Nebel v McCalla
2007 NY Slip Op 32146(U)
July 9, 2007
Supreme Court, Suffolk County
Docket Number: 0009728/2005
Judge: Jeffrey Arlen Spinner
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

COPY

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

JOY NEBEL and **WILLIAM NEBEL**, Plaintiffs,	**INDEX NO.:**	**2005-9728**
- against -	MOTION SEQ. NO.:	001 - MG
	ORIG. MOTION DATE:	11/14/06
RUTH McCALLA, TRAVIS GRINER and **BAKEMARK INGREDIENTS (EAST), INC,**	MOTION SEQ. NO.:	002 - MG
	ORIG. MOTION DATE:	03/07/07
Defendants.	FINAL SUBMIT DATE:	05/16/07

UPON the following papers numbered 1 to 63 read on this Motion:
- Defendant McCALLA's Motion (001) (Pages 1-11 & Exhibits A-E);
- Defendant GRINER's Opposition (Pages 12-17 & Exhibit A);
- Plaintiff's Opposition (Pages 18-22);
- Defendant McCALLA's Reply (Pages 23-28);
- Defendants GRINER & BAKEMARK's Motion (002) (Pages 29-45 & Exhibits A-E);
- Plaintiff's Opposition (Pages 46-56 & Exhibit A);
- Defendants GRINER & BAKEMARK's Reply (Pages 57-63);

it is,

ORDERED, that the application of Defendant McCALLA is hereby granted in all respects; and the application of Defendant GRINER is hereby granted in all respects.

Defendant McCALLA moves this Court (001) for an Order:

A. Pursuant to CPLR 3212, granting Summary Judgment to Defendant McCALLA, dismissing the Verified Complaint of Plaintiffs, on the ground that there are no triable issues of fact or law to be determined;
B. Dismissing any and all Cross-Claims asserted against Defendant McCALLA.

Defendant GRINER moves this Court (002) for an Order granting Summary Judgment, pursuant to CPLR 3212, dismissing the Complaint of Plaintiffs, pursuant to the threshold requirements of Insurance Law.

This action arises from claims to recover damages for personal injuries allegedly sustained by Plaintiff as the result of an automobile accident that occurred on November 15, 2004, when Plaintiff JOY NEBEL's vehicle was struck in the rear, while she was completely stopped at a red light, by Defendant McCALLA's vehicle, which had been completely stopped at said red light when it was struck by Defendant GRINER's vehicle. Defendant GRINER testified at his deposition that Defendant McCALLA's vehicle was stopped in front of him, that he had grabbed his map and glanced at it, tossed it to the seat, looked up and noticed Defendant McCALLA's vehicle a split second before striking it, and that striking it caused it to be pushed into the vehicle in front of it, Plaintiff JOY NEBEL's vehicle.

In order for the Court to grant such relief, it must clearly appear that there are no material issues of fact (***Sillman v Twentieth Century-Fox Film Corp***, 3 NY2d 395 [1957]). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Zuckerman v City of New York***, 49 NY2d 557, 404 NE2d 718 [1980]; ***Sillman v Twentieth Century-Fox Film Corp***, *supra*).

Once a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact is shown, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action (***Zuckerman v City of New York***, *supra*).

As to Defendant McCALLA's Motion (001) for Summary Judgement regarding triable issues of fact or law to be determined in a rear end collision, Defendant GRINER's Counsel argues that Plaintiff JOY NEBEL testified that Defendant McCALLA, in a roadside conversation after the accident, stated that she saw that Defendant GRINER was going to hit her, so she slammed on the gas to avoid the accident, hitting Plaintiff JOY NEBEL's vehicle, but same is inconsistent with the testimony of both Defendants as to the sequence of events that produced the accident.

It is well settled law that a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of liability with respect to the rearmost vehicle, imposing a duty of explanation on that operator to excuse the collision (*See:* ***Filippazzo v Santiago***, 277 AD2d 419 [2 Dept 2000]; ***Mendiolaza v Novinski***, 268 AD2d 462 [2 Dept 2000]; ***Young v City of New York***, 113 AD2d 833 [2 Dept 1985]; ***Starace v Oonexions***, 198 AD2d 493 [2 Dept 1993]; ***Dhamah v Richmond Co Amb Servc, Inc***, 279 AD2d 564 [2 Dept 2001]).

