

Turmon v Sinha
2024 NY Slip Op 35422(U)
April 10, 2024
Supreme Court, Albany County
Docket Number: Index No. 907303-22
Judge: Kimberly A. O'Connor
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

KHALIF TURMON,

Plaintiff,

- against -

DECISION AND ORDER

Index No.: 907303-22

PRIA SINHA,

Defendant.

(Supreme Court, Albany County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

APPEARANCES: THE STEINER LAW FIRM, PLLC
Attorneys For Plaintiff
(Norman Steiner, Esq. of Counsel)
1 Croton Point Avenue
Croton On Hudson, New York 10520

LAW OFFICES OF JENNIFER S. ADAMS
Attorneys for Defendant
(Paul G. Hanson, Esq. of Counsel)
One Executive Boulevard, Suite 280
Yonkers, New York 10701

O'CONNOR, J.:

Background

Plaintiff commenced this personal injury action by Summons and Verified Complaint filed on September 28, 2022, seeking to recover damages for injuries that he allegedly sustained as a result of a motor vehicle accident which occurred on July 30, 2022, in the County of Albany, State of New York. Following joinder of issue, defendant moves for summary judgment pursuant to

CPLR § 3212 on the issues of liability, and “serious injury” as defined by Insurance Law § 5102.

Plaintiff opposes the motion.¹

This action arises out of a motor vehicle accident that occurred at approximately 1:18 A.M. on July 30, 2022, on Interstate 787, at or near mile marker 4.9. The record establishes that defendant was riding her Kawasaki motorcycle northbound on Interstate 787. Plaintiff was also driving northbound on I-787. While traveling on the interstate, defendant fell off her motorcycle. Plaintiff’s vehicle collided with defendant’s motorcycle, which was lying in the roadway.

Discussion

Defendant contends that plaintiff’s negligent operation of his own vehicle was the sole proximate cause of the accident. Defendant argues that the location of plaintiff’s motorcycle in the roadway merely furnished the occasion for the accident and was not a proximate cause. Defendant further alleges that plaintiff’s accusations of negligence are “[c]onclusory and unsupported.” Defendant states that even if she was negligent in operating her motorcycle, plaintiff failed to demonstrate that such negligence was the cause of the event that produced the harm. Defendant also claims that plaintiff did not suffer a serious injury under Insurance Law § 5102. In support, defendant argues that plaintiff only sought minimal treatment and discontinued treatment for his claimed injuries. Defendant argues that plaintiff’s cervical spine injuries are degenerative in nature and not related to the accident. Defendant states that any limitations in plaintiff’s ranges of motion are subjective and thus insufficient to support a finding of severe injury. Further, defendant argues that plaintiff was only confined to his home for 14 days, and thus did not meet the requirements of the 90/180-day serious injury category. In support, defendant

¹Although plaintiff requested that “reverse summary judgment” be granted in its favor within its opposition papers, plaintiff failed to properly file a notice of cross-motion for summary judgment. As such, the Court interprets plaintiff’s filings solely as opposition to defendant’s motion for summary judgment.

submits, *inter alia*, defendant's deposition transcript, plaintiff's deposition transcript, a police accident report, and several medical reports.

Plaintiff avers that he was traveling at the posted speed limit of 55 miles per hour and had no warning that the motorcycle was in his path. Plaintiff contends that defendant was "operating her motorcycle negligently and without caution to the hazardous road conditions" which caused her to lose control of the motorcycle. Plaintiff argues that defendant violated several sections of the New York Vehicle and Traffic Law and that such violations are evidence of negligence. Plaintiff contends that defendant "utterly failed to submit competent medical evidence establishing, *prima facie*, that Plaintiff did not sustain serious injuries." Further, plaintiff asserts, pursuant to CPLR 3212(b), that defendant's motion lacks an affidavit by any party with personal knowledge, and therefore "the motion papers are entirely devoid of anything probative for this Honorable Court to consider."

I. Admissibility Issues

As an initial matter, in opposition to defendant's motion, plaintiff objects to the defendant's use of plaintiff's testimony, since plaintiff was not provided with the opportunity to examine the deposition and make alterations before the transcript was finalized (*see* CPLR 3116). Further, plaintiff states that defendant's deposition transcript is inadmissible because it is not signed. Similarly, plaintiff argues that defendant relies on an uncertified, and thus inadmissible, copy of a purported police accident report.² In response, defendant maintains that the police accident report is certified, and claims that because defendant submitted the sworn deposition testimony of the parties, an affidavit was not necessary to demonstrate her entitlement to summary judgment.

