Style v Abbott
2014 NY Slip Op 33232(U)
January 23, 2014
Supreme Court, Bronx County
Docket Number: 300085/2013
Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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DAVID A. STYLE,

Plaintiff,

- against -

SHEILA F. ABBOTT,

Defendant.

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DECISION AND ORDER

Index No. 300085/2013

PRESENT: Hon. Lucindo Suarez

Upon defendant's notice of motion dated November 5, 2013 and the affirmation, affirmed report, and exhibits submitted in support thereof; plaintiff's affirmation in opposition dated January 10 2014 and the affidavits, affirmed reports, and exhibits annexed thereto; plaintiff's notice of cross-motion dated January 9, 2014 and the affirmation and exhibits submitted in support thereof; defendant's affirmation in partial opposition dated January 10, 2014; and due deliberation; the court finds:

Plaintiff commenced this action to recover damages for personal injuries sustained in a motor vehicle accident that occurred on February 21, 2012 on the Saw Mill River Parkway in Yonkers, Westchester County. Defendant now moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint on the ground that plaintiff did not sustain a "serious injury," as the phrase is defined in Insurance Law § 5102. Plaintiff cross-moves pursuant to CPLR 3212 for partial summary judgment on the issue of defendant's liability for causing the accident.

Defendant relies on the pleadings, plaintiff's deposition transcript and an affirmed report from orthopedic surgeon Alexios Apazidis, M.D. in support of the motion. Plaintiff alleges in his verified bill of particulars to have sustained an interstitial tear to the medial distal fibers of the quadriceps tendon in the left knee, tendinosis of the left shoulder, and numerous bulging and herniated discs in the cervical

and lumbar spine. Plaintiff claims his injuries constitute a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and 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 ("90/180").

Dr. Apazidis performed an independent orthopedic evaluation of plaintiff on September 19, 2013 and reported finding normal ranges of motion for all areas tested and normal or negative results for all additional tests administered. He opined that plaintiff's spine, left knee and left shoulder sprains had resolved. Plaintiff's deposition testimony reveals that he missed only one day of work after the accident, and the three month period during which he was restricted to light duty was self-imposed. At the time of his deposition, he experienced limitations only in walking up stairs, and there were no activities in which he could not perform.

Defendant has demonstrated that plaintiff did not suffer a serious injury within the meaning of the Insurance Law. *See Levinson v. Mollah*, 105 A.D.3d 644, 963 N.Y.S.2d 653 (1st Dep't 2013); *Haniff v. Khan*, 101 A.D.3d 643, 958 N.Y.S.2d 89 (1st Dep't 2012). Plaintiff's testimony that he missed one day from work defeats his 90/180 claim. *See Frias v. Son Tien Liu*, 107 A.D.3d 589, 967 N.Y.S.2d 382 (1st Dep't 2013).

The burden having shifted, plaintiff in opposition submits his affidavit; uncertified records from Weiler Hospital; an affidavit from chiropractor Mitchell Zeren, D.C.; an affirmed initial report from physiatrist Yolande Bernard, M.D. and records; an unsigned report from Steven Wilson, M.D.; two affirmed reports from neurologist Aric Hausknecht, M.D.; and an affirmation from radiologist Narayan Paruchuri, M.D. Dr. Paruchuri confirmed that the MRIs taken within two months of the accident revealed positive findings for a disc bulge at L4; disc herniations at C4-C5, C5-C6, C6-C7, and L5-S1;

supraspinatus and infraspinatus tendinosis in the left shoulder; and an interstitial tear of the quadriceps tendon of the left knee. Plaintiff's treating chiropractor and physicians reported finding range of motion limitations of the spine, left knee and left shoulder in a number of examinations performed shortly after the accident. Dr. Zeren and Dr. Hausknecht also examined plaintiff more recently and found persisting range of motion deficits of those same areas. Plaintiff was asymptomatic prior to the accident, and they opined that the injuries were causally related to the motor vehicle accident. Plaintiff's submissions are sufficient to raise a triable issue of fact, *see Lee v. Cornell Univ.*, 112 A.D.3d 466, 976 N.Y.S.2d 85 (1st Dep't 2013); *Bonilla v. Abdullah*, 90 A.D.3d 466, 933 N.Y.S.2d 682 (1st Dep't 2011), *leave denied*, 19 N.Y.3d 885, 971 N.E.2d 857, 948 N.Y.S.2d 576 (2012). Plaintiff, though, has not raised an issue of fact concerning his 90/180 claim.

In support of his cross-motion for partial summary judgment on liability, plaintiff submits the deposition transcripts and the police accident report. The uncertified police accident report is not in admissible form. *See Coleman v. Maclas*, 61 A.D.3d 569, 877 N.Y.S.2d 297 (1st Dep't 2009). Plaintiff's testimony reveals that he was traveling southbound when he felt a heavy, rear end impact. He never saw the other vehicle prior to the accident. Defendant testified that she was traveling southbound in the middle lane when her car "drifted" into the slow lane, causing the impact to the rear driver's side of plaintiff's vehicle. She could not recall seeing plaintiff's vehicle prior to the impact.

Generally, a driver traveling behind another vehicle has a duty to maintain a safe distance behind the front vehicle, whether it is moving or stopped, to avoid a rear end collision in the event the front vehicle slows down or stops, even suddenly, *see* New York Vehicle and Traffic Law §1129(a), and taking into account the weather and road conditions. *See Francisco v. Schoepfer*, 30 A.D.3d 275, 817 N.Y.S.2d 52 (1st Dep't 2006). In addition, a driver may not change lanes without first ascertaining whether it is safe to do so. *See* Vehicle and Traffic Law § 1128(a). Plaintiff has met his burden on the issue of defendant's liability, *see Neryaev v. Solon*, 6 A.D.3d 510, 775 N.Y.S.2d 348 (2d Dep't 2004),

and defendant has not raised a triable issue of fact in opposition.

Accordingly, it is

ORDERED, that the motion of defendant Sheila F. Abbott for summary judgment dismissing plaintiff's complaint is granted to the extent of dismissing plaintiff's claim of serious injury in the category of 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; and it is further

ORDERED, that plaintiff's cross-motion for partial summary judgment on the issue of defendant's liability for causing the accident is granted; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Sheila F. Abbott dismissing plaintiff's claim of serious injury in the category of 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; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff David A. Style on the issue of defendant's liability for causing the accident.

This constitutes the decision and order of the court.

Dated: January 23, 2014

Lucindo Suarez, J.S.C.