is a negligence action concerning a vehicular accident that occurred near 11th Avenue and 38th Street, New York, New York on May 30, 2020.

Defendants move for summary judgment and dismissal of the complaint on the ground that Plaintiff's injuries fail to reach the threshold of "serious injury" as defined by section 5102 (d) of the New York Insurance Law (Insurance Law). Defendants submit a verified Bill of Particulars and an amended version; the deposition testimony from Plaintiff; an affirmed review from radiologist Melissa Cohn; and an affirmed report from neurologist Robert April.

Dr. April affirms that he examined Plaintiff on August 18, 2022 and conducted a physical examination of plaintiff, including a range of motion test and sensory exam. Dr. April found a normal range of motion, normal straight leg test, and noted that the Babinski sign and Romberg

sign were absent. Dr. April found a minor post-concussion syndrome that has resolved fairly well since the accident. Dr. April concluded that Plaintiff had recovered from his injuries resulting from the accident in May 2020 and that there was no evidence of structural brain damage.

Dr. Cohn reviewed Plaintiff's MRI and CT records related to the accident and found no permanent or significant damage. Dr. Cohn reported evidence of degenerative disc disease in the cervical spine unrelated to the effects of the accident. She stated that the condition was related to Plaintiff's age and unrelated to trauma. The medical evidence reveals that whatever damage was caused by the accident has become minimal now.

In his examination before trial, Plaintiff testified that on the day of the accident he was riding an electrical bicycle with pedals that goes about 18 miles per hour, he was not wearing a helmet, he first saw the traffic light at 38th Street, where he intended to make a left turn, about two-thirds of a block away where there was a yellow vehicle stopped in the opposite direction, he was traveling 14-16 miles per hour, the light was red, he noticed the construction barrier was partially blocking his lane so he took a wider turn into the middle of the roadway, about 15-20 feet onto 38th street, the front driver's side quarter fender came into contact with the front wheel of Plaintiff's bicycle and he felt his bicycle scraping against the vehicle and at one point felt his leg against the car door.

Defendants contend that based on the medical evidence, there is no serious injury. They argue that Plaintiff failed to specify the type of serious injury he is suffering. Defendants refer to the 90/180 days category of serious injury and submit Plaintiff's deposition testimony. Plaintiff testified that after the accident, he was confined to his bed and home for about two months, but later went on a trip to New Orleans.

Defendant has met his initial burden of establishing that Plaintiff did not sustain serious injuries as a result of the accident under Insurance Law 5102 (d) (*Perez v Rodriguez*, 25 AD3d 506). The burden therefore shifts to Plaintiff to raise an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Plaintiff opposes Defendants' motion and cross-moves for partial summary judgment. Plaintiff submits Plaintiff's affidavit; Defendant James' deposition testimony; two medical reports from Plaintiff's neurologist Dr. Aric Hausknecht, one dated June 5, 2020, and one dated February 17, 2023; copies of medical records from Bellevue and Mt. Sinai Hospitals; and a medical report from neuropsychologist Dr. Jason Brown, dated December 10, 2022.

As an initial matter, Defendants contend in reply that the hospital records are unsworn and are not certified. While typically unaffirmed medical records and MRI reports may be excludable at trial, they may be considered to deny a motion for summary judgment, if they are not the sole basis for the Court's determination (*Clemmer v Drah Cab Corp.*, 74 AD3d 660, 660 [1st Dept 2010]).

Moreover, Dr. Brown, who conducted an evaluation based on Plaintiff's level of concentration and other cognitive traits, and diagnosed Plaintiff with traumatic brain injury, post-concussion syndrome, and cognitive deficits. However, he did not affirm his report. As such, the Court will not consider it in its determination.

Dr. Hausknecht affirmed that Plaintiff suffered permanent injuries to his cervical spine as a result of the accident. Specifically, Dr. Hausknecht reported cervical derangement with disc herniations with associated spinal cord impingement. Dr. Hausknecht also reported closed head trauma with post-concussion syndrome and mild traumatic brain injury. Dr. Hausknecht stated that there was objective proof of cervical spine impairment, a structural pathology of neural

impingement, a permanent consequential limitation of his cervical spine, and a significant limitation of function of neurological system. He traced these injuries directly to the accident.