² The Court notes that plaintiff's objections to the depositions and police report were only raised in plaintiff's counter statement of material facts. While these arguments should have been raised in plaintiff's affirmation in opposition, the Court will address plaintiff's admissibility concerns.

“To obtain summary judgment it is necessary that the movant establish his cause of action or defense ‘sufficiently to warrant the court as a matter of law in directing judgment’ in his favor (CPLR 3212, subd [b]), and he must do so by tender of evidentiary proof in *admissible form*” (*Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 N.Y.2d 1065, 1067 [1979]) [emphasis added]). “The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide ‘evidentiary proof in admissible form’, e.g., documents, transcripts” (*Zuckerman v. New York*, 49 N.Y.2d 557, 563 [1980]). “An uncertified police accident report does not constitute admissible evidence, absent a proper foundation for its admissibility” (*Yassin v. Blackman*, 188 A.D.3d 62, 63 [2d Dep’t 2020]; *see Toll v. State*, 32 AD2d 47 [3d Dep’t 1969]). Likewise, an unsigned deposition that was never submitted to the witness for examination is inadmissible (*see* CPLR 3116; *Pina v Flik Intl. Corp.*, 25 A.D.3d 772, 773 [2d Dep’t 2006]). However, a certified but unsigned deposition transcript is considered accurate, and is admissible, when it is the deposition transcript of the movant submitted in support of his or her own motion (*see Guerin v. Robbins*, 182 A.D.3d 951, 952, n. 3 [3d Dep’t 2020]).

The Court finds that contrary to plaintiff’s contention, although an affidavit by defendant was not submitted, defendant’s submission of an attorney affirmation with deposition testimony and exhibits attached does provide some admissible evidence for the court to consider (*see Zuckerman v. New York*, 49 N.Y.2d 557, 563 [1980]). Turning first to the deposition testimony, plaintiff’s deposition transcript is unsigned and there is no indication that the transcript was ever provided to plaintiff for review. Accordingly, plaintiff’s transcript is inadmissible (*see Pina v Flik Intl. Corp.*, 25 A.D.3d 772, 773 [2d Dep’t 2006]). Defendant’s transcript is also unsigned; yet is admissible because it is offered in support of her own motion (*see Guerin v. Robbins*, 182 A.D.3d

951, 952, n. 3 [3d Dep't 2020]). Lastly, the police report offered by defendant bears no certification and thus is inadmissible (*see Yassin v. Blackman*, 188 A.D.3d 62, 63 [2d Dep't 2020]; *Toll v. State*, 32 AD2d 47 [3d Dep't 1969]).

After determining the admissibility of defendant's proof, the Court is left to consider the following documents and exhibits offered by defendant: defendant's statement of material facts; defendant's attorney affirmation; the pleadings; defendant's deposition transcript; plaintiff's verified³ bill of particulars; plaintiff's x-ray report; plaintiff's MRI report; plaintiff's independent medical exam report; and defendant's attorney affirmation in reply.

II. Summary Judgment

"Summary judgment is a drastic remedy" (*Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 [2012]), which should only be granted when it "clearly appear[s] that no material and triable issue of fact is presented" (*Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 315 [2004])[internal quotation marks and citation omitted]; *see Andre v. Pomeroy*, 35 N.Y.2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Matter of New York City Asbestos Litig. v. Chevron Corp.*, 33 N.Y.3d 20, 25-26 [2019], quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]; *see Deleon v. New York City Sanitation Dep't*, 25 N.Y.3d 1102, 1106 [2015]; *see also* CPLR 3212[b]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Vega v. Restani Const. Corp.*, 18 N.Y.3d at 503, quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324 [emphasis omitted]; *see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]).

³ The bill of particulars is unsigned, an issue that neither party raises.

It is only when the moving party has demonstrated a right to judgment as a matter of law that the burden shifts to the party opposing the motion to establish, by admissible proof, the existence of a genuine issue of material fact requiring trial of the action, or to demonstrate an acceptable excuse for the failure to do so (*see Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; CPLR 3212[b]). The Court's function on a motion for summary judgment is to view the "facts . . . in the light most favorable to the non-moving party" (*Matter of New York City Asbestos Litig. v. Chevron Corp.*, 33 N.Y.3d at 25, quoting *Vega v. Restani Const. Corp.*, 18 N.Y.3d at 503 [internal quotation marks and further citation omitted]), and "decide only whether [any] triable issues have been raised" (*Barlow v. Spaziani*, 63 A.D.3d 1225, 1226 [3d Dep't 2009]; *see Boston v. Dunham*, 274 A.D.2d 708, 709 [3d Dep't 2000]). "Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d at 315; *accord Matter of New York City Asbestos Litig. v. Chevron Corp.*, 33 N.Y.3d at 25).

