Koshy v Murabito
2020 NY Slip Op 34782(U)
February 3, 2020
Supreme Court, Westchester County
Docket Number: Index No. 59740/2018
Judge: Terry Jane Ruderman
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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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SUNIL KOSHY,

Plaintiffs,

-against-

CHRISTOPHER MURABITO and TOWN OF HARRISON,

Defendants.

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DECISION and ORDER

Motion Sequence No. 1
Index No. 59740/2018

RUDERMAN, J.

The following papers were considered in connection with the motion by defendants for summary judgment dismissing the complaint:

Papers	Numbered
Notice of Motion, Affirmation, Exhibits A - K, and Memorandum of Law	1
Affirmation in Opposition, Exhibit 1 - 4	2
Reply Affirmation, Exhibit L, Memorandum of Law in Reply	3

This is an action for personal injuries allegedly sustained in a motor vehicle collision that occurred on June 2, 2017 at approximately 9:50 p.m. at the intersection of Westchester Avenue and Bryant Avenue, in the Town of Harrison in Westchester County, between a vehicle driven by plaintiff Sunil Koshy and a police car driven by defendant Police Officer Christopher Murabito and owned by the Town of Harrison Police Department. Plaintiff was driving on Bryant Avenue, with the green light in his favor, when defendants' police car, with emergency lights activated, proceeded westbound on Westchester Avenue through a red light and struck plaintiff's vehicle, flipping it onto its driver's side. Defendants have established that Officer

Murabito was engaged in an emergency operation at the time.

Plaintiff was taken by ambulance to the White Plains Hospital emergency room, where he complained of pain in his right foot. After x-rays were taken, he was released. He went to an urgent care facility three days later, complaining of pain in his back and right shoulder, and underwent additional x-rays of his back, neck left leg and left foot. Subsequently, severe pain gradually developed in his left knee, and he consulted orthopedist Dr. Chong Oh on July 26, 2017 for evaluation of his thoracic pain and left knee pain. Dr. Oh prescribed an MRI on plaintiff's his left knee.

An MRI was performed at Northern Westchester Hospital on August 7, 2017, and the MRI report, electronically signed by Dr. Chimere Mba-Jones, and submitted by defendants as an exhibit to the present motion, includes the following in its findings: "There is a small area of focal T2 signal hyperintensity involving the anterolateral margin of the lateral trochlea, likely reflecting a contusion/trabecular fracture. There is no evidence for cortical break. No additional fracture is identified." This language in the MRI report is discussed by both defendants' orthopedic expert and plaintiff's treating orthopedist, and plaintiff relies on it to establish the presence of a fracture, for purposes of his serious injury claim.

Plaintiff followed up with Dr. Oh on August 30, 2017. The next date on which he returned to Dr. Oh was on May 9, 2018.

This action was commenced by filing a summons and complaint on June 22, 2018. Discovery is complete and plaintiff's note of issue has been filed.

In now moving for summary judgment dismissing the complaint, defendants argue that the accident occurred during the performance of an emergency operation, and that proceeding past the red light did not violate the applicable "reckless disregard" standard. Defendants argue

in the alternative that plaintiff's injuries do not meet the serious injury threshold, relying on the reports of the neurologist and orthopedist who conducted independent medical examinations, as well as on the report of an orthopedist who provided treatment to plaintiff.

In opposition, plaintiff observes that defendants' evidentiary submissions fail to establish that the officer engaged the vehicle's siren. He further emphasizes Murabito's deposition testimony that he could not estimate the speed of his vehicle while he was driving on Westchester Avenue or at the time of impact; moreover, although Murabito stated that he decelerated once he noticed a tractor trailer enter the intersection from Bryant Avenue southbound, the video from the dashboard camera fails to establish that the police car decelerated as it approached the red light. Regarding the serious injury threshold, plaintiff contends that the requirement is satisfied with the evidence establishing a fracture, specifically, a focal trabecular fracture of the lateral trochlea within his left knee, as well as cervical and lumbar spine disc derangement and bilateral ankle internal derangement.

Analysis

Emergency Exemption

"[T]he driver of an 'authorized emergency vehicle' engaged in an 'emergency operation' is exempt from certain 'rules of the road' under Vehicle and Traffic Law § 1104" (*Pollak v Maimonides Med. Ctr.*, 136 AD3d 1008, 1008 [2d Dept 2016], quoting *Criscione v City of New York*, 97 NY2d 152, 156 [2001]). "The manner in which an operator of an authorized emergency vehicle operates the vehicle in an emergency situation may not form the basis for civil liability to an injured third party unless the operator acted in reckless disregard for the safety of others" (*Pollak v Maimonides*, *supra*, citing Vehicle & Traffic Law § 1104 [e]). "The 'reckless disregard' standard requires proof that the [operator] intentionally committed an act of

an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow" (*id.* at 1008-1009).

Plaintiff suggests that defendants may not rely on the emergency exemption of Vehicle and Traffic Law § 1104, because the police car's siren had not been activated. However, notably, although the statute provides that the exemptions apply only when both sirens and lights are activated, that provision explicitly makes an exception for "an authorized emergency vehicle operated as a police vehicle" (Vehicle & Traffic Law § 1104 [c]). Therefore, any failure on the part of a police car to activate its sirens while performing an emergency operation is immaterial to the applicability of the emergency exemption of Vehicle and Traffic Law § 1104 (*see Deno v Belliard*, 165 AD3d 602, 603 [1st Dept 2018] [internal quotation marks and citations omitted]).

The issue to be addressed here is whether, applying the reckless disregard standard, defendants have established that, as a matter of law, defendant Murabito did not act "in reckless disregard for the safety of others, by "intentionally committ[ing] an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow" (*Pollak v Maimonides*, 136 AD3d at 1008-1009; Vehicle & Traffic Law § 1104 [e]). In *Britt v Bustamante*, 55 AD3d 858 [2d Dept 2008]), the Court reversed a grant of summary judgment to the defendants, explaining that "[w]hile the defendants established that Bustamante, who was operating a police car which struck the plaintiff's vehicle, was engaged in an emergency operation at the time of the collision and activated the turret lights on his vehicle, the plaintiff raised a triable issue of fact by submitting the affidavit of . . . an eyewitness to the occurrence, who stated that the 'police car did not have its overhead emergency lights on, nor were the sirens activated,' [and] it was undisputed that the police officer did not stop for the stop sign at the intersection in question and that his view of the intersection was partially obstructed

by hedges" (*Britt v Bustamante*, 55 AD3d at 859). Similarly, here, while defendants established a prima facie right to relief with evidence that Murabito was operating a police car with activated emergency lights while engaged in an emergency operation at the time of the collision with plaintiff's vehicle, a triable issue of fact was raised based on evidence submitted by plaintiff as to whether Murabito appropriately slowed down "as necessary for safe operation" before proceeding past the red light into the intersection where the accident occurred (*see* Vehicle & Traffic Law § 1104 [b] [2]).

While defendants contend that the dashboard camera video submitted as an exhibit "establishes" that Murabito decelerated when he saw a tractor-trailer as he approached and entered the intersection, review of the video footage is inconclusive and does not establish defendants' right to relief as a matter of law. Rather, an issue of fact is presented as to whether Murabito slowed down appropriately when approaching the red light at the intersection. Notably, a failure to do so, if such a failure is found, may amount to more than the type of negligent "momentary lapse in judgment" that is insufficient to establish reckless disregard (*see Puntarich v County of Suffolk*, 47 AD3d 785 [2d Dept 2008]).

Serious Injury

Defendants contend that plaintiff neither sustained a fracture causally related to the accident, nor suffered any other form of serious injury as that term is defined in Insurance Law § 5102. They rely on the report of their orthopedic expert, Dr. Ronald L. Mann, dated May 29, 2019, and that of their neurologist, Dr. Michael I. Weintraub, whose report is dated June 19, 2019. Dr. Mann performed an examination and found no limitation in plaintiff's ranges of motion, and diagnosed his condition as "Lumbar sprain/strain, left knee contusion/sprain/strain,

and right foot contusion/sprain." He concluded that there is no medical necessity for further orthopedic treatment or physical therapy, no disability, and no permanency regarding these injuries relating to this accident.

Dr. Weintraub's report discussed his examination of plaintiff and plaintiff's medical records, and concluded

> "the accident of 06/02/2017 appears to have produced a concussion as well as a soft tissue injury to the right ankle, left knee, thoracic spine and right shoulder. He does have pre-existing degenerative arthritis in the thoracic spine, which apparently was activated by the trauma. It is unclear why he is still symptomatic 2 years since the accident in the absence of any fractures. A strain/sprain syndrome has occurred. His symptoms are subjective rather than objective."

Defendants further observe that while the unaffirmed MRI report signed by Dr. Mba-Jonas, which they submit as part of plaintiff's Northern Westchester Hospital records, referred to the presence of a "fracture," specifically a "small focal trabecular fracture/contusion of the lateral trochlea without cortical break," no doctor, including plaintiff's treating physician, adopted the MRI report's finding of fracture. Rather, they all concluded instead that the injury was merely a contusion.

