

Mingino v Sourdos

2007 NY Slip Op 31350(U)

May 22, 2007

Supreme Court, Kings County

Docket Number: 0042996/1997

Judge: David I. Schmidt

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At an IAS Term, SCP Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of May, 2007

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

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Index No. 42996/97

MARIE MINGINO,

Plaintiff,

- against -

A.G. SQUORDOS, JR., et al.,

Defendants.

-----X

The following papers numbered 1 to 11 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	_____1-4_____
Opposing Affidavits (Affirmations)_____	_____5-9_____
Reply Affidavits (Affirmations)_____	_____10-11_____
_____Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, defendants Kings Plaza Jeep & Eagle [King's Plaza] and Stephen Koss move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint insofar as asserted against them. Plaintiff Marie Mingino cross-moves for an order, pursuant to the same statute, granting her summary judgment on the issue of liability as to her claims against defendants John T. Domenico and Josephine Domenico.

Defendants John T. Domenico and Josephine Domenico cross-move for an order granting them summary judgment dismissing the complaint as asserted against them. Finally, defendant Laura Scott Williams cross-moves for an order granting her summary judgment dismissing the complaint as asserted against her.

This action involves a multi-car collision which occurred on January 18, 1995. On that date, plaintiff was a passenger in a vehicle owned by King's Plaza and operated by Koss (the Koss vehicle) which was traveling westbound in the middle lane of the Belt Parkway. Defendant Laura Scott Williams was operating a vehicle immediately behind the Koss vehicle (the Williams vehicle). Driving in the left lane ahead of the Williams and Koss vehicles was a vehicle owned by the Domenico defendants, which was being operated by Josephine Domenico (the Domenico vehicle). About 100 feet ahead of the Domenico vehicle was a disabled vehicle which was owned by defendant A.G. Sourdous (the disabled vehicle). The disabled vehicle was positioned partly on the left shoulder of the parkway and partly in the left lane.

Josephine Domenico testified at her deposition that she was traveling about 45 miles per hour as she approached the disabled vehicle. According to Domenico, she slowed down and thought that she would be able to avoid the disabled vehicle by passing it on the right hand side. However, instead, the front driver's side of the Domenico vehicle came into contact with the disabled vehicle, causing her vehicle to spin around 180 degrees and collide head-on with the Koss vehicle. When Williams saw Domenico lose control of her vehicle,

she attempted to maneuver her vehicle to the right lane to avoid it, but as she did, her vehicle was side-swiped by the Koss vehicle as it was caused to drift into the right lane by the force of the collision with the Domenico vehicle.

In this negligence action, plaintiff claims that the two collisions caused her serious physical injury. In their motion, Kings Plaza and Koss contend that plaintiff can not maintain this action because she did not suffer serious injury as required by the Insurance Law and, in any event, that the complaint must be dismissed insofar as asserted against them because they can not be found negligent as a matter of law. The Domenicos, in their cross-motion, also challenge the seriousness of plaintiff's injury and similarly seek summary judgment of the complaint insofar as asserted against them on the issue of liability. Plaintiff, in turn, cross moves for summary judgment on the issue of liability as to her claim against the Domenicos. Finally, Williams cross moves for summary judgment dismissing the complaint as asserted against her on the grounds that she too was not negligent as a matter of law.

The Threshold Issue

The court first addresses the issue raised in both the Kings Plaza/Koss motion and the Domenico cross motion – that the plaintiff did not suffer a “serious injury” as a result of the motor vehicle accident and, thus, that summary judgment must be granted to those defendants.

To succeed on a motion for summary judgment, defendants must meet an initial burden of showing that the plaintiff did not sustain “serious injuries” as defined by Insurance

Law § 5102 (*Blusiewicz v Comeau*, 212 AD2d 657 [1995]; *Fenstamacher v Reyell*, 152 AD2d 890 [1989]).¹ In her bill of particulars, plaintiff alleges that her injuries include, *inter alia*, disc bulges and herniations, resulting in pain and decreased range of motion in her cervical spine as well as pain, tenderness and spasm in her left shoulder.