a. Proximate Cause

"Defendants moving for summary judgment in a negligence action arising out of an automobile accident have the burden of establishing, prima facie, that they were not at fault in the happening of the accident" (*Nesbitt v. Gallant*, 149 A.D.3d 763, 763 [2d Dep't 2017]). "Evidence of negligence is not enough by itself to establish liability. It must also be proved that the negligence was the cause of the event which produced the harm sustained by one who brings the complaint" (*Sheehan v. New York*, 40 N.Y.2d 496, 501 [1976]). "[L]iability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its causes" (*Ely v. Pierce*, 302 A.D.2d 489, 489 [2d Dep't 2003]; *see Schiff v. Possemato*, 25 A.D.3d 839, 839 [3d Dep't 2006]). Although proximate cause is generally a question "for the

factfinder, there are instances in which proximate cause can be determined as a matter of law because ‘only one conclusion may be drawn from the established facts’” (*Hain v. Jamison*, 28 N.Y.3d 524, 529 [2016], quoting *Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d 308, 315 [1980]).

In her deposition testimony, defendant averred that on July 30, 2022, she left work in the early morning. Defendant recalled that she was riding her motorcycle and made the decision to take I-787. Defendant stated that although it had just started to rain, “it was the hottest day of the summer, [so] the pavement was not wet.” Defendant testified that while riding on I-787 in the right lane, she “was rear-ended by a car coming up behind [her], so that was the cause of the bike going down.” Defendant asserted that she lost control of the motorcycle after the rear impact, and recalled that as the motorcycle went down, she rolled away and saw sparks from the motorcycle, which was sliding into the roadway. Defendant stated that “[i]t felt like a while, but it was really just like a couple seconds” before she heard a second crash. Defendant stated that she did not see any other cars pass before the second crash. Defendant confirmed that the police arrived at the scene, and she spoke with an officer regarding the circumstances of the accident. Defendant did not know the color or type of vehicle that rear-ended her. Defendant recalled that her taillight and rear signal lights were on and working at the time of the accident. Defendant stated that when she was provided with a copy of the police accident report several weeks later, she observed that the report omitted that she was a victim of a hit and run. Defendant confirmed that she went to the police barracks and completed an amendment to the police report to resolve the discrepancy.⁴

Based on the foregoing, the Court finds that defendant failed to meet her initial burden of demonstrating that defendant was not the proximate cause of the accident. Defendant’s deposition testimony is insufficient to establish what caused defendant to lose control of her motorcycle.

⁴ An amended police report was not submitted in support of the motion.

Defendant states that she was rear-ended by another vehicle but provides no other support for her claim. Defendant did not recall any identifying features of the alleged vehicle and did not see the subsequent collision of plaintiff's vehicle into the motorcycle, which defendant conceded was lying in the roadway. As such, there is no other admissible evidence, aside from defendant's deposition, provided to establish that defendant's conduct was not a proximate cause of the accident. While defendant alleged that the initial police report did not reflect a hit-and-run with respect to defendant's initial accident, defendant failed to submit an admissible police report, and failed to submit the alleged revised report that she claimed she completed to correct this omission. Further, defendant does not establish that plaintiff's actions or inactions are the sole proximate cause of the accident. Accordingly, triable issues of fact remain as to whether defendant was a proximate cause regarding plaintiff's collision with the motorcycle. Therefore, defendant's motion for summary judgment on this issue of liability is denied.

b. Serious Injury

Insurance Law § 5102 allows a plaintiff to bring a lawsuit outside New York's "no-fault" statute provided the plaintiff has suffered "serious injury." This phrase is defined in the statute:

(d) "Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; 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 days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

In the instant case, plaintiff's theories of entitlement to recovery are based upon allegations of "significant limitation of use of a body function or system" and "medically determined injury or impairment of a nonpermanent nature" that prevented plaintiff from performing substantially all of his regular activities for ninety of the one hundred eighty days following the accident.

Defendant, on the other hand, alleges that there are no triable issues of fact that would support this position and that, instead, the evidence shows that plaintiff cannot meet the threshold showing of serious injury.

"[A] defendant seeking summary judgment as to the no-fault threshold bears the initial burden of establishing the absence of a serious injury as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case" (*McElroy v. Sivasubramaniam*, 305 A.D.2d 944, 945, 761 N.Y.S.2d 688 [3d Dep't 2003] [citations omitted]). "[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v. Wright*, 268 A.D.2d 79, 83-84 [2000]).

