Fazaluddin v Jackson
2019 NY Slip Op 34376(U)
November 19, 2019
Supreme Court, Westchester County
Docket Number: Index No. 69827/2017
Judge: Lawrence H. Ecker

To commence the statutory time 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

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MOHAMMED FAZALUDDIN, and NOOJAHAN AKHTER,

Plaintiffs,

-against-

WILLIE J. JACKSON and W. MAE BEAVERS,

Defendants.

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WILLIE J. JACKSON and W. MAE BEAVERS,

Third-party Plaintiffs

Against

380 RIVERDALE AVE. INC. and RIVERDALE CONVENIENCE CORP.[1],

Third-party Defendants

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Index No. 69827/2017

DECISION/ORDER

Motion Date: 10/23/2019
Motion Seqs. 2,3

ECKER, J.

The following papers were read on the motion of third-party defendant 380 RIVERDALE AVE. INC. (Riverdale) [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the third-party complaint as against defendant/third-party plaintiffs WILLIE J. JACKSON and W. MAE BEAVERS (defendants), and the motion of plaintiffs MOHAMMED FAZALUDDIN and NOOJAHAN AKHTER [Mot. Seq. 3], for an order, pursuant to CPLR 3212, granting plaintiffs partial summary judgment as to liability as against defendants and dismissing defendants' ninth affirmative defense (culpable conduct):

PAPERS
Mot. Seq. 2
Notice of Motion (Riverdale), Affirmation in Support, Exhibits A-N and Memorandum in Support
Plaintiff's Affirmation in Opposition, and Exhibits 1-6
Plaintiff's Amended Affirmation in Opposition
Riverdale's Reply Affirmation
Defendants' Affirmation in Opposition
Mot. Seq. 3
Notice of Motion (plaintiff), Affirmation in Support, and Exhibits 1-13

[1]Defendant Riverdale Convenience Corp. has not appeared in the action.

Defendants' Affirmation in Opposition, and Exhibits A-F

Upon the foregoing papers, the court determines, as follows:

This action for personal injuries arises from an accident that occurred on November 15, 2017. Plaintiff was working as a gas station attendant at a gas station and was employed by third-party defendant Riverdale. It is undisputed that defendant, driving a car, struck plaintiff with his vehicle. Specifically, plaintiff was run over by defendants' vehicle while he was kneeling on the ground clearing debris away for the cap of an underground gas tank (the Accident). Most of the facts concerning the circumstances of the Accident are uncontraverted and the Accident was recorded on video.

The complaint, filed on or about November 29, 2017, alleges that plaintiff sustained serious injuries as the result of defendant's negligence in causing the Accident. Defendants filed an answer containing general denials, and affirmative defenses of: failure to state a cause of action; collateral source; General Obligations Law 15-108; lack of personal jurisdiction; Article 16; no duty to plaintiff; no negligence; failure to mitigate damages; culpable conduct; no loss of enjoyment of life damages; no serious injury; failure to wear seat belts; liens; plaintiff violated Vehicle and Traffic Law; emergency doctrine; assumption of risk; and arbitration. [NYSCEF No.2].

Thereafter, on or about September 12, 2018, defendants commenced a third-party action against plaintiff's employer Riverdale. Defendants acknowledge that Riverdale is plaintiff's employer, but allege that the third-party action is permissible under the "grave injury" exception to section 11 of the New York State Workers' Compensation Law. In its answer, Riverdale alleges general denials, twenty-two affirmative defenses, and cross-claims for contribution, indemnity, and a Kenney claim against defendants and culpable conduct against plaintiff.

Riverdale [Mot. Seq. 2], now moves, pursuant to CPLR 3212, for an order dismissing the third-party complaint as against Riverdale on the grounds that plaintiff has not sustained a "serious injury" as defined by the Workers' Compensation Law. Plaintiffs cross-move [Mot. Seq. 3], for an order, pursuant to CPLR 3212, granting plaintiffs partial summary judgment as to liability as against defendants and dismissing defendants' ninth affirmative defense (culpable conduct).

It is well-settled that the proponent of the 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 (*Zuckerman v City of New York,* 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.,* 68 NY2d 320 [1986]; *De Souza v Empire Transit Mix, Inc.,* 155 AD3d 605 [2d Dept 2017]). Importantly, once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp., supra; see De Souza v Empire Transit Mix, Inc., supra).* Mere conclusions, expressions of hope or

unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact (*Zuckerman v City of New York, supra; Hammond v Smith,* 151 AD3d 1896 [4th Dept 2017]).