In support of the motions, defendants submit the affirmation of William J. Kulak, M.D., who performed an independent orthopedic examination upon plaintiff on May 22, 2006. The doctor states that following his examination of plaintiff he concluded that the disc damage observed on plaintiff's MRI is degenerative in nature and unrelated to the motor vehicle accident. The doctor opines that there is no objective findings to indicate the presence of any traumatic disc injury and that plaintiff is fully functional. Doctor Kulak, states, however, that a neurological IME is advised as is a review of the MRI films by a radiologist, and defendant provides no evidence that that recommendation was followed. Notably, the doctor recommends a neurological examination despite the fact that he states in his report that he reviewed a neurological examination dated June 19, 2001. The court concurs with the Doctor Kulak's implicit rejection of the completeness of this report since it not only fails to state what objective tests were employed by the neurologist during his examination of

¹ Insurance Law §5102(d) defines "serious injury" as a "personal injury which results in death; 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 and eighty days immediately following the occurrence of the injury or impairment."

plaintiff, but also states only that the plaintiff's range of motion in her cervical spine was "full" and fails to assign a numerical figure for that range and compare it to the normal range, as is required (*see Manceri v Bowel*, 19 AD3d 462 [2005]; *Lora v Calle*, 16 AD3d 359 [2005]; *Mosheyev v Pilevsky*, 3 AD3d 523 [2004]). In short, the doctors' reports fail to satisfy the defendants' burden to establish that plaintiff did not suffer a serious physical injury (*see Grossman v Wright*, 268 AD2d 79 [2000]), and thus, defendants Kings Plaza/Koss and the Domenicos have failed to meet their burden of proof on this issue.

Having concluded that these defendants failed to meet their initial burden, the court need not consider whether the plaintiff's papers in opposition to the motion were sufficient to raise a triable issue of fact (*Papadonikolakis v First Fid. Leasing Group, Inc.*, 283 AD2d 470 [2001]; *Chaplin v Taylor*, 273 AD2d 188 [2000]).

Accordingly, those branches of the motion of Kings Plaza/Koss and the cross motion of the Domenicos seeking summary judgment on the grounds that plaintiff did not suffer a serious injury as a matter of law are denied.

Liability

In their motion, Kings Plaza/Koss seek summary judgment and dismissal of the complaint insofar as it is asserted against them on the ground that they are not negligent in the happening of the accident as a matter of law. In her cross motion, plaintiff seeks summary judgment on the issue of liability as against the Domenicos. In turn, in their cross motion, the Domenicos seek summary judgment and dismissal of the complaint as asserted

against them. Finally, Williams seeks summary judgment dismissing the complaint insofar as asserted against her.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). After such a showing, if the party opposing the motion comes forward with admissible evidence that there are issues of fact requiring a trial, the motion will be denied (*Rebecchi v Whitmore*, 172 AD2d 600, 601 [1991]). Moreover, in order to grant the drastic remedy of summary judgment “it must clearly appear that no material and triable issue of fact is presented ...’issue finding rather than issue-determination is the key to [a motion for summary judgment]” (*Strychalski v Mekus*, 54 AD2d 1068, 1069 [1976], quoting, *Sillman v Twentieth Century - Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Finally, the evidence presented by the nonmoving party must be accepted as true and a decision on the motion must be made on the version of the facts most favorable to him or her (*id.*). “Where there is any significant doubt whether there is a material triable issue of fact or where the material issue of fact is ‘arguable’ summary judgment must be denied” (*Strychalski v Mekus*, 54 AD2d at 1069, quoting, *Moyer v Briggs*, 47 AD2d 64, 66-67 [1975]). Applying these principals to the case at bar, and as discussed below, the court concludes that the motion and cross motion must be granted save for the cross motion of the Domenicos.

The Kings Plaza/Koss Motion

It is well-settled that a driver is not required to anticipate that an automobile will suddenly approach them driving in the opposite direction; such a scenario presents an emergency situation and the actions of the driver must be judged in that context, that is, they must be “reasonable” under the circumstances (*see Gajjar v Shah*, 31 AD3d 377 [2006]; *Vatter v Gibson*, 228 AD2d 581 [1996]; *Rocourt v Kelly*, 239 AD2d 483 [1997]).