When a vehicle is struck in the rear, absent some excuse, it is negligence as a matter of law (*See,* ***Rich v O'Connor***, NYLJ 03-03-1995, p 34, c 2 [2 Dept]; ***Mead v Marino***, NYLJ 06-28-1994, p 31 c 1 [2 Dept]; ***Edney v MABSTOA***, 178 AD2d 398; ***DeAngelis v Kirschner***, 171 AD2d 593 [1 Dept 1991]; ***Crociata v Vasquez***, 168 AD2d 419; ***Cohen v Terranella***, 112 AD2d 264 [2 Dept 1985]; ***Carter v Castle Elec Contr***, 26 AD2d 83 [2 Dept 1966]). The occurrence of a rear end collision is sufficient to create a *prima facie* case of liability (***Crociata v Vasquez***, *supra*; ***Benyarko v Avis***, 162 AD2d 572 [2 Dept 1990]). Where it is indisputable that the first vehicle was struck in the rear by the second, even where it is alleged that said first vehicle stopped short, the Court has ruled that such speculation is insufficient to defeat a motion for summary judgment, and that a rear end collision is sufficient to create a *prima facie* case of liability (*See,* ***Levine v Taylor***, 268 AD2d 566). Any operator of a motor vehicle approaching another motor vehicle from the rear is responsible for maintaining a reasonably safe rate of speed and control over their vehicle, and to exercise reasonable care to avoid collision with the other vehicle (*See,* ***Bucceri v Frazer***, 297 AD2d 304 [2 Dept 2002]).

The assertion that Defendant GRINER told Plaintiff that Defendant McCALLA slammed on her gas just prior to being struck, because she feared being struck, standing starkly alone, does not create evidence that would support a claim of comparative negligence herein. Defendant GRINER's own testimony is conclusive, as to liability, and therefore this Motion must be granted, although of little effect, in light of the further determination of this Court herein..

As to Defendants GRINER & BAKEMARK's Motion (002) for Summary Judgment, regarding the issue of serious injury, Insurance Law § 5102(d) sets forth nine specific ways in which Plaintiff can establish that she suffered such an injury, as defined therein:

> " "Serious injury" means 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."

The term "significant", as it appears in the statute, has been defined to mean "something more than a minor limitation of use" (***Licari v Elliot***, 57 NY2d 230 [1982]). The Plaintiff must demonstrate not only the extent or degree of limitation, but also its duration (***Beckett v Conte***, 176 AD2d 774 [1991], *app. Den.* 79 NY2d 753). The duration of the injury must be more than "fleeting" (***Partlow v Meehan***, 155 AD2d 647 [1989], *lv. App. Dis.* 76 NY2d 770). The term "consequential" has been defined to mean important or significant (***Kordana v Pomelitto***, 121 AD2d 783 [1986], *app. Dis.* 68 NY2d 848). A "permanent loss" of use of a body organ, member, function or system must be total (***Oberly v Bangs Ambulance, Inc***, 96 NY2d 295 [2001]). In order to prove the extent or degree of physical limitation, an expert can designate a numeric percentage of a plaintiff's loss of range of motion or give a "qualitative assessment of a plaintiff's condition ...provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (***Toure v Avis Rent A Car Sys***, 98 NY2d 345 [2002]; *rearg den* ***Manzano v O'Neil***, 98 NY2d 728).

That leaves the ninth and final category with which to sustain her claim for serious injury: 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 their usual and customary daily activities for not less than 90 days during the 180 days immediately following occurrence of the injury or impairment. In order to prosecute a claim for serious injury pursuant to this category under Insurance Law § 5102(d), Plaintiff is required to show something more than slight curtailment of the material acts which constitute their usual and customary daily activities, and must support that claim with medical proof attributing such impairment to a 'medically determined' injury (***Giaddy v Eyler***, 79 NY2d 955 [1992] (Plaintiff must prove they were "curtailed from performing... usual activities to a great extent rather than some light curtailment"); ***Thompson v Abasi***, 788 NYS2d 48, 2005 NY App Div LEXIS 23 [1 Dpt 2005] ("When construing the statutory definition of a 90/180-day claim, the words 'substantially all' should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment"); ***Sigona v New York City Transit Authority***, 255 AD2d 231 [1 Dpt 1998]).

