Murray v Kalata
2007 NY Slip Op 32241(U)
July 17, 2007
Supreme Court, Suffolk County
Docket Number: 0001367/2005
Judge: Robert W. Doyle
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SHORT FORM ORDER

INDEX No. 05-1367
CAL. No. 06-02910-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 3/27/07
ADJ. DATE 6/8/07
Mot. Seq. # 001 - MG
002 - MD
003 - XMD

---X
BRIAN J. MURRAY,

Plaintiff,

- against -

CHRISTOPHER D. KALATA and
GREGORY J. DeBRUIN,

Defendants.
---X

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Upon the following papers numbered 1 to 65 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-8; 9-23 ; Notice of Cross Motion and supporting papers 24 - 51 ; Answering Affidavits and supporting papers 52 - 61 ; Replying Affidavits and supporting papers 62 - 65 ; Other ______; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that for the purposes of this determination the motion by plaintiff for partial summary judgment and the motion by defendant Kalata for summary judgment are consolidated and decided together with the cross motion by defendant DeBruin for summary judgment; and it is further

ORDERED that the motion by plaintiff for summary judgment in his favor on the issue of liability is granted; and it is further

ORDERED that the motion by defendant Kalata for summary judgment dismissing the complaint against him on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the cross motion by defendant DeBruin for summary judgment dismissing the complaint against him on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Brian Murray, as a result of two separate motor vehicle accidents. Plaintiff alleges that his vehicle was struck in the rear by a vehicle owned and operated by defendant Christopher Kalata on the Long Island Expressway between exits 51 and 52 on October 15, 2003. He also alleges that his vehicle was struck in the rear by a vehicle owned and operated by defendant Gregory DeBruin on the Long Island Expressway at or near exit 57 on October 22, 2003. Plaintiff underwent left shoulder surgery on February 27, 2004.

Plaintiff now moves for summary judgment in his favor against both defendants on the issue of liability on the ground that each defendant's vehicle rear-ended the plaintiff's vehicle when it was completely stopped. In support, plaintiff submits, *inter alia*, the pleadings and portions of the deposition testimony of defendants Kalata and DeBruin.

It is well settled that a prima facie case of liability is created when the operator of the moving vehicle rear-ends a stopped or stopping 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]). Moreover, vehicle stops that are foreseeable under the prevailing traffic conditions, even if sudden and frequent, are to be anticipated by the operator of the rear vehicle since he is under a duty to maintain a safe distance between his car and the preceding car (***Shamah v Richmond County Ambulance Serv.***, 279 AD2d 564, 718 NYS2d 287 [2001]).

At his examination before trial, defendant Kalata testified to the effect that he had been traveling in the westbound left lane of the Long Island Expressway in stop-and-go traffic. He testified that, after "we were at stop[,] we started to speed up" and that, because "traffic came to an abrupt stop," he could not stop in time. He also testified that he did not realize that the plaintiff's vehicle in front of him was stopped. Although defendant Kalata applied brakes and attempted to stop, he hit the plaintiff's vehicle.

Here, the adduced evidence indicates that, while the plaintiff's vehicle was stopped due to traffic in the Long Island Expressway, it was struck from the rear by the Kalata vehicle. Thus, the requisite prima facie case of negligence has been established and there is no material triable issue of fact as to the negligence of defendant Kalata regarding the October 15, 2003 accident. Although defendant Kalata avers, in opposition, that there is a question of fact as to whether he had adequate time and opportunity to bring his vehicle to stop, he failed to proffer sufficient evidence to rebut the inference of his own negligence and to raise a triable issue of fact (*see*, ***Nieves v JHH Transp.***, 40 AD3d 1060, 836 NYS2d 697 [2007]). Moreover, the adduced evidence indicates that nothing obstructed his view of the roadway. In any event, even if plaintiff did stop

suddenly, this fact, standing alone, is insufficient to rebut the presumption of negligence (***Russ v Investech Sec.***, *supra*; ***Leal v Wolff***, 224 AD2d 392, 638 NYS2d 110 [1996]). Defendant Kalata was under a duty to maintain a safe distance between his vehicle and the plaintiff's vehicle as well as anticipate foreseeable stops by the vehicle preceding his and his failure to do so, as well as his inability to put forth a sufficient non negligent explanation for the accident establishes his negligence as a matter of law (***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [1991]).

