Mesilas v Ledesman
2025 NY Slip Op 35299(U)
April 1, 2025
Supreme Court, Queens County
Docket Number: Index No. 712689/2020
Judge: Karen Lin
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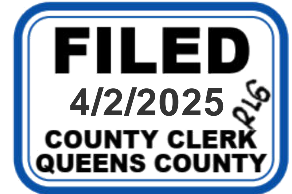

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: PART 24

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JEAN-GARRY MESILAS,

Plaintiff,

-against-

JOSE LEDESMAN,

Defendant.

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Index No. 712689/2020

Motion Seq. Nos. 001 and 002

DECISION AND ORDER

The following is a recitation pursuant to CPLR 2219(a) of the papers reviewed and considered on this motion by defendant for summary judgment dismissing the complaint (motion seq. no. 001); by plaintiff for summary judgment on defendant's liability and dismissing affirmative defenses (motion seq. no. 002):

Papers	*NYSCEF Doc. No.*
Motion Seq. No. 1	
Notice of Motion, Affirmation, Exhibits	22-31
Answering Affirmation, Exhibits	51-62
Reply Affirmation	64
Motion Seq. No. 2	
Notice of Motion, Affirmation, Exhibits	37-44
Answering Affirmation, Exhibits	46-49
Reply Affirmation	63

Upon the foregoing papers, motion seq. nos. 001 and 002 are consolidated for the purpose of disposition only and are decided as follows.

On August 11, 2020, plaintiff Jean-Garry Mesilas commenced this action to recover damages for personal injuries sustained on May 2, 2019, in a collision between a motor vehicle that he operated, and a motor vehicle that defendant Jose Ledesman owned and operated. In the answer, defendant asserted, among other things, contributory negligence or assumption of risk as the third affirmative defense, failure to mitigate damages by not using a seat belt as the fifth affirmative defense, and that plaintiff's injuries resulted from his own unlawful or intentional acts as the ninth affirmative defense. Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury (*see* CPLR 3212[b];

Insurance Law § 5104[a]). Plaintiff separately moves for summary judgment on the complaint and dismissing the third, fifth, and ninth affirmative defenses (*see* CPLR 3212[b]).

The Court first addresses defendant's motion for summary judgment dismissal on the ground plaintiff did not sustain a serious injury. "To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented" (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 23 [2019] quoting *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). "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" (*id.* at 23, quoting *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). On summary judgment, "facts must be viewed in the light most favorable to the non-moving party" (*id.* at 23, quoting *Vega v Restani Constr. Corp.*, 18 NY3d 499, 502 [2012]), and "the 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" (*id.* at 23, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 322 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 322 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 , 853 [1985]).

"Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss" (Insurance Law § 5104[a], *see Aetna Health Plans v Hanover Ins. Co.*, 27 NY3d 577, 582 [2016]). "'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" (Insurance Law § 5102[d], *see Perl v Meher*, 18 NY3d 208, 215 [2011]). Here, plaintiff's bill of particulars dated February 9, 2021, indicated various injuries to his cervical and lumbar spine, and knees, and alleged categories of serious injury including permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system, and a non-permanent injury which prevents him from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following his injury in the collision (90/180 category).

Regarding the branch of defendant's motion seeking dismissal based on an absence of serious injury under the 90/180 category, defendant relies solely on plaintiff's deposition testimony,[1] held February 4, 2022, wherein plaintiff testified that he was working as a truck driver, that he was injured on Thursday but returned to work on the following Monday "because I wasn't able to drive anymore, they put me working inside." During his deposition, plaintiff was only asked questions regarding his physical limitations in May 2020, over a year after the underlying accident (*see* NYSCEF Doc. No. 31 at 84-85). Since the deposition transcript fails to address plaintiff's usual and customary activities in the relevant timeframe, defendant fails to meet his initial burden in a motion for summary judgment of showing that plaintiff did not sustain a serious injury under the 90/180 category (*see Hall v Stargot*, 187 AD3d 996, 996 [2d Dept 2020]; *Reid v Edwards-Grant*, 186 AD3d 1741, 1742 [2d Dept 2020]; *Jong Cheol Yang v Grayline NY Tours*, 186 AD3d 1501, 1501-02 [2d Dept 2020]). Therefore, denial of defendant's motion for summary judgment dismissal on the ground plaintiff did not sustain a serious injury under Insurance Law § 5102(d) is appropriate despite any insufficiency in the opposing papers (*see Hall*, 187 AD3d at 997; *Reid*, 186 AD3d at 1742; *Jong Cheol Yang*, 186 AD3d at 1502).

Turning to plaintiff's motion for summary judgment on defendant's liability, plaintiff contends that defendant's collision with the rear of plaintiff's vehicle renders defendant liable for plaintiff's injuries. "The driver of a motor vehicle shall not follow another vehicle more closely

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[1] The Court rejects plaintiff's contention in opposition that his deposition transcript should not be considered due to his failure to sign it (*see* CPLR 3116[a]). Not only may the deposition be fully used as though signed where, as here, the deponent failed to sign and return the same within 60 days, but also where, as here, plaintiff deponent proffers a copy of the same unsigned transcript in support of his own summary judgment motion, such transcript has been adopted as accurate by the plaintiff deponent (*see Farquharson v United Parcel Serv.*, 202 AD3d 923, 925 [2d Dept 2022]; *E.W. v City of New York*, 179 AD3d 747, 747-48 [2d Dept 2020]; *Baptiste v Ditmas Park, LLC*, 171 AD3d 1001, 1002 [2d Dept 2019]).

than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway" (Vehicle and Traffic Law § 1129[a]). A collision with the rear of a stopped vehicle establishes prima facie negligence of the rear vehicle driver (*see Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]; *Fleischmann v County of Suffolk*, 226 AD3d 873, 873 [2d Dept 2024]; *Toala v EAN Holdings, LLC*, 191 AD3d 724, 726 [2d Dept 2021]; *Rosenblum v Schloss*, 175 AD3d 1339, 1341 [2d Dept 2019]). The rear vehicle driver must rebut the inference of negligence by furnishing a non-negligent explanation for the collision (*see Fleischmann*, 226 AD3d at 873; *Toala*, 191 AD3d at 726; *Rosenblum*, 175 AD3d at 1341).

Here, plaintiff's deposition testimony that he was stopped at a red light when defendant's vehicle collided with the rear of his vehicle demonstrates his entitlement to judgment as a matter of law (*see Fleischmann*, 226 AD3d at 874; *Rosenblum*, 175 AD3d at 1341; *McLaughlin v Lunn*, 137 AD3d 757, 758 [2d Dept 2016]). In opposition, defendant relies on an uncertified police accident report. However, since defendant fails to lay a business record foundation for the report or demonstrate that it was properly certified, it is not in admissible form (*see* CPLR 3122-a[a], [b], 4518[a]; *Yassin v Blackman*, 188 AD3d 62, 65 [2d Dept 2020]). Thus, the statements therein are inadmissible hearsay (*see Zeldin v Larose*, 223 AD3d 858, 859 [2d Dept 2024]). Contrary to defendant's contention, the uncertified police accident report was not based on the police officer's personal observations, as he merely noted each of the parties' statements regarding the collision. Defendant further contends that there exist alleged discrepancies or inconsistencies in plaintiff's deposition regarding how he detected the collision, if the traffic light had changed from red to green, and whether his cell phone was placed on or under the passenger side seat, which raise fact issues. However, these discrepancies fail to rebut the undisputed fact of defendant's vehicle striking plaintiff's vehicle in the rear while stopped at the red light. Thus, defendant fails to raise factual issues regarding his negligence (*see Fleischmann*, 226 AD3d at 874; *Rosenblum*, 175 AD3d at 1341; *McLaughlin*, 137 AD3d at 758) and summary judgment in favor of plaintiff on defendant's liability is appropriate (*see Fleischmann*, 226 AD3d at 874; *Rosenblum*, 175 AD3d at 1341; *McLaughlin*, 137 AD3d at 758).

Regarding the branch of plaintiff's motion for summary judgment dismissing defendant's affirmative defenses, since plaintiff's testimony also established he was not at fault in the collision and did not engage in unlawful or intentional conduct that caused his injuries, plaintiff also demonstrates entitlement to summary judgment dismissing the affirmative defenses of

comparative negligence (*see Fleischmann*, 226 AD3d at 874; *Ali v Alam*, 223 AD3d 642, 644 [2d Dept 2024]; *Tenezaca v State of New York*, 220 AD3d 959, 961 [2d Dept 2023]; *Quintanilla v Mark*, 210 AD3d 713, 714 [2d Dept 2022]) and unlawful or intentional acts (*see generally Tenezaca*, 220 AD3d at 961; *Johnson v Thompson*, 149 AD3d 1530, 1531 [4th Dept 2017]). As defendant does not raise arguments opposing dismissal of the affirmative defenses, defendant fails to raise fact issues regarding plaintiff's comparative fault in the collision (*see Fleischmann*, 226 AD3d at 874; *Ali*, 223 AD3d at 644; *Tenezaca*, 220 AD3d at 961; *Quintanilla*, 210 AD3d at 714; *Johnson*, 149 AD3d at 1531). Further, plaintiff's unrebutted testimony that he wore a lap and shoulder safety belt at the time of the collision demonstrates that the affirmative defense of failure to mitigate damages by failing to use a seatbelt lacks merit (*see Prak v New York City Tr. Auth.*, 205 AD3d 489, 490 [1st Dept 2022]; *Stickney v Alleca*, 52 AD3d 1214, 1215 [4th Dept 2008]). Therefore, plaintiff is entitled to summary judgment dismissing the affirmative defenses for comparative negligence, unlawful or intentional conduct (*see Fleischmann*, 226 AD3d at 874; *Tenezaca*, 220 AD3d at 961-62; *Quintanilla*, 210 AD3d at 715; *Johnson*, 149 AD3d at 1531), and failing to mitigate damages by not using a seatbelt (*see Prak*, 205 AD3d at 490; *Stickney*, 52 AD3d at 1215).

Accordingly, plaintiff's motion is granted and defendant's motion is denied.

For all the foregoing reasons, it is hereby

ORDERED, that defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) is denied; and it is further

ORDERED, that plaintiff's motion for summary judgment on the issue of liability and dismissing defendant's third, fifth, and ninth affirmative defenses is granted; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff against defendant; and it is further

ORDERED, that the matter is to be set down for a trial for a determination on whether plaintiff sustained serious injury pursuant to Insurance Law § 5102(d) and, if established, an assessment of damages; and it is further

ORDERED, that plaintiff is directed to serve a copy of this Decision and Order with Notice of Entry upon all parties, within thirty (30) days of the date of entry.

This constitutes the Decision and Order of the Court.

Dated: April 1, 2025
Long Island City, New York

HON. KAREN LIN, J.S.C.