Plaintiff emphasizes that the MRI report electronically signed by Dr. Mba-Jonas includes the finding that

> "[t]here is a small area of focal T2 signal hyperintensity involving the anterolateral margin of the lateral trochlea, likely reflecting a contusion/trabecular fracture. There is no evidence for cortical break. No additional fracture is identified. "

Plaintiff observes that defendants' expert Dr. Mann acknowledged, in his own report, that the MRI report "indicates a small focal trabecular fracture/contusion lateral trochlear without cortical break." Based on that acknowledgment by Dr. Mann, plaintiff argues that in the absence of any specific assertion by Dr. Mann that he disagreed with the MRI report in that regard, or an

explanation of why he did so, the acknowledged indication in the MRI report is sufficient to create a question of fact as to whether plaintiff suffered a fracture as a result of the accident. Plaintiff adds that since defendants' expert Dr. Weintraub did not review either the MRI image or the MRI report, but only the records of plaintiff's treating orthopedist, Dr. Oh, and that Dr. Weintraub specifically refers to the part of Dr. Oh's August 31, 2017 records in which he "states that the MRI revealed a focal trabecular fracture/contusion of the lateral trochlea without cortical break."

Defendants cite *O'Bradovich v Mrijaj* (35 AD3d 274, 275 [1st Dept 2006]), where an award of summary judgment to the defendant was affirmed based on the absence of evidence of serious injury. The Court explained that there was no admissible evidence that plaintiff was ever diagnosed with a fracture that resulted from this accident, since "the unsworn MRI report merely contain[ed] the reference to a 'cortical or impact fracture,'" but the plaintiff's treating physician did not reference or adopt the report's findings pertaining to a possible fracture. In *Baez v Boyd* (90 AD3d 524 [1st Dept 2011]), where plaintiff's treating orthopedist affirmed that "his review of the plaintiff's MRI films revealed a nondisplaced fracture of the calcaneus (heel bone) and a presumed Salter-Harris I fracture of the distal fibula," the plaintiff's evidence was sufficient to raise a triable issue of fact; however, the Court commented that "the 'equivocal' finding of a 'presumed' Salter-Harris I fracture, standing alone, may not satisfy the serious injury threshold" (*id.* at 525, citing *Glover v Capres Contr. Corp.*, 61 AD3d 549, 550 [1st Dept 2009] [contemporaneous x- ray reports were said to be equivocal regarding the existence of a fracture and in any event inadmissible]).

On the present record, this Court may not ignore the finding in the unsworn MRI report. Where unsworn MRI reports were referred to by both defendants' and plaintiff's experts in their

affirmations, they are properly before the court (see *Clemmer v Drah Cab Corp.*, 74 AD3d 660, 662 [1st Dept 2010]). Here, unlike in *O'Bradovich v Mrijaj* (35 AD3d at 275), the plaintiff's treating physician and at least one of defendants' experts directly referenced the MRI report's findings pertaining to a fracture, without elaborating on why the finding of fracture was not explicitly adopted.

Notably, the discussion in Dr. Oh's report can be understood as viewing the knee injury as a fracture, with his comment: "Trabecular fractures are generally treated in the same way as a severe contusion . . . No acute treatment was needed for the left knee." Based on the unsworn MRI report and Dr. Oh's report, a question of fact is presented as to whether plaintiff sustained a fracture as a result of the accident.

Additionally, although there is no showing of permanence on this record, plaintiff's claims sufficiently fall within the category of "significant limitation of use of a major body function or system," which need not be accompanied by proof of permanence (*see Miller v Miller*, 100 AD2d 577, 578 [2d Dept 1984]). Dr. Oh's assessment of plaintiff's injuries is sufficient to create an issue of fact as to whether they constituted a significant limitation.

Since Dr. Oh's report also confirmed that there was a direct causal relation between plaintiff's injuries and the accident, summary judgment must be denied here. As long as a plaintiff establishes one serious injury of any kind, the plaintiff is entitled to recover for all injuries incurred as a result of the accident (*see Marte v New York City Tr. Auth.*, 59 AD3d 398, 399 [2d Dept 2009]).

In view of the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint is denied, and it is further

ORDERED that all parties are directed to appear at 9:15 a.m. on Tuesday, March 17, 2020, in the Settlement Conference Part, room 1600 of the Westchester County Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, 10601, to schedule a trial.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
February 3, 2020

HON. TERRY JANE RUDERMAN, J.S.C.