Klune v Aydogan
2007 NY Slip Op 31290(U)
May 14, 2007
Supreme Court, Suffolk County
Docket Number: 0001764/2005
Judge: Robert W. Doyle
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SHORT FORM ORDER

INDEX No. 05-1764
CAL. No. 06-02099-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1/10/07
ADJ. DATE 2/21/07
Mot. Seq. # 001 - MD
002 - XMotD

GLADYS KLUNE and DONALD F. KLUNE,

Plaintiffs,

- against -

HIZIR AYDOGAN, GARY CONRAD and PEGGY J. CONRAD,

Defendants.

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Upon the following papers numbered 1 to 33 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers 12 - 21; Answering Affidavits and supporting papers 22 - 31; Replying Affidavits and supporting papers 32 - 33; Other ______; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by defendant Hizir Aydogan pursuant to CPLR 3212 and Insurance Law § 5102 for an order granting summary judgment dismissing the complaint of plaintiffs, Gladys Klune and Donald F. Klune, asserting plaintiff's injuries do not meet the serious injury threshold, opposed by plaintiff, is denied; and it is further

ORDERED that this motion (002) by defendants Gary Conrad and Peggy Conrad pursuant to CPLR 3212 and Insurance Law § 5102 for an order granting summary judgment dismissing the complaint and all cross claims interposed against the moving defendants on the issue of liability is granted, and on the issue that plaintiff did not sustain serious injury, is denied.

This is an action sounding in negligence arising out of an automobile accident which occurred on

September 23, 2003 on Medford Avenue south of Barton Avenue, Town of Brookhaven, County of Suffolk, State of New York. The MV 104 Police Report submitted by defendant Conrad (Exhibit C) states this accident involved four vehicles in a collision in which vehicle four, operated by Hizir Aydogan, allegedly struck vehicle three which was operated by Peggy Conrad. Vehicle three allegedly struck vehicle two, which was operated by plaintiff Gladys Klune, whose vehicle struck vehicle one, which was operated by Lori Hines.

In the Bill of Particulars, plaintiff has set forth that she sustained C4-5 and T1-2 posterior disc bulges; cervical sprain/strain; thoracic sprain/strain; cervical brachial-radiculitis; reduced hypertonicity in the cervical paraspinal muscles on the right, upper thoracic muscles on the right, and lumbar paraspinal muscles on the right; straightening of the cervical lordosis; C 5-6 posterior left sided disc herniation with ventral CSF impression in this region; chronic impingement upon the supraspinatus muscle tendon complex by the inferior aspect of the acromion process of the scapula, right shoulder; supraspinatus and infraspinatus tendinosis associated with partial thickness tears extending to the undersurface of the infraspinatus tendon and bursal surface of the supraspinatus tendon, right shoulder; tear of the rotator interval and small tear in the joint capsule interposed between the supraspinatus and infraspinatus muscle tendon complex, right shoulder; fraying type tear of the anterior glenoid labrum, right shoulder; small effusions of the glenohumeral joint and subacromial-subdeltoid bursa, right shoulder; tendonitis affecting the biceps long head tendon, right shoulder; focal reactive changes in the humeral neck and greater tuberosity, right shoulder; severe right sensorimotor carpal tunnel syndrome; intermittent numbness and tingling running down the right arm to the fingers of the right hand; decreased sensation to pin prick and temperature over the extensor forearm on the right and anatomic snuffbox on the right; headaches; difficulty sleeping due to pain; anxiety; exacerbation of pre-existing quiescent lower back pain; and lumbosacral sprain/strain. Plaintiff claims that as a result of this accident, she was caused to sustain serious personal injury within the definition of "serious injury" as set forth in New York State Insurance Law §5102.

Defendants seek an order granting summary judgment in motions #001 and #002, asserting plaintiff has not sustained serious injury within the meaning of Insurance Law § 5102(d). In support of motion #001, defendant Aydogan has submitted, inter alia, copies of the summons and complaint; answer with cross claim; verified bill of particulars; a signed and sworn copy of the plaintiff's deposition; a copy of the medical examination report of neurologist Mark J. Zuckerman, M.D. dated July 17, 2006; and a copy of the orthodpedic medical examination of Arthur Bernhang, M.D. dated July 25, 2006. In support of motion (002), defendants Gary and Peggy Conrad have submitted, inter alia, a copy of plaintiff's verified bill of particulars; a copy of the MV 104 Police Accident Report; an unsigned, unsworn copy of Peggy Conrad's deposition transcript; and a partial copy of the deposition transcript of plaintiff Gladys Klune.

Pursuant to Insurance Law §5102(d), " '[s]erious injury' means a personal injury which results in dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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

[* 3]

or impairment."

The term "significant" as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment" (***Licari v. Elliot,*** 57 NY2d 230, 455 NYS2d 570).

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*see*, ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (***Rodriguez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]).

It is undisputed by defendants' examining physicians that plaintiff's MRI studies revealed posterior disc bulges at C4-5 and T1-2, and left sided disc herniation at C5-6 with ventral CSF impression in this region (plaintiff's Exhibit A); nor do they dispute that the shoulder MRI revealed, inter alia, tear of the rotator interval and a small tear in the joint capsule interposed between the supraspinatus and infraspinatus muscle-tendon complexes, and possible fraying type tear of the anterior glenoid labrum (plaintiff's Exhibit B). The EMG studies reveal right sensorimotor carpal tunnel syndrome (plaintiff's Exhibit C).

Although Dr. Zuckerman's impression that plaintiff Klune had possible mild median neuropathy on the right, and peripheral neuropathy, he states in the report there is not a causally related neurologic disability, and the neuropathy and possible median neuropathy are most likely related to her prior history of diabetes. However, he does not set for the basis for this conclusory statement. Dr. Zuckerman made the finding that there was causation between the diagnosis of cervical sprain and the accident and found limitation in the cervical range of motion of 70 degrees out of 80 degrees; to the left of 50 degrees out of 80 degrees; cervical flexion 40 degrees out of 45 degrees; lumbar forward flexion of 75-80 degrees out of 90 degrees; lateral lumbar flexion 25 degrees out of 30 degrees to the left and right; and shoulder range of motion was limited by pain.

Dr. Bernhang does not dispute the findings on the MRI of the cervical spine or shoulder and does find that while plaintiff "may have sustained soft-tissue injuries to the cervical spine, right shoulder, and

thoracic spine, these injuries would appear to have resolved. However, it is noted that his report does state that if plaintiff "does heavy shopping and vacuuming, driving or mowing the lawn, she has trouble. She can only play golf one day a week because she has pain the following day." Dr. Bernhang had objective findings of limitation of motion for cervical flexion of 5 degrees out of 38 degrees, cervical extension of 20 degrees out of 38 degrees, lateral flexion of 15-20 degrees out of 43 degrees, active shoulder abduction 90/90out of 170, active shoulder forward flexion 90/90 out of 158, and internal rotation45/45 out of 70.

Based upon the foregoing, it is determined that Dr. Bernhang and Dr. Zuckerman have actually supported plaintiff's claim that plaintiff Gladys Klune sustained has disc herniation as well as quantifiable limitation in range of motion. Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith,*** 294 AD2d 540; 742 NYS2d 876 [2nd Dept 2000]). Therefore, it is determined that defendants have not met their burden of demonstrating entitlement to an order granting summary judgment on the issue of serious injury as they have failed to show that there are no issues of fact as to whether or not plaintiff sustained serious injury.

Accordingly, motion #001 and that part of motion #002 which seeks dismissal of the complaint on the issue that plaintiff did not sustain serious injury is denied.