Importantly, it is not the court's function on a motion for summary judgment to assess credibility(*Rawls v Simon,* 157 AD3d 418 [2d Dept 2018]), or to engage in the weighing of evidence (*Scott v Long Is. Power Auth*., 294 AD2d 348 [2d Dept 2002]). Resolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact (*Bykov v Brody*, 150 AD3d 808 [2d Dept 2017]). Thus 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]; *Civil Serv. Empls. Assn. v County of Nassau*, 144 AD3d 1077 [2d Dept 2016]).

Riverdale's motion [Mot. Seq. 2], pursuant to CPLR 3212, for an order dismissing the third-party complaint on the grounds that plaintiff has not sustained a "serious injury" as defined by the Workers' Compensation Law.

As the plaintiff's employer, Riverdale would only be liable for common-law contribution and indemnification if the plaintiff suffered a "grave injury" as a result of the Accident (Workers' Compensation Law 11; *Ownes v Jea Bus Co., Inc.*, 161 AD3d 1188 [2d Dept 2018]). An employer may only be liable for indemnification or contribution where its employee is found to have suffered a "grave injury" which, as is relevant here, includes the permanent and total loss of use or amputation of an arm, leg, hand or foot or the loss of multiple fingers (*Barclay v Techno-Design, Inc.*, 125 AD3d 1168 [3d Dept 2015]; Workers' Compensation Law 11). As the movant, Riverdale has the burden of proving, by competent admissible evidence that the plaintiff's injuries, although clearly serious, did not rise to the level of "grave" injuries, within the meaning of Workers' Compensation Law 11(*see Goodleaf v Tzivos Heshem, Inc.,* 68 AD3d 817 [2d Dept 2009]; *Fitzpatrick v Chase Manhattan Bank*, 285 AD2d 487 [2d Dept 2001]; *Way v Grantling*, 289 AD2d 790 [3d Dept 2001]). In support of its motion, Riverdale submits an attorney's affirmation, the pleadings, the bills of particulars, deposition transcripts, physician affidavits and medical reports.

At an examination of plaintiff, memorialized in the medical report of Dr. Vidyasagar at Doctor's United, dated October 3, 2017, the physician notes that plaintiff is walking with a walker and a long left ankle orthotic. The doctor finds that there is zero foot dorsiflexion and minimal plantar flexion. [NYSCEF No. 64]. Dr. Vidyasagar also finds that plaintiff is able to move his toes. There is an impairment of light touch over the lateral aspect of the left leg which implied that the entrapment of the peroneal nerve is most likely at the level of the fibular head. As "Diagnoses" he finds: causally related left hip fracture, acetabular fracture; status post ORIF surgery, left hip; left footdrop secondary to possible peroneal nerve damage around the knee; and right shoulder dysfunction and internaltion derangement. Under recommendations, he describes the level of disability as "total."

The submitted report of Schervier Nursing Care Center (Dr. Przechodzka), dated January 1, 2018, echoes Dr. Vidyasagar's findings and states that: the left footdrop continues; plaintiff was able to move toes minimally but no active dorsiflexion of the ankle was observed and; neurological otherwise shows decreased light touch sensation in the peroneal nerve distribution. The doctor observed that plaintiff was able to ambulate toe-touch weightbearing and covered about a 10-foot distance with a step to gait on the left side. [NYSCEF No. 65]. As treatment, in relevant part, the physician recommended continuing physical therapy and strengthening exercises to the left ankle and electrical stimulation to the peroneal nerve.

Dr. Przechodzka examined the plaintiff again on February 9, 2018. In the report, he notes that plaintiff's footdrop remains and his weightbearing is limited to toe-to-touch weigthbearing only. He states that plaintiff, who is in a wheelchair, maintains toe movement and a 3/5 plantar flexion strength. Plaintiff is able to ambulate up to about 40-45 feet with rolling walker, toe-touch on the left lower extremity. Plaintiff wears a multi-podus boot for proper ankle/foot positioning in dorsiflexior and to prevent plantar flexion contracture of the left foot.

On February 23, 2018, Dr. Przechodzka examined plaintiff again. In addition to repeating the same findings from the first two examinations, the doctor notes that plaintiff complains of left lower extreme weakness, numbness, paresthesias in the left peroneal nerve distribution, and swelling of the left foot. The left dropfoot persists, with no active dorsiflexion or toe extension, and there is weakness in the plantar flexion as well.

