

Kelly v Brown

2020 NY Slip Op 31855(U)

June 9, 2020

Supreme Court, New York County

Docket Number: 159558/2018

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22
Justice
MEGHAN KELLY, INDEX NO. 159558/2018
Plaintiff, MOTION DATE 04/02/2020
- v - MOTION SEQ. NO. 001
DAVE DONOVAN BROWN, DECISION + ORDER ON MOTION
Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32 were read on this motion to/for JUDGMENT - SUMMARY.

Before the court is plaintiff Meghan Kelly’s motion for an Order granting summary judgment in favor of plaintiff for summary judgment on the issue of liability and serious injury pursuant to the New York Insurance Law § 5102(d). Defendant opposes the motion.

This matter stems from a motor vehicle accident which occurred on July 27, 2018, on 68th Street between First Avenue and York Avenue in the County, City, and State of New York, when plaintiff Meghan Kelly was a pedestrian struck and allegedly seriously injured by a reversing vehicle owned by defendant Dave Donovan Brown.

Summary Judgment (Liability)

Plaintiff’s motion for summary judgment on the issue of liability in favor of plaintiff as against defendant is granted. “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]). Violation of the Vehicle and Traffic Law ("VTL") constitutes negligence per se (*See Flores v City of New York*, 66 AD3d 599 [1st Dep't 2009]). VTL 1146 places a duty upon motorists to exercise due care in their operation of a motor vehicle and avoid colliding into any pedestrian. VTL 1127 states, "upon a roadway designated and signposted for one-way traffic, a vehicle shall be driven only in the direction designated."

Here, defendant testified that he reversed his car on a one-way street and was looking behind him when he moved the car seven or eight car lengths down the street, did not see the impact at all, and felt that he struck something (Mot, Exh K at 17, 27, 33, 43). Defendant's own admission that he did not see plaintiff when he drove his car in the opposite direction of a one-way street demonstrates that defendant violated the VTL. Defendant's opposition fails to raise an issue of fact as to the occurrence of the accident. Defendant's assertion that plaintiff crossed the street outside of a crosswalk and that defendant did not see plaintiff when he was reversing his vehicle does not excuse defendant's negligence. Drivers have a "duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*DeAngelis v. Kirschner*, 171 AD2d 593, 595 [1st Dep't 1991]). Thus, defendant has failed to raise a triable issue of fact and plaintiff's motion for summary judgment is granted in favor of plaintiff as against defendant on the issue of liability.

Summary Judgment (Serious Injury)

Plaintiff's motion for an order granting summary judgment in favor of plaintiff finding that that plaintiff has sustained a serious injury is denied. 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”]).

Here, plaintiff alleges to have suffered a concussion, headaches, post-concussion syndrome, chronic cervical pain, bilateral lower extremity/low back pain, nausea, vomiting, and dizziness (Mot at 5). Plaintiff attaches the report of Dr. Robert S. April who concluded with reasonable medical certainty that, as a result of the underlying accident, plaintiff “has a diagnosis of post-concussion syndrome with migrainous headaches” (Mot, Exh I at 4). The Court of Appeals decision in *Licari v Elliot*, 57 NY2d 230 [1982] created the requirement for objective medical proof and found that “plaintiff’s subjective complaints of headaches hardly fulfill the definition of serious injury” (*id.* at 239). A physicians’ diagnosis of a concussion and post-concussive syndrome, absent objective medical evidence, does not raise to the level of “serious injury” pursuant to Insurance Law § 5102 (*Fitzmaurice v. Chase*, 288 AD2d 651, 654 [3d Dep’t 2001] finding that plaintiff’s physicians’ diagnosis of post-concussive syndrome paired with unremarkable MRI and CAT scan findings, was “deficient as they fail to offer sufficient medical evidence to confirm the existence of a medically determined injury which would have caused such limitations on plaintiff’s daily activities”).

Here, plaintiff’s attached medical reports are conclusory and simply state that plaintiff has post-concussive syndrome (Mot, Exh G at 51). Plaintiff’s attached medical reports demonstrate unremarkable MRI findings as to plaintiff’s alleged brain injury (*id.* at 38). As to plaintiff’s alleged cervical spine injury and low back injury, plaintiff’s attached medical reports

all demonstrate that plaintiff has a normal range of motion (*id.* at 30; Mot, Exh I at 3). Thus, plaintiff has failed to satisfy their burden under Insurance Law § 5102 and the branch of plaintiff’s motion for an affirmative finding that plaintiff suffered a “serious injury” is denied.

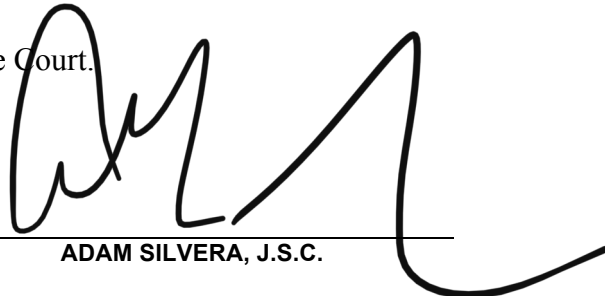
Accordingly, it is

ORDERED that the branch of plaintiff’s motion for summary judgment in favor of plaintiff as against defendant on the issue of liability is granted; and it is further

ORDERED that the branch of plaintiff’s motion for summary judgment on the issue of serious injury is denied; and it is further

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

This constitutes the Decision/Order of the Court.



6/9/2020
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" 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