Turning to that part of motion #002 which seeks an order granting summary judgment on the issue of liability, it is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (***Chepel v Meyers,*** 306 AD2d 235, 762 NYS2d 95 [2003]; ***Power v Hupart,*** 260 AD2d 458, 688 NYS2d 194 [1999]; *see also,* Vehicle and Traffic Law § 1129[a]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, and unavoidable skidding on a wet pavement or some other reasonable excuse (*see,* ***Rainford v Han,*** 18 AD3d 638; 795 NYS2d 645 [2005]; ***Thoman v Rivera***, 16 AD3d 667, 792 NYS2d 558 [2005]; ***Power v Hupart,*** *supra*).

In support of the motion of defendants Conrad, copies of of an unsworn, unsigned deposition of Peggy Conrad and Gladys Klune were submitted, inter alia. However, none of the parties have objected to the same, so the court will consider the deposition transcripts.

This accident involved four cars in a chain collision. The first car was operated by nonparty Lori Hines; the second car in line was operated by Gladys Klune; the third car in line was operated by Peggy Conrad, and the fourth car by Hizir Aydogian.

At her examination before trial, in the related action arising out of this same accident (defendant Conrad exhibit G), Gladys Klune testified she was driving an Hyundai, Elantra, southbound on Route 112, when she was involved in a four vehicle accident. Hers was the second vehicle in line behind a blue van that stopped, a normal short stop. She then stopped her vehicle when she was struck from behind. She felt it and heard brakes screeching and then bang. She described the impact as heavy to the

rear of her car, but light to the vehicle in front of her. Then she felt another impact to the rear of her car which caused her vehicle to hit the car ahead of her again.

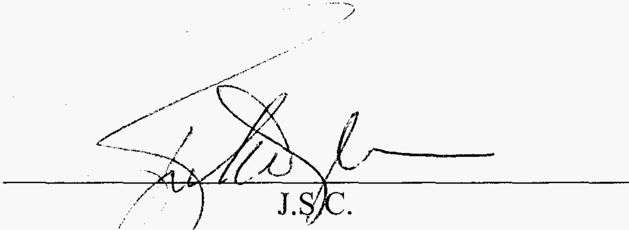
Peggy Conrad testified at her examination before trial (defendant Conrad exhibit F) that she was operating a Saturn LS on Route 112, when she looked into her rear view mirror and saw a vehicle coming towards her at about 40 to 45 miles per hour. She had just stopped her vehicle when it was struck in the rear. She had stopped because the two cars ahead of her had slammed on their brakes and stopped. The impact she felt to the rear of her car was heavy, and caused her vehicle to move forward into the vehicle in front of her. After that, the vehicle in front of her came into contact with a minivan ahead. When asked if any part of her car hit the rear of the vehicle in front of it before she felt an impact to the rear of her vehicle, she responded "No." (p. 16).

This Court has been advised by counsel for the Conrad defendants that defendant Hizir Aydogan has not testified in this action. In reviewing the submissions to this Court on this motion, it is determined that defendant Aydogan has not offered any non-negligent explanation for this rear-end collision and has not submitted an affidavit or admissible evidence to oppose this motion. Here, the adduced evidence establishes that the vehicle operated by defendant Conrad was stopped when struck by the Aydogan vehicle, causing her vehicle to strike the vehicle operated by plaintiff Klune. Defendant Conrad has therefore demonstrated entitlement to summary judgment as a matter of law.

In opposing this application, plaintiff Klune has not come forward with any admissible evidence to contradict that the Conrad vehicle was stopped when struck by the Aydogan vehicle. She argues whether or not the Conrad vehicle was stopped is a factual issue, as Klune stated she felt two impacts to the rear of her vehicle. However, plaintiff's argument is merely speculative unsupported by any admissible evidence. Therefore plaintiff has not come forward with admissible evidence to rebut defendant Conrad's demonstration of prima facie entitlement to an order granting summary judgment on liability.

Accordingly, that part of the application of defendants Conrad (002) for an order granting summary judgment as to liability and dismissing the complaint and any and all cross claims is granted. The action is severed and shall continue as against defendant Aydogan.

Dated: MAY 14 2007



J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION