

Dieguez v Olicker

2007 NY Slip Op 33939(U)

November 21, 2007

Supreme Court, Queens County

Docket Number: 0006162/2006

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14
Justice

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HERBERT DIEGUEZ,	No. 6162/06
Plaintiff,	Motion
-against-	Date September 18, 2007
RITA OLICKER,	Motion
	Cal. No. 11
Defendant.	Motion
-----	Seq. No. 2

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Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained on November 8, 2004 due to a motor vehicle accident on Crocheron Avenue, in the County of Queens, City and State of New York.

Defendant moves for an order pursuant to CPLR 3212 granting summary judgment in her favor on the grounds of defendant's lack of liability and that plaintiff has not sustained a serious injury as defined in Insurance Law 5102(d).

Contentions of the Parties

Defendant asserts that she is not liable for the accident because she was lawfully proceeding with the right of way on Crocheron Avenue when plaintiff, without warning or signaling, attempted to enter the travel lane from the parking lane and hit defendant's motor vehicle. Plaintiff's violation of VTL § 1128 and failure to see defendant's vehicle are the sole proximate causes of the accident.

Defendant submits her deposition testimony. She

testified that she had turned onto Crocheron Avenue at the intersection of 166th Street. Crocheron Avenue which was a two-way street with parking on each side of the roadway. She had been traveling for about 50 feet and there was a bus about a half a block behind her. She was looking straight ahead. She did not see the other car before the accident happened. She did not see the other car in the bus stop or in a parked position. The right passenger front fender of her car and the driver's front fender of the other car were damaged. She had been going about 10 miles per hour and described the impact as a heavy jolt.

Defendant also submits the deposition testimony of plaintiff. He testified that he was parked on Crocheron Avenue about 10 feet in front of the bus stop. There were cars parked ahead of him. He did not see the other vehicle at any time before the accident. He was pulling out of his parked position when the collision occurred. The driver's side door of his car came into contact with the other vehicle. His vehicle was more than half way out of the parking position. Prior to moving his vehicle, he had looked in his side view mirror to observe traffic conditions. He looked into the mirror two times and on the second time, he saw a bus coming about a block away. About six seconds elapsed from the time that he looked into his mirror for the second time until the time of the accident. He described the impact as heavy and stated that defendant was speeding a lot and coming very fast.

Defendant argues that the testimony makes clear that defendant was proceeding straight on Crocheron Avenue with the right of way when plaintiff pulled out of a parking space in violation of VTL § 1128. Plaintiff only looked in his side view mirror two times and never looked over his shoulder to check for traffic.

Defendant also argues that the complaint should be dismissed as plaintiff did not sustain a serious injury. Plaintiff's bill of particulars alleges that he sustained a cervical bulge at C5-6 with disiccation, lumbosacral derangement and LCL sprain. Plaintiff's deposition testimony shows that he is currently employed full time as a porter of an apartment building doing maintenance and cleaning including garbage collecting, vacuuming, clearing snow and cleaning elevators and the basement. His job duties are the same as before the accident. He did not miss any time from work. At the hospital, plaintiff only complained about his left eye and he was discharged the same

day. He only sought further medical attention two weeks later and stopped treatment after four weeks. He couldn't recall the last time that he had any medical care for the injuries alleged. He is limited in walking a lot and running and can't go grocery shopping or lift the hand truck with a lot of garbage.

Defendant submits the affirmed report of Dr. Alan J. Zimmerman, an orthopedic surgeon, who examined plaintiff on January 17, 2007. As to the cervical spine and lumbar spine, he found no tenderness or spasm; full range of motion with specified results within normal ranges; and negative results on all objective tests performed. There was tenderness of the left patella with range of motion of both knees within specified normal limits. He reviewed the MRI of the left knee which showed an ACL sprain. The MRI of the cervical spine showed a disc bulge "which is of no clinical significance." He diagnosed lumbar sprain, left knee contusion resolved and no evidence of cervical injury or carpal tunnel syndrome.