Defendant's expert, Dr. Steven Weinfeld, a physician who specializes in foot and ankle surgery, performed an independent physical examination of plaintiff on March 22, 2019. [NYSCEF No. 60]. In his report, in sum and substance, the doctor concludes that plaintiff suffered an acetabular fracture causing a sciatic nerve injury and a footdrop, with decreased sensation, as the result of the Accident. He finds that plaintiff displays a 2/5 plantar flexion strength in his left foot and suffers from decreased sensation in the left foot. The doctor notes that plaintiff ambulates with a brace and a walker on his left leg and opines that further surgical intervention would not be helpful.

In opposition to Riverdale's motion, plaintiff submits the report of Dr. Ronald L. Mann, orthopedic surgeon, dated September 4, 2018. [NYSCEF No. 94]. Dr. Mann concludes that, among other things, plaintiff suffers from a left footdrop, and that all of plaintiff's injuries are casually related to the Accident. He finds plaintiff capable of doing minimal sedentary duties only, and that plaintiff has a guarded prognosis. Dr. Mann states that, in his opinion, with a reasonable degree of medical certainty, there were objective findings to support the claimant's subjective complaints.

In a second report, dated March 21, 2019, Dr. Mann finds, in relevant part, that plaintiff's dropfoot is the consequence of his pelvic injury and causally related to the Accident. [NYSCEF No. 95]. He finds that an examination of the lower left leg reveals calf atrophy and a complete dropfoot of the left foot, with zero dorsiflexion of the left calf and

ankle. The physician opines that it is unlikely that plaintiff would have any improvement and concludes that the therapy for the left foot would be geared toward maintaining range of motion. He finds that plaintiff does not have an ankle injury but has a dropfoot which is the result of nerve damage.

Plaintiff also submits the IME report of Riverdale's expert, Dr. Lloyd R. Saberski, an internist specializing in pain management, based on an examination dated April 5, 2019. [NYSCEF No. 96]. In addition to the finding of a left footdrop, in relevant part, Dr. Saberski finds that plaintiff is ambulatory with the assistance of an orthosis and cane when at home and when outside the home ambulatory with the orthosis and a walker, and there is every expectation he will continue to improve with time.

Plaintiff further submits the medical report of Dr. Ali E. Guy [NYSCEF No. 97]. This was an addendum to his prior report of March 7, 2019 and April 4, 2019. In the opinion section, Dr. Guy opines that it is his professional opinion that plaintiff has a 100% total disability from work and he has a total loss of use of his left leg. He does not require amputation but his left leg has no function. Dr. Guy opines:

> "He cannot stand safely. He cannot walk safely even 50 feet. He has no or limited sensation in the left lower extremity. This patient cannot and will not be able to work in any capacity."

Plaintiff finally submits the report, dated September 14, 2019, of Dr. Megar of Doctors United. [NYSCEF No. 98]. This physician found, in essence, that plaintiff requires a left ankle brace for a left dropfoot, which lacks motor power, and could not walk without a walker.

Applying the principles governing summary judgment motions to the parties' extensive medical submissions, the court finds that Riverdale met its *prima facie* burden of showing that plaintiff did not sustain a serious injury within the meaning of Workers' Compensation Law 11 as a result of the subject accident by submitting the medical findings and opinions of experts (*Barclay v Techno-Design, Inc.,* 125 AD3d 1168 [3d Dept 2015]). In opposition, plaintiffs submit competent medical expert evidence that generates triable issue of fact as to the same relevant medical issue (*Millard v Alliance Laundry Systems LLC,* 28 AD3d 1145 [4th Dept 2006]; *see Way v George Grantling Chemung Contracting Corp.*, 289 AD2d 790 [3d Dept 2001]). Specifically, here, the physicians are united in the diagnosis of plaintiff as suffering a left footdrop but differ as to the extent of the resulting loss of function. Doctor Guy's opinion that plaintiff has suffered a complete loss of the use of the left leg and foot is sufficient to generate a question of fact as to whether plaintiff suffers from a total loss of the leg and foot or retains only "passive movement" in that limb (*see Fleischman v Peacock Water Co., Inc.,* 51 AD3d 1203 [3d Dept 2008]; *Millard v Alliance Laundry Systems LLC*., *supra; Cullin v Makely,* 80 AD3d 1042 [3d Dept 2011]). Based on the submissions, therefore the court finds that an issue of fact exists as to whether plaintiff sustained a "grave injury" as it is not for this court on a summary judgment motion to decide which expert is to be accepted over the other. That

is the function of the trier of fact (*Pantojas v Lajara Auto Corp.*, 117 AD3d 577 [1st Dept 2014]).

Plaintiffs' motion [Mot. Seq. 3] for an order, pursuant to CPLR 3212, granting plaintiffs partial summary judgment as to liability as against defendants and dismissing defendants' ninth affirmative defense (culpable conduct).