Defendant also submitted three of plaintiff's medical reports. The x-ray report of plaintiff's cervical spine dated July 30, 2022, stated that no acute fracture or malalignment was observed. The x-ray found "[m]ild degenerative changes at C5-C6." The report of the MRI of plaintiff's cervical spine, conducted on August 26, 2022, stated the doctor's impression was "[d]isc osteophyte complex eccentric to the right at C5-C6 with mild stenosis of the spinal canal centrally and moderate to severe right and mild left foraminal stenosis. Additional mild right foraminal stenosis at C2-C3." A report of an independent medical exam was conducted on June 21, 2023, by Dr. Edward L. Mills, M.D. Mills' examination of the plaintiff included the use of a hand-held goniometer, which measures "active or active-assist motion perfected by the claimant." Mills explained that the measured range of motion is compared to normal ranges, which "are based on published guidelines as per AMA 5th edition." Mills maintained that this form of evaluation is, "as much as possible, an objective measurement of the claimant's subjective efforts." An

examination of plaintiff's cervical spine revealed that plaintiff's "[r]ange of motion demonstrates flexion to 30 degrees (50 degrees normal), extension to 30 degrees (60 degrees normal)," both left and right lateral flexion to 20 degrees (45 degrees normal), and left and right rotation to 10 degrees (80 degrees normal). Mills similarly reported that plaintiff's range of motion testing for plaintiff's thoracic spine, lumbar spine, and shoulders reported below each area's "normal" rotational ranges. Impingement signs in both shoulders were negative. Mills noted that he did not observe any palpable muscle spasms during plaintiff's exam, but reflected that plaintiff had pain with motion in the cervical, thoracic, and lumbar spine, as well as pain with palpitation in the cervical and thoracic spine. Plaintiff informed Mills that he did not have any history of prior accidents or similar injuries, and had no history of significant medical illness. Plaintiff similarly denied history of any accidents following the accident at issue. Based upon his examination of plaintiff, Mills concluded that there was "[t]here is no objective correlative evidence of a causally related orthopaedic disability. The claimant has fully recovered."

Based on the foregoing, the Court finds that defendant also fails to establish that, as a matter of law, plaintiff did not suffer a serious injury under Insurance Law § 5102. Defendant's independent medical exam makes the determination that plaintiff has fully recovered, despite finding limitations in plaintiff's range of motion and plaintiff experiencing pain during the examination. The report does not articulate or explain which findings form the basis of its conclusion. Further, the report does not address defendant's claim that plaintiff's injuries are degenerative or were pre-existing before the accident. Moreover, defendant's admissible proof does not establish that plaintiff only sought minimal treatment or discontinued treatment for his injuries. As for evidence that plaintiff did not meet the 90/180-day category, defendant relies on plaintiff's bill of particulars which states that plaintiff was confined to his home for 14 days

following the accident. Defendant offers no proof as to plaintiff's ability to work or perform substantially all of his regular activities for the remainder of the 90 days. Accordingly, triable issues of fact remain as to whether plaintiff suffered a serious injury as a result of the collision of plaintiff's vehicle with defendant's motorcycle. Accordingly, defendant's motion for summary judgment on this issue of serious injury is denied.

Any remaining arguments not specifically addressed herein have been considered and found to be lacking in merit or need not be reached in light of this determination.

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment is denied; and it is further

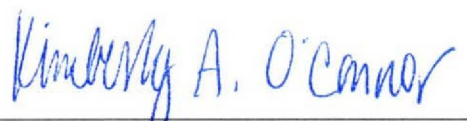
ORDERED, that the parties will attend a virtual conference on May 6, 2024 at 2:00 p.m.;

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being uploaded to the NYSCEF system for filing and entry by the Albany County Clerk. The signing of this Decision and Order and uploading to the NYSCEF system shall not constitute filing, entry, service, or notice of entry under CPLR 2220 and § 202.5-b(h)(2) of the Uniform Rules for the New York State Trial Courts. Counsel is not relieved from the applicable provisions of those Rules with respect to filing, entry, service, and notice of entry of the original Decision and Order.

SO ORDERED.

ENTER.

Dated: April 10, 2024
Albany, New York



HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice



04/10/2024

Papers Considered:

1. Defendant's Notice of Motion for Summary Judgment, dated August 7, 2023; Statement of Material Facts, dated August 7, 2023; Affirmation of Paul G. Hanson, Esq., in Support of Motion, dated August 7, 2023, with Exhibits A-I annexed;
2. Affirmation of Norman Steiner, Esq., in Opposition of Motion for Summary Judgment, dated November 21, 2023, with Exhibits A-C annexed; Response and Counter-Statement of Material Facts; dated November 8, 2023; *and*
3. Affirmation of Paul G. Hanson, Esq., in Reply to Plaintiff's Opposition, dated November 28, 2023.