

Wildman v Woo Chon Foods Enters.

2007 NY Slip Op 33088(U)

September 7, 2007

Supreme Court, New York County

Docket Number: 0123724/2002

Judge: Deborah A. Kaplan

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

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

KAREN SUE WILDMAN

INDEX NO. 123724/02

- v -

MOTION DATE _____

MOTION SEQ. NO. 005
~~103/004~~

WOO CHON FOODS ENTERPRISES,
YON SUK CHOI and ANAMA PARES

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

FILED
PAPERS NUMBERED _____
SEP 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

The motion of defendants Woo Chon Foods Enterprise and Yon Suk Choi for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d) is denied, and the cross-motion of defendant Anama Pares for summary judgment on the same ground and on the issue of liability is granted to the extent that it seeks summary judgment on the issue of liability, dismissing the complaint and all cross-claims against that defendant, in accordance with the attached Decision.

This constitutes the Decision and Order of the Court.

Dated: September 7, 2007

Deborah Kaplan

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

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

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : IAS PART 22

-----x
KAREN SUE WILDMAN,

Plaintiff,

Index No. 123724/02

- against -

WOO CHON FOODS ENTERPRISES,
YON SUK CHOI, and ANAMA PARES,

Defendants.
-----x

HON. DEBORAH KAPLAN, J.:

This is an action to recover damages for personal injuries allegedly sustained in a pedestrian/motor vehicle accident wherein the plaintiff was struck by a vehicle owned and operated by defendant Anama Pares as she was crossing Madison Avenue in the crosswalk at the intersection of East 35th Street in Manhattan at approximately 1:00 p.m. on September 6, 2001. Pares was stopped at a red light at the intersection with a right turn signal on, intending to turn right onto Madison Avenue. When the light changed, Pares began to make a right turn onto Madison Avenue and then stopped before the crosswalk to allow the plaintiff to cross in front of her. After a few seconds, Pares' vehicle was struck in the rear by a vehicle operated by defendant Choi and owned by defendant Woo Chon Food Enterprises, which was proceeding west on East 35th Street with the green light. The impact propelled Pares' vehicle into the plaintiff, injuring her.

There are two motions now before the court. (1) Defendants Woo Chon Foods Enterprises and Yon Suk Choi move, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d). (2) Defendant Anama Blitzer Pares cross-moves for summary judgment on the same ground and on the issue of liability.

By orders dated April 26, 2005 and October 5, 2005, this Court (Tingling, J.) granted the motion and cross motion on default. However, by order entered January 26, 2007, this Court (Tingling, J.), *inter alia*, granted plaintiff's motion to vacate the prior orders and restore the motion and cross motion to the calendar. As such, the merits of the summary judgment motions are addressed herein.

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(1) Motion and Cross-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).

In deciding a summary judgment motion, the court must bear in mind that issue finding rather than issue determination is the key. See Sillman v Twentieth Century Fox Film Corp., 3 NY2d 395 (1957). Furthermore, 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).

Insurance Law § 5104(a) precludes any "right of recovery for non-economic loss, except in the case of "serious injury". Insurance Law § 5102(d) defines "serious injury", in pertinent part, as:

personal injury which results in ...a fracture; ...; a permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or medically determined injury or impairment of a nonpermanent 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.

It is incumbent upon the court to decide in the first instance whether a plaintiff has made out a prima facie case of serious injury sufficient to satisfy the statutory standards. See Licari v Elliott, 57 NY2d 230, 235 (1982). The "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries." Toure v Avis Rent A Car Sys., 98 NY2d 345, 350 (2002), quoting Dufel v Green, 84 NY2d 795, 798 (1995).

As such, 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 an 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. In threshold "serious injury" cases, subjective complaints alone are not sufficient. See Toure v Avis Rent A Car Systems, supra; Gaddy v Eyer, 79 NY2d 955 (1992). Thus, the party opposing a motion for summary judgment on the "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, supra; Dufel v Green, supra.

Here, plaintiff claims that as a result of the accident, she sustained the following injuries: right wrist fracture; right posterolateral disc protrusion; left paracentral disc protrusion; left posterolateral degenerative disc complex; back and shoulder injury; injuries to the hip, leg, and buttock on the right side; shooting pains down right leg; bruises, contusions, and abrasions; weakness and loss of sensation; loss of mobility; numbness; and continuous pain and muscle spasms down right side of body (Bill of Particulars, Not of Cross Mot, Exh B, p. 4). Plaintiff also claims that she was partially disabled for one and one-half years after the accident, and that she was confined to a bed at home for 22 days after the accident (*id.*). She argues that the injuries she sustained were "serious," within the meaning of Insurance Law § 5102(d), in that they resulted in a fracture; permanent consequential limitation of use of a body organ or member; and injury under the "90/180" category.

To substantiate her claim of serious injury, plaintiff offers, *inter alia*, a copy of the transcript of her deposition, as well as summary reports from Dr. Richard Rho, her primary care orthopedic physician. At her deposition, held on September 24, 2003, plaintiff testified, *inter alia*, that she injured her right hand, right hip, right leg, right foot, and lower back in the subject accident (Wildman EBT, Not of Cross Mot, Exh C, p. 8); that she was taken by ambulance from the scene of the accident to the emergency room at St. Vincent's Medical Center (*id.* at 10, 11); that at the hospital, xrays were taken of her right hand and the upper part of her right leg (*id.* at 12); and that an attending physician told her

that the xray of her right wrist revealed a hairline fracture (*id.* at 13). Plaintiff also testified that she received a soft cast, which extended from her right hand to below her right elbow, and ice for swelling and bruises (*id.*). She further stated that she was discharged from the emergency the same day (*id.* at 14). In addition, plaintiff testified that she was unable to walk, and that she was confined to her apartment, taking prescription painkillers for approximately 10 days after the accident (*id.* at 17,18). She also stated that she could only walk "very slowly," with the use of a cane, for approximately three months after the accident (*id.* at 22).

In a Summary Report, dated April 12, 2006, Dr. Richard Rho states, *inter alia*, that he began treating plaintiff on September 18, 2001; that plaintiff complained of neck, low back, and right arm/wrist pain after being struck by a motor vehicle on September 5, 2001; and that

X-rays of the right wrist on 11/3/2001 were normal. MRI of the cervical spine on 11/3/2001 revealed disc protrusion and a degenerative disc/osteophyte complex at the C5-6 level. MRI of the lumbar spine on 11/3/2001 revealed a moderately sized right L5-S1 disc bulge with right L5 nerve root compression.

(Rhos Summary Report, Wildman Affid, Exh A).

Dr. Rho also notes that plaintiff was treated for a hairline fracture of the right ankle with a cast as a result of a fall in May 2005 (*id.*). Dr. Rho further states that although he cannot within a degree of medical certainty say that plaintiff's cervical disc bulge and osteophyte complex at C5,6 was direct result of the alleged accident, he can, within a degree of medical certainty, directly relate her L5-S1 disc bulge and right knee bone contusion to the accident (*id.*).

In another Summary Report, dated January 12, 2005, Dr. Rho states:

[Plaintiff's] injuries include a right knee bone contusion, and L5-S1 disc protrusion with a right L5 nerve root compression, and a right ankle injury with loose bone bodies. Her treatments have included antiinflammatory medications, opioids, physical therapy and epidural steroid injections. Her disc and ankle injury is permanent. She will require

symptomatic treatments in the future to include medications, physical therapy, epidural injections and possibly surgery. It is my medical opinion that the injuries were as a direct result of her accident.

(Rho Summary Report, Wildman Affid, Exh B).

The report of an independent medical examination, conducted on November 3, 2003, by Howard M. Baruch, M.D., an orthopedic surgeon, on behalf of defendants, states, in part:

Physical examination of the right ankle-foot demonstrated objective findings [including decreased range of motion]. Physical examination of the cervical spine and lumbar spine demonstrated no objective findings. Claimant expressed extensive subjective complaints. There is no orthopedic disability of cervical spine, no orthopedic disability of lumbar spine, and partial-mild orthopedic disability of right ankle-foot. The claimant prognosis is good. She can continue to work on regular duty which she is presently tolerating [X-ray] report of the right [wrist] dated 11/3/02 reveals no sign of fracture. The claimant presented today with no complaints of pain and no history of injury with respect to her right wrist. Medical records provided for my review do no mention any right wrist fracture

(Baruch Summary Report, Not of Mot, Exh E).

In addition, after reviewing plaintiff's November 3, 2001 cervical and lumbar spine MRI films at defendants' request, Stephen W. Lastig, M.D. of Crossland Medical Review Services, Inc., prepared a report of his study of the MRI of plaintiff's cervical and lumbar spines, stating in the Summary sections, in part:

MRI STUDY OF THE CERVICAL SPINE

There is unequivocal evidence of multilevel degenerative disc disease and multilevel disc desiccation as well as disc space narrowing at the C4-C5 through C6-C7 levels. In my opinion,

the described disc pathology at C4-C5 and C5-C6 is degenerative in origin and therefore unrelated to the accident of 9/6/01.

The left-sided uncinata osteophyte formation and osteophytic ridging indicates the presence of a long-standing degenerative hypertrophic bony process, which in my opinion preexists the accident of 9/6/01, which occurred only two months prior to this imaging study.

The precise etiology of the focal left paracentral disc herniation at the C6-C7 level cannot be determined on the basis of this single imaging study. There is no evidence of cord deformity at this level.

MRI STUDY OF THE LUMBAR SPINE

There is unequivocal evidence of degenerative disc disease with both disc space narrowing and disc desiccation of the L5-S1 level. Disc space narrowing and disc desiccation are the hallmarks of degenerative disc disease.

In my opinion, the right lateral disc protrusion described at the L5-S1 level is most likely degenerative in origin. Reports in the orthopedic and radiologic literature have indicated that it is not uncommon for asymptomatic individuals to demonstrate annular bulges and/or protrusions in the lumbar spine

(Lastig Report, Not of Mot, Exh F).

Upon review of these submissions, the Court concludes that the motion and cross-motion for summary judgment based on plaintiff's failure to establish "serious injury" within the meaning of Insurance Law § 5102(d) must be denied. Plaintiff's claims of a right wrist fracture and injury under the "90/18" category are clearly and unequivocally refuted by the defendants' proof. However, the proof, in particular the Baruch Summary Report, sufficiently substantiates plaintiff's claim of limitation of use of her right ankle so as to preclude summary judgment on the issue of serious injury.

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

Pares argues that she is entitled to summary judgment dismissing the complaint and all cross-claims against her on the issue of liability since her vehicle was struck from behind after it came to a stop to allow plaintiff to cross the street.

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 or her. 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 Conklin, 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. 2006); Grimes-Carrion v Carroll, 13 AD3d 126 (1st Dept. 2004); Johnson v Phillips, supra.

The proof submitted by Pares includes her deposition testimony and affidavit stating that she stopped at a red traffic light at the intersection and, when it turned green, she proceeded to turn right onto Madison Avenue and saw the plaintiff walking toward her in the crosswalk. Pares states further that claims she stopped partly through the turn before the crosswalk and was stopped for about ten seconds in the intersection when she was struck in the rear by Choi. This proof is sufficient to make out a prima facie case of negligence on the part of defendants Woo Chon Foods and Choi. Moreover, the assertion of the plaintiff and those defendants that the Choi vehicle struck the Pares vehicle after the latter came to a sudden stop is insufficient to raise a triable issue of fact. 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); Figueroa v Luna, 281 AD2d 204 (1st Dept. 2001). The court notes that Choi testified at her deposition that she was traveling behind Pares' car on 35th Street, noticed the green traffic

light on Madison Avenue while two or three car lengths away, saw the car in front of Pares proceeded straight on 35th Street across Madison Avenue and saw Pares' car turn right , with her right turn signal on, and then stop at the crosswalk. Nonetheless, Choi was unable to stop her vehicle in time or otherwise avoid the collision.

Since defendants Woo Chon Foods and Choi have failed to come forward with an adequate non-negligent explanation for striking Pares' stopped vehicle, they are negligent as a matter of law, and Pares is entitled to summary judgment dismissing the complaint and all crossclaims against her.

Accordingly, it is

ORDERED that the motion by defendants Woo Chon Foods Enterprises and Yon Suk Choi for summary judgment on the issue of "serious injury" is denied; and it is further

ORDERED that the cross motion of defendant Anama Pares for summary judgment is granted to the extent that it seeks summary judgment on the issue of liability, and the motion is otherwise denied, and the complaint is hereby severed and dismissed as against defendant Anama Pares, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue.

Dated: September 7, 2007

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