Plaintiff must demonstrate that the motor vehicle accident prevented her from performing a substantial part of her usual and customary daily routine for 90 out of the 180 days immediately following the accident (*see:* ***Pierre v Nanton***, 279 AD2d 621 [2 Dpt 2001] (ruling that although Plaintiff claimed he did not work for almost four months after the accident, there was no serious injury because he was not ordered by a doctor to stay home); ***Curry v Velez***; 243 AD2d 442 [2 Dpt 1997]. Furthermore, in order to sustain a claim for

serious injury, Plaintiff is required to establish "competent proof connecting the condition to the accident" (***Rose v Furgerson***, 281 AD2d 857 [3 Dpt 2001]; *see also* ***Ceglian v Chan***, 283 AD2d 536 [2 Dpt 2001] (holding that objective proof is required that the subject accident was the cause of the disc injuries).

As pointed out by Counsel for movants: Plaintiff JOY NEBEL was treated by Dr. Izhar Haque approximately four to five times, and by Dr. Cecily Anto three times for alleged accident related injuries, with no future appointments scheduled; that after an independent medical examination of said Plaintiff, Dr Yan Q. Sun, an orthopedic surgeon, concluded that there was no disability, no need for treatment, and Plaintiff was fully capable of performing activities of daily living independently; that after another independent medical examination of said Plaintiff, Dr. Edward Weiland, a board certified neurologist, concluded that there was no neurologic disability, and Plaintiff was able tp perform activities of daily living and continue gainful employment without restrictions. Additionally, the Court notes that the transcript of said Plaintiff's deposition reveals that she testified she sought physical therapy with Tracey Dolan a couple of times, missed no work and too it easy for a week or so.

Furthermore, Counsel for movants argues: that, in instances where Plaintiff has been involved in another accident, either before or after the incident from which serious injury is claimed, Plaintiff needs to establish that the subject accident was the proximate cause of the alleged injuries (*See:* ***Finkelstyn v Harris***, 280 AD2d 579 [2 Dept 2001]) (Plaintiff JOY NEBEL having testified that she was involved in a prior motor vehicle accident in 1998, and a slip and fall accident in 1999); and that based on her failure to establish a causal relationship between the subject accident and her alleged injuries, coupled with her expert's failure to even address or mention her pre-existing back and knee conditions, summary judgment is warranted in this matter (*See:* ***D'Alba v Oyong-Ae Choi***, 33 AD3d 650 [2 Dept 2003]; ***Montgomery v Pena***, 19 AD3d 288 [1 Dept 2005]; ***Franchini v Palmieri***, 1 NY3d 536 [2003]). This Court concurs.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the application of Defendant McCALLA (001) for an Order granting Summary Judgment dismissing Plaintiff's Complaint and all Cross-Claims asserted against her, on the grounds that there are no triable issues of fact or law to be determined, is hereby granted in all respects; and it is further

ORDERED, that the application of Defendants GRINER and BAKEMARK (002) for an Order granting Summary Judgment dismissing Plaintiff's Complaint ,pursuant to the threshold requirements of Insurance Law, is hereby granted in all respects, the Complaint herein is dismissed, and this action is disposed of; and it is further

ORDERED, that Counsel for Defendants GRINER and BAKEMARK is hereby directed to serve a copy of this order, with Notice of Entry, upon all other parties, upon the Calendar Clerk of this Court and upon the Suffolk County Clerk within twenty (20) days of the date this order is entered by the Suffolk County Clerk..

Dated: Riverhead, New York
July 9, 2007

HON. JEFFREY ARLEN SPINNER, J.S.C.

✓ FINAL DISPOSITION	NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

TO:

Baron & Pagluighi, Esqs
Attorneys for Plaintiffs
85 Main Street, Suite A
Cold Spring Harbor, New York 11724

Law Office of John P Humphreys
Attorneys for Defendant McCALLA
5 Huntington Quadrangle, Suite 102S
PO Box 9028
Melville, New York 11747

Loccisano & Larkin, Esqs
Attorneys for Defendant GRINER & BAKEMARK
150 Motor Parkway, Suite 405
Hauppauge, New York 11788-5108