

Koch v Leonard

2007 NY Slip Op 31403(U)

May 21, 2007

Supreme Court, Suffolk County

Docket Number: 0007097/2005

Judge: Robert W. Doyle

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 2-20-07
ADJ. DATE 4-20-07
Mot. Seq. # 003 - MD

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 13 - 18; Replying Affidavits and supporting papers 19 - 20; 21 - 22; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Bharathan Geeta for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint against her is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Diana Koch ("plaintiff") when her vehicle was rear-ended by a vehicle operated and owned by defendant Arthur Leonard, III ("Arthur") in the westbound lane of North Country Road, a two-way one-lane roadway, in the Town of Brookhaven, Suffolk County, on January 20, 2004. The following facts are undisputed. There were three vehicles involved in the accident. The lead vehicle which was operated and owned by defendant Geeta Bharathan, s/h/a Bharathan Geeta ("Bharathan"), skidded to a stop in a snow bank on the right side of the road; behind it was plaintiff's vehicle; and last in line was the Arthur vehicle.

Defendant Bharathan now moves for summary judgment in her favor dismissing the complaint on the ground that plaintiffs have failed to prove that defendant Bharathan was negligent and that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, Bharathan submits, *inter alia*, the pleadings; a bill of particulars; the affirmed report dated September 13, 2006 of her examining orthopedist, Dr. Craig Ordway; and the deposition testimony given by plaintiff, Bharathan and Arthur.

At her examination before trial, plaintiff testified to the effect that, while she was traveling westbound on North Country Road, she observed the Bharathan vehicle in front of her move slowly into the side of the road and stop, “blocking a quarter of [her] lane.” To avoid hitting the Bharathan vehicle, plaintiff slowed down and drove around the vehicle. Then, she felt an impact from behind caused by the Arthur vehicle. At the time of the impact, plaintiff’s vehicle was moving. As a result of the impact, she “felt the car moved faster than [she] was moving prior to the bump in the car.”

At her deposition, defendant Bharathan testified to the effect that, while she was traveling westbound on North Country Road, she lost control of her vehicle, which skidded into a snow bank on the right side of the road and was embedded in the bank. “Moments” later, she felt a light impact from behind caused by the Arthur vehicle. Bharathan did not “observe plaintiff’s vehicle go around [her] before the impact.” She also did not observe “[plaintiff’s] vehicle being struck.”

At his deposition, defendant Arthur testified to the effect that, while he was traveling westbound on North Country Road at approximately 20 to 30 miles per hour, he first observed the Bharathan vehicle “perpendicular to the road, with the nose of the car in a snow bank.” At the same time, he also observed plaintiff’s vehicle which “stopped in the middle of the road.” At the time, the distance between the Bharathan vehicle and plaintiff’s vehicle was “less than the width of a Hyundai Sonata,” and the distance between his vehicle and the Bharathan vehicle was approximately 15 to 20 feet. Arthur also testified that, since the observation of the Bharathan vehicle, he had applied his brakes, but “came into contact with two vehicles at the same time.”

It is well settled that a *prima facie* case of liability is created when the operator of the moving vehicle rear-ends a stopped vehicle and that a duty of explanation is imposed 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, an unavoidable skidding on a wet pavement or some other reasonable cause (*see, Rainford v Han*, 18 AD3d 638, 795 NYS2d 645 [2005]; *Thoman v Rivera*, 16 AD3d 667, 792 NYS2d 558 [2005]; *Power v Hupart*, 260 AD2d 458, 688 NYS2d 194 [1999]). If the operator of the moving vehicle cannot come forward with any evidence to rebut the inference of negligence, the driver of the lead vehicle may properly be awarded judgment as a matter of law (*Russ v Investech Sec.*, 6 AD3d 602, 775 NYS2d 867 [2004]; *Reid v Courtesy Bus Co.*, 234 AD2d 531, 651 NYS2d 612 [1996]). It is also well settled that a driver of a motor vehicle who is approaching another motor vehicle from the rear is bound to maintain a safe rate of speed and has a duty to keep control over his vehicle, as well as to exercise reasonable care to avoid colliding with the other vehicle (*Chapel v Meyer*, 306 AD2d 235, 762 NYS2d 95 [2003]; *Power v Hupart*, *supra*; *see also*, Vehicle and Traffic Law §1129 [a]).

