Spaulding-Bey v Bingquan Chen
2022 NY Slip Op 32598(U)
August 2, 2022
Supreme Court, Kings County
Docket Number: Index No. 516897/2019
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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FRANK SPAULDING-BEY JR.,

Plaintiff,

-against-

BINGQUAN CHEN,

Defendant.

---x

DECISION / ORDER

Index No. 516897/2019
Motion Seq. No. 1 & 2

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion for summary judgment and plaintiff's cross motion for summary judgment.

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmation and Exhibits Annexed.....	18-27
Affirmation in Opposition and Exhibits Annexed.....	30-32
Reply Affirmation.....	
Notice of Cross-Motion, Affirmation and Exhibits Annexed.....	33-44
Affirmation in Opposition and Exhibits Annexed.....	47
Reply Affirmation.....	

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is a personal injury action arising out of a motor vehicle accident that took place on March 25, 2018, in New York, NY. At the time of the accident, plaintiff and the defendant were driving their own vehicles when a collision occurred on East 63rd Street near the intersection with Second Avenue in Manhattan. As the plaintiff was in the process of making a left turn onto Second Avenue, the defendant's vehicle, which was also traveling westbound on East 63rd Street, a one-way street, came into contact with the rear of plaintiff's vehicle. Plaintiff testified that he was stopped in the left lane, waiting to make a left turn onto Second Avenue, when the defendant's vehicle, which was behind the plaintiff's vehicle, moved to the right, into the middle lane, to go around the plaintiff, and instead struck his vehicle. According to the plaintiff, in his bill of particulars, he states that

the front left quarter panel of the defendant's vehicle came into contact with the right rear of the plaintiff's vehicle. The plaintiff drove from the scene of the accident to Valley Stream Hospital, where he was seen in the emergency room, treated and released [Doc. 25, p. 58].

In his bill of particulars, the plaintiff alleges that as a result of the accident, he sustained injuries to his cervical, thoracic and lumbar spine, as well as injuries to his right and left knees, which required surgical intervention in both knees to repair meniscal tears. At the time of the accident, he was forty-seven years old. He states in his bill of particulars that he was confined to bed and home for ten days following the surgery to his left knee and was confined to bed and home for two days following the surgery to his right knee. He was not incapacitated from his employment as a real estate broker. His deposition testimony confirms that he missed no time from work and that he is not claiming any lost income [Doc. 25, pp. 13-14].

The defendant moves for summary judgment [MS #1], contending that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d). The plaintiff cross-moves for summary judgment on the issue of liability [MS #2].

In support of his motion, the defendant submits the pleadings, an attorney's affirmation, plaintiff's bill of particulars, plaintiff's EBT transcript, an affirmed report from an orthopedist, Dr. Jeffrey Guttman, and affirmed reports from a radiologist, Dr. Michael Setton.

Initially, the court notes that Dr. Guttman, the defendant's examining orthopedist, examined the plaintiff on April 15, 2021, more than three years after the accident. Dr. Setton, the defendant's radiologist, did not examine the plaintiff. He reviewed the cervical, thoracic, and lumbar x-rays as well as the MRIs of the plaintiff's right knee. He concludes that all of the positive findings in the x-rays are degenerative, longstanding and not causally related to the date of the accident. In his review of the MRI of the plaintiff's right knee, he opines that

"[t]here is no definitive evidence of any recent traumatic meniscal injury. There is no evidence of any associated ligament injury; ligament injuries frequently accompany traumatic meniscal injuries." However, he also concedes that "[t]here is a horizontal tear of the medial meniscus, the etiology of which is uncertain (with both degenerative and chronic posttraumatic etiologies a possibility)." Inexplicably, Dr. Setton did not review the MRIs of the plaintiff's cervical or lumbar spine or the MRI of the plaintiff's left knee. As such, the plaintiff's claims of medial and lateral meniscal tears in his left knee were not addressed by the defendant's radiologist.

Dr. Guttman examined plaintiff and tested the range of motion in plaintiff's cervical, thoracic and lumbar spine, as well in both of the plaintiff's knees, and reports completely normal results. He concludes that plaintiff's sprains and strains have all resolved, and that the "alleged bilateral knee arthroscopies are resolved," as well. He opines that "the injured body parts alleged in the Bill of Particulars have resolved. The claimant did not sustain any significant or permanent injury as a result of the motor vehicle accident. There are no objective clinical findings indicative of a present disability, or functional impairment, which prevents the examinee from engaging in ADLs, including work, school, and hobbies."

With regard to the 90/180-day category of injury, as previously indicated, the plaintiff's bill of particulars and his deposition testimony are clear that he missed no time from his job as a real estate broker. The court additionally notes that although the plaintiff's papers in opposition argue that the defendant fails to make a prima facie showing of entitlement to summary judgment on the 90/180 category, the plaintiff offers no evidence to counter the defendant's contention that the plaintiff's testimony is proof which satisfies the 90/180 category of injury. Based on the foregoing, the court is unable to conclude that the plaintiff was unable to perform substantially all of his usual and customary daily activities for

90 out of 180 days after the accident. The plaintiff's bill of particulars and his deposition testimony are clear that he missed no time from his job as a real estate broker. The defendant has made a prima facie case with regard to the 90/180 category of injury.

However, the court finds that defendant has not made a *prima facie* showing of his entitlement to summary judgment (*see Toure v Avis Rent A Car Sys*., 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). While plaintiff's testimony that he missed no time from work after the accident makes a prima facie showing on the 90/180-day category of injury (*see Dacosta v Gibbs*, 139 AD3d 487, 488 [1st Dept 2016] ["Plaintiff's testimony indicating that she missed less than 90 days of work in the 180 days immediately following the accident and otherwise worked "light duty" is fatal to her 90/180–day claim"]; *Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013] [plaintiff returned to work on a partial basis during the relevant period of time]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007] ["The plaintiff testified at trial that he missed only one month of work, that he then returned to work on a part-time basis, and that, after another month, he had resumed working on a full-time basis"]), the defendant has not made a prima facie case with regard to the other applicable categories of injury.

Dr. Guttman fails to address the plaintiff's claim that he sustained medial and lateral meniscal tears to both of his knees. Although he found that the plaintiff had normal range of motion in both of his knees, because he failed to review any of plaintiff's medical records, not even the surgical reports from the surgeries to the plaintiff's knees, he fails to opine on the plaintiff's claim that the tears in his knees were caused by the subject accident. In fact, despite his conclusion that the plaintiff's injuries have "resolved", he fails to address the issue of causation whatsoever. As previously mentioned, Dr. Setton never reviewed the MRIs of the plaintiff's cervical or lumbar spine and more importantly, never reviewed the MRI

of the plaintiff's left knee, in which the plaintiff claims he sustained tears to his medial and lateral meniscus, and which required surgery. Neither Dr. Guttman nor Dr. Setton reviewed the MRI or the surgical report for the plaintiff's left knee. As such, plaintiff's claim that the tears in that knee were caused by the subject accident are unaddressed by defendant, and the court finds that the reports of Dr. Guttman and Dr. Setton are insufficient to establish that the plaintiff did not sustain a serious injury to his left knee as defined in Insurance Law § 5102(d).

When a defendant has failed to make a prima facie case with regard to all of the plaintiff's claimed injuries and all of the applicable categories of injury, the motion must be denied, and it is unnecessary to consider the papers submitted by plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

Even if the defendant had met his prima facie burden for summary judgment, plaintiff would have been found to have overcome the motion, as there are triable issues of fact raised by his submissions in opposition to the motion. There are issues of fact raised by plaintiff's doctor's affirmations, which create a "battle of the experts" sufficient to overcome the motion. In particular, Dr. Goldman, the plaintiff's treating surgeon [Doc 31] states in his surgical reports regarding the plaintiff's knees, that he found medial and lateral meniscal tears in both knees and opines that the plaintiff "has a mild partial disability and should refrain

from prolonged bending, kneeling, squatting, overhead reaching and heavy lifting/pushing/pulling more than 20 lbs." Dr. Jay Eneman, an orthopedist who last examined the plaintiff in February of 2019, found reduced ranges of motion in both knees, and opines that the plaintiff's left knee sprain/contusion, which is status post-surgery, remains "unrecovered". Finally, Dr. Eneman opines that plaintiff's injuries "are causally related to the accident on March 25, 2018."

Turning to the plaintiff's motion for summary judgment [MS #2] on the issue of liability, the court finds that plaintiff has made a prima facie case. The copy of the police accident report provided is not certified, so it is, therefore, inadmissible. It is, however, evidence of the date, time, and place of the accident, information the officer had a duty to report. The plaintiff's testimony is all that is offered regarding the happening of the accident. As previously stated, at the time of the accident, plaintiff and the defendant were driving west on East 63rd Street. As the plaintiff was in the process of making a left turn onto Second Avenue, the defendant's vehicle, which was also traveling westbound on East 63rd Street, and was behind plaintiff's vehicle, came into contact with the plaintiff's vehicle. According to the plaintiff's deposition testimony [Doc. 25], he was stopped in the left lane waiting to make a left turn onto Second Avenue when the defendant's vehicle, which was behind the plaintiff's vehicle, attempted to switch into the middle lane to go around the plaintiff and instead struck his vehicle. According to the plaintiff, the defendant struck the right rear corner of his car [Doc. 25, p. 40].

The defendant offers only an attorney's affirmation in opposition to the motion, which is not evidence. In the attorney's affirmation, counsel suggests that the plaintiff's vehicle came to a sudden stop, but there is absolutely no evidence to support this contention.

A rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of

liability with respect to the operator of the rear vehicle and imposes a duty on that operator to come forward with a nonnegligent explanation for the collision. *Gutierrez v Trillium USA, LLC*, 111 A.D.3d 669 [2d Dept 2013]; *Fajardo v. City of New York*, 95 A.D.3d 820 [2d Dept 2012]; *Francisco v. Schoepfer*, 30 A.D.3d 275 [1st Dept 2006]. As the defendant in this case offers neither deposition testimony nor an affidavit that would establish a non-negligent explanation for the collision, the plaintiff's motion on the issue of liability is granted. Any affirmative defenses of comparative fault are stricken. The case shall proceed to trial on the issue of damages only.

Accordingly, it is **ORDERED** that the defendant's motion for summary judgment on the issue of the "serious injury" threshold [MS #1] is denied, and plaintiff's motion for summary judgment on the issue of liability [MS #2], is granted.

This constitutes the decision and order of the court.

Dated: August 2, 2022

ENTER:

Hon. Debra Silber, J.S.C.