At his deposition, defendant DeBruin testified to the effect that, he had been traveling in the eastbound left lane of the Long Island Expressway in heavy stop-and-go traffic. When he first saw the plaintiff's vehicle, it was in front of him, and he was following the plaintiff's vehicle for minutes. Defendant DeBruin also testified that, when he "looked left at the HOV lane *** traffic was stopped and [he] didn't have time to stop before hitting."

Here, the adduced evidence indicates that, while the plaintiff's vehicle was stopped due to traffic in the Long Island Expressway, it was struck from the rear by the DeBruin vehicle. Thus, the requisite prima facie case of negligence has been established and there is no material triable issue of fact as to the negligence of defendant DeBruin regarding the October 22, 2003 accident. Defendant DeBruin, in opposition, failed to proffer sufficient evidence to rebut the inference of his own negligence and to raise a triable issue of fact (*see*, ***Nieves v JHH Transp.***, *supra*). It is undisputed that the plaintiff's vehicle was completely stopped when it was struck from the rear by the DeBruin vehicle. Moreover, the adduced evidence indicates that nothing obstructed his view of the roadway. In any event, even if plaintiff did stop suddenly, this fact, standing alone, is insufficient to rebut the presumption of negligence (***Russ v Investech Sec.***, *supra*; ***Leal v Wolff***, *supra*). Defendant DeBruin was under a duty to maintain a safe distance between his vehicle and the plaintiff's vehicle as well as anticipate foreseeable stops by the vehicle preceding his and his failure to do so, as well as his inability to put forth a sufficient non negligent explanation for the accident establishes his negligence as a matter of law (***Rebecchi v Whitmore***, *supra*).

Accordingly, plaintiff's motion for summary judgment in his favor against defendants Kalata and DeBruin on the issue of liability is granted. Plaintiff is directed to serve a copy of this order with notice of entry upon the Calendar Clerk of this Court. Upon such service, the Calendar Clerk is directed to place this matter on the Calendar Control Part Calendar for the next available date.

Defendant Kalata moves for summary judgment in his favor dismissing the complaint on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendant Kalata submits, *inter alia*,; the medical record of Stony Brook University Hospital, dated October 15, 2003 and October 22, 2003; the medical report dated November 5, 2003 of plaintiff's orthopedist, Dr. Kenneth Glass, based on an examination of plaintiff on October 31, 2003; the medical record dated February 27, 2004 of St. Catherine of Siena Medical Center; the medical report dated September 21, 2006 of no-fault carrier's orthopedist, Dr. Harold Kozinn; and the medical report dated September 21, 2006 of no-fault carrier's neurologist, Dr. C.M. Sharma.

This Court notes that defendant Kalata failed to submit the pleadings and a bill of particulars. Nevertheless, this Court has the authority to search the record and so considers plaintiff's bill of particulars submitted to support the cross motion by defendant DeBruin.

By his bill of particulars, plaintiff alleges that he sustained serious injuries as a result of the October 15, 2003 accident, including cervical and lumbosacral spine sprain/strain; left shoulder and left upper arm sprain/strain, impingement syndrome of the left shoulder; cervical and lumbar radiculopathy; pelvis and right hip sprain/strain; chronic impingement syndrome upon the supraspinatus muscle-tendon complex by the anterior-inferior aspect of the acromion process of the scapula and coraco-acromial ligament of the left shoulder; severe acromion bursitis of the left shoulder; and necessity for arthroscopic surgery of the left shoulder with left subacromial decompression release of coraco-acromial ligament bursectomy. In addition, plaintiff claims that he was confined to bed and home for approximately one week.

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 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 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 Eyler***, 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 Kalata failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see*, ***Cruz v Williams***, 34 AD3d 719, 825 NYS2d 510 [2006]; ***Nembhard v Delatorre***, 16 AD3d 390, 791NYS2d 144 [2005]). On September 21, 2006, approximately two years and eleven months after the October 15, 2003 accident, Dr. Kozinn examined plaintiff, using certain orthopedic and neurological tests including Lasegue test, Patrick's test and Straight Leg Raising test. All the test results were negative. Dr. Kozinn reported his findings with respect to the various ranges of motion of plaintiff's cervical and lumbosacral spine and shoulders and compared those

findings to the normal ranges of motion. He found that plaintiff had normal range of motion in her cervical and lumbosacral spine and shoulders and that there were no tenderness. Nevertheless, Dr. Kozinn failed to specify the degree of range of motion in rotation of plaintiff's cervical spine and extension of plaintiff's lumbosacral spine in support of his conclusion that plaintiff did not sustain a serious injury (*see*, ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2006]). On September 21, 2006, Dr. Sharma conducted a neurologic examination of plaintiff and opined that there are no causally related neurological lesions; there is no further need for neurological testing or treatment; and there is no neurological disability. Nevertheless, Dr. Sharma failed to discuss the range of motion of plaintiff's cervical and lumbar spine (*compare*, ***Kerzhner v N.Y. Ubu Taxi Corp.***, 17 AD3d 410, 792 NYS2d 622 [2005]).

Thus, defendant Kalata failed to establish, prima facie, his entitlement to judgment as a matter of law. Accordingly, his motion for summary judgment dismissing the complaint on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d) is denied. Under the circumstances, it is unnecessary to consider the sufficiency of plaintiff's opposition papers (*see*, ***Barrett v Jeannot***, 18 AD3d 679, 795 NYS2d 727 [2005]).

Defendant DeBruin cross-moves for summary judgment in his favor dismissing the complaint on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendant DeBruin submits, *inter alia*, the pleadings; a bill of particulars; the medical record dated February 27, 2004 of St. Catherine of Siena Medical Center, including the report of operation dated February 27, 2004 of plaintiff's treating surgeon, Dr. Kenneth Glass, based on the operation of plaintiff on the same date; the MRI report dated November 11, 2003 of plaintiff's left shoulder, taken by Dr. Steven Kuchta; two MRI reports of plaintiff's cervical and lumbar spine respectively, taken on November 12, 2003 by Dr. David Panasci; the affirmed report dated March 20, 2006 of defendant DeBruin's examining orthopedist, Dr. Arthur Bernhang, based on an examination of plaintiff on March 13, 2006; and the affirmed report dated March 15, 2006 of defendant DeBruin's examining neurologist, Dr. Richard Pearl, based on an examination of plaintiff on March 14, 2006.

By his bill of particulars, plaintiff alleges that he sustained serious injuries as a result of the October 22, 2003 accident. The injuries claimed in the bill of particulars as a result of the October 22, 2003 accident were identical to those alleged in the bill of particulars as a result of the October 15, 2003 accident.

Defendant DeBruin must demonstrate that plaintiff's injury was either not causally related to the October 22, 2003 accident or not serious within the meaning of Insurance Law § 5102 (d) (*see*, ***Browdame v Candura***, *supra*; ***Zavala v DeSantis***, 1 AD3d 354, 766 NYS2d 598 [2003]). Defendant DeBruin 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***, *supra*). The MRI report of plaintiff's left shoulder, taken on November 11, 2003, revealed that "there is slight chronic impingement syndrome upon the supraspinatus muscle-tendon complex by the anterior-inferior aspect of the acromion process of the scapula and coraco-acromial ligament." On February 27, 2004, Dr. Glass performed arthroscopic surgery on plaintiff's left shoulder. Dr. Glass stated in his surgical report that "[plaintiff] had impingement syndrome of the left shoulder with impingement from the coraco-acromial ligament and impingement from the acromion" and "there was also severe bursitis." In the surgery, a complete bursectomy was performed; a complete release of the coraco-acromial ligament was performed; a complete subacromial decompression was performed; and "all impingement was arthroscopically removed." If the left shoulder surgery were causally related to the

October 22, 2003 accident, the medical evidence as to his limited range of motion and the necessity of the surgery would be sufficient to establish a qualifying serious injury (*cf.* ***Files v Ken Goewey Dodge***, 33 AD3d 1109, 822 NYS2d 663 [2006]).

