

Mignone v Cano-Olvera
2024 NY Slip Op 35458(U)
August 2, 2024
Supreme Court, Westchester County
Docket Number: Index No. 57737/2021
Judge: William J. Giacomo
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

----- x
GERARD A. MIGNONE,

Plaintiff,

Index No. 57737/2021

– against –

Motion Sequence #001

MONSERRAT N. CANO-OLVERA,

DECISION & ORDER

Defendant.
----- x

In an action to recover damages for personal injuries, plaintiff moves for summary judgment against defendant on the issues of liability and the no-fault threshold pursuant to CPLR 3212 and Insurance Law Section 5104:

Papers Considered

NYSCEF DOC NO. 14-29

1. Notice of Motion/Affirmation of William Martin, Esq./Statement of Material Facts/Exhibits 1-13

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced this action for personal injuries sustained as a result of a motor vehicle accident that occurred on December 15, 2020, at approximately 5:55 p.m., at the intersection of Anderson Avenue and Alida Street in the town of Eastchester, New York. Defendant joined issue with the service and filing of her answer.

Plaintiff moves for partial summary judgment on liability and for summary judgment on the issue of the serious injury threshold. Plaintiff testified that he was operating his vehicle northbound on Alida Street when defendant's vehicle failed to stop at the stop sign at the intersection of Anderson Ave and then collided with plaintiff's vehicle. Alida Avenue did not have any traffic controls or stop sign, but Anderson Avenue had a stop sign. Plaintiff argues that

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defendant failed to stop at the sign, or stopped, but then failed to yield to plaintiff's vehicle which had the right of way, causing the vehicles to collide. Plaintiff submits pictures of the intersections, indicating that one street had a stop sign at the intersection, while the other one did not. This is also noted in the certified police report. Defendant testified that she stopped for three to four seconds, looked to her right and left and then turned left onto Alida Avenue. After she made the turn into the intersection, she saw plaintiff's headlights and tried to stop, but the vehicles collided.

Plaintiff alleges that he suffered a serious injury under NY Insurance Law § 5102 (d). In support, plaintiff submits hospital records from a visit a few days after the accident which indicated that plaintiff's right foot had a healing fracture deformity of the second metatarsal. Three weeks after the accident, plaintiff was also treated for "Adhesive capsulitis of right shoulder" and "Acute pain of right shoulder." Plaintiff claims that this right shoulder injury was causally related to the accident and that he suffered a permanent loss of range of motion due to this injury.

Plaintiff submits the sworn affirmation from Richard D. Semble, M.D., a Board Certified Orthopedist, who defendant had hired to perform an examination of plaintiff. Dr. Semble evaluated plaintiff on September 7, 2023. Dr. Semble affirmed in his report, "[f]racture right, second metatarsal, healed uneventfully and causally related." Dr. Semble also opined that "[t]here is permanency due to the loss of range of motion of the right shoulder."

The motion is unopposed.

DISCUSSION

Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from

the evidence, or where there are issues of credibility.” *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

Liability

“A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant’s negligence was a proximate cause of the alleged injuries.” *Ahmed v Fernando*, 22 AD3d 832, 832 (2d Dept 2022) (internal citations omitted). Further, “[t]o be entitled to partial summary judgment a plaintiff does not bear the . . . burden of establishing . . . the absence of his or her own comparative fault.” *Id.*

A driver who fails to yield the right-of-way after stopping at a stop sign is in violation of Vehicle and Traffic Law § 1142 (a) and is negligent as a matter of law. *Rabenstein v Suffolk County Dept. of Pub. Works*, 131 AD3d 1145, 1145 (2d Dept 2015). Moreover, “[t]he question of whether the driver stopped at the stop sign is not dispositive where the evidence establishes that the driver failed to yield after initially stopping.” *Jones v Haifeng Zuo*, 220 AD3d 933, 934 (2d Dept 2023) (internal quotation marks omitted). A driver who has the right-of-way is entitled to anticipate that other drivers will obey traffic laws that require them to yield. *Cheese v Ferguson*, 208 AD3d 1302, 1303 (2d Dept 2022).

