Austin v Ohene
2021 NY Slip Op 30551(U)
February 16, 2021
Supreme Court, Kings County
Docket Number: 508464/2018
Judge: Lara J. Genovesi

At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 16th day of February 2021.

P R E S E N T:
HON. LARA J. GENOVESI,
J.S.C.

----------X

CORWIN AUSTIN,

Index No.: 508464/2018

Plaintiff,

DECISION & ORDER

-against-

ISAAC OHENE and SAMUEL AMPADU,

Defendants.

----------X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	NYSCEF Doc. No.:
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	14-16; 24, 25
Opposing Affidavits (Affirmations)	19; 66
Reply Affidavits (Affirmations)	21; 71

Introduction

Plaintiff, Corwin Austin, moves by notice of motion, sequence number one, pursuant to CPLR § 3212, for summary judgment on the issue of liability and for such other relief as the Court deems proper. Defendants oppose this motion. Defendants, Isaac Ohene and Samuel Ampadu, move by notice of motion, sequence number two, for

001 - XMG
002 - XMD

summary judgment on the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Plaintiff opposes this motion.

Background

This action involves a rear-end collision that occurred on October 28, 2016 at around 6:30 p.m., on Vandam Street near the intersection of Hunters Point Avenue, Queens, New York. Plaintiff Corwin Austin was a passenger in a vehicle operated by Warren McBride, which was stopped at a red light (*see* NYSCEF Doc. # 16). As the vehicle was stopped, it was struck in the rear by a vehicle operated by defendant Isaac Ohene and owned by defendant Samuel Ampadu (*see id.*). In the bill of particulars, plaintiff alleged injuries to his cervical spine, thoracic spine, lumbosacral spine, and right ankle, including a right ankle tear (*see* NYSCEF Doc. # 29 at ¶ 10). Plaintiff further alleges that these injuries meet the following categories of Insurance Law § 5102: (1) permanent loss of use of a body function/system, (2) permanent consequential limitation, (3) a significant limitation, and (4) a non-permanent medically determined injury which prevented him from his usual and customary activities for 90 out of the first 180 days following the accident (*see id.* at ¶ 20). Defendants deny having any knowledge or information sufficient to form a belief as to the truth of plaintiff's allegations.

This action was commenced by the filing of the summons and complaint on April 25, 2018 (*see* NYSCEF Doc. No. # 1, 2). On May 30, 2018, plaintiff filed an amended verified complaint to add defendant Samuel Ampadu (*see* NYSCEF Doc. # 4).

Discussion

Summary Judgment

"[T]he 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 demonstrate the absence of any material issues of fact" (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh,* 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra; see also Hoover v. New Holland N. Am., Inc.,* 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

Plaintiff's Motion for Summary Judgment as to Liability

"A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision" (*Xin Fang Xia v. Saft*, 177 A.D.3d 823, 113 N.Y.S.3d 249 [2 Dept., 2019];

see also Ordonez v. Lee, 177 A.D.3d 756, 110 N.Y.S.3d 339 [2 Dept., 2019]). A plaintiff does not need to demonstrate the absence of their own comparative negligence to be entitled to partial summary judgment as to a defendant's liability (*see Rodriguez v City of New York*, 31 N.Y.3d 312, 76 N.Y.S.3d 898 [2018 N.Y. Slip Op. 02287]). However, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence (*see Poon v. Nisanov*, 162 A.D.3d 804, 808, 79 N.Y.S.3d 227 [2 Dept., 2018]).

In the case at bar, plaintiffs met the prima facie burden. Plaintiff's affidavit states that the vehicle he was in was struck in the rear by a vehicle operated by Isaac Ohene and owned by Samuel Ampadu. Plaintiff's affidavit further states that the vehicle he was in "was NOT moving" at the time, and that the vehicle was stopped at a red light. In opposition, defendants failed to provide a nonnegligent explanation for the accident. Instead, defendants argue that plaintiff's motion is premature as discovery has not yet been completed, and because there is a "question of whether the defendant has exercised due care under the circumstances and whether the accident was unavoidable in light of all the surrounding circumstances." Neither of these arguments are availing. First, "a party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Rungoo v. Leary*, 110 A.D.3d 781, 972 N.Y.S.2d 672 [2 Dept., 2013] [internal citations omitted]; *see Coelho v. City of*

New York, 176 A.D.3d 1162, 112 N.Y.S.3d 270 [2 Dept., 2019]). Here, the defendants do not specify how this discovery will contest the facts submitted by plaintiff. "[D]efendants failed to submit an affidavit from a person with personal knowledge of the facts so as to raise a triable issue of fact as to whether there was a nonnegligent explanation for the happening of this rear-end collision, or whether the plaintiff's culpable conduct contributed to the happening of the accident" (*Service v. McVoy*, 131 A.D.3d 1038, 16 N.Y.S.3d 283 [2 Dept., 2015]). Second, because in a rear-end collision the burden is on the rear driver to provide the court with a nonnegligent explanation for the accident, and defendant has not done so (*see Xin Fang Xia v. Saft*, 177 A.D.3d 823, *supra*). Defendant was "under a duty to maintain a safe distance" between her vehicle and plaintiff's vehicle, and the "failure to do so, in the absence of an adequate, nonnegligent explanation, constituted negligence as a matter of law" (*see Silberman v. Surrey Cadillac Limousine Serv.*, 109 A.D.2d 833, 486 N.Y.S.2d 357 [2 Dept., 1985]).

Defendants' Motion for Summary Judgment Pursuant to Insurance Law § 5102(d)

Defendants failed to meet their burden and establish that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Defendant provided the sworn medical report of Dr. Dana A. Mannor, M.D., who examined plaintiff on March 11, 2020 and found that range of motion in his cervical and lumbar spine was normal, however measured 50% loss in range of motion in plantar flexion of the right ankle/foot (20 degrees measured/40 degrees normal) (*see* NYSCEF Doc. # 37). The doctor opined that plaintiff had no orthopedic limitations, the sprain/strain in his cervical, thoracic and lumbar spine is resolved, and his "right ankle sprain/strain, superimposed on prior unrelated surgery –

healed" (*id.*). Although Dr. Mannor references a prior unrelated surgery to plaintiff's right ankle, she does not address whether the loss in range of motion measured at examination is causally related to the accident.

Additionally, "[t]he papers submitted by the defendant failed to eliminate triable issues of fact regarding the plaintiff's claim, set forth in the bill of particulars, that he sustained a serious injury under the 90/180–day category of Insurance Law § 5102(d)" (*Reid v. Edwards- Grant*, 186 A.D.3d 1741, 129 N.Y.S.3d 798 [2 Dept., 2020]). The medical evidence provided does not establish that plaintiff has no injury or that his injury is not causally related to the accident. Further, the deposition transcript provided by defendant "failed to identify the plaintiff's usual and customary daily activities during the specific relevant time frame, and did not compare the plaintiff's pre-accident and post-accident activities during that relevant time frame" (*id.*). Here, plaintiff testified that he has back spasms when standing walking or teaching for long periods of time, or playing extracurricular sports such as basketball (*see* NYSCEF Doc. # 33 at p 46-47). However, at the time of the deposition, he was playing basketball in a league (*see id.* at 54).

As defendants did not meet their burden, this Court need not examine the sufficiency of plaintiff's opposition papers. However, even assuming, arguendo, that defendants met their burden, plaintiff provided credible medical evidence sufficient to raise a triable issue of fact on the significant limitation and permanent consequential limitation categories of Insurance Law 5102(d). The sworn report of Dr. Gideon Hedrych, M.D., who examined plaintiff on August 26, 2020, found range of motion in his cervicothoracic

spine, thoracolumbar spine and right ankle, and causally related the injuries to this accident (*see* NYSCEF Doc. # 70).

Conclusion

Accordingly, plaintiff's motion for summary judgment as to liability is granted. Defendants' motion for summary judgment pursuant to Insurance Law § 5102(d) is denied. This constitutes the decision and order of this case.

ENTER:

Hon. Lara J. Genovesi
J.S.C.

To:

Fabien Robley
Friedman Sanchez, LLP
Attorney for Plaintiff
16 Court Street, 26th Floor
Brooklyn, New York 11241

Stephen Schioppi
Baker, McEvoy & Moskovits, P.C.
Attorney for Defendant
One Metrotech, 8th Floor
Brooklyn, New York 11201