Here, the deposition testimony of defendants Bharathan and Arthur conflicted with each other as to the happening of the accident. Moreover, there is an issue of fact as to whether the plaintiff's vehicle came to a stop or moving at the time of the impact. Under this circumstances, there is a question of fact as to whether the action of defendant Bharathan contributed to any injuries sustained by plaintiff (*see, Viggiano v Camara*, 250 AD2d 836, 673 NYS2d 714 [1998]). Thus, defendant Bharathan has failed to sustain the initial burden of establishing a prima facie entitlement to judgment as a matter of law. Accordingly, this branch of the motion by defendant Bharathan for summary judgment on the issue of liability is denied.

Defendant Bharathan also seek summary judgment on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d).

By their bill of particulars, plaintiffs allege that, as a result of the subject accident, plaintiff sustained serious injuries including herniated discs at C5-C6 and C6-C7; cervical radiculopathy; and cervicla spine sprain. In addition, plaintiff claims that, following the subject accident, she was confined to bed and home for approximately three weeks.

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 eighty days immediately following the occurrence of the injury or impairment."

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*, 96 NY2d 295, 727 NYS2c 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 a "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 Sys.*, 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]).

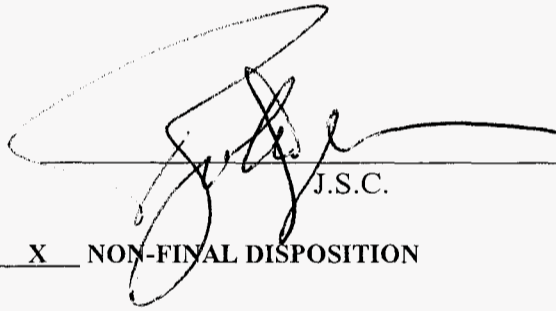
It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [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 Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*,

182 AD2d 268, 587 NYS2d 692 [1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [1990]).

Here, defendant Bharathan failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see, Nembhard v Delatorre*, 16 AD3d 390, 791 NYS2d 144 [2005]). On September 13, 2006, approximately two years and eight months after the subject accident, defendant Bharathan's sole examining orthopedist, Dr. Ordway, examined plaintiff, using certain orthopedic and neurologic tests. Dr. Ordway found that foraminal closure test was negative and that there was no spasm in her cervical spine. Although Dr. Ordway reported his findings with respect to the various ranges of motion of plaintiff's cervical spine and merely stated that "[plaintiff's] chin is easily brought to the chest," he failed to specify the degree of range of motion in forward flexion of plaintiff's cervical spine (*see, Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2006]). Moreover, Dr. Ordway also failed to compare his findings with a normal range of motion (*see, Baudillo v Pam Car & Truck Rental*, 23 AD3d 420, 803 NYS2d 922 [2005]; *Aronov v Leybovich*, 3 AD3d 511, 770 NYS2d 741 [2004]).

Thus, defendant Bharathan failed to establish, prima facie, her entitlement to judgment as a matter of law (*see, Goldman v Frankel*, 5 AD3d 729, 773 NYS2d 602 [2004]; *Michel v Graham, supra*). Accordingly, this branch of the motion by defendant Bharathan for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied. Under the circumstances, it is unnecessary to consider the sufficiency of plaintiffs' opposition papers (*see, Barrett v Jeannot*, 18 AD3d 679, 795 NYS2d 727 [2005]).

Dated: MAY 21 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION