Nicolosi v Wynn

2007 NY Slip Op 32787(U)

August 20, 2007

Supreme Court, New York County

Docket Number: 0113459/2005

Judge: Deborah A. Kaplan

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.

SCANNED ON 9/5/2007

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

GREGORY NICOLOSI

INDEX NO. 113459/05

MOTION DATE 6-13-07

- v -

MOTION SEQ. NO. 001

RHODA WYNN and GRACE WYNN

MOTION CAL. NO. 72

The following papers, numbered 1 to 4, were read on this motion by defendants plaintiffs for summary judgment on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102(d), and cross-motion by plaintiff for partial summary judgment on the issue of liability.

	PAPERS NUMBERED
Notice of Motion – Affidavits — Exhibits	1
Notice of Cross Motion – Affidavits — Exhibits	2
Answering Affidavits — Exhibits (Memo)	3
Affirmation in Reply	4

FILED
SEP 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ■ Yes ☐ No

In this action to recover damages for injuries arising from a motor vehicle accident, the undisputed facts establish that on the evening of June 9, 2005, a vehicle driven by defendant Rhoda Wynn and owned by defendant Grace Wynn struck the rear of a vehicle driven by the plaintiff Gregory Nicolisi at a stop sign on an entrance ramp to the Gowanus Expressway. The plaintiff, a bank manager, went to work the next day but claims to have suffered various injuries to his back, neck and left knee, including herniated discs. He underwent a six-week course of chiropractic treatment and claims to still suffer pain which limits his activities.

In his Bill of Particulars, the plaintiff claims that his injuries constitute a "permanent loss or use of a body organ, member, function or system," a"significant limitation of use of a body function or system," and a "medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constitute his usual and

customary daily activities for at least 90 days during the180 days immediately following the occurrence of the injury or impairment", three categories of "serious injury" as defined by Insurance Law § 5102(d).

There are two motions now before the court: (1) defendants' motion for summary judgment dismissing the complaint pursuant to CPLR 3212 on the ground that the plaintiff did not sustain a "serious injury" as defined by Insurance Law §5102(d), and (2) plaintiff's cross-motion for partial summary judgment on the issue of liability.

(1) Motion for Summary Judgment on the Issue of "Serious Injury"

To prevail on a motion for summary judgment, the moving party must produce evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. See Kosson v Algaze, 84 NY2d 1019 (1995); Alvarez v Prospect Hospital, 68 NY2d 320 (1986);Winegrad v New York Univ. Med Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980). Where, as here, a defendant seeks summary judgment on the threshold "serious injury" issue under the "No-Fault" Law (Insurance Law § 5102[d]), he or she bears the initial burden of establishing the absence of a "serious injury" as a matter of law.

If the moving party makes the requisite showing, the burden then shifts to the opposing party to come forward with proof in admissible form to raise a triable issue of fact requiring a trial. See Kosson v Algaze, supra; Alvarez v Prospect Hospital, supra; Winegrad v New York Univ. Med Ctr., supra; Zuckerman v City of New York, supra. The party opposing a motion for summary judgment on the threshold "serious injury" issue must come forward with objective proof of his or her injury to raise a triable issue. See Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Dufel v Green, 84 NY2d 795 (1995). Subjective complaints alone are not sufficient. See Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, 79 NY2d 955 (1992).

It is also settled law that a herniated or bulging disc may constitute a serious injury within the meaning of Insurance Law §5102(d). See Pommels v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., 22 AD3d 326 (1st Dept. 2005); Arjona v Calcano, 7 AD3d 279 (1st Dept. 2004). Furthermore , a CT

scan or MRI may constitute objective evidence to support subjective complaints. (see Arjona v Calcano, supra; Lesser v Smart Cab Corp., 283 AD2d 273 [1st Dept. 2001)], so long as the plaintiff offers "some objective evidence of the extent or degree of the alleged physical limitations, and their duration, resulting from the disc injury." Arjona v Calcano, supra; see Pommels v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., supra; Simms v APA Truck Leasing Corp., 14 AD3d 322 (1st Dept. 2005).

Where, as here, the plaintiff claims serious injury under the "90/180" category of Insurance Law § 5102(d), he or she must (1) demonstrate that his or her usual activities were curtailed during the requisite time period and (2) submit competent credible evidence based on objective medical findings of a medically determined injury or impairment which caused the alleged limitations in plaintiff's daily activities. Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Gaddy v Eyler, 79 NY2d 955 (1992).

In deciding a summary judgment motion, the court must bear in mind that issue finding rather than issue determination is the key. See Sillman vTwentieth Century Fox Film Corp., 3 NY2d 395 (1957). Since summary judgment is a drastic remedy which deprives a litigant of his or her day in court, the evidence adduced on the motion must be liberally construed in the light most favorable to the opposing party. See Kesselman v Lever House Restaurant, 29 AD3d 302 (1st Dept. 2006); Goldman v Metropolitan Life Ins. Co., 13 AD3d 289 (1st Dept. 2004).

In this case, the defendants have met their initial burden of establishing, as a matter of law, that the plaintiff did not sustain a "serious injury" under any of the three categories of the statutory definition he alleges. The defendants' proof includes an affirmed report of Dr. Robert Goldberg, a doctor of osteopathic medicine, who examined the plaintiff and reviewed his medical records on November 27, 2006, found all normal functioning and full range of motion in his neck, spine, knees and legs. Dr. Goldberg concluded that the plaintiff suffered only a bruise of his left knee, from which he has recovered, and that "there is no objective evidence to indicate that [plaintiff] sustained any nerve root, herniated discs or any permanent injury. The MRI findings of the spine noted in reports are degenerative, pre-existing and are of long standing."

In opposition, the plaintiff submits, inter alia, an affirmation of his treating

physician, Dr. Leonard Langman, a board-certified neurologist. Dr. Langman first examined the plaintiff on June 16, 2005, and last examined him on March 13, 2007. It was Dr. Langman's opinion that as a result of this accident, the plaintiff suffered significant, i.e. 25% to 67%, range of motion deficits in his cervical and lumbar spines which were causally related to the subject accident and which are permanent. Also submitted are Dr. Langmans' treatment records in which he sets forth the objective tests he employed and the test results.

The plaintiff also submits an affirmation of Dr. Mark Novick, a board certified radiologist, who reviewed and interpreted MRIs of the plaintiffs cervical spine, lumbar spine, and left knee, taken in June 2005. It was Dr. Novick's opinion that the MRIs showed "degenerative discs with bulging annular fibrosis and left herniated nuclei polposus at C5-6 and C6-7, and bulging annulus fibrosis at C3-4" in the cervical spine, "degenerative joint and disc disease at L4-5 and L5-S1, right lateral herniated nucleus pulposus at L4-5, and central subligamentous herniated nucleus pulposus at L5-S1" in the lumbar spine and "small bone contusions in the medial femoralcondyle and medial tibial plateau, minimal joint diffusion' in the left knee.

The plaintiff also submitted his deposition testimony in which he states, inter alia, that he missed no work as a result of this accident, but had to cut back on the number of customers he walked to see each day and he could no longer perform household chores, or sit or drive for as long as he could before the accident. He also testified that he was involved in a car accident in 1991 where he injured his neck, back and knee.

The plaintiff's proof presents a triable issue of fact as to whether he sustained a"significant limitation of use of a body function or system," but does not raise any triable issues as to the categories of "permanent loss or use of a body organ, member, function or system," or the "90/180" category.

Accordingly, the motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is granted to the extent that the complaint is dismissed insofar as it asserts a claim under the "permanent loss or use of a body organ, member, function or system" category or"90/180" category of serious injury as defined by Insurance Law § 5102(d), and the motion is otherwise denied.

(2) Cross-Motion for SummaryJudgment on the Issue of Liability

The plaintiff cross-moves for partial summary judgment on the issue of liability as against both defendants. That motion must be granted since the plaintiff has demonstrated, by proof in admissible form, the absence of any triable issues of fact and the right to judgment as a matter of law. See Kosson v Algaze, supra; Alvarez v Prospect Hospital, supra; Winegrad v New York Univ. Med Ctr.,supra; Zuckerman v City of New York, supra.

It is well settled that the driver of a motor vehicle is expected to drive at a safe rate of speed, taking into account weather and road conditions, and to maintain a safe distance from the vehicle in front of him (see Vehicle and Traffic Law §§1129[a];1180[a]; Malone v Morillo, 6 AD3d 324 (1st Dept. 2004); Mitchell v Gonzalez, 269 AD2d 250 [1st Dept. 2000]). "[T]his rule imposes on [drivers] a duty to be aware of traffic conditions, including vehicle stoppages." Johnson v Philips, 261 AD2d 269, 271 (1st Dept. 1999). Thus, a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver who strikes the vehicle in front, unless the operator of the rear vehicle can come forth with an adequate, non-negligent explanation for the collision. See Somers v Condlin, 39 AD3d 289 (1st Dept. 2007); Francisco v Schoepfer, 30 AD3d 275 (1st Dept. 2006); Garcia v Bakemark Ingredients (East) Inc., 19 AD3d 224 (1st Dept. 2005); Grimes-Carrion v Carroll, 13 AD3d 125 (1st Dept. 2004);Johnson v Phillips, supra.

The defendants correctly argue that a non-negligent explanation maybe made out, in some circumstances, by showing that the front vehicle stopped short. See Sawhey v Bailey, 13 AD3d 203 (1st Dept. 2004); Martin v Pullafico, 272 AD2d 305 (2nd Dept. 2000); Corrado v DeJesus, 264 AD2d 577 (1st Dept. 1999). However, the First Department has repeatedly held that "an assertion that the lead vehicle 'stopped suddenly' is generally insufficient to rebut the presumption of negligence on the part of the offending vehicle." Francisco v Schoepfer, supra at 276; see Ferguson v Honda Lease Trust, 34 AD3d 356 (1st Dept. 2006); Woodley v Ramirez, 25 AD3d 451 (1st Dept. 2006).

Here, the plaintiff has submitted his own affidavit as well as complete transcripts of his and defendant Wynn's deposition testimony. The plaintiff's

testimony and affidavit establish that he stopped his car about five feet before the stop sign waiting to get onto the highway, and was stopped for about 30 seconds before he was struck from behind by the defendants' car. He further testified that when they got out of their cars, Rhoda Wynn told him she did not see him.

The defendants' papers in opposition consist only of an attorney's affirmation, with excerpts from the deposition transcripts of plaintiff and defendant Rhoda Wynn as exhibits. Of course, affirmations of attorneys who claim no personal knowledge of the accident are without probative value on motions such as these. See Zuckerman v City of New York, supra at 563; Johannsen v Rudolph, 34 AD3d 338 (1st Dept. 2006); Diaz v New York City Transit Authority.,12 AD3d 316 (1st Dept. 2004). They may, however, serve as vehicles for submitting documentary evidence or other proof in admissible form as an attachment. See Alvarez v Prospect Hospital, supra at 325; Zuckerman v City of New York, supra at 563. However, the proof appended to counsel's affirmation does not support the defendants' claim that the plaintiff stopped suddenly. Defendant Wynn testified that she was slowly following the plaintiff's vehicle up the inclined and curved ramp for a few minutes in stop-and-go traffic. She estimated that there were a about twelve cars on the ramp and her top rate of speed was ten miles per hour. Just before the accident, she removed her foot from the brake and accelerated slightly to move or "roll" her car up the stop sign. Wynn admitted that when she struck the plaintiff's vehicle, it was stopped. She added that it had been moving slowly but then stopped "quickly" when it reached the stop sign.

Contrary to the defendants' assertion, Rhona Wynn's testimony does not establish a non-negligent explanation for the collision to rebut the presumption of negligence. She failed to provide testimony or any other proof to show why she could not have avoided the collision. As observed by the plaintiff, since she was admittedly traveling at such a slow rate of speed in stop-and go traffic on an entrance ramp leading up to a stop sign, which requires all vehicles to stop, logic dictates that defendant Rhoda Wynn was following too closely behind the plaintiff's car. As such, she was negligent. See Malone v Morillo, supra; Mitchell v Gonzalez, supra; Johnson v Philips, supra.

Although the issue is not raised by the parties, the court notes that the deposition transcripts submitted by both parties are unsigned and it is not established that they were forwarded to the deposed party for review as required

by CPLR 3116. See McDonald v Mauss, 38 AD3d 727 (2nd Dept. 2007); Reilly v Newireen Associates, 303 AD2d 214 (1st Dept. 2003). In an event, even if the transcripts are not in admissible form and the plaintiff's affidavit, alone, is considered, he would still be entitled to summary judgment on the issue of liability.

Accordingly, the plaintiff's cross-motion for summary judgment on the issue of liability is granted and, in light of the disposition of the defendants' motion for summary judgment, the matter shall be set down for a trial on the issue of damages in regard to the remaining causes of action of the complaint.

For these reasons and upon the foregoing papers, it is,

ORDERED that the motion by defendants for summary judgment dismissing the complaint on the ground that plaintiff did not sustain "serious injury" as defined by Insurance Law § 5102(d) is granted to the extent that the complaint is dismissed insofar as it asserts a claim under the "permanent loss or use of a body organ, member, function or system" category or the "90/180" category of serious injury as defined by Insurance Law § 5102(d), and the motion is otherwise denied; and it is further,

ORDERED that the cross-motion by the plaintiff for partial summary judgment on the issue of liability is granted, and it is further,

ORDERED that the parties shall appear for a pre-trial conference on October 2, 2007, at 9:30 a.m. at Part 22, 80 Centre Street, Room 136.

Dated: August 20, 2007

FILED
SEP 05 2007
COUNTY CLERK'S OFFICE
NEW YORK

Deborah A. Kaplan
DEBORAH A. KAPLAN
J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**