Bermudez v Moeller

2007 NY Slip Op 32508(U)

August 13, 2007

Supreme Court, Richmond County

Docket Number: 0102013/2005

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND PART DCM 3

Index No. 102013/05
Motion No.: 3,4

LAURIE BERMUDEZ and HENRY BERMUDEZ

Plaintiffs

- against –

MEAGAN A. MOELLER and GERALD MOELLER

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of these motions for summary judgment

Papers	Numbered
Notice of Motion and Affidavits Annexed	1, 2
Answering Affidavits	3, 4
Replying Papers	5, 6
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on these Motions is as follows:

The plaintiff's motion seeking summary judgment on the issue of liability against the defendant is granted. The defendant's motion seeking summary judgment based on the plaintiff's failure to meet the serious injury threshold under the "No-Fault" Insurance Law §5102 is denied.

The plaintiff, LAURIE BERMUDEZ, was operating a motor vehicle owned by her husband, the plaintiff HENRY BERMUDEZ, on October 20, 2003.

The plaintiff states in her deposition that at approximately 2:10 p.m. she was stopped in the left lane of the northbound side of Hylan Boulevard, because a school bus in the opposite lane had on its flashing lights, indicating that it had stopped to discharge passengers.

The defendant, MEAGEN A. MOELLER, was operating a motor vehicle owned by her father, the defendant GERALD MOELLER. The defendants' vehicle was traveling north on

Hylan Boulevard in the left lane. The defendant operator stated in her deposition that she was initially unclear as to whether the plaintiff's car was actually stopped. When MEAGAN A. MOELLER realized that the plaintiff's car was not moving, she began to apply the brakes. The defendant's car struck the rear of the plaintiff's vehicle.

Summary judgment may be granted in automobile collision cases where no genuine issue of fact is raised. (*Opalek v. Oshrain*, 33 A.D.2d 521 [2d Dept 1969].)

Vehicle and Traffic Law Section 1129(a) states, "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." This section of the statute places the duty upon drivers to maintain adequate distance between their vehicle and those ahead of them. In the absence of an adequate, nonnegligent explanation, failure to do so constitutes negligence as a matter of law. (*Silberman v. Surrey Cadillac Limousine Service, Inc.* 109 A.D.2d 833 [2d Dept 1985].)

The Civil Practice Law and Rules (CPLR) Section 3212(b) states in part, "The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.

In her deposition, defendant admitted that the vehicle she was operating struck the rear of the defendant's vehicle. Aside from stating that she did not believe the plaintiff's vehicle was stopped initially, the defendant has offered no explanation or justification for striking the rear of the plaintiff's vehicle. The plaintiff's motion for summary judgment must be granted as to the issue of liability of the defendant.

The defendant also seeks summary judgment on the issue of whether a "serious injury" was sustained by the plaintiff, as defined in the Insurance Law §5102(d). The plaintiff claims that she has sustained various injuries to her lower back as a result of the accident of October 20, 2003. She claims that, as a result of these injuries, she is restricted in performing certain

activities that she engaged in before the accident, such as household chores, playing with her daughter, and performing the normal activities of a wife and mother. The defense asserts that the injuries to Mrs. Bermudez do not meet the threshold to be considered "serious injury" in accordance with Insurance Law §5102(d).

When a defendant moves for summary judgment claiming that the plaintiff has not sustained a serious injury, the defendant has the obligation to make out a *prima facie* case that would entitle them to summary judgment. (*Licari v. Elliot*, 57 N.Y.2d 230 [1982].) The defendant may submit affidavits or affirmations from a medical expert who examined the plaintiff and concluded that there are no objective medical findings supportive of the plaintiff's claim of serious injury. (*Grossman v. Wright*, 268 A.D.2d 79 [2d Dept 2000].)

On June 1, 2006, Dr. Gregory Montalbano, the defendant's independent medical examiner, performed an examination of the plaintiff, including the completion of a straight leg-raising test, which is considered an objective medical test. (*Kim v. Cohen*, 208 A.D.2d 807 [2d Dept 1994].) His findings indicate:

> "Range of motion is Flexion 70 degrees (normal 90 degrees); Extension 25 degrees (normal 30 degrees); Rotation right 35 degrees (normal 45 degrees); Rotation left 35 degrees (normal 45 degrees); Bending Lateral left 25 degrees (normal 45 degrees); Bending Lateral right 35 degrees (normal 45 degrees). Straight Leg Raising Test is negative bilaterally."

Dr. Montalbano's conclusion indicates that, while there was a possible acute injury consisting of an annular tear at the L5-S1 level, it has since resolved. He further concludes that any pain she may be experiencing at this point is likely due to pre-existing degenerative conditions.

In evaluating a summary judgment motion, the issue must be analyzed in a manner most favorable to the party opposing the motion. In this case, the plaintiff's physician, Dr. Suarez, indicates that the plaintiff's injuries consisted of: "L5-S1 invertibral disc with resolution of previously demonstrated annular tear, small left L3-4 foraminal disc protrusion, partially degenerated bulging L2-3 invertibral disc without focality and cervical and lumbar restrictions of motion." (Dr. Suarez aff. Page 6 line 23). Dr. Suarez states that Mrs. Bermudez has been

prevented from fully performing her normal activities due to the injuries sustained from the accident, including exercise, dancing, and her duties as a wife and mother. He is of the opinion that "within a reasonable degree of medical certainty that the trauma of Mrs. Bermudez's motor vehicle accident of October 20, 2003 caused the above noted injuries..." Dr. Suarez concludes that "Her work, exercise, dance, and physical limitations and inabilities were natural and expected medical consequences of her injuries, and were consistent with her complaints, physical examination, restrictions of motion, and MRI findings."

The plaintiff asserts that, due to the injuries sustained from this accident, she has suffered a "permanent consequential limitation of use of a body organ or member and/or impairment that prevented her from performing substantially all of the material acts that constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident."

The Appellate Division, Second Department has stated that "an affidavit from a doctor of osteopathy who stated that plaintiff incurred 'restricted motion [of the lumbar spine] by 10 degrees… after achieving maximum medical improvement'… demonstrated by competent medical evidence that she suffered a significant permanent limitation of a body function or system and the defendant's motion was thus properly denied." (*Schwartz v. New York City Housing Authority*, 229 A.D.2d 481 [2d Dept 1996].) They have also held that, when noted in the report of defendant's medical expert, decreased ranges of motion create a triable issue of fact as to whether the plaintiff sustained "significant limitation of use of a body function or system." (*Picotti v. Lewis*, 26 A.D.3d 319, 809 N.Y.S.2d 541 [2d Dept 2006].) The defendant's own expert report concluded that Mrs. Bermudez suffers from a decreased range of motion in all areas:

> "Range of motion is Flexion 70 degrees (normal 90 degrees); Extension 25 degrees (normal 30 degrees); Rotation right 35 degrees (normal 45 degrees); Rotation left 35 degrees (normal 45 degrees); Bending Lateral left 25 degrees (normal 45 degrees); Bending Lateral right 35 degrees (normal 45 degrees). Straight Leg Raising Test is negative bilaterally."

[* 5]

The Appellate Division, Second Department has also held that when substantiated with degrees of limitation of movement, the inability to perform simple daily activities such as household chores or engaging in family activities is sufficient to meet the threshold of serious injury under Insurance Law 5102(d). (*Gleissner v. LoPresti*, 135 A.D.2d 494 [2d Dept 1987].)

The plaintiff has documented with objective medical tests that she has sustained a serious injury by way of a significant limitation of a body function or system (Insurance Law 5102(d)). She has also demonstrated that as a result of the accident she was impaired from doing her normal household chores for at least 90 out of the immediate 180 days following the accident, in satisfaction of Insurance Law Section 5102(d).

Since there are issues of fact concerning the extent of the injuries sustained by the plaintiff, the defendant's motion for summary judgment is denied.

Accordingly, it is hereby:

ORDERED that the plaintiff's motion for summary judgment based on the liability of the defendants is granted; and it is further

ORDERED that the defendant's motion for summary judgment based upon the failure of the plaintiff to demonstrate a "serious injury" under the Insurance Law §5102(d) is denied; and it is further

ORDERED, that all parties return to DCM 3 at 9:30AM on **August 22, 2007** for a pre-trial conference.

ENTER,

DATED: August 13, 2007

____
Joseph J. Maltese
Justice of the Supreme Court

[* 6]