Dr. Charles Bagely, a neurologist, states in his affirmed report that he examined plaintiff on January 17, 2007. All range of motion testing of the cervical spine and lumbar spine produced specified degrees within normal limits without apparent pain or discomfort. Straight leg raising was negative and specified tests were normal. He found plaintiff was not neurologically disabled; and a normal neurovascular status and had made a good recovery.

Plaintiff opposes the motion and asserts that he had the right of way and that defendant did not exercise due care in attempting to avoid his vehicle. He was already out of his parking spot when defendant's car hit his car as he testified that he was more than halfway out of the spot. He stated that defendant was speeding a lot - she was coming very fast. Plaintiff argues that defendant was likely in violation of VTL § 1662-(a) and passed the speed limit.

As to serious injury, plaintiff submits an unsigned and unaffirmed report of a recent examination by Dr. Maria S. Narvedo-Rivera; unaffirmed reports by radiologists and nerve test result reports; and unaffirmed reports by Dr. Narvedo-Rivera with respect to prior examinations. Plaintiff's affidavit states that he was treated by Dr. Narvedo-Rivera via physical therapy, acupuncture, massage and electrical stimulation for his neck, lower back and cervical spine. He continues to suffer from constant pain in his wrists and

arms; and lower, upper and middle back. He is unable to run or walk for long periods of time and cannot lift heavy bags. He has limitations in turning his head and bending and cannot stand for long periods of time.

In reply, defendant asserts that plaintiff merely speculates that defendant was speeding when it is clear that plaintiff's sudden pulling out of the parking lane into the travel lane without seeing defendant's approaching car was the proximate cause of the accident. Plaintiff admitted that he was pulling out when the impact occurred and he had only looked twice in his side view mirror. The impact occurred six seconds after his last look. As to threshold, defendant's counsel asserts that he only received an unsigned faxed version of the plaintiff's opposition papers which did not contain proof of a recent examination. In any event, the reports submitted are not in admissible form and are not sufficient to defeat the motion.

Decision of the Court

The motion by defendant is granted.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank, 100 NY2d 72 at 81.

In the instant case, as to liability, defendant has established her entitlement to judgment as a matter of law. The deposition testimony of plaintiff and defendant shows that defendant had the right of way on Crocheron Avenue when plaintiff pulled out of to his parking spot. If one accepts plaintiff's version as true, he proceeded into the traffic lane without properly determining what was approaching him in violation of VTL § 1128(a). Defendant had the right of way and was entitled to anticipate that plaintiff would obey the traffic rules which required him to yield. Jacino v. Sugerman, 10 AD3d 593; Spivak v. Erickson, 40 AD3d 962. Plaintiff's assertion that defendant was speeding is mere speculation. Defendant testified at her deposition that at the time of the accident she was traveling at about ten miles per hour and the road surface was dry. Plaintiff's

characterization that defendant was speeding could not have been based upon personal knowledge or observation since he did not see the vehicle prior to the impact. Jacino v. Sugerman, supra at 594. Therefore, dismissal of the complaint is warranted based upon the lack of liability of the defendant.

With respect to the serious injury threshold issue, defendant sustained her burden of establishing her entitlement to judgment as a matter of law. Defendant submitted affirmed reports of an orthopedic surgeon and a neurologist who examined plaintiff and found there to be no orthopedic or neurological disability based upon the injuries sustained in the subject accident. The examining doctors performed objective tests including range of motion tests which resulted in specified findings within normal limits or produced negative results. In opposition to the motion, the papers submitted by plaintiff, other than plaintiff's own self-serving affidavit, were not affirmed. As such evidence was not in admissible form, it is insufficient to warrant a denial of the motion. Malave v. Basikov, 2007 WL 3317793.

Accordingly, the motion by defendant is granted.

Dated: November 21, 2007

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HON. DAVID ELLIOT