In support of his cross-motion, Plaintiff submits his affidavit and the examination before trial testimony of Defendant James. In his affidavit, Plaintiff avers that he was riding his non-motorized bicycle on 11th Avenue, he saw Defendants' vehicle stopped at a red light in the lane directly opposite him and he made a left onto West 38th Street from 11th Avenue. Plaintiff's affidavit thereafter includes portions of Defendant James' testimony and Plaintiff avers that it is clear that Defendant James saw Plaintiff and failed to give Plaintiff the right of way.

Defendant James testified that he first saw the bicyclist about one block away in the same lane as Defendant James but further north approaching in the opposite direction on 11th Avenue. Defendant James turned onto 38th Street, about five car lengths into the street, he felt a thump in the rear driver's side fender of his vehicle, he looked out the side-view mirror and saw the bicyclist falling off his bike.

In reply, Defendants argue that Plaintiff failed to submit a response to their Statement of Facts. The Court finds it appropriate to exercise its discretion under CPLR 2001 to overlook the defect (*Galpern v Air Chefs, L.L.C.*, 180 AD3d 501 [1st Dept 2020]).

Defendants further contend that Plaintiff failed to explain a two-year gap in treatment between January 15, 2021 and January 10, 2023. However, in his latest report, Dr. Hausknecht mentioned that since their last meeting, Plaintiff underwent chiropractic therapy without success in improving his condition. Defendants also contend that the report from Dr. Hausknecht failed to substantiate causation and duration of Plaintiff's injuries, specifically in failing to address Dr. Cohn's assessment of degeneration, a prior condition unrelated to the accident. However, Dr.

Hausknecht, who also reviewed the records, stated in his report that Plaintiff has no history of neck or head problems, indicating that whatever degeneration exist relates to the accident.

In opposition to the cross-motion, Defendants contend that there are issues of fact as to liability, particularly Plaintiff's alleged negligence due to his failure to wear a safety helmet at the time of the accident. Defendants submit a Police Accident Report which discussed the accident and mentioned "unsafe lane changing." Defendants contend that this evidence indicates an issue as to whether plaintiff had made an improper attempt to change lanes.

In reply, Plaintiff contends that the Police Accident Report contains hearsay statements, and he was not present during the execution of the report. Plaintiff submits a copy of a proposed Statement of Facts with the reply.

"It is axiomatic that summary judgment is drastic remedy and should not granted where there is any doubt as to the existence of factual issues" (*Birnbaum v Hyman*, 43 AD3d 374, 375 [1st Dept 2007]). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). "To prevail on a summary judgment motion, the moving party must provide evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor [citation omitted]" (*Kershaw v Hospital for Special Services*, 114 AD3d 75, 81 [1st Dept 2013]). "Once this burden is met, the burden shifts to the opposing party to submit proof in an admissible form sufficient to create a question of fact requiring a trial" (*Id.* at 82).

In examining the medical evidence submitted by the parties, the Court finds that there are significant differences in the conclusions of the neurologists. There remains an issue as to

causation and duration of Plaintiff's injuries. Therefore, Defendants' motion for summary judgment is denied.

Plaintiff's cross-motion for summary judgment is also denied. The Court finds that Plaintiff has not conclusively demonstrated that defendants are solely liable for negligence in this case and shall deny the cross-motion. The conflicting accounts of the accident set forth by the parties raise issues of fact sufficient to preclude summary judgment on liability (*Ramos v Rojas* 37 A.D.3d 291, 292 [1st Dep't 2007]). As such, Plaintiff's motion for summary judgment on the issue of liability is denied. Accordingly, it is

ORDERED that the motion by Defendants Darnell D. James and Zion King for summary judgment on the grounds that Plaintiff has failed to satisfy the serious injury threshold under Insurance Law 5102 (d) is denied; and it is further

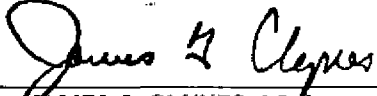
ORDERED that the cross-motion by Plaintiff for summary judgment on the issue of liability in favor of Plaintiff and against Defendants is denied; and it is further

ORDERED that any requested relief not specifically addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, Plaintiff shall serve a copy of this Decision and Order upon Defendant with Notice of Entry.

This constitutes the Decision and Order of the Court.

5/9/2024
DATE


JAMES G. CLYNES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	