Cisco v Fernandez
2007 NY Slip Op 34016(U)
November 30, 2007
Supreme Court, Suffolk County
Docket Number: 0024620/2004
Judge: Robert W. Doyle
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SHORT FORM ORDER

INDEX No. 04-24620
CAL. No. 07-01285-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 8-17-07
ADJ. DATE 9-24-07
Mot. Seq. # 003 - MD
004 - MD
005 - XMotD

---X

WAYNE B. CISCO, SR. and BEVERLY GRAY,

Plaintiffs,

- against -

LIZ FERNANDEZ, GUSTAVO HERRERA and BEATRIZ ALEMAN-CISNEROS,

Defendants.

---X

SCOTT LOCKWOOD, ESQ.
Attorney for Plaintiff
1600 Deer Park Avenue
Deer Park, New York 11729

RUSSO & APOZNANSKI
Attorneys for Defendant Aleman-Cisneros
875 Merrick Avenue
Westbury, New York 11590

ESCHEN, FRENKEL & WEISMAN, LLP
Attorneys for Defts Fernandez & Herrera
20 West Main Street
Bay Shore, New York 11706

Upon the following papers numbered 1 to 32 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-10 ; Notice of Cross Motion and supporting papers 11-13; 14-23; 31-32; Answering Affidavits and supporting papers 24-28; 29-30 ; Replying Affidavits and supporting papers ___; Other ___; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (003) by defendant, Beatriz Aleman-Cisneros, pursuant to CPLR 3212 and Insurance Law §5102(d) for summary judgment dismissing the complaint on the issue that plaintiff Cisco did not sustain serious injury, is denied without prejudice with leave to renew within thirty days of the date of this order; and it is further

ORDERED that this cross motion (004) by defendants Liz Fernandez and Gustavo Herrera pursuant to CPLR 3212 and Insurance Law §5102(d) for summary judgment dismissing the complaint on the issue that plaintiff Cisco did not sustain serious injury, is denied without prejudice with leave to renew within thirty days of the date of this order; and it is further

ORDERED that this cross motion (005) by plaintiffs, Wayne B. Cisco, Sr. and Beverly Gray, pursuant to CPLR 3215 for a default judgment against defendants Liz Fernandez and Gustavo Herrera striking the answer is granted as to defendant Liz Fernandez only; pursuant to CPLR 3212 for partial summary judgment on the issue of liability as against defendant Beatriz Aleman-Cisneros is granted, and

for dismissal of the affirmative defenses of comparative negligence and failure to use the seat belt, is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiffs, Wayne Cisco and Beverly Gray, in a three car chain collision which occurred on December 18, 2002, on Bay Shore Road, Town of Islip, County of Suffolk. Beverly Gray was a passenger in the vehicle operated by Wayne Cisco. Gustavo Herrera was the registered owner of the vehicle operated by defendant Liz Fernandez. Beatriz Aleman-Cisneros was the registered owner and operator of the third vehicle involved in the incident.

Wayne Cisco, Sr. claims in his bill of particulars that as a result of this accident he was caused to sustain a cervical sprain and strain, decreased range of motion in the cervical spine; and neck pain. Beverly Gray claims she sustained a torn medial meniscus of the right knee requiring an arthroscopy and surgical intervention consisting of a partial medial minisectomy, partial lateral meniscetomy, medial and lateral compartment synovectomy with drilling of the medical femoral condyle; medial femoral condyle micro fracture, medial compartment damage in the left knee; left knee derangement; tear of the medial meniscus in the left knee necessitating surgical intervention, synovial swelling of the left knee; pain, tenderness and swelling in both the left and right knees; difficulty ambulating; pain in the right wrist; and decreased range of motion in the left and right knees, lumbosacral spine and right wrist;

Defendants, Beatriz Aleman-Cisneros, Liz Fernandez and Gustavo Herrera, seek summary judgment dismissing the complaint arguing that plaintiff Wayne Cisco did not sustain serious injury within the definition set forth in Insurance Law § 5102.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]).

Pursuant to Insurance Law § 5102(d), " '[s]erious injury' means a personal injury which results in dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body

organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medical determined injury or impairment of a non-permanent 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2nd Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808, 810 [3rd Dept 1990]).

In support of application (003), the moving defendant, Beatriz Aleman-Cisneros has submitted an attorney's affirmation; a copy of the summons and complaint; a copy of defendant Cisneros' answer with a cross claim against co-defendants; a copy of plaintiff's bill of particulars; an unsigned, unsworn copy of plaintiff's deposition transcript; and medical reports of Dr. Anthony Spartaro dated November 16, 2005, and Dr. C.M. Charma dated November 16, 2005.

In support of application (004), the moving defendants, Liz Fernandez and Gustavo Herrera, adopt and incorporate by reference all the papers set forth in the moving papers submitted by defendant Aleman-Cisneros. While CPLR 3212(b) does not provide for adopting and incorporating another parties papers and arguments in support of a motion for summary judgment, this court will, however, search the record.

