

Decided on June 6, 2008

Supreme Court, Queens County

Clive Lewis, Plaintiff,

against

P. Ulloa-Gonzalez and Dalmar Car Service Corp.,
Defendants.

5535/05

Joseph P. Dorsa, J.

By notice of motion, defendants seek an order of the Court, pursuant to CPLR § 3212, granting them summary judgment and dismissal on the grounds that plaintiff failed to suffer a serious injury within the meaning of NY Insurance Law § 5012(d) and § 5104(a).

Plaintiff files an affirmation in opposition and cross-moves for summary judgment on the issue of liability. Defendants file an affidavit in opposition to plaintiff's cross-motion.

The underlying cause of action is a claim by plaintiff for personal injuries alleged to have been sustained in a motor vehicle accident on January 19, 2003, at or near the intersection of Lenox Road and East 39th Street, in Brooklyn, NY The intersection was controlled by a traffic signal.

At that time and place, plaintiff maintains that he was traveling west bound on Lenox Road, and defendant was traveling eastbound. At the intersection with 39th Street, plaintiff maintains that defendant, in an attempt to "beat the traffic" [*2]made a left turn on to East 39th Street colliding with plaintiff's vehicle which was lawfully traveling straight through the intersection. Plaintiff maintains that defendant improperly made his left turn without waiting for the intersection to clear.

In response, defendant maintains that he was stopped in the intersection with his left blinker light on; that he waited for three vehicles to pass before attempting to turn; and, that at the moment he

was "preparing" to turn, plaintiff, traveling at a fast rate of speed, struck his vehicle.

In support of their motion for summary judgment and dismissal, defendants submit the affirmed report of Dr. Sarasvani Jayaram, based upon an examination conducted on June 28, 2007; the affirmed report of Dr. Wayne Kerness, based upon an examination conducted on June 28, 2007; and, the affirmed report of Dr. David Milbauer, based upon an examination on January 20, 2007.

Dr. Jayaram reported that he examined plaintiff on June 28, 2007, approximately four and one half (4 ½) years after the accident. Mr. Lewis, who was forty-three (43) years old at the time of his examination reported to Dr. Jayaram that he was out of work for four (4) months following the accident. Mr. Lewis complained of continuing pain in his neck, lower back, and right knee. Dr. Jayaram tested plaintiff's range of motion, listing the names of the tests he used, regarding his cervical, thoracic and lumbar spines, among other things. He found his range of motion as to each to be normal as compared to a "normal range," and concluded that there was no permanency to his complained of injuries.

He expressed no opinion as to causality, but concluded that plaintiff's cervical and lumbar strain/sprain was resolved. Dr. Jayaram did not test or examine plaintiff's right knee.

Finally, despite plaintiff's claim that he'd missed four (4) months of work following the accident, Dr. Jayaram expressed no opinion, and in no way addressed this claim by plaintiff based on a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Dr. Kerness also tested plaintiff's range of motion with respect to his cervical and lumbar spines, naming the tests used [*3] and comparing his range of motion to "normal." He found plaintiff to have exactly the same "normal" range of motion as did Dr. Jayaram, and also agreed that the plaintiff's experienced strain or sprain was resolved. He did not express an opinion as to the causality, and he did not address plaintiff's claim based on the ninety/one hundred eighty category.

Dr. Kerness did express an opinion that plaintiff's knee injury, without naming what that injury was, was resolved.

Finally, Dr. Milbauer reviewed only the MRI film of plaintiff's right knee taken on January 21, 2003. Dr. Milbauer maintained that the possible small tear of the medial meniscus in plaintiff's right knee could not be attributed to traumatic injury because of the absence of joint effusion, which he explained should be present two days after the accident, if indeed trauma was the cause.

On a motion for summary judgment the defendant has the burden of coming forward with sufficient evidence in admissible form to warrant as a matter of law a finding that plaintiff has not suffered a "serious injury." *See Pagano v. Kingsbury*, 182 AD2d 268 (2nd Dep't. 1992). If the defendant fails to meet this burden, the motion will be denied; and in such instances the merits of

plaintiff's claim will not be examined. Jones v. Jacob, 1 AD3d 485 (2d Dep't 2003); D'Onofrio v. Arsenault, 35 AD3d 646 , 828 NYS2d 117 (2d Dep't 2006); see also Bozza v. O'Neill, 43 AD3d 1094 , 1096, 842 NYS2d 88 (2d Dep't 2007).

Here, as in Bozza v. O'Neill, *supra* "[t]he defendant's medical experts did not relate [their] findings to [the] period of time immediately following the accident (*see Sayers v. Hot*, 23 AD3d 453 (2005))." *Id.* at 1096 (*see also Deville v. Barry*, 41 AD3d 763, 839 NYS2d 216; Nakanishi v. Sadaqat, 35 AD3d 416 , 417, 826 NYS2d 373 (2d Dep't 2006); Volpetti v. Yoonkap, 28 AD3d 750, 751, 814 NYS2d 236 (2d Dep't 2006).

Accordingly, defendants' motion to dismiss plaintiff's complaint is denied.

[Plaintiff] [has] "...demonstrated her entitlement to judgment as a matter of law [on the issue of liability] by establishing that [defendant] violated *Vehicle and Traffic Law* § 1141 when [he] made a left-hand turn directly into the path of appellant's on coming vehicle (*see Moreback v. Mesquita*, 17 AD3d 420 , 421 (2005); Casaregola v. Farkouh, 1 AD3d 306 (2003))." Maloney v. Niewender, 27 AD3d 426 , 812 NYS2d 585 (2d Dep't 2006). [*4]

In response, defendants represent only "...conclusory and speculative assertions concerning [defendant's] speed and possible negligence... unsupported by competent evidence. (*See Rieman v. Smith*, *supra* ; c.f. Casaregola v. Farkouh, *supra* . *Id.* at 427.

Accordingly, upon all of the foregoing, it is hereby

ORDERED, that the cross-motion is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendants on the issue of liability and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein.

Dated: Jamaica, New York

June 6, 2008

JOSEPH P. DORSA

J.S.C.