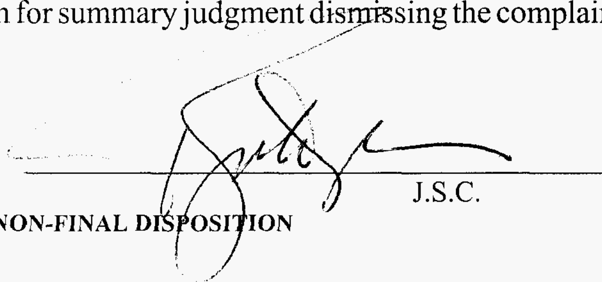
On March 14, 2006, approximately two years and five months after the October 22, 2003 accident, defendant DeBruin's examining neurologist, Dr. Pearl, examined plaintiff, using certain orthopedic and neurological tests including Babinski sign, Romberg test, Tinel's sign and Straight Leg Raising test. All the test results were negative. Dr. Pearl reported his findings with respect to the various ranges of motion of plaintiff's cervical and lumbar spine and compared those findings to the normal ranges of motion. He found that plaintiff had normal range of motion in her lumbar spine and that there were no spasm or tenderness. Nevertheless, Dr. Cohen failed to specify the degree of range of motion in lateral bending of plaintiff's cervical spine in support of his conclusion that plaintiff did not sustain a serious injury (*see*, ***Browdame v Candura***, *supra*). Dr. Pearl "defer[s] discussion of allegations involving the left shoulder to appropriate orthopedic consultants."

On March 13, 2006, defendant DeBruin's examining physician, Dr. Bernhang, examined plaintiff, using certain orthopedic and neurological tests, including Provocative test, Spurling's test, Hawkin's test, Napoleon's test, Hornblower's test, O'Brien's test, Yergason's test, Straight Leg Raising, Tinel's sign and FABER and FADIR test. All the test results were negative or normal, although O'Brien's test was positive. He reported his findings with respect to the various ranges of motion of plaintiff's cervical and lumbar spine and shoulders. Although Dr. Bernhang found that plaintiff had normal range of motion in the cervical spine, he also found range of motion restrictions when compared to normal range of motion with respect to plaintiff's shoulders: 120 degrees abduction (120 degrees normal), 115 degrees forward flexion (158 degrees normal), 80 degrees external rotation (90 degrees normal) and L2 degrees internal rotation (70 degrees normal). Moreover, Dr. Bernhang failed to provide objective test measurements for plaintiff's lumbar extension, flexion and rotation. Dr. Bernhang's report indicates that "[d]orsolumbar expansion with the knees extended is 11"; [plaintiff] can touch his toes with his fingertips; lateral flexion is to the proximal tibia." Dr. Bernhang indicates that he reviewed the record of arthroscopic surgery of the left shoulder performed on February 27, 2004 and that "a rear end collision could cause impingement syndrome in someone who had a pre-existing depressed acromion." Defendant DeBruin also failed to make a prima facie showing that plaintiff's injury was not causally related to the October 22, 2003 accident.

Therefore, defendant DeBruin failed to establish, prima facie, his entitlement to judgment as a matter of law, and thus, his cross motion for summary judgment dismissing the complaint is denied. Under the circumstances, it is unnecessary to consider the sufficiency of plaintiff's opposition papers (*see*, ***Barrett v Jeannot***, *supra*).

Accordingly, the motion by plaintiff for partial summary judgment is granted. The motion by defendant Kalata and the cross motion by defendant DeBruin for summary judgment dismissing the complaint are denied.

Dated: JUL 17 2007



J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION