Euishin Kim v Stork

2023 NY Slip Op 33976(U)

November 6, 2023

Supreme Court, New York County

Docket Number: Index No. 157973/2019

Judge: James G. Clynes

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES **PART** 22M

Justice

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EUISHIN KIM,

Plaintiff,

- v -

MALLORY A STORK, LUCY STORK

Defendants.

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INDEX NO. 157973/2019

MOTION DATE 05/01/2023, 05/01/2023

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 76, 77, 78, 79

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 53, 54, 55, 56, 57, 58, 59, 60, 61, 80, 81, 82, 83

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion by Defendants for summary judgment on the grounds that Plaintiff fails to meet the serious injury threshold under Insurance Law 5102 (d) and Plaintiff's cross-motion for summary judgment on the grounds that Plaintiff has established prima facie showing of a serious injury under Insurance Law 5102 (d) (Motion Sequence #2) and the motion by Plaintiff for summary judgment as to liability against Defendants (Motion Sequence #3) are decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of a November 3, 2017 motor vehicle accident between a vehicle owned by Defendant Lucy Stork and operated by Defendant Mallory Stork and a vehicle owned and operated by Plaintiff on the Queensboro Bridge, Queens, NY.

Defendants' Motion for Summary Judgment, Serious Injury Threshold (Motion Sequence #2)

Plaintiff's Bill of Particulars alleges that Plaintiff sustained injuries to his cervical spine for which he underwent surgery on April 4, 2018; lumbar spine to which he received an epidural

injection on March 14, 2018; right elbow; left ankle; and right and left shoulders. The parties do not dispute that the airbags did not deploy in the accident, no glass was broken, that no police or ambulance were called to or arrived at the accident scene, and that Plaintiff did not go to the hospital or seek treatment until 13 days after the accident.

The burden rests upon the movant to establish that the plaintiff has not sustained a serious injury (*Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of serious injury (*see Lopez v Senatore*, 65 NY2d 1017 [1985]).

In support of their motion, Defendants rely on the Plaintiff's Bill of Particulars, the affirmed independent medical examination report of Dr. Gregory Montalbano, MD, an orthopedic surgeon, and Plaintiff's examination before trial (EBT) testimony.

Dr. Montalbano examined Plaintiff on December 15, 2022 and concluded that Plaintiff did not sustain any permanent injury to the cervical spine, thoracic spine, lumbar spine, right elbow, right shoulder, left shoulder, or left ankle as a result of the accident in question. Dr. Montalbano concluded that Plaintiff had a pre-existing condition of degenerative disc disease which is unrelated to the accident in question and is likely the cause of any ongoing symptoms in the spine. Dr. Montalbano did not observe any abnormalities in Plaintiff's gait.

Dr. Montalbano measured Plaintiff's range of motion with a goniometer pursuant to the New York State Office of Temporary and Disability Assistance and found limitation in range of motion as to Plaintiff's cervical spine and lumbar/thoracic spine. However, Dr. Montalbano noted that these limitations are bilaterally symmetric and therefore likely normal for this individual. Specifically, the decreased lateral bending is subjective in nature with no positive clinical objective signs of disability.

As to Plaintiff's cervical spine, Dr. Montalbano noted a healed surgical scar from prior surgery. Dr. Montalbano noted that the cervical lordosis was normal with no paraspinal spasm noted. As to Plaintiff's lumbar/thoracic spine, Dr. Montalbano noted that the lumbar lordosis and thoracic kypohosis was normal with no list or abnormal curvature and no muscle spasms noted.

Dr. Montalbano did not note any fasciculations in the upper or lower neurological, and yielded negative on the Hoffman and Babinski tests. The motor testing was 5/5.

Dr. Montalbano reviewed Plaintiff's medical records beginning with office notes from Plaintiff's Chiropractor on November 16, 2017, 13 days after the alleged accident. Plaintiff denied head trauma or loss of consciousness after the accident. Plaintiff reported radiation of pain from his neck to his right arm and shoulder, and from his lower back to his buttocks and right posterior thigh.

Dr. Montalbano found no causal relationship between any of the Plaintiff's injuries and the subject accident. With regard to Plaintiff's procedures, Dr. Montalbano noted that Plaintiff underwent a cervical spine discectomy at 2 levels, but the injections and spinal procedures were for the treatment of a pre-existing degenerative disc disease correlating to Plaintiff's age, as opposed to treatment for injuries sustained in the subject accident.

