Lee v Colangelo
2015 NY Slip Op 32740(U)
December 2, 2015
Supreme Court, Erie County
Docket Number: 801634/2013
Judge: Patrick H. NeMoyer
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At a Special Term of the Supreme Court, State of New York, County of Erie, City of Buffalo, New York on the 2ND day of DECEMBER, 2015

STATE OF NEW YORK :
SUPREME COURT : COUNTY OF ERIE

JASON LEE,

Plaintiff,

v.

GIULIO COLANGELO,

Defendant.

DECISION and ORDER

INDEX NO. 801634/2013

APPEARANCES: NELSON E. SCHULE, JR.,ESQ., for Plaintiff
HILARY C. BANKER, ESQ., for Defendant

PAPERS CONSIDERED: The NOTICE OF MOTION of Defendant and the supporting AFFIDAVIT of Steven P. Curvin, Esq., with annexed exhibits; and

the AFFIDAVIT IN OPPOSITION of Nelson E. Schule, Jr., Esq.

Plaintiff commenced this action to recover damages for injuries incurred as a result of a slip and fall on an alleged condition of snow and ice on the driveway of defendant's residence in the City of Niagara Falls. At the time of the accident, the afternoon of February 22, 2013, plaintiff was working as a letter carrier, had just delivered defendant's mail, and was exiting the property between two cars parked on the driveway. Following the fall, the 41-year-old plaintiff was transported to the hospital, where he was diagnosed with fractures of the right tibia and fibula.

Now before the Court is a motion by defendant to bifurcate the upcoming trial of the action. The motion is opposed by plaintiff. Upon its consideration of the parties' respective submissions, this Court renders the following determinations:

CPLR 603 provides that in "furtherance of convenience or to avoid prejudice the court may order . . . a separate trial of any . . . separate issue" in a case. The statute further provides

that the "court may order the trial of any . . . issue prior to the trial of the others" (*see also* CPLR 4011 ["The court may determine the sequence in which the issue shall be tried . . ."]). The Uniform Rule provides, "Judges are encouraged to order a bifurcated trial of the issues of liability and damages in any action for personal injury where it appears that bifurcation may assist in a clarification or simplification of issues and fair and more expeditious resolution of the accident" (22 NYCRR 202.42 [a]). In applying those precepts, the Fourth Department has treated bifurcation as the procedure that is at least preferable, if indeed not dictated by law, absent a showing by the party opposing bifurcation that the particular nature of the plaintiff's injuries is probative of the defendant's fault or at least of how the accident occurred (*see Fox v Frometa*, 43 AD3d 1432 [4th Dept 2007]; *Davis v McCullough*, 37 AD3d 1121, 1122 [4th Dept 2007]; *Dirschedl v Blum*, 24 AD3d 1291, 1292 [4th Dept 2005]; *see also Hrusa v Bogdan*, 278 AD2d 947 [4th Dept 2000] [held: "Issues of liability and damages in a negligence action are distinct and severable issues that should be tried and determined separately unless plaintiff's injuries have an important bearing on the issue of liability"]). On the other hand, the Fourth Department has consistently labeled bifurcation of the liability and damages phases of the trial of a personal injury action as discretionary with the trial court (*see Fox*, 43 AD3d at 1432; *Davis*, 37 AD3d at 1122).

Under the unique circumstances of this case, the Court will exercise its discretion to deny the motion to bifurcate. As an initial matter, the Court notes that defendant's motion to bifurcate is somewhat belated, its having been made returnable only about five weeks prior to the scheduled start of jury selection. In that connection, the Court notes that, although the note of issue was not filed by plaintiff until mid-June 2015, the action has been on the Court's trial calendar since the parties' initial appearance before the Court in late April of this year. The Court further notes that, as a result of the belated motion to bifurcate, plaintiff has, in

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reasonable anticipation of a unitary trial, already committed himself to pay for the procurement of the testimony of his (evidently sole) treating physician, orthopedic surgeon Bernard J. Rohrbacher, M.D., having done so 60 days before trial, as required by the physician. The Court would gather that, in agreeing to accept the fee at that juncture, the physician freed up his schedule to testify in early January 2016, and not necessarily at some later time. In contrast, defendant has waived an IME in the case and, as far as has been revealed to the Court, has not yet retained an expert to testify for the defense following a review of plaintiff's medical records (actually, the Court has not been told that the defense even plans to retain such an expert). Defendant thus would not be prejudiced monetarily or schedule-wise by a denial of bifurcation.

Moreover, in the view of the Court, this is not the kind of case in which it can be ruled out that the nature of plaintiff's injuries – i.e., the particular type or types of skeletal fractures sustained by him -- might be probative of defendant's fault or at least of how the accident occurred. The Court can envision a situation in which the medical expert or experts might be asked to opine concerning whether certain sorts of fractures are or are not associated with slips and falls on ice as opposed to other kinds of mishaps. Even if that should turn out not to be the case, however, the Court would not regard this action as one in which bifurcation would assist in a clarification or simplification of the issues for the jury. Indeed, given the straightforward occurrence of the alleged accident, in combination with the simplicity of plaintiff's diagnosis and the uncomplicated course of his treatment and recovery, the Court would expect even a unitary trial to be relatively brief (*see Swimm v Bratt,* 15 AD3d 976, 977 [4th Dept 2005]; *DiPirro v Thompson,* 289 AD2d 1025, 1026 [4th Dept 2001]). Thus, and especially considering the time and effort that might have to be devoted to selecting two distinct jury panels, the Court does not foresee that bifurcation in this instance would lead to any appreciable savings of time, any real

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efficiencies in the presentation of evidence, and any notable preservation of scarce judicial resources (*see generally* CPLR 603; 22 NYCRR 202.42 [a]).

Accordingly, the motion of defendant to bifurcate trial of the issues of liability and damages is DENIED.

SO ORDERED:

HON. PATRICK H. NeMOYER, J.S.C.

GRANTED