

Johnson v County of Suffolk

2007 NY Slip Op 33971(U)

November 19, 2007

Supreme Court, Suffolk County

Docket Number: 0013880/2004

Judge: Robert W. Doyle

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vehicle. Causes of action sounding in negligence were asserted by George Johnson and Richard Johnson, with a derivative claim on behalf of Annette Johnson, spouse of George Johnson. Miguel Vasquez was the operator of a bus owned by the County of Suffolk, which bus struck the vehicle, owned by On Time Auto Parts and operated by Michael Toscano, in the rear causing that vehicle to cross over into oncoming traffic striking the Johnson vehicle.

Defendants, On Time Auto Parts, LLC and Michael Toscano, in motion (004), previously sought an order granting summary judgment on the issue of liability and on the issue that plaintiffs failed to sustain a serious injury as defined by Insurance Law §5102. That motion was granted to the moving defendants on the issue of liability and the complaint and cross claims were dismissed as asserted against On Time Auto Parts and Michael Toscano. As to the issue of whether or not plaintiffs sustained serious injury, that part of their motion was rendered academic in that the complaint and cross claims were dismissed against them and accordingly denied.

In motion (005), defendants, the County of Suffolk and Miguel Vasquez, previously sought an order granting summary judgment on the issue of liability and that plaintiffs failed to sustain a serious injury as defined by Insurance Law §5102. That motion was denied. On the issue of liability, it was determined that defendants failed to come forward with a non-negligent explanation for striking the Toscano vehicle in the rear. On the issue of serious injury, it was determined by this court that defendants failed to demonstrate prima facie entitlement to summary judgment. The County of Suffolk and Miguel Vasquez now seek reargument and renewal of the motion on the issues of liability and serious injury.

Pursuant to CPLR 2221(d)(2,) a motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion. It is a basic principle that a movant on reargument must show that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision (*Bolos v Staten Island Hosp.*, 217 AD2d 643, 629 NYS2d 809 [2nd Dept 1995]). A motion to reargue is not to be used as a means in which an unsuccessful party is permitted to argue again the same issues previously decided (*Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 588 NYS2d 8 [1st Dept 1984]). Nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted (*Giovanniello v Carolona Wholesale Office Machine Co., Inc.*, 29 AD3d 737, 815 NYS2d 248 [2nd Dept 2006]).

Pursuant to CPLR 2221(d)(3), a motion for leave to reargue shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. Plaintiffs have provided a copy of this order with notice of entry which was served by defendants On Time Auto Parts and Michael Toscano on August 7, 2007. This motion was served August 9, 2007. It is therefore determined that the instant motion to reargue is timely.

The County of Suffolk and defendant Vasquez argue they established that the On Time Auto Parts, LLC vehicle, operated by Michael Toscano, lacked brake lights, and therefore, reargument should be granted on liability dismissing the complaint due to mistake of fact by this court. Defendants On Time Auto Parts and Michael Toscano, and plaintiffs have submitted opposition.

Based upon the foregoing assertion, this court grants reargument to the moving defendants on the issue of liability.

On the issue of liability, defendant Miguel Vasquez clearly testified that when he first saw the station wagon it was at the traffic light about fifteen or twenty feet away. The light was green and the station wagon was stopped. He stated the stopped station wagon did not move prior to the impact. Vasquez testified that when he first saw the stopped station wagon, his foot was on the gas a little bit. He put his hand on the horn and moved the power steering on the right side. He then struck the rear of the station wagon. He stated he couldn't see very good because of heavy snow. He was driving about fifteen to twenty miles per hour. He testified he did not see the brake light on the station wagon. However, although defendant Vasquez did not see the brake light on, he stated he saw the vehicle was stopped when he first saw it and that it did not move prior to the impact. In that defendant Vasquez saw the car was stopped at the light when he first saw it, Vasquez has failed to come forward with a reasonable explanation of non-negligence for striking the Toscano vehicle in the rear. Additionally, defendant Vasquez did not offer any admissible evidence to support any claim that the brake lights were not working. Co-defendant, in opposing the motion, argues defendant Vasquez did not state at the scene of the accident that the brake light was not on when he saw the stopped car, and further argues that no traffic violations were issued to Michael Toscano for not having operational brake lights.

Accordingly, this court adheres to its prior decision and order of June 7, 2007 which denied summary judgment on the issue of liability in that defendants County of Suffolk and Miguel Vasquez failed to come forward with a non-negligent excuse to explain the happening of the accident.

Turning to that part of defendants' motion for reargument on the issue of serious injury, the County of Suffolk further argues that plaintiff George Johnson did not sustain a hairline fracture of the left fibula or the odontoid process and those injuries were not asserted in the bill of particulars. Therefore, a mistake of fact has been made by the court. The County of Suffolk also asserts that plaintiffs did not suffer a serious injury, that the court made mistakes on findings of fact as to proximate cause and serious injury as to the claimed injuries, and therefore reargument should be granted on the issue of serious injury.

Based upon the foregoing, reargument is granted on the issue of serious injury.

It is determined by this court that as a result of this accident, plaintiff George Johnson is claiming in his Bill of Particulars that he sustained a herniated disc at C3-4 with partial effacement of the ventral CSF space; cervical spine sprain; disc bulge at L4-5; lumbosacral spine sprain; left shoulder sprain; post traumatic headaches; post concussion syndrome with memory problems; forgetfulness and confusion; and left leg hematoma.

As a result of this accident, plaintiff Richard Johnson is claiming in his Bill of Particulars that he sustained herniated discs at L2-3, L3-4, L4-5 and L5-S1; lumbosacral spine sprain with neuritis/radiculitis; lumbago, cervicalgia, and post traumatic headaches.

This court determined, *inter alia*, there were factual issues concerning whether plaintiff George Johnson sustained a fracture of the left fibula or the odontoid process. However, defendant argues that plaintiff has not claimed the same in the bill of particulars (*see*, CPLR 3042). Plaintiff does not seek to amend the bill of particulars to add those possible injuries and does not claim they are related to the accident. Therefore, it is determined that the County of Suffolk and Miguel Vasquez have demonstrated prima facie entitlement to summary judgment against plaintiff on the issue that plaintiff did not sustain a fracture of the left fibula and a fracture of the odontoid process as a result of the accident.

Accordingly, that part of defendants' motion which seeks summary judgment on the issue of whether plaintiff sustained a fracture of the left fibula or the odontoid process is granted against plaintiff George Johnson and the prior order of June 7, 2007 is deemed amended to reflect the same.

Turning to the remainder of defendants' contentions, this court determined in its prior decision of June 7, 2007 that the County of Suffolk and Miguel Vasquez did not establish prima facie entitlement to an order granting summary judgment on the issue of serious injury. The court found that defendants submitted evidence that the MRI of George Johnson revealed herniation of the cervical disc at C3-4 with partial effacement of the ventral CSF space, and that the MRI of Richard Johnson's lumbar spine revealed four herniated lumbar discs. None of defendants' examining physicians disputed the findings of the MRI and Cat scan films in their reports with regard to these herniations. Therefore, defendants did not demonstrate prima facie that plaintiffs did not sustain these injuries consisting of herniated discs as set forth.

Dr. DaSilva treated plaintiff for injuries claimed in this accident. Defendants argue that Dr. DaSilva's report was from just after the accident and that Dr. DaSilva did not diagnose whether either plaintiff suffered herniated discs. This claim, however, is without merit. It was set forth in this court's decision of June 7, 2007 that the affirmation of Dr. Samuel Mayerfield (plaintiff's exhibit C), plaintiff's physician, affirmed the findings on the MRI of George Johnson's cervical spine which demonstrated central disc herniation at C3-4 with partial effacement of the ventral CFS space and a question of a fracture of the odontoid. Dr. Mayerfield affirmed the findings of the MRI of Richard Johnson which diagnosed four posterior disc herniations at L2-3, L3-4, L4-5 and L5-S-1 (Plaintiffs' exhibit E). Defendants submitted the report of their expert, Dr. Reiser, who set forth in that report that his review of the records indicates the MRI of the lumbar spine performed on May 7, 2003 of Richard Johnson reveals herniations from L2-3 through L5-S1, with no neural compression reported, and that the MRI scans of George Johnson's cervical spine revealed a herniation at C3-4. Dr. Reiser did not dispute the findings in his report and does not opine whether or not these injuries were caused by the accident. Accordingly, defendant has not established prima facie that those of herniated discs allegedly sustained by plaintiffs do not constitute serious injury.

Dr. DaSilva had set forth quantified objective findings of decreased range of motion in George Johnson's cervical spine, as well as the positive findings of his orthopedic examinations of the cervical spine and lumbar spine at the time of the examination. Dr. DaSilva (plaintiff's exhibit F) has set forth quantified limitations in the range of motion of Richard Johnson's lumbar spine as well as his cervical spine at the time of examination. He then set forth, *inter alia*, the positive findings relating to his orthopedic evaluations and the significance of those findings. However, these findings of limitations were made immediately following the accident.

Moreover, defendants submitted copies of plaintiffs' transcripts of their examinations before trial which this court found raised factual issues which precluded summary judgment to defendants on the issue of serious injury. Defendants submitted testimony of Richard Johnson stating, in part, that he is no longer able to engage in his martial arts programs or tournaments and weight lifting as a result of the accident. Defendants further submitted the testimony of George Johnson wherein he testified, in part, that he began working with L&F after the accident and voluntarily left this employment in February, 2004, as he could not physically do the lifting of the bulkheads, which were too heavy, causing him pain in his back and arm. Therefore, this court determined that defendants did not demonstrate prima facie entitlement to

summary judgment on the issue of whether plaintiffs sustained a serious injury within the meaning of Insurance Law §5102 as there were factual issues in this regard.

Defendants' remaining arguments that there is no causal connection between the accident and plaintiffs' claims of their respective herniations is also without merit. Dr. Paul's report submitted by the moving defendants sets forth that there is causality between the injuries reported and the motor vehicle accident. Dr. Nussbaum-Blonder's report sets forth that the symptoms described are causally related to the accident of April 7, 2003. Dr. DeJesus reported that she found the injuries reported were causally related to the accident. Dr. Reiser states that his review of the records indicates the MRI of the lumbar spine performed on May 7, 2003 of Richard Johnson reveals herniations from L2-3 through L5-S1, with no neural compression reported, and that the MRI scans of George Johnson's cervical spine revealed a herniation at C3-4. Dr. Reiser did not dispute the findings in these reports and did not opine whether or not those injuries were caused by the accident. Plaintiffs, by their testimony submitted by the moving defendants, set forth their inability to perform activities of daily living as a result of this accident, despite the moving defendants' contentions that there was no evidence that there were any physical limitations or disabilities causally related to the accident. Therefore, the moving defendants did not demonstrate entitlement to summary judgment on the issue of proximate cause of plaintiffs' injuries.

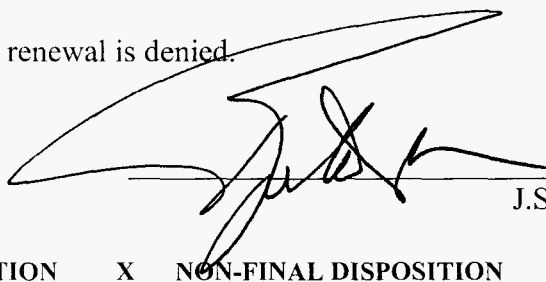
Accordingly, this court adheres to its prior decision of June 7, 2007 that defendants County of Suffolk and Miquel Vasquez failed to demonstrate prima facie entitlement to summary judgment on the issue of serious injury for those injuries claimed by plaintiffs in their respective bills of particulars.

Pursuant to CPLR 2221(e)(2) a motion for leave to renew shall be based upon new facts not offered on the prior motion that would have changed the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination. Pursuant to CPLR 2221(e)(3) a motion for leave to renew shall contain reasonable justification for the failure to present such facts on the prior motion. "A motion for renewal is properly made to the motion court...to draw its attention to material facts which, although extant at the time of the original motion, were not then known to the party seeking renewal and, consequently, were not placed before the court. Renewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit the additional facts on the original application; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Beiny v Trustees of the Trust Created by Elizabeth N.F. Weinberg, as Grantor*, 132 AD2d 190, 522 NYS2d 511 [1st Dept 1987]).

Based upon the foregoing, the moving defendants have not demonstrated entitlement to an order granting renewal as they have not presented material fact extant at the time of the original motion, and the issues of fractures of the left fibula and odontoid have been resolved on reargument.

Accordingly, defendant's request for renewal is denied.

Dated: NOV 19 2007



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION