

Davis v Crump
2024 NY Slip Op 35419(U)
April 2, 2024
Supreme Court, Erie County
Docket Number: Index No. 816210/2019
Judge: Michael A. Siragusa
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At a term of the Supreme Court, Part 29, held
in and for the County of Erie, State of New
York at 50 Delaware Avenue, Buffalo, on the
2nd day of April 2024.

PRESENT: HON. MICHAEL A. SIRAGUSA, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

DWIGHT DAVIS,
Plaintiff,

v.

KAMILLE CRUMP,

Defendant.

**DECISION AND ORDER
INDEX NO. 816210/2019**

DWIGHT DAVIS

Plaintiff,

v.

ROMAN I. BLYASHUK
JUSTYNE B. WEATHERBEE,
CCAP AUTO LEASING LTD.,
And MELISSA LACOUNT, doing business as
311 AUTO REPAIR AND COLLISION

Defendant.

MOTION #002

Upon reading the Notice of Motion (Motion #002) of defendant, Kamille Crump
(hereinafter "defendant"), *NYSCEF Doc. No. 34*, seeking an order granting summary judgment in
favor of the defendant and dismissing plaintiff's complaint on the issue of serious injury pursuant
to CPLR Section 3212; and upon reading the affirmation of Paul G. Hanson, Esq., dated the 19th

day of September 2023, with attached exhibits, in support of defendant's motion, *NYSCEF Doc. Nos. 36-47*; and

Upon reading the affirmation in opposition of Scott M. Schwartz, Esq., dated the 27th day of November 2023, with attached exhibits, *NYSCEF Doc. Nos 67-74*; and upon reading the affirmation of Paul G. Hanson Esq., in reply to plaintiff's opposition and in further support of defendant's motion for summary judgment on the issue of serious injury, *NYSCEF Doc. No.84*; and upon due deliberation having been had, the decision and order of this court is as follows:

This action arises out of two separate motor vehicle accidents in which plaintiff alleges to have been injured. The first accident occurred on December 12, 2018, and the second accident occurred on December 4, 2019. This moving defendant, Kamille Crump, was not involved in the first accident on December 12, 2018. *See NYSCEF Doc. No.36.*

Procedurally, and by order of the Honorable E. Jeannette Ogden, dated February 14, 2022, the actions arising out of the first and second accidents were consolidated for joint trial. *NYSCEF Doc. No. 39.*

In this case, plaintiff alleges that because of the December 4, 2019 accident, he sustained serious injuries within the meaning of New York State Insurance Law Section 5102(d) under the permanent consequential limitation of use, and the 90/180 categories. *See NYSCEF Doc. No. 67.* Defendant has moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury that was causally related to this collision. *See NYSCEF Doc. No.34.*

SERIOUS INJURY

Under New York State Insurance Law Section 5102(d), plaintiff must prove that he sustained a qualifying serious injury. The proponent of a motion for summary judgment must

tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v. New York Univ. Medical Center*, 64 NY2d 851 (1985). In the present action, the burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a serious injury. *Lamar v. Anastasi*, 188 AD3d 1637, (4th Dept. 2020). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Frank v. Price Chopper*, 275 A.D. 2d at 940; citing *Matter of Redemption Church of Christ v. Williams*, 84 A.D. 2d 648, 649 (3rd Dept. 1981); *see also Greenberg v. Manlon Realty*, 43 A.D. 2d 968, 969 (2nd Dept. 1974). Once the defendant has met this burden, it shifts to the plaintiff to raise a triable issue of fact by submitting competent and admissible medical evidence based on objective medical findings and diagnostic tests supporting a claim of serious injury. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y. 2d 345 (2002); *Gaddy v. Eyler*, 79 N.Y. 2d 955 (1992); *Licari, supra*; *Lopez v. Senatore*, 65 N.Y. 2d 1017 (1985).

The record before the Court demonstrates that defendant has met her initial burden with respect to the two categories of serious injury alleged in plaintiff's complaint. *Tate v. Brown*, 125 A.D.3d 1397, 1397-1398 (4th Det.2014); *Clark v. Aquino*, 113 A.D. 3d 1076-1078 (4th Dept. 2014); *Summers v. Spada*, 109 A.D.3d 1192-1193 (4th Dept. 2013). Here, defendant has met her burden through the submission of plaintiff's medical records and deposition testimony to establish that plaintiff did not suffer a serious injury related to the accident that occurred on December 4, 2019. *Franchini v. Palmieri*, 1 N.Y3d 536 (2003).

Defendant attached plaintiff's medical records and his deposition transcript to her motion papers which attributed plaintiff's injuries to the first accident on December 12, 2018, or to other incidents that reflected ongoing complaints and limitations within months of the second accident

that occurred on December 4, 2019. *NYSCEF Doc. Nos 42-47*. Further, defendant provided medical evidence showing that when plaintiff returned to Medical Care of Western New York on February 5, 2020, two months after the December 4, 2019 second accident, his complaints and diagnoses remained unchanged from the prior visit, all of which were attributed to the first accident. *See NYSCEF Doc. No. 42*.

Based upon the evidence submitted in support of defendant's motion, defendant has established her initial burden that plaintiff has not sustained a serious injury as a result of the December 4, 2019, second accident. As defendant met her burden, the burden now shifts to the plaintiff to come forward with proof in admissible form to raise a triable issue of fact.

Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

As the burden now shifts to the plaintiff, the court finds that plaintiff has sustained his burden of raising triable issues of fact with regard to the seriousness of his claimed injuries and as to causation. Plaintiff raised those facts by submitting objective medical evidence along with plaintiff's deposition testimony. *NYSCEF Doc. Nos. 68-74*. As demonstrated in the record before this court, plaintiff's range of motion measurements to his cervical spine, lumbar spine, and right ankle, significantly decreased after the December 4, 2019 accident as compared to the measurements taken after the December 12, 2018 accident. *Id*; *see also Toure v. Avis Rent A Car Sys.*, 98 NY2d 345,353, (2002); *Carter v. Patterson*, 197 A.D. 3d 857 (4th Det. 2021).

Further, on September 1, 2020, an Independent Medical Evaluation was conducted on plaintiff by Dr. Warren Slaten. After Dr. Slaten physically examined and reviewed plaintiff's medical records, he concluded under causality, "that based on his symptomatic reports, the injuries to the cervical spine, lumbar spine, thoracic spine, right foot and ankle and left knee and left hip were exacerbated by the motor vehicle accident that occurred on 12/04/19."

Based on the medical records provided by plaintiff, along with his deposition testimony, he has raised triable issues of fact as to whether his injuries are significant and permanent and whether the December 4, 2019 accident caused and/or caused an aggravation of his preexisting cervical, lumbar, thoracic, right foot and ankle, and left knee and left hip injuries. Plaintiff's medical records and deposition testimony demonstrates that he has also raised triable issues of fact as to whether he has been unable to perform his usual and customary daily activities for over 90 days during the first 180 days following the December 4, 2019 accident. *NYSCEF Doc. Nos. 68-74.*

Accordingly, it is hereby ORDERED that defendant's motion for summary judgment on the issue of serious injury is DENIED.

MOTION #003

Upon reading the notice of motion (Motion No. 003) of plaintiff, Dwight Davis (hereinafter "plaintiff"), *NYSCEF Doc. No. 48*, seeking an order granting partial summary judgment as against defendants Roman I. Blyashuk and Justyne B. Weatherbee on the issue of negligence; and upon reading the affirmation of Scott M. Schwartz, Esq. dated the 4th day of October 2023, with attached exhibits, in support of plaintiff's motion, *NYSCEF Doc. Nos. 49-57*; and

Upon reading the affirmation in opposition of Nelson E. Schule, Jr. Esq., dated the 18th day of December 2023, with attached exhibit, *NYSCEF Doc. Nos. 87 & 88*; and upon reading the affirmation of Scott M. Schwartz, Esq. in reply to the affirmation in opposition of Nelson E. Schule, Jr. Esq., *NYSCEF Doc. No. 89*; and upon due deliberation having been had, the decision and order of this court is as follows:

Plaintiff asserts that the record evidence before this court demonstrates that defendant, Blyashuk backed the Weatherbee's vehicle into plaintiff's vehicle without properly looking behind him and in violation of New York State Vehicle & Traffic Law Sections 1112, 1100(a), and 129-b. Based on this evidence, plaintiff concludes that he is entitled to partial summary judgment on the issue of negligence as against defendant Blyashuk. *NYSCEF Doc. No. 49*. Plaintiff further concludes that he is entitled to partial summary judgment, by vicarious liability, as to his negligence claim against defendant Weatherbee. *See New York State Vehicle & Traffic Law Section 388*.

Defendant Blyashuk argues that since the vehicle that he was backing out of the garage skidded on a patch of ice, this in and of itself, is not negligence. *See New York State Pattern Jury Instructions Section 2:84; Phelps v. Fiordilino, 67 AD2d 1032 (3rd Dept. 1979)*. During his deposition, Blyashuk testified that the weather on the date of the accident was snowy and cold. He stated that he backed out of the collision bay when he slid on a big pothole with ice and was unable to stop. *NYSCEF Doc. No.88*.

The record before the court demonstrates that there are issues of fact as to causation and foreseeability which should be left for the fact finder to resolve. How the accident occurred, who was negligent, and the reasons for their negligence, are questions for the fact finder to determine. *Derdiarian v. Felix Contr. Corp., 51 NY2d 308, 315 (1980)*. Further, and based on the conflicting testimony of the parties, plaintiff has not met his burden of demonstrating that there are no triable issues of fact in order to be granted judgment as a matter of law on the issue of negligence against defendants Blyashuk and Weatherbee. *Zuckerman v. City of New York, 49 N.Y. 2d 557,597 (1980)*.

Accordingly, it is hereby ORDERED that plaintiff's motion for partial summary judgment on the issue of negligence against defendants Blyashuk and Weatherbee is DENIED.

Motion #0003

Upon reading the notice of motion (Motion No. 0003) of plaintiff, Dwight Davis, (hereinafter "plaintiff"), *NYSCEF Doc. No. 58*, seeking to strike defendant, Melissa LaCount d/b/a/ 311 Auto Repair and Collision's (hereinafter "defendant") answer, and granting default judgment against defendant, and referring this matter for an assessment of damages hearing; and upon reading the affirmation of Scott M. Schwartz, Esq., dated the 18th day of October 2023, with attached exhibits, in support of said motion, *NYSCEF Doc Nos. 59-66*; and

Upon reading the affirmation of attorney Sareer A. Fazili, Esq., in opposition to plaintiff's motion seeking a default judgment and an inquest hearing on damages with respect to defendant, *NYSCEF Doc. No. 76*; and upon due deliberation having been had, the decision and order of this court is as follows:

The record before the court demonstrates that plaintiff is not entitled to a default judgment against defendant. *CPLR 3215; 22 NYCRR 202.27(a)*. In this case, defendant filed an answer and an amended answer on January 8, 2020 and March 2, 2020, respectively. *See NYSCEF Doc. Nos. 7 & 8*. An order for substitution of counsel was signed and filed on March 29, 2023. *NYSCEF Doc. No. 32*. The court ordered that defendant, within 30 days, appear before this court either with new counsel retained or acknowledge her intention to proceed pro se. *Id.* Defendant has been in contact with the court and advised that she cannot afford to retain an attorney and will be representing herself. Therefore, plaintiff's request for a default judgment against defendant is denied.

Accordingly, since the court has denied plaintiff's request for a default judgment against defendant, plaintiff's request for a damages inquest hearing is denied as well, as premature.

Accordingly, it is hereby ORDERED that plaintiff's motion for a default judgment and request for an inquest hearing on damages is DENIED.

Motion #004

Upon reading defendant Weatherbee's notice of cross motion for summary judgment (Motion No. 004) on negligence and for indemnification against defendant LaCount, *NYSCEF Doc. No. 75*; and upon reading the affirmation of Sareer A. Fazili, Esq., dated the 19th day of October 2023, in support of said motion, with attached exhibits, *NYSCEF Doc. Nos 76-83*; and upon due deliberation having been had, the decision and order of this court is as follows:

This action involves a car accident that occurred on December 12, 2018, at defendant LaCount's Auto Repair and Collision shop located at 311 Kenmore Avenue, Buffalo, New York. At the time of the accident, defendant Blyashuk, while in the course of his employment as an employee of defendant LaCount, operated a motor vehicle owned by defendant Weatherbee that came into contact with a vehicle in which plaintiff was a passenger. *See NYSCEF Doc. No. 76*. The Weatherbee vehicle was in defendant LaCount's repair shop for repairs and was being operated by defendant Blyashuk on the date of the accident.

Defendant Weatherbee contends that she is entitled to summary judgment on the issue of defendant LaCount's negligence under the doctrine of respondeat superior. She further contends that she is entitled to summary judgment on the issue of indemnification from defendant LaCount. *Id.*

The record before the court demonstrates that defendant LaCount was in possession of the Weatherbee vehicle at the time of the accident. This vehicle was being operated by

defendant Blyashuk, an employee of LaCount. *NYSCEF. Doc. Nos. 76-83*. The record further demonstrates that there is no affirmative negligence as to Weatherbee's operation of the vehicle, as she was not operating same at the time of the accident. However, triable issues of fact remain as to the obligation of both Weatherbee and LaCount, as to ownership of said vehicle and permissive use and operation of said vehicle under section 388 of the New York State Vehicle & Traffic Law. There are also triable issues of fact as to whether defendants LaCount and Blyashuk were negligent with respect to the happening of this accident.

Accordingly, it is hereby ORDERED that defendant Weatherbee's cross motion for summary judgment on negligence and indemnification grounds as against defendant LaCount, d/b/a 311 Auto Repair and Collision, is DENIED.

ENTER:

Dated: April 2, 2024



HON. MICHAEL A. SIRAGUSA, A.J.S.C.