There can be more than one proximate cause of an accident. *Hartsuff v Michaels*, 139 AD3d 1005, 1006 (2d Dept 2016). 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. *Rabenstein v Suffolk County Dept. of Pub. Works*, 131 AD3d at 1146; *see also Jones v Haifeng Zuo*, 220 AD3d at 934 (internal quotation marks omitted) (“a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision . . . [and] to see what there is to be seen through the proper use of his or her senses”). Nonetheless, 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. *Cheese v Ferguson*, 208 AD3d at 1303.

The undisputed facts include that defendant had a stop sign and plaintiff did not, and neither driver saw the other prior to when they were both in the intersection. It is undisputed that plaintiff had the right-of-way and was therefore entitled to anticipate that defendant would obey traffic laws requiring her to yield. Therefore, based on the evidence presented, including testimony of the parties and the certified police report, plaintiff has established prima facie entitlement to judgment

as a matter of law as to defendant's liability in that she failed to yield the right-of-way to plaintiff's vehicle after stopping at a stop sign in violation of Vehicle and Traffic Law § 1142 (a). *See e.g. Jones v Haifeng Zuo*, 220 AD3d at 934 ("Here, the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by submitting his affidavit, which demonstrated that the defendant failed to yield the right-of-way to the plaintiff and negligently drove his vehicle into the plaintiff's vehicle"). Defendant has not opposed the motion and has failed to raise a triable issue of fact in opposition "as to whether [defendant's] negligence was a proximate cause of the accident." *Id.*

Accordingly, plaintiff is granted partial summary judgment on liability.

Serious Injury

Insurance Law 5102(d) defines "serious injury" as "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."

"To recover damages for noneconomic loss related to personal injury allegedly sustained in a motor vehicle accident, the plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of Insurance Law § 5102 (d), but also that the injury was causally related to the accident."

Valentin v Pomilla, 59 AD3d 184, 186 (1st Dept 2009) (internal quotation marks and citation omitted).

Here, plaintiff submitted competent medical evidence, through the affirmed IME report and other medical records, establishing, prima facie, that the plaintiff's injuries meet the "no-fault" threshold. Plaintiff suffered a fracture in his right foot as a result of the accident. It is undisputed that "a fracture" qualifies as a "serious injury" under Insurance Law § 5102(d).

Defendant does not oppose plaintiff's motion and fails to raise a triable fact in opposition. In fact, defendant's own medical evidence acknowledged that plaintiff sustained a fracture as result of the accident.

Plaintiff also submitted evidence that his right shoulder injury constituted a serious injury under the permanent consequential limitation of use category. However, as plaintiff established that at least some of his injuries meet the “no-fault” threshold, it is unnecessary to address his proof with respect to other injuries. *See e.g. Perez-Hernandez v M. Marte Auto Corp.*, 104 AD3d 489, 490 (1st Dept 2013) (“Because plaintiff has established a fracture, he is entitled to recover for all injuries causally related to the accident, including those not meeting the serious injury threshold”).

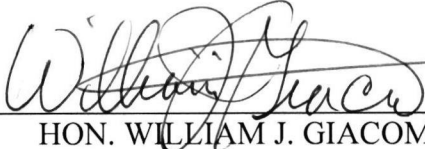
Accordingly, it is hereby

ORDERED that the branch of plaintiff’s motion for partial summary judgment on the issue of liability, is granted; and it is further

ORDERED, that the branch of the plaintiff’s motion for summary judgment on the issue of determining that the plaintiff sustained a “serious injury” as defined by Section 5102(d) of the New York State Insurance Law, granted.

The parties are directed to appear for a virtual settlement conference, on October 7, 2024 at 10:30 a.m., subject to confirmation by the virtual conference link emailed by this Court.

Dated: White Plains, New York
August 2, 2024


HON. WILLIAM J. GIACOMO, J.S.C.