In support of the motion for partial summary judgment as to liability against defendants, plaintiffs argue that the uncontraverted facts, as supported by the submitted pleadings, bills of particulars, depositions, photographs, video, and police report, prove that defendant was negligent and that said negligence caused the Accident. Plaintiffs' version of events is not denied by defendants and is shown on the submitted video. Defendants instead argue that plaintiffs fail to make a *prima facie* showing that plaintiff was exercising reasonable care and that plaintiff's actions did not constitute culpable conduct. Specifically, defendants cite to the testimony of plaintiff that he failed to use safety cones that were provided by his employer.

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 (*Wray v Galella*, 172 AD3d 1446 [2d Dept 2019]; *see Rodriguez v City of New York*, 31 NY3d 312 [2018]). Plaintiff is not required to demonstrate his freedom from comparative fault to be entitled to partial summary judgment as to defendant's liability (*Rodriguez v City of New York*, *supra*; *Lewis v Revello*, 172 AD3d 505 [1st Dept 2019]). Even though a plaintiff is no longer required to establish his or her freedom from comparative negligence, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence (*Wray v Galella*, *supra; Yayoi Higashi v M. & R. Scarsdale Restaurant, LLC.,* _AD3d_, 2019 N.Y. Slip Op. 07240 [2d Dept 2019]).

Here, plaintiffs establish *prima facie* entitlement to judgment as a matter of law on the issue of defendants' liability by the submitted testimony, depositions, police report, video, and photographs that demonstrate that defendant was negligent in his operation of the vehicle, and that the operation of the vehicle was a substantial cause in the happening of the accident (*Yayoi Higashi v M& R Scarsdale Restaurant, LLC.,supra*). A driver is bound to see what is there to be seen with the proper use of his or her senses (*Id.*; *see Brandt v Zahner*, 110 AD3d 752 [2d Dept 2013]). Here, plaintiffs established their *prima facie* entitlement to judgment as a matter of law on the issue of liability by submitting evidence that the defendant driver never saw the injured plaintiff before striking him (*see generally Rodriguez v City of New York*, *supra*). In opposition, defendant fails to generate questions of fact as to whether he kept a proper lookout and whether his alleged negligence contributed to the happening of the Accident (*see Brandt v Zahner*, 110 AD3d 752 [2d Dept 2013]). Accordingly, plaintiffs are granted partial summary judgment.

Questions of fact exist, however, which preclude the dismissal of the defendants' affirmative defense alleging that the injured plaintiff was comparatively negligent (*see Wray v Galella*, *supra*). This issue of comparative negligence is to be considered by the trier of fact in mitigation of plaintiff's injuries, however, rather than as a bar to the granting of partial summary judgment (*see, Harrinarain v Sisters of St. Joseph*, 173 AD3d 983 [2d Dept 2019]). Thus, at the trial, the jury will be instructed that it was previously determined that defendant was negligent and that negligence was a substantial factor in causing the relevant injuries. On the verdict sheet, the jury will be asked to decide whether plaintiff was also negligent and whether plaintiff's negligence was also a substantial factor in causing the injuries. If the answer to both interrogatories is positive, the jury will ascribe the percentage fault between defendant and plaintiff (*see Rodriguez v City of New York*, *supra*).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of third-party defendant 380 RIVERDALE AVE. INC. [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the third-party complaint as against defendants/third-party plaintiffs WILLIE J. JACKSON and W. MAE BEAVERS is denied; and it is further

ORDERED that the part of the motion of plaintiffs MOHAMMED FAZALUDDIN and NOOJAHAN AKHTER [Mot. Seq. 3], that seeks an order, pursuant to CPLR 3212, granting plaintiffs MOHAMMED FAZALUDDIN and NOOJAHAN AKHTER partial summary judgment as to liability as against defendants/third-party plaintiffs WILLIE J. JACKSON and W. MAE BEAVERS is granted; and it is further

ORDERED that the part of the motion of plaintiffs MOHAMMED FAZALUDDIN and NOOJAHAN AKHTER [Mot. Seq. 3], that seeks an order, pursuant to CPLR 3212, dismissing the ninth affirmative defense (culpable conduct) asserted by defendants/third-party plaintiffs WILLIE J. JACKSON and W. MAE BEAVERS is denied; and it is further

ORDERED that the parties shall appear at the Settlement Conference Part of the Court, Room 1600, on January 14, 2020, at 9:15 a.m.

The forgoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
November 19, 2019

ENTER,

HON. LAWRENCE H. ECKER, J.S.C.

Appearances: All parties via NYSCEF