

**Kelso v Rogers**

2018 NY Slip Op 33101(U)

December 6, 2018

Supreme Court, New York County

Docket Number: 153429/2016

Judge: Adam Silvera

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 22

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DAVID KELSO,

Plaintiff,

- v -

STEVEN ROGERS, BURMA-BIBAS, INC.

Defendant.

INDEX NO. 153429/2016

MOTION DATE 10/03/2018

MOTION SEQ. NO. 004

**DECISION AND ORDER**

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to/for REARGUMENT/RECONSIDERATION

Upon the foregoing documents, it is ORDERED that plaintiff David Kelso’s motion is granted in part to renew and reargue for the reasons set forth below. Before the court is plaintiff’s Motion Sequence 004 to reargue the court’s decision of June 12, 2018, on the issue of liability and to renew the portion of the motion seeking summary judgment in favor of plaintiff on the issue of “serious injury” as defined by Insurance Law § 5102(d) and to assess sanctions against the defense for allegedly engaging in frivolous conduct. Defendants oppose the motion.

**BACKGROUND**

The suit at bar stems from an incident which occurred on December 17, 2014, while plaintiff was allegedly a lawful pedestrian crossing Park Avenue from east to west in the crosswalk on the north side of East 74<sup>th</sup> Street in the County, City, and State of New York, with the light in his favor, when he was struck by defendants’ turning vehicle. In a June 12, 2018 Decision/Order, this court denied plaintiff’s motion, motion sequence 003, on the issue of

“serious injury” as defined under Section § 5102(d) of the Insurance Law and on the issue of liability. Plaintiff argues that the Court misapprehended the law in motion sequence 003 and erroneously considered plaintiff’s argument for denial.

### **DISCUSSION**

CPLR 2221(d)(2) permits a party to move for leave to reargue a decision upon a showing that the court misapprehended the law in rendering its initial decision. “A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.” *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1<sup>st</sup> Dep’t 1992), *appeal denied in part, dismissed in part* 80 NY2d 1005 (1992) (internal quotations omitted).

Here, in the original motion, the Court overlooked issues of fact presented in the evidence which are highlighted in the instant motion:

### **Summary Judgment (Serious Injury)**

Plaintiffs convincingly argue that this Court misapprehended both the law and the facts, as plaintiff did indeed demonstrate a prima facie entitlement to summary judgment on the issue of “serious injury” in motion sequence 003. The Court erroneously stated in its decision that the report of Dr. Stuart Kahn was unsworn. Plaintiff notes that Dr. Kahn is a physician licensed to practice medicine in New York State and therefore under CPLR 2106 is allowed to submit an affirmation. Dr. Kahn’s report attached to motion sequence 003 utilized the word “attest” and thus was properly affirmed. Thus, the branch of plaintiff’s motion, for summary judgment, pursuant to CPLR 3212, in favor of plaintiff on the issue of “serious injury” as defined under Section § 5102(d) of the Insurance Law is granted for the reasons below:

“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 eliminate any material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the “serious injury” threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a “permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system”]).

Defendants’ opposition alleges that plaintiff has failed to demonstrate the existence of a “serious injury” as defined under Section 5102(d) of the Insurance Law. In support of his argument, plaintiff submits the Expert Affirmation of Dr. Stuart Kahn which cites to prior treatment for the alleged serious injury which includes treatment at the following facilities: Cornell Hospital, Neurology and Orthopedics, Hebrew Home in Westchester County, Hospital for Special Surgery outpatient facility in Jupiter Florida, with podiatrist Dr. Positano, and physical therapy. (Plaintiff’s Mot., Exh 8). Dr. Kahn also lists four separate surgeries performed on plaintiff as a result of the accident at issue that dealt with a tibial fracture and subsequent removal of hardware related to the fracture (*id.* at 3).

Further, Dr. Kahn notes that plaintiff has suffered from permanent injuries causally related to the accident at issue including: chronic left leg pain, tibial plateau fracture, ankle fracture, a decreased range of motion in the left ankle, left shoulder, and lumbar spine amongst other injuries listed (*id.* at 5). Plaintiff has made a showing of entitlement to summary judgment and the burden shifts to defendants to raise an issue of fact. In opposition, defendants fail to raise an issue of fact. Thus, the branch of plaintiff's motion for summary judgment in favor of plaintiff on the issue of "serious injury" as defined by Insurance Law § 5102(d) is granted.

#### **Summary Judgment (Liability)**

Plaintiffs convincingly argue that this Court misapprehended both the law and the facts, as plaintiff did indeed demonstrate a prima facie entitlement to summary judgment on the issue of liability in motion sequence 003. The Court erroneously stated in its decision that defendants' opposition, which contested the facts of the actual occurrence of the accident and plaintiff's comparative liability, precluded summary judgment. Thus, the branch of plaintiff's motion, for summary judgment, pursuant to CPLR 3212, in favor of plaintiff on the issue of liability is granted for the reasons below:

Plaintiff's motion, which alleges that he was in the crosswalk with the light in his favor when he was struck by defendants' turning vehicle, has made out a prima facie case of negligence, and the burden shifts to defendants to raise a triable issue of fact. (*See Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *see also Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). A pedestrian who demonstrates that they were walking within a crosswalk, with the light in their favor when struck by a turning vehicle, is entitled to a judgment as a matter of law on the issue of liability. (*Perez-Hernandez v M. Marte Auto Corp.*,

104 AD3d 489, 490 [1st Dep't 2007] [Finding that plaintiff could not have avoided the accident and noticed the car only moments before being struck]).

Here, defendants' opposition disputes plaintiff's allegations and attempts to raise an issue of fact with respect to liability. Plaintiff testified that he was in the crosswalk, with the light in his favor, walking westbound when he was struck by defendants' vehicle. Defendants however, allege that defendant driver did not see plaintiff at all before the collision and that plaintiff had "earphones in his ears" and was thus distracted (Mot, Exh 11 at 65). The court notes that the mere statement that one did not see their vehicle make contact with plaintiff, does not refute plaintiff's claim that defendants' car struck plaintiff. Defendants must affirmatively put forth evidence to raise a material issue of fact.

Further, were plaintiff to have been partially liable for the accident at issue, this does not defeat a motion for summary judgment as to defendants' liability. This Court's June 12, 2018 Decision/Order was misguided as the Court of Appeals has held that a plaintiff is entitled to partial summary judgment on the issue of a defendant's liability even if a defendant raises an issue of fact regarding plaintiff's comparative negligence (*Rodriguez v City of New York*, — NE3d —, 2018 NY Slip Op 02287 [2018]). The issue of a plaintiff's comparative negligence is addressed and determined only when considering the damages that a defendant owes to a plaintiff (*id.* at 3). Thus, defendants have failed to raise an issue of fact as precluding summary judgment and plaintiff's motion for summary judgment on the issue of liability is granted.

### **Sanctions**

The branch of plaintiff's motion requesting that the court determine the appropriate sanction for defendants alleged "frivolous conduct" is denied.

Accordingly, it is

ORDERED that the branch of plaintiff's motion for summary judgment on the issue of liability as against defendants is denied; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment in favor of plaintiff on the issue of "serious injury" as defined under Section § 5102(d) of the Insurance Law is granted; and it is further

ORDERED that the branch of plaintiff's motion for sanctions is denied; and it is further

ORDERED that within 30 days of entry, defendants shall serve a copy of this decision/order upon plaintiff with notice of entry.

This constitutes the Decision/Order of the Court.

12/6/2018  
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE