

Dialto v Mirabito

2007 NY Slip Op 33213(U)

October 2, 2007

Supreme Court, Suffolk County

Docket Number: 0030041/2004

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 30041/2004
MOTION DATE: 05/10/2007

-----X
DOMINICK DIALTO,

Plaintiff,

-against-

MOT. NO.: 001 MD
002 MD
003 MG
004 MG
005 MG

JANET MIRABITO and ALEJANDRO RUIZ,

Defendants.
-----X

PLAINTIFF'S ATTORNEY:
LAW OFFICE OF CARL MALTESE
1050 West Jericho Turnpike
Smithtown, New York 11787

DEFENDANTS' ATTORNEYS:

BAXTER & SMITH, P.C.
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Atty. For Deft. Alejandro Ruiz
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Jericho, New York 11753

RUSSO & APOZNANSKI
By: Gerard L. Mulhall, RN, Esq.
Attys. For Deft. Janet Mirabito
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Westbury, New York 11590

Upon the following papers numbered 1 to 7 read on this motion and cross-motions for summary judgment: Notice of Motion and Affirmation 1 and supporting papers; Notice of Cross-motion and Affirmation in Support 2 and supporting papers; Notice of Motion 3 and supporting papers; Notice of Cross-motion 4 and supporting papers; Affirmation in Opposition to cross-motion & Reply Affirmation 5 and supporting papers; Notice of Cross-motion and Affirmation 6 and supporting papers; Affirmation in Opposition 7; it is

ORDERED that the following motions and cross-motions are consolidated for purposes of this decision and order and, as so consolidated, are determined as follows:

ORDERED that the motion (motion sequence no. 001) of defendant ALEJANDRO RUIZ for an order pursuant to CPLR R. 3212 granting summary judgment in favor of the defendant and dismissing plaintiff's complaint and any and all cross-claims against him on the ground that plaintiff has not sustained a "serious injury" as defined under Insurance Law §5102(d) is denied; and it is further

ORDERED that the cross-motion (motion sequence no. 002) of defendant JANET MIRABITO for an order pursuant to CPLR R. 3212 granting summary judgment in favor of the defendant and dismissing plaintiff's complaint and any and all cross-claims against her on the ground that plaintiff has not sustained a "serious injury" as defined under Insurance Law §5102(d) is denied; and it is further

ORDERED that the motion (motion sequence no. 003) of defendant JANET MIRABITO for an order pursuant to CPLR R. 3212 dismissing the complaint on the ground that the defendant's vehicle was stopped when it was struck in the rear is granted; and it is further

ORDERED that the cross-motion (motion sequence no. 004) of plaintiff DOMINICK DIALTO for an order pursuant to CPLR §3025 permitting plaintiff to serve an amended bill of particulars and denying defendants' motions for summary judgment is granted; and it is further

ORDERED that the cross-motion (motion sequence no. 005) of plaintiff DOMINICK DIALTO for an order pursuant to CPLR R. 3212 granting plaintiff partial summary judgment against defendant ALEJANDRO RUIZ on the issue of liability is granted.

The instant personal injury action arose out of a multi-vehicle accident that occurred on May 6, 2003 in which plaintiff DOMINICK DIALTO allegedly sustained serious injuries, including lumbar disc bulges, cervical disc herniations, cervical radiculopathy, and right elbow ulnar nerve contusion with compression syndrome. Plaintiff, a carpenter, alleges that he was unable to work for nearly three months following the accident. Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102(d). (The cross-motion of defendant MIRABITO relies on the medical proof and other evidence submitted in support of the motion of co-defendant RUIZ.) Defendant JANET MIRABITO and plaintiff also move/cross-move for summary judgment/partial summary judgment on the issue of liability for the happening of the accident. Because the threshold "serious injury" issue is potentially dispositive of this action, the Court will first consider defendants' motions for summary judgment dismissing plaintiff's claims on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102(d) in the accident that occurred on May 6, 2003.

Plaintiff was examined by defendants' expert orthopedist and neurologist on September 21, 2005 and February 27, 2006, respectively. Plaintiff's continued physical complaints of neck and lower back pain and numbness in two fingers of the right hand were noted. On physical examination by the orthopedic expert plaintiff was found to have a full range of motion of the cervical and lumbar spine. No spasm, atrophy or tenderness of the cervical spine muscles, paravertebral muscles or spinous process was noted. No tenderness to palpation or paraspinal spasm was noted on physical examination of the lumbar spine, and the straight-leg raising and Lasegue tests were negative. A positive Tinel's sign was noted with respect to the right elbow; range of motion was normal. The neurologic expert reported a negative Tinel's sign at the elbows, and reported reduced ranges of motion of the lumbar spine of 25/30 for lateral flexion, and of the cervical spine of 70/80 for range of motion to the left and right. Defendants' experts reported essentially normal orthopedic and neurological examinations, and concluded that plaintiff had sustained resolved cervical and lumbar sprain/derangement and right elbow ulnar nerve neuropathy. The radiologist who reviewed plaintiff's cervical MRI films reported straightening of the cervical curvature possibly related to muscle spasm, but found no disc bulges or herniations. Although the orthopedic expert did not review plaintiff's cervical MRI report, which reflected herniated discs (the record were reviewed by defendants' neurologist), defendants' experts found no objective medical evidence of limitation of movement, disability or permanence and no need for further treatment. Defendants' submissions thus establish, *prima*

facie, that plaintiff did not sustain a “serious injury” in the accident on May 6, 2003. The burden has thus shifted to plaintiff to submit proof that he did sustain a causally related serious injury. *Gaddy v. Eyles*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992).

