

**DeSabato v Ringold**

2007 NY Slip Op 32705(U)

August 23, 2007

Supreme Court, Suffolk County

Docket Number: 0006232/2005

Judge: Robert W. Doyle

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result of this accident, plaintiff DeSabato claims to have sustained personal injury.

The amended verified bill of particulars sets forth that as a result of this collision, plaintiff DeSabato sustained, inter alia, headaches, a disc bulge at C3-4, a herniated disc at C 4-5, diffuse disc bulging with osteophyte formation at C5-6, central disc herniation with impingement at C6-7 with left sided radiculopathy and loss of ROM 20-30% on forward flexion and 45% on lateral tilt, anterior subluxation of C4 on C5, exacerbation of degenerative disc disease of the lumbar and cervical spine with loss of ROM, left elbow sprain, right shoulder pain, and emotional distress, anxiety and depression from trauma and failure of plaintiff's condition to improve.

In motion (002) defendant Ringold seeks summary judgment on the serious injury threshold or, in the alternative, an order compelling plaintiff to comply with discovery demands. In support, defendant has submitted copies of the pleadings, amended bill of particulars, a copy of the transcript of the examination before trial of defendant, expert letters/reports of orthopedist Vartkes Khachadurian, M.D., neurologist Mathew M. Chacko, M.D., D.P.N. and radiologist Paul S. Needelman, M.D., copy of the note of issue dated February 21, 2007 and demands for authorizations served by defendant dated March 21, 2007.

Plaintiffs' cross motion (003), also submitted in opposition to motion (002), sets forth that on May 21, 2007 plaintiff provided defendant with HIPPA-compliant authorizations pursuant to defendant's demand, thus rendering academic that part of motion (002) wherein defendant requests an order compelling plaintiffs to comply with defendant's demand of March 21, 2007.

Accordingly, that part of motion (002) which seeks an order compelling plaintiffs to comply with defendant's discovery demand for authorizations is denied as moot.

This court therefore turns to defendant's motion for dismissal of the complaint, which asserts plaintiff has not sustained a serious injury pursuant to Insurance Law §5102(d).

Insurance Law §5102(d) provides in pertinent part that “ ‘[s]erious 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 as “something more than a minor limitation of use,” and the term “substantially all” has been construed to mean “that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (*Licari v Elliot*, 57 NY2d 230, 455 NYS2d 570).

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 Inc.*, 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 “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 Systems, Inc.*, 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 (*see, Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 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 [1<sup>st</sup> Dept 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]).

The report of Dr. Khachadurian, M.D., dated December 28, 2006, indicates he examined plaintiff on September 22, 2006 and was advised by plaintiff that as a result of the impact to the rear of plaintiff’s vehicle on October 14, 2004, he immediately felt pain in the lower back and upper back and was taken by ambulance to Central Suffolk Hospital where he was examined. Dr. Khachadurian indicates that thereafter plaintiff had acupuncture treatment but does not indicate the duration or frequency. Although he indicates plaintiff is not currently receiving physical therapy, he does not indicate the duration, frequency and type of therapy plaintiff received. He indicates plaintiff is currently taking Vicodin, Bextra and Darvocet, p.r.n., but does not state the reason for the same. At the time of the examination, plaintiff complained of pain in his neck with radiation to the left shoulder and left hand with numbness and pain in the lower back. Dr. Khachadurian states plaintiff works in construction and gives tennis instruction. Mr. DeSabato gave a history of right shoulder surgery and left knee surgery in the past and back injury.

Dr. Khachadurian indicates he reviewed the pleadings, amended particulars, various medical records from Dr. Neil Smith, M.D., MRI and Cat scan reports of the cervical spine, among other things. Upon examination of Mr. DeSabato’s lumbar spine, he noted a limitation in range of motion of forward flexion 70 degrees (normal 90 degrees), extension 20 degrees (normal 30 degrees) and right and left rotation 40 degrees (45 degrees normal). Examination of the cervical spine revealed a minimal decrease of cervical lordosis with limitation in range of motion of forward flexion 70 degrees (80 degrees normal), extension 60 degrees (normal 70 degrees), right and left tilt to 20 degrees (30 degrees normal).

Dr. Khachadurian does not comment on the MRI findings of the cervical or lumbar spine and diagnosed plaintiff with status post cervical strain, posttraumatic superimposed on reported degenerative disease of the spine with spinal stenosis and degenerative disc disease with no clinical evidence of herniated discs, radiculitis or radiculopathy; and lumbar sprain, posttraumatic, superimposed on degenerative disease with no clinical evidence of radiculitis or radiculopathy. He opined plaintiff no longer needs physical therapy or further orthopedic treatment, and there is no ongoing orthopedic disability related to the accident. He also opined plaintiff is capable of performing his usual work activities, unrestricted.

A letter/report dated September 22, 2006 from Dr. Chacko, a neurologist, indicated Mr. DeSabato was seen on that date for evaluation. Dr. Chacko indicates Mr. DeSabato is a 62-year-old gentleman with a history of being involved in a motor vehicle accident on October 14, 2004, when his vehicle was hit in the rear. Following the accident, he experienced upper back and lower neck pain for which he underwent physical therapy, chiropractic treatment and acupuncture. He continues with the acupuncture on an as-needed basis, usually one to four times a month, and uses Vicodin, Bextra and Darvocet for his pain. He gave a history of back injury from a motor vehicle accident five or six years ago and left shoulder, left knee and right shoulder injuries. He states his left hand and arm go numb at times.

Physical examination revealed limitation in the range of motion of the cervical spine on flexion, extension, lateral rotation and lateral flexion; however, Dr. Chacko states this is not an objective finding. No limitation in range of motion upon examination of the lumbar spine was found. He states there is a report by Dr. Smith that MRI of the cervical spine was consistent with slight anterior subluxation of C4-5 and shallow broad-based central disc herniation at C4-5 and mild disc bulge and osteophyte formation at C6-7. Dr. Chacko states there are no findings consistent with cervical radiculopathy, and he finds no objective evidence of any neurological sequelae attributable to the accident at the time of the examination. Dr. Chacko opines Mr. DeSabato is working in construction and as a tennis instructor and is capable of performing normal activities of daily living.

At his examination before trial, Mr. DeSabato testified he was employed in construction and as a professional tennis instructor. Prior to that he was a certified psychiatric social worker with a Master's Degree in social work. When the accident occurred, he felt an impact to the rear of his car and a second impact when his vehicle was pushed into the vehicle ahead of him. He believed he lost consciousness as he became aware of his surroundings when someone opened his car door.

He was taken by ambulance to Central Suffolk Hospital, where x-rays were performed on his neck and left shoulder. He thereafter received medical care and treatment at a Touch of Wellness. MRIs were ordered. He started physical therapy and continued through 2005, when, he stated, his insurance discontinued the treatment. He then performed exercise at home four nights a week. His treating doctor was Dr. Smith, whom he saw about every four to six weeks for about a year, and continues to see him occasionally for complaints of pain in his left shoulder and neck. In addition to recommending physical therapy, Dr. Smith ordered muscle relaxants and MRIs and sent him for epidurals, which helped relieve some of the pain in his neck and shoulder. He also saw a neurologist, who performed diagnostic testing and diagnosed him with carpal tunnel syndrome for which he was prescribed braces for both wrists, which he wore for about three or four months.

Mr. DeSabato testified to a previous accident in 2002 in which he sustained injury to his neck when his vehicle was hit by an ambulance. He treated for that neck injury for about one year with physical therapy. Thereafter, he did not experience further pain until this current accident. Now, he states, he has pain all the time, burning and sharp, worse at sometimes than other times, radiating to his shoulders, and for which he takes Mobic.

Mr. DeSabato testified that before the accident he was teaching tennis about thirty-five hours a week. After the accident he stayed home for a week, then taught tennis about twenty to twenty-five

hours a week and cut back to less strenuous lessons by teaching novices or beginners. He is no longer able to work in the same capacity he worked at Sport Time teaching tennis lessons as he could before the accident due to the pain in his neck. It is difficult for him to teach serving because it involves raising his arms above his head. Prior to the accident he was working as a contractor, but he was unable to work in contracting for the first five to six months following the accident. When he returned to contracting, he would occasionally hire someone to help him with the heavier manual labor. He testified that working with concrete or lifting bundles on a roof is very difficult for him. Also as a result of this accident, he has not been able to play competitive tennis tournaments. He played competitive tennis on a league two or three nights a week prior to this accident. He used to swim a lot and swims only infrequently now. It is a problem for him to do the physical things around the house that he used to do. Any work or activities above his head, such as lifting, are now limited since the accident.

Counsel for defendant has also submitted an unsigned letter addressed to counsel from Dr. Needelman, a radiologist, which letter is unsigned and is not in admissible form, and therefore has not been considered on this motion.

Based upon the foregoing, this court concludes that defendant has not demonstrated prima facie entitlement to summary judgment on the issue of serious injury.

Defendant's examining physicians did not examine plaintiff until almost two years after the accident and not during the statutory period of 180 days following the accident, thus rendering defendant physicians' affidavit insufficient to demonstrate entitlement to an order granting summary judgment on the issue of whether plaintiff was unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (*Blanchard v Wilcox*, 283 AD2d 821, 725 NYS2d 433 [3rd Dept 2001]). Additionally, defendant submitted deposition testimony wherein plaintiff testified he was out of work from his construction job for about five to six months following the accident and had to modify his teaching of tennis to beginner or novice players, requiring less strenuous exertion. Therefore, defendant has not demonstrated there are no factual issues concerning whether plaintiff was able to perform his usual and customary daily activities for a period in excess of 90 days during the 180 days following the accident.

Additionally, Dr. Chacko stated the report by Dr. Smith showed the MRI of the cervical spine was consistent with slight anterior subluxation of C4-5 and shallow broad-based central disc herniation at C4-5 and mild disc bulge and osteophyte formation at C6-7. Dr. Chacko did not dispute these findings and in fact found limitations in plaintiff's cervical range of motion upon examination, which Dr. Chacko stated, conclusively without explanation, was not an objective finding. However, disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (*Jankowsky v Smith*, 294 AD2d 540; 742 NYS2d 876; *see also, Bonilla v Bromfield*, 2002 NY Slip Op 50209U, 2002 NY Misc LEXIS 636 [2<sup>nd</sup> Dept 2002]). This gives rise to an additional factual issue to preclude summary judgment.

Accordingly, defendant's motion for summary judgment dismissing the complaint on the issue of serious injury is denied.

In motion (003), Dennis DeSabato seeks an order granting summary judgment in his favor on the issue of liability. In support, plaintiff has submitted, inter alia, a copy of the transcript of the examination before trial of defendant, Maureen Ringold.

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. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle and to exercise reasonable care to avoid colliding with the other vehicle (*Chepel v Meyers*, 306 AD2d 235, 762 NYS2d 95 [2<sup>nd</sup> Dept 2003]; *Power v Hupart*, 260 AD2d 458, 688 NYS2d 194 [2<sup>nd</sup> Dept 1999]; see also, Vehicle and Traffic Law § 1129[a]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation 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 and unavoidable skidding on a wet pavement or some other reasonable excuse (see, *Rainford v Han*, 18 AD3d 638, 795 NYS2d 645 [2<sup>nd</sup> Dept 2005]; *Thoman v Rivera*, 16 AD3d 667, 792 NYS2d 558 [2005]; *Power v Hupart, supra*).

Maureen Ringold testified she was involved in a motor vehicle accident on October 14, 2004, at which time she was driving one of the three vehicles involved in the accident. She was traveling westbound on County Road 58 in stop-and-go traffic, which she described as heavy. She states it was drizzling at the time. She stated she was traveling at whatever the speed limit was but slower where the accident occurred due to heavier traffic. She had stopped at a traffic light. There were several cars traveling in front of her between that light and the next traffic light where the accident occurred. She saw the brake lights of the car in front of her, so she applied her brakes. When she applied the brakes, she stated the front of her vehicle began to skid, but she did not know in which direction it skid. Her vehicle impacted the rear of the vehicle in front of her. She was traveling approximately ten miles an hour at the time of impact. She did not notice her car, or the car which she hit, move in any direction

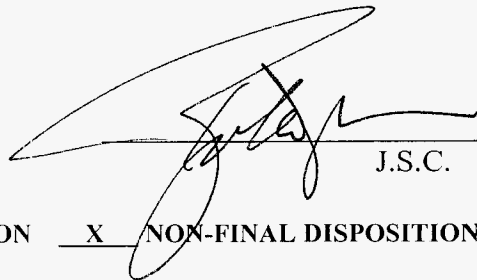
with the impact. She did not realize a third car was involved in the accident until they all pulled over.

Based upon the foregoing, it is determined plaintiffs have demonstrated prima facie entitlement to summary judgment on liability.

In opposing this motion, defendant Ringold has submitted only the affirmation of her counsel who points to defendant's deposition testimony that it had been drizzling at the time of the accident, that the road was damp and that her car skidded when she braked. Counsel contends that defendant has thus raised an issue of fact. Nevertheless, a rear end collision with a stationary vehicle creates a prima facie case of negligence, and it is not a sufficient defense to claim that the roadway was wet to rebut the presumption of negligence (*Crociata v Vasquez*, 168 AD2d 410, 562 NYS2d 536 [2<sup>nd</sup> Dept 1990]; *Mitchell v Gonzales*, 269 AD2d 250, 703 NYS2d 124 [1<sup>st</sup> Dept 2000]). A driver is expected to drive at a sufficiently safe speed and to maintain enough distance between himself and the cars ahead of him so as to avoid collision with stopped vehicles, taking into account the weather and road conditions (*Malone v Morillo*, 6 AD3d 324, 775 NYS2d 312 [1<sup>st</sup> Dept 2004]). Therefore, defendant has not come forward with a nonnegligent explanation for the occurrence. Nor has defendant come forward with any testimony indicating the distance between her vehicle and plaintiff's vehicle immediately prior to the accident to demonstrate she was following at a reasonable distance. Nor has she offered any testimony as to whether the vehicle in front of her was stopped or moving at the time of the accident or the color of the traffic light. She did not testify or offer an affidavit stating she saw the brake lights come on in plaintiff's vehicle and then applied her brakes. Instead, she testified that she saw the brake lights of the car in front, which indicated she had to stop. The Court concludes that defendant has not come forward with a reasonable non-negligent explanation to excuse defendant's striking plaintiff's vehicle in the rear.

Accordingly, motion (003) which seeks summary judgment to plaintiffs on liability is granted.

Dated:     AUG 23 2007    

  
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J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION