

Magenta v Lucas

2007 NY Slip Op 30479(U)

March 30, 2007

Supreme Court, Richmond County

Docket Number: 0011072/1998

Judge: Thomas P. Aliotta

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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CATHERINE MAGENTA and GINO MAGENTA,

Plaintiff(s),

Part C-2

Present:

Hon. Thomas P. Aliotta

-against-

JAMES LUCAS, DDI TRANSPORTATION,
INC., ROBERT SALGADO, and THE NEW
YORK CITY POLICE DEPARTMENT,

Decision and Order

Defendant(s).

Index No. 11072/98

Motion No. 2449 - 006

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The following papers numbered 1 to 4 were used on this motion the 7th day of February, 2007:

Notice of Motion for Leave to Reargue (Affirmation in Support)

Affirmation in Opposition of Defendant THE CITY OF NEW YORK

Affirmation in Opposition of Defendants JAMES LUCAS and DDI
TRANSPORTATION, INC. 3

Affirmation in Opposition of Defendant ROBERT SALGADO 4

Upon the foregoing papers, plaintiffs' motion for leave to reargue is denied.

Plaintiff CATHERINE MAGENTA claims to have sustained serious personal injuries when the vehicle which she was driving was struck by a vehicle operated by defendant JAMES LUCAS and owned by defendant DDI TRANSPORTATION, INC. It is further claimed that the LUCAS vehicle was speeding and on the wrong side of the road when it struck another vehicle (that of codefendant ROBERT SALGADO) before swerving into plaintiff's vehicle. It has been alleged that the accident occurred while LUCAS was enroute to a medical emergency at his home. It is further

alleged that a New York City Police Department vehicle driven by Officer Frank Leando was either following or escorting LUCAS when the accident occurred.

In the prior motion, defendant THE CITY OF NEW YORK (hereinafter THE CITY) moved for summary judgment on the issue of liability by claiming, *inter alia*, that it owed no special duty to MS. MAGENTA, and that the conduct of its officer did not rise to the level of "reckless disregard". Accordingly, THE CITY claimed that it could not be held liable. Defendants JAMES LUCAS and DDI TRANSPORTATION, INC. (hereinafter "LUCAS" and "DDI") cross-moved for like relief, claiming that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d). Defendant ROBERT SALGADO (hereinafter "SALGADO") also cross-moved for summary judgment. According to this defendant, (1) it was LUCAS that caused the accident and (2) plaintiff did not sustain a serious injury. To this extent, he incorporated the arguments made by codefendants LUCAS and DDI. In opposing THE CITY's motion, plaintiffs and SALGADO maintained that THE CITY had a special relationship with MS. MAGENTA, and that it breached its affirmative duty to protect her and all other drivers when it failed to properly monitor the operation of the LUCAS vehicle. This Court granted the motion and cross motions on the ground that plaintiff CATHERINE MAGENTA did not sustain a serious injury.

In the present application for leave to reargue, plaintiffs maintain that this Court failed to consider the objective medical evidence submitted by plaintiff in support of her claim of serious injury, and that it further failed to consider the delay in discovery caused by insolvency proceedings against the insurer for codefendants LUCAS and DDI. In particular, plaintiffs argue that the Court (1) improperly relied upon the subjective findings of defendants' examining physicians, and (2) failed to accord proper weight to the objective tests administered by plaintiff's treating physician and his positive findings with regard to the allegations of serious injury. Finally, plaintiffs argue that the aforementioned insolvency proceedings delayed discovery in this action for almost two years. In support of these arguments, plaintiffs have submitted (1) a copy of the insurance company's Order of Liquidation, and (2) an excerpt from the deposition testimony of plaintiff CATHERINE MAGENTA in which she recounts both the events giving rise to her injury and its effect on her daily activities.

In opposition, defendant SALGADO contends that plaintiffs' motion fails to raise any

issue of fact regarding his liability for the underlying accident, and claims that the positive MRI findings of Dr. Alan Crystal were sufficiently addressed in this Court's prior decision. In addition, SALGADO contends that any alleged delay caused by the insolvency proceedings is irrelevant to this motion, and has no bearing on the medical treatment received by plaintiff or the results of the various tests administered to her.

In their opposition, defendants LUCAS and DDI adopt the arguments set forth by defendant SALGADO, and claim that plaintiff failed to present any new or significant findings to warrant reconsideration by the Court.

For its part, THE CITY contends that the motion is procedurally defective based on plaintiffs' failure to submit a copy of each of the papers upon which they purport to rely. On the merits, THE CITY has adopted the arguments set forth by codefendant SALGADO in his opposition papers.

The motion is denied.

In support of their motion, plaintiffs were required to furnish the Court with copies of each of the documents upon which they intended to rely, including the prior Decision and Order (*see* CPLR 2214; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2214:23, at 99-100). Here, the only papers submitted by plaintiffs are a copy of the Order of Liquidation and excerpts from MS. MAGENTA's deposition testimony. Under these circumstances, the Court is not required to proceed any further (*see* Sheedy v. Pataki, 236 AD2d 92, *lv denied* 91 NY2d 805; Loeb v. Tannebaum, 124 AD2d 941).

However, plaintiffs have also failed to demonstrate that the Court overlooked any relevant fact, misapprehended the law, or for any other reason mistakenly arrived at its earlier decision (*see* CPLR 2221[d][2]); Schneider v. Solowey, 141 AD2d 813). In particular, while plaintiffs contend that the Court failed to consider Dr. Crystal's MRI finding of herniated discs, the Court must note that these findings were discussed at length in the prior decision dated June 26, 2006 (Mega, J.). In pertinent part, Justice Mega properly considered Dr. Crystal's opinion that the herniated discs were not impinging on any nerves or the dural sac, and that there were no findings correlating the MRI results with the subject motor vehicle accident. According to Dr. Crystal, these disc herniations were related to normal degeneration rather than trauma.

Similarly, plaintiffs have failed to demonstrate any palpable nexus between the stay in insolvency proceedings and the prior determination.

Accordingly, it is

ORDERED that plaintiffs' motion for leave to reargue is denied.

The foregoing constitutes the Decision and Order of the Court.

Law Clerk to notify all parties of this Decision/Order.

DATED: MAR 30 2007

/s/

J.S.C.

HON. THOMAS P. ALIOTTA,

ALL SIDES NOTIFIED BY EVE/pt on 4/2/07

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