In opposition to the motion and cross-motion, plaintiff has submitted the affidavits of his treating chiropractor, Dr. John Scelfo, along with the affirmed MRI reports of plaintiff’s cervical and lumbar spines and the affirmation of David J. Panasci, M.D., who independently reviewed plaintiff’s cervical MRI films. The narrative report of Dr. Scelfo reflects plaintiff’s initial complaints of severe headaches, neck pain into both arms, and lower back pain into his right leg. Upon physical examination of plaintiff, Dr. Scelfo noted tenderness with associated muscle spasm of the cervical and lumbar spines on digital palpation, and positive straight-leg-raising, Soto Hall, advancement, foramen compression, and Kemp’s tests. Dr. Scelfo also conducted range of motion studies with a protractor that revealed specifically quantified reduced ranges of motion of the cervical and lumbar spines.

Dr. Scelfo re-evaluated plaintiff on January 12, 2004 and noted his continued complaints of lower back pain shooting into his right lower extremity. Dr. Scelfo reported positive straight-leg-raising, Soto Hall, Kemp’s and advancement tests with respect to the lumbar spine. Examination of the cervical spine resulted in positive Jackson and foramen compression tests. Range of motion studies conducted with a protractor reflected specifically quantified reduced ranges of motion of the cervical and lumbar spines. Dr. Scelfo diagnosed cervical herniated disc at C6-C7 (apparently predicated on the cervical MRI report, sworn to by Elizabeth P. Maltin, M.D., on January 25, 2007), lumbar subluxation complex at L5-S1, and intermittent cervical paravertebral muscle spasm. Dr. Scelfo, who was still treating plaintiff on an ongoing basis at the time of plaintiff’s deposition in August 2005, re-examined plaintiff on March 16, 2007, and reported the following positive orthopedic/neurologic tests: straight-leg-raising, Soto Hall, Kemp’s test, foramen compression test, and cervical shoulder depression test. Range of motion studies performed on March 16, 2007 reflected specifically quantified reduced range of motion of the cervical and lumbar spines, with the most pronounced limitations occurring on cervical extension (25/50), cervical rotation to the left (55/80), cervical rotation to the right (50/80), and cervical lateral flexion to the left (20/40). Dr. Scelfo noted plaintiff’s continuing complaints of neck pain associated with intermittent headaches, and lower back pain to a lesser degree. Dr. Scelfo diagnosed cervical herniated disc at C6-C7, cervical subluxation complex at C3-C4-C6-C7, lumbar subluxation complex at L5-S1, intermittent lumbar paravertebral muscle spasm, and intermittent cervical cranial encephalgia. Dr. Scelfo concluded within a reasonable degree of chiropractic certainty that the foregoing complaints and restrictions in ranges of motion were causally related to plaintiff’s accident, and that plaintiff’s inability to improve more than four years after the accident indicates that plaintiff’s injuries are permanent.

The affirmation of Dr. Panasci, who reviewed plaintiff’s cervical MRI films, reported a straightening of the cervical lordosis, which he stated can be seen in patients with muscle spasm. He reported a right-sided disc herniation at C5-6 extending into the neural foramen which is compressing the right C6 nerve root. He identified a smaller right-sided disc herniation at C6-7 without spinal cord or nerve root compression, as well as a small left-sided ridge at C3-4 without spinal cord or nerve root compression. Plaintiff’s submissions, which reflect a cervical disc herniation and a causally related significant limitation of motion of plaintiff’s cervical spine, thus

raise a question of fact as to whether plaintiff suffered a serious injury. *Vance v. Li*, 241 A.D.2d 547, 664 N.Y.S.2d 725 (2d Dept. 1997); *Lombardi v. Hochfeld*, 240 A.D.2d 711, 660 N.Y.S.2d 987 (2d Dept. 1997). In light of the foregoing, the defendants' motion and cross-motion for summary judgment (motion sequence nos. 001 and 002) are denied.

Plaintiff's motion for leave to amend the bill of particulars previously served on defendant RUIZ is granted (motion sequence no. 004). The submissions reflect that the failure to include a response that alleges in what respect plaintiff sustained a serious injury (although plaintiff enumerated in great detail the specific injuries he allegedly sustained) was inadvertent, and there is no showing of prejudice to defendant, who obtained plaintiff's medical records and deposed plaintiff as to the extent and nature of his injuries.

As to the motions of defendant MIRABITO and plaintiff regarding liability (motion sequence nos. 003 and 005), the submissions reflect that the accident occurred when a vehicle driver by defendant RUIZ struck the vehicle driven by third-party defendant MARK CHO,¹ then struck the MIRABITO vehicle, which was stopped in traffic, propelling the MIRABITO vehicle into plaintiff's vehicle. It is well established that a rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the following driver and imposes a duty to proffer a non-negligent explanation of how the accident occurred. *Dewar v. Padilla*, 305 A.D.2d 629, 760 N.Y.S.2d 203 (2d Dept. 2003). "If the operator of the offending 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." *McGregor v. Manzo*, 295 A.D.2d 487, 744 N.Y.S.2d 467 (2d Dept. 2002). The submissions establish, *prima facie*, the liability of defendant RUIZ for the happening of the accident, and the absence of any liability on the part of defendant MIRABITO. The opposition of defendant RUIZ consists only of the affirmation of defendant's attorney, who does not have personal knowledge of the facts, and fails to raise a triable issue. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). Accordingly, plaintiff is granted summary judgment on the issue of liability only as to defendant RUIZ; and defendant MIRABITO is granted summary judgment dismissing the complaint and any cross-claims.

Plaintiff is directed to serve a copy of this order, with notice of entry thereof, on all other parties.

Dated: October 2, 2007

HON. PAUL J. BAISLEY, JR.

J.S.C.

¹ The submissions, and the Court's records, reflect that the third-party action against Mr. Cho has been discontinued.