Defendants have met their initial burden of establishing that Plaintiff did not sustain serious injuries as a result of the accident under Insurance Law 5102 (d) (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]).

In opposition and in support of his cross-motion, Plaintiff submits the unsworn report of Mark S. McMahon, M.D., David Hong, D.C. records, Plaintiff's treating records, which include unaffirmed medical records from his treatment at Apple Pain Management and other unaffirmed medical records from Giani Perish and David Hong, unaffirmed MRI reports, and the EBT of Defendant Stork.

Uncertified medical records and unsworn reports are inadmissible in opposing a summary judgment motion unless they are relied upon by a defendant's expert in drawing his or her conclusions (*Toledo v A.P.O.W. Auto Repair/Towing*, 307 AD2d 233 [1st Dept 2003]). Accordingly, the Court will not consider the unsworn and unaffirmed treatment records.

Pursuant to CPLR 2106, chiropractors are not afforded the privilege of making an affirmation without appearing before a notary or other official authorized to administer oaths or affirmations (*Burgess v Avignon Taxi, LLC*, 211 AD3d 522 [1st Dept 2022] [where the First

Department ruled that the motion court correctly disregarded it because it failed to comply with the rule that "reports of chiropractors must be subscribed before a notary or other authorized official"]). Thus, here, although Dr. Montalbano relies on and incorporates Dr. Hong's findings in his evaluation of Plaintiff, Dr. Hong's report is nonetheless deficient because it is unsigned and not notarized. The Court will not consider Dr. Hong's report.

With regard to Dr. McMahon's report, Plaintiff submitted the completed affidavit affirming Dr. McMahon's report and attached it thereto. The initial technical error has been resolved and will therefore be excused. Defendants' May 26, 2023 letter to the Court fails to articulate prejudice to Defendants. The Court will consider Dr. McMahon's report.

Dr. McMahon initially examined Plaintiff on October 27, 2022 and made an assessment that included cervical spine broad-based central posterior disc herniation at C3-4 causing spinal canal stenosis and foraminal narrowing; right paracentral broad-based disc herniations at C4-C5 and C5-C6 causing spinal stenosis, cord impingement, and foraminal narrowing, contacting the bilateral exiting C5 and C6 nerve respectively, without myelomalacia. He also reported a disc bulge at C6-C7 causing spinal canal stenosis and foraminal narrowing, central posterior disc herniation at C7-T1 indenting the ventral thecal sac; and spinal canal narrowing throughout, due to congenitally shortened pedicles. According to his report, this necessitated anterior percutaneous discectomies of C4-C5 and C5-C6. As to Plaintiff's lumbar spine, Dr. McMahon noted broad-based central posterior disc herniation at L4-5, flattening the ventral thecal sac, lateral recesses, and foramina abutting the exiting right L4 nerve root, which necessitated a caudal epidural steroid injection. As to Plaintiff's left ankle, Dr. McMahon found partial tears of the anterior and posterior talofibular ligaments with associated soft issue edema subchondral cyst formation and joint effusion, which necessitated a cortisone injection into the subtalar joint and cortisone injection into the plantar fascia and tarsal tunnel. Dr. McMahon opined that these injuries were causally related to the motor vehicle accident on November 3, 2017.

With respect to the 90/180 days serious injury claim, the Court notes that Plaintiff's papers fail to discuss his 90/180 days claim or any opposition to its dismissal.

Plaintiff's Bill of Particulars alleges that Plaintiff could not recall how long he was confined to his bed or home. Plaintiff did not identify any activities that he was unable to perform in his Bill of Particulars or his testimony.

Plaintiff testified that several activities were limited but not impossible. Plaintiff remained able to exercise at the gym and lift 20 to 30 pounds. Plaintiff remained able to walk albeit not as frequently. The only activity Plaintiff identified as being unable to perform was playing golf and swinging a golf club because of his fear that it would make his stiffness in his neck and lower back worse. Plaintiff testified that he was able to swing a golf club but that he avoided it. Plaintiff was not employed at the time of the accident. Nevertheless, Plaintiff did not offer any admissible evidence that he would be unable to be employed in his regular occupation as a marketing consultant and in fact returned to gainful employment after the accident in May or June 2018 (*Cruz v Aponte*, 60 AD3d 431, 432 [1st Dept 2009]). Plaintiff's subjective complaints of pain and limitation, without more, do not rise to the level of a "serious injury" within this category of Insurance Law 5102 (d).