In reviewing the submissions of all the defendants in motions (003) and (004), it is determined that neither motion is supported by an affidavit by any defendant or by their respective deposition transcripts (*see,* CPLR 3212(b)). In further searching the records, a copy of the deposition transcript of Beatriz Aleman-Cisneros has been included in support of motion (005), however, that transcript is unsigned and unsworn, and is not in admissible form. No party has objected to the use of an unsigned deposition, however, neither party has submitted a copy of the answer served on behalf of defendants Fernandez and Herrera (*see,* CPLR 3212(b)). Therefore, both motions are insufficient as a matter of law.

Accordingly, motions (003) and (004) are denied without prejudice with leave to renew or proper papers within thirty days of the date of this order.

In motion (005), plaintiffs move pursuant to CPLR 3215 for a default judgment striking the answer of defendants Liz Fernandez and Gustavo Herrera; pursuant to CPLR 3212 for partial summary judgment on the issue of liability; and for a further order dismissing the affirmative defenses of comparative negligence and failure to use the seat belt. Plaintiffs support their application with a copy of the summons and complaint, answer of defendant Cisneros, copy of the Court order dated March 30, 2006 (Pines, J.) and unsigned copies of the transcripts of the examinations before trial of Beatriz Aleman-Cisneros, Beverly Gray and Wayne Cisco.

While the copies of the deposition transcripts submitted to the Court are unsigned and unsworn and therefore not in admissible form, no party has objected to their use on the instant motions and the Court will consider them.

Turning to that part of the application which seeks an order granting a default judgment against defendants Liz Fernandez and Gustavo Herrera, plaintiffs have submitted a copy of the Order dated March 30, 2006, (Pines, J.), served upon defendants with Notice of Entry on April 13, 2006. The Court found that defendant Fernandez did not appear for her examination before trial scheduled October 13, 2005, and no future date had been rescheduled. The order provided that defendant Liz Fernandez was directed to appear for an examination before trial at the office of plaintiff's counsel on or before May 1, 2006, at a time convenient for counsel. The Court then directed that "In the event she fails to appear as directed herein, her pleadings in this action shall be stricken."

In the event of failure to comply with a conditional order of dismissal, that order becomes absolute (***Kepple v J. Hill Associates et al,*** 275 AD2d 299, 712 NYS2d 405 [2nd Dept 2000]). In order to be relieved of a failure in complying with a conditional order of preclusion, the moving party must demonstrate a reasonable excuse for its failure to comply and must show, in evidentiary form from a party with personal knowledge of the facts, that a meritorious cause of action or defense exists (***Weitzberg v Nassau County Department of Recreation and Parks et al,*** 282 AD2d 741, 724 NYS2d 357 [2nd Dept 2001]). Although counsel for defendant Fernandez opposes this application for default, counsel for defendants Fernandez and Herrera has not come forward with any explanation concerning why defendant Fernandez did not appear for an examination before trial pursuant to the order by May 1, 2006, nor does counsel offer an affidavit from defendant Fernandez setting forth an explanation or a meritorious defense on her own behalf. Counsel for defendant does not even argue that a meritorious defense exists. It is therefore determined by this court that defendant Fernandez is in default of the order of March 30, 2006 (Pines, J.) in that defendant Fernandez has failed to comply with that conditional order by not having appeared for her examination before trial by May 1, 2006, and that conditional order has become absolute.

Accordingly, that part of motion (005) which seeks default against defendant Fernandez is granted and the answer and any affirmative defenses by defendant Fernandez are hereby struck.

Although plaintiffs also seek an order striking the answer of defendant Herrera, it is noted that the order of March 20, 2006 provides only that "In the event she fails to appear as directed herein, her pleadings in this action shall be stricken." It is therefore determined that no conditional order was issued by the court striking the answer of defendant Herrera should the conditional order not be complied with. Plaintiff's do not argue that defendant Herrera failed to appear for any scheduled examinations before

trial

Accordingly, that part of motion (005) which seeks default against defendant Gustavo Herrera is denied.

Plaintiffs, Wayne Cisco and Beverly Gray also seek summary judgment on the issue of liability against defendant Beatriz Aleman-Cisneros (Cisneros).

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (***Chepel v Meyers,*** 306 AD2d 235, 762 NYS2d 95 [2nd Dept 2003]; ***Power v Hupart,*** 260 AD2d 458, 688 NYS2d 194 [2nd Dept 1999]; *see also,* Vehicle and Traffic Law § 1129[a]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, and unavoidable skidding on a wet pavement or some other reasonable excuse (*see,* ***Rainford v Han,*** 18 AD3d 638, 795 NYS2d 645 [2nd Dept 2005]; ***Thoman v Rivera***, 16 AD3d 667, 792 NYS2d 558 [2nd Dept 2005]; ***Power v Hupart,*** *supra*).

Wayne Cisco testified that at the time of the accident he was traveling eastbound on Bay Shore Road. The weather was cool and the roads were dry. At the intersection with Ward Street, there was a red light for which about five cars in front of him were stopped. He brought his vehicle to a stop and was stopped for about a half minute when his vehicle was struck in the rear. He felt two heavy impacts, separated by about two seconds. His vehicle was the first vehicle of the three vehicles involved in this chain collision accident. He was able to see the vehicles behind him in his rearview mirror immediately prior to the accident. The car behind him was a smaller car, followed by an SUV. These were the two cars involved in the accident. The smaller car behind him was moving when he saw it, and a few seconds later it hit him. The SUV was also moving when he saw it. The vehicle immediately behind him was driven by Liz Fernandez and the third vehicle was operated by Beatriz Aleman-Cisneros.

Based upon the foregoing, plaintiffs have demonstrated prima facie entitlement to an order granting summary judgment on liability.

In opposing this motion, defendant Beatriz Aleman-Cisneros has submitted an attorney's affirmation, an uncertified copy of the Police MV 104 Accident Report, and copies of her transcript and the transcripts of Wayne Cisco of the examinations before trial. Ms. Cisneros testified at her examination before trial that she was operating a Chevy Blazer, traveling on Bay Shore Road behind a small, two-door vehicle when she noticed the cars in her travel lane in front of her had slowed and then braked. She began to slow her vehicle and brought it to a complete stop. The cars in front of her started moving, so she began to move as well, keeping the vehicle in front of her in her view at all times. The car in front of her braked again. To avoid striking the vehicle in front of her, she braked and turned to the right, but the left drivers side of her vehicle came in contact with the rear bumper of the small vehicle in front of her. The car in front of her was moving forward when she struck it. She thought she was traveling about ten to fifteen miles per hour when the accident occurred. She stated that as a result of the impact with the

vehicle in front of her, that the car in front continued to move ahead and made contact with the car in front of it. She states she did not see the impact between the car in front of her and the van in front of that car at the moment of impact. She also testified that after the accident she was trying to help the woman in the car in front of her, trying to make her feel better because she felt badly that she hit her car.

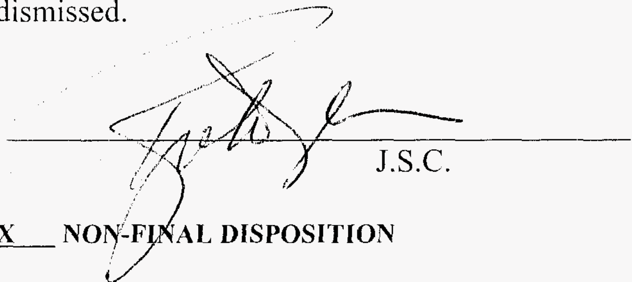
The adduced evidence demonstrates that defendant Cisneros' vehicle struck the vehicle operated by defendant Fernandez while it was moving in stop and go traffic, and that defendant Fernandez's vehicle then struck plaintiff's vehicle in the rear. Although defendant Cisneros stated that she hit the Fernandez vehicle, she has not come forward with a reasonable, non-negligent explanation for striking that vehicle in the rear. She testified that she saw the brake lights come on on defendant Fernandez's vehicle, it stopped, then started moving again, and the brake lights came on again. It was then that she struck the Fernandez vehicle in the rear. The adduced evidence further demonstrates that the Fernandez vehicle struck the Cisco vehicle in the rear after having been struck by the Fernandez vehicle, with no reasonable non-negligent explanation offered to explain the happening of the accident.

Accordingly, summary judgment is granted to plaintiffs on the issue of liability as against defendant Cisneros.

Plaintiffs also seek summary judgment dismissing the two affirmative defenses contained in defendant Cisneros' answer that plaintiff Cisco was comparatively negligent in causing the accident and that plaintiffs were not using seat belts at the time of the accident. As set forth above, the adduced and unrebutted evidence demonstrates plaintiff Cisco's vehicle had been stopped for about thirty seconds when it was struck in the rear by defendant Fernandez's vehicle after it had been struck in the rear by defendant Cisneros' vehicle. There has been no admissible evidence submitted to demonstrate any comparative negligence on behalf of plaintiff. Additionally, Beverly Gray and Wayne Cisco both testified at their examinations before trial that they were wearing seat belts at the time of the accident. There has been no admissible evidence submitted to rebut this testimony either.

Accordingly, that part of plaintiffs' motion (005) which seeks to dismiss the affirmative defenses as set forth above in defendant Cisneros' answer is granted and the affirmative defenses of comparative negligence and failure to wear a seat belt are hereby dismissed.

Dated: NOV 30 2007



J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**