Here, through the deposition testimony of both plaintiff and Koss, Kings Plaza/Koss met their burden of establishing that Koss was traveling at a lawful speed behind the Domenico vehicle when the Domenico vehicle suddenly came at the Koss vehicle head-on. With this evidence, Kings Plaza/Koss have established “a complete defense to plaintiff’s action” and it then becomes “incumbent upon plaintiff to submit evidence in admissible form to create an issue of fact as to [defendant’s] negligence contributing to the accident” (*Eisenbach v Rogers*, 158 AD2d 792, 793 [1990], *lv. denied* 79 NY2d 752 [1992]; *see also Morowitz v Naughton*, 150 AD2d 536 [1989]). This plaintiff has failed to do.

Instead, plaintiff submits an attorney affirmation in which the attorney argues that Koss may have been able to avoid the collision with the Domenico vehicle by turning to the right. This is, of course, mere speculation and is insufficient to raise a triable issue of fact (*see Gajjar*, 31 AD3d at 378). Moreover, even if Koss could “conceivably have swerved his [vehicle] to avoid the collision, such vehicular agility was not required” (*id.*).

Thus, the court grants the motion of Kings Plaza and Koss for summary judgment dismissing the complaint as asserted against them. In so doing, the court also rejects plaintiff's claim, contained in her bill of particulars, that Koss has violated any of the myriad of sections of the Vehicle and Traffic Law listed therein, finding that no evidence has been adduced as to any of those violations.

The cross motion of Laura Scott Williams

For the aforementioned reasons, Williams' cross motion must also be granted since her vehicle was also hit by the Koss vehicle as it careened into her lane of traffic and, again, plaintiff has failed to offer any evidence demonstrating a question of fact on the issue of Williams' negligence in the happening of the accident. Thus, plaintiff's complaint is dismissed insofar as it is asserted against Williams.²

Plaintiff's cross motion against the Domenicos and the Domenicos' cross motion against defendant

Plaintiff contends that she is entitled to summary judgment on the issue of liability as against the Domenico defendants, whose vehicle hit the Koss vehicle, in which plaintiff was a passenger, head-on. The Domenicos, in turn, claim that they are entitled to summary judgment and dismissal of the complaint as asserted against them on the ground that they, like the other defendants, were faced with an emergency situation – the disabled car – and Josephine Domenico's reaction was reasonable under the circumstances.

² To the extent that a cause of action is asserted against Williams for violations of the Vehicle and Traffic Law, that cause of action is similarly dismissed..

As discussed above, it is undisputed that the Domenico vehicle struck the Koss vehicle head-on, and, with this evidence, plaintiff has made out a prima facie case of negligence and satisfied her burden of establishing her entitlement to summary judgment (*see Matte v Hall*, 20 AD3d 898, 899-900 [2005]; *Stringari v Peerless Importers*, 304 AD2d 413 [2003]). The burden then shifts to the Domenicos to "provide a nonnegligent explanation, in evidentiary form, for the collision" (*id.*). The Domenicos failed to sustain that burden.

Unlike the Koss and Williams defendants who were faced with sudden and unexpected conditions, the condition facing Josephine Domenico was not unanticipated — that is, she was required to, and, in fact, stated that she did, see the disabled vehicle jutting into her lane as she approached it and had ample time to slow down or shift to the right to avoid it, as did the vehicle traveling directly ahead of her. Thus, absent any proof that she faced a condition that could not have been avoided through the exercise of reasonable care, the Domenicos have failed to rebut the plaintiff's *prima facie* showing of negligence (*see Matte*, 20 AD3d at 899-900; *Stringari*, 304 AD2d at 413).

Accordingly, plaintiff's cross motion for partial summary judgment on the issue of liability as to the Domenico defendants is granted and the cross motion of the Domenico defendants for summary judgment and dismissal of the complaint as asserted against them is denied.

Conclusion

The motion of Kings Plaza and Koss for summary judgment and dismissal of the complaint as asserted against them is granted as is the cross motion of Williams seeking the same relief. Plaintiff's cross motion for partial summary judgment on the issue of liability as to the Domenico defendants is granted. Finally, the cross motion of the Domenicos for summary judgment dismissing the complaint insofar as asserted against them is denied.

This constitutes the decision and order of the court.

ENTER,


J. S. C.

HON. DAVID I. SCHMIDT