As such. Defendants' motion for summary judgment on the grounds that Plaintiff did not sustain a serious injury under Insurance Law 5102 (d) is granted under the 90/180 days category only. Plaintiff's cross-motion for summary judgment is denied. Issues of fact exist with respect to the remaining categories under Insurance Law 5102 (d), based on the conflicting expert opinions submitted by the parties (*Perl v Meher*, 18 NY3d 208 [2011]).

Plaintiff's motion for summary judgment as to liability against Defendants (Motion Sequence #3)

Plaintiff's motion for partial summary judgment on the issue of liability in favor of Plaintiff as against Defendants 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]).

As it pertains to Plaintiff's contention that Defendants' opposition was untimely filed and should therefore not be considered in the determination of this motion, the Court, notwithstanding Defendants' untimely opposition papers, in the interest of justice, and consistent with the policy of resolving issues on their merits, will consider Defendants' untimely opposition papers.

In support of his motion, Plaintiff relies on the EBT testimony of Plaintiff, and Defendant Driver Mallory Stork. Plaintiff's Bill of Particulars states that when the accident occurred, Plaintiff was traveling west bound when Defendants' vehicle to his rear right switched lanes, striking the Plaintiff's vehicle on the passenger side rear quarter panel and bumper. Defendant Stork testified in her EBT that the accident occurred in "stop and go" traffic on the two-lane bridge, which is narrow, and that Plaintiff's car was a large SUV that was partially in her lane. Defendant Stork testified that she tried to pass Plaintiff by moving into the right lane when traffic opened up, but that Plaintiff braked slightly as she moved to pass into the other lane. Defendant Stork testified that the traffic kept "stopping short" and that she tried to avoid Plaintiff's car but ended up hitting him from behind on the right rear of the passenger side of Plaintiff's car. She testified that the impact between her car and Plaintiff's vehicle was very light, that they both stopped their cars, and that at the time that they stopped, her car was still in the right-hand lane and Plaintiff's car was in the left-hand lane. Plaintiff testified that he was not changing lanes or signaling to change lanes and was in the left lane at the time of the accident.

A rear-end collision 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 non-negligent explanation for the collision (*Franklin v Chalov*, 209 AD3d 524 [1st Dept 2022]).

In opposition, Defendants rely on the EBT testimony of Defendant Stork and Plaintiff. However, the Defendants do not offer a non-negligent explanation of the rear-end accident. Defendants cite cases that involved the *plaintiff* changing lanes. Here, Defendant Stork's own testimony indicates that she was changing lanes when Plaintiff braked, causing her to strike his

vehicle. Defendant Stork's version of events does not offer a non-negligent explanation of the rear end collision with Plaintiff's vehicle. New York Courts have consistently held that a defendant's explanation that a plaintiff's vehicle came to an abrupt stop, standing alone, is insufficient to raise a triable issue of fact (*Agramonte v City of NY*, 288 AD2d 75 [1st Dept 2001]). The emergency doctrine may protect a driver from liability where the driver, through no fault of his or her own, is required to take immediate action in order to avoid being suddenly cut off (*Maisonet v Roman*, 139 AD3d 121, 122 [1st Dept 2016]). However, here, Defendant Stork's testimony does not articulate how her failure to properly assess the space available for changing lanes in "stop and go" traffic and allowing for the possibility of the car ahead of her suddenly breaking was non-negligent. Therefore, it is insufficient to defeat Plaintiff's motion as to liability.

Accordingly, based on the foregoing it is hereby

ORDERED that Defendants' motion for summary judgment on the grounds that Plaintiff fails to meet the serious injury threshold under Insurance Law 5102 (d) (Motion Sequence #2) is denied, except as to the 90/180 days category; and it is further

ORDERED that Plaintiffs' motion for summary judgment on liability in favor of Plaintiffs and against Defendants (Motion Sequence #3) is granted; and it is further

ORDERED that any requested relief not specifically addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, Plaintiff shall serve a copy of this Decision and Order upon Defendants with Notice of Entry.

This constitutes the Decision and Order of the Court.

11/6/2023
DATE

JAMES G. CLYNES, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

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