

Eskander v Toyota Motor Credit Corp.

2007 NY Slip Op 34188(U)

December 5, 2007

Supreme Court, New York County

Docket Number: 0106951/2005

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

NADIA ESKANDER

INDEX NO. 106951-05

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. 23

- v -

TOYOTA MOTOR CREDIT CORP. and
HAROLD McCORMACK

[and a thlrd-party action]

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) _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the papers submitted on these motions, and after oral argument, and for the reasons set forth in the attached Memorandum Decision, it is

ORDERED that the branch of the motion of third-party defendant Steven J. Schumacher which seeks summary judgment dismissing the complaint on the issue of serious injury (Insurance Law § 5102[d]) and the cross-motion of defendants Toyota Motor Credit Corporation and Harold McCormack for the same relief is granted to the extent that that portion of the complaint which asserts a claim under the "90/180" category of serious injury is dismissed, and that motion and cross-motion are otherwise denied; and it is further,

ORDERED that the branch of the motion of third-party defendant Steven J. Schumacher which seeks summary judgment dismissing the complaint as to him on the issue of liability is denied. Parties to appear for a pre-trial conference on January 8, 2008 at 136 80 Centre St., 9:30 AM.

This constitutes the Decision and Order of the Court.

Dated: December 5, 2007

FILED
DEC 27 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

-----x
NADIA ESKANDER,

Plaintiff,

Index No. 106951/05

-against-

TOYOTA MOTOR CREDIT CORP. and
HAROLD McCORMACK,

Defendants.

-----x
TOYOTA MOTOR CREDIT CORP. and
HAROLD McCORMACK,

Index No. 591160/05

Third-Party Plaintiffs,

-against-

STEVEN J. SCHUMACHER,

Third-Party Defendant.

-----x
DEBORAH A. KAPLAN, J.:

Third-party defendant Steven J. Schumacher (Schumacher) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the third-party complaint for failure to prove a prima facie case of liability, and for failure to meet the "serious injury" threshold set by New York State Insurance Law (Insurance Law) §§ 5102 and 5104.¹

Third-party defendant Schumacher designates his motion to dismiss the complaint, based upon threshold limits, as a cross motion to his motion. This court will consider this request as

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Defendants Toyota Motor Credit Corp. (Toyota) and Harold McCormack (McCormack) cross-move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint for plaintiff's failure to meet the "serious injury" threshold, pursuant to Insurance Law § 5102 (d).

This personal injury action arises out of a two-car motor vehicle accident which occurred on January 19, 2003 at the intersection of Country Road 101 and the North Service Road of Interstate 495, Suffolk County, New York. Plaintiff, Nadia Escander, was riding in the front passenger seat of a motor vehicle driven by Schumacher, which collided with a motor vehicle driven by McCormack. Plaintiff seeks to recover money damages for personal injuries she allegedly sustained as a result of the accident. At the time of the accident, plaintiff was approximately 41 years old, and working as a supermarket manager.

Shortly before the accident, Schumacher was traveling westbound on the service road coming off the Long Island Expressway, and McCormack was traveling northbound on Country Road 101. McCormack's wife, non-party Ellen McCormack (Mrs. McCormack), was riding in the front passenger seat.

As a result of the accident, plaintiff was taken to Brookhaven Memorial Hospital, where she complained of mild to moderate pain in her chest, and pain to her cervical spine. X-

part of Schumacher's main motion.

rays were taken of plaintiff's cervical spine which showed no evidence of a fracture, but a straightening of the normal cervical lordosis. The emergency room physician also noted vertebral point tenderness in plaintiff's neck. The clinical impression was of a contusion on the chest and neck strain. Plaintiff was discharged with a prescription for a pain killer and muscle relaxers, and instructions to see her doctor. Three days after the accident, plaintiff was seen at Beth Israel Hospital, where an MRI was done, and plaintiff was given medication. She was thereafter treated and evaluated by a number of physicians, underwent physical therapy for a few months, and had different tests performed including two additional MRIs.

Summary Judgment on the Issue of Serious Injury

Defendants and third-party defendant seek to dismiss the complaints against them on the ground that plaintiff has failed to make a prima facie showing of "serious injury" as defined and required by New York Insurance Law § 5102 (d). Pursuant to the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (now Insurance Law § 5101, et seq. - the "No Fault" statute), a party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has suffered a "serious injury" as contemplated by New York State Insurance Law § 5102 (d).

The courts have determined that, in a motor vehicle action, serious injury is a "threshold" issue, and thus, a necessary element of plaintiff's prima facie case (Licari v Elliott, 57 NY2d 230 [1982]; Toure v Harrison, 6 AD3d 270 [1st Dept 2004]; Reid v Brown, 308 AD2d 331 [1st Dept 2003]; Insurance Law § 5104 [a]). This is in accord with the original intent of the "no-fault" law, which was to eliminate recovery in a common-law tort action for minor personal injuries (Rubensccastro v Alfaro, 29 AD3d 436 [1st Dept 2006]; Zecca v Riccardelli, 293 AD2d 31, 33 [2d Dept 2002]).

On a motion for summary judgment for the failure to sustain a "serious injury," within the meaning of Insurance Law § 5102 (d), the defendants bear the initial burden of establishing the absence of a serious injury as a matter of law by tendering sufficient evidence to eliminate any material issues of fact (Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; see also Gaddy v Eyler, 79 NY2d 955 [1992]; Pirrelli v Long Island Railroad, 226 AD2d 166 [1st Dept 1996]).

In support of defendants' claim that plaintiff did not sustain a serious injury, defendants may rely either on the sworn statements of the defendants' examining doctor wherein the physician affirms that plaintiff had a normal examination (see Gaddy v Eyler, 79 NY2d 955, supra), or plaintiff's deposition testimony and the unsworn reports prepared by plaintiff's own

examining physician (Fragale v Geiger, 288 AD2d 431 [2d Dept 2001]; Pagano v Kingsbury, 182 AD2d 268 [2d Dept 1992]).

Once the defendants meet this burden, the burden shifts to the plaintiff to come forward with prima facie evidence in admissible form to overcome the defendants' submissions by demonstrating a triable issue of fact that a serious injury was sustained (see Pommells v Perez, 4 NY3d 566 [2005]; Gaddy v Eyler, 79 NY2d 955, supra; Alvarez v Prospect Hospital, 68 NY2d 320 [1986]; Perez v Rodriguez, 25 AD3d 506 [1st Dept 2006]).

In the first instance, the court makes the determination as to whether the injuries sustained by the plaintiff fall within the definition of a "serious injury" (see Licari v Elliott, 57 NY2d 230, supra). Insurance Law § 5102 (d) defines "serious injury" as:

a personal injury which results in death; 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 medically 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.

Plaintiff alleges that she suffered "serious injury" within the meaning of Insurance Law § 5102 (d) in that she suffered a "significant limitation of use of the cervical spine," and "a permanent consequential limitation of the cervical spine." According to plaintiff's Second Supplemental Verified Bill of Particulars, dated July 27, 2006, plaintiff alleges that she sustained permanent and transitory injuries. Specifically, it is alleged that plaintiff's injuries include "small central and paracentral to the right of midline disc herniation at C4-5 with slight spinal cord compression and mild right neuroforaminal stenosis; small non-focal annular bulges or early osteophyte formation at C3-4, C5-6, and T2-3, confirmed by MRI; need for spinal surgery presently awaiting scheduling; post-surgical scarring and possible osteo-arthritis; [and] exacerbation and aggravation of previously asymptomatic cervical and thoracic spinal condition."

Plaintiff further asserts that she sustained an injury which "kept her from performing substantially all of the material acts which constituted her usual and customary daily activity for at least 90 of the 180 days immediately subsequent to the accident" She claims that, as a result of her injuries and the pain she suffered, she was confined to bed for approximately one month, and confined to her home for approximately two months, immediately following the accident, except for necessary errands

and medical treatment. In her affidavit in opposition to the motions, plaintiff claims that, since the accident, she has trouble moving her head/neck, has constant pain, and has difficulty in performing normal everyday activities.

In support of their motions, defendants rely, among other things, on the affirmed medical reports of three doctors. Dr. A. Robert Tantleff, a radiologist, performed an independent radiological review on March 31, 2005 of plaintiff's MRI report and films taken of plaintiff's cervical spine on February 18, 2003, by the Spine and Joint Center, and the MRI report and films taken of plaintiff's cervical spine on October 21, 2004, at the Dove Open MRI.

Dr. Tantleff's report of the MRI taken on February 18, 2003² shows, in relevant part: mild degeneration of the C3-4 disc, without herniation or stenosis; mild to moderate degeneration at the C4-5 level; mild spinal stenosis with a slight anterior impression on the spinal cord; mild right neuroforaminal stenosis, without definite nerve impingement; at the C5-6 level, mild degeneration and a mild bulge, without stenosis or herniation; congenital fusion of the C6-7 and C7-T1 levels; and at the T1-2 level, mild degeneration and a bulge.

Defendants attach a copy of the MRI taken of plaintiff's cervical spine on February 18, 2003.

Dr. Tantleff's report of the MRI taken October 21, 2004 notes that the findings describe: "[s]mall central and paracentral to the right of midline disc herniation C4/5 with slight spinal cord compression; small non-focal annular bulges or early osteophyte formation C3/4, C5/6 and T2/3; [and] small probable syrinx seen within thoracic spinal cord T2/3." After reviewing both MRI reports and attendant films, Dr. Tantleff, in his affirmed reports, concluded that the findings represent age-appropriate chronic degenerative changes which are longstanding and congenital in origin, and not causally related to the accident.

Dr. Charles Toterò, an orthopedist, saw plaintiff for an independent orthopedic medical examination on September 25, 2006. In his affirmed report, Dr. Toterò states that he reviewed plaintiff's medical history, which he specifically lists and includes, among other things, her MRIs. He notes that she was currently undergoing chiropractic treatment primarily involving ultrasound treatments and acupuncture. Plaintiff's complaints were noted as including neck pain that radiates down into both her right and left arms and back region, and occasional numbness and tingling in her arms.

Plaintiff underwent a physical examination wherein Dr. Toterò found that plaintiff's range of motion of the cervical spine showed chin to chest flexion limited to two finger breadths

(normal: chin to chest); left and right rotation was 50 degrees on the right and 40 degrees on the left (normal: 75-80 degrees); extension 30 degrees (normal: 50 degrees); and range of motion of the shoulders, elbows, wrists and small joints of the fingers within normal limits.

Dr. Toterò concluded that plaintiff was being treated for subjective complaints involving the cervical spine; that her MRIs revealed no acute abnormalities; that the findings of congenital fusion and syrinx were pre-existing to the accident. He found no objective orthopedic finding based upon the orthopedic physical examination documents. He further opined that there was no causally related disability to the accident, and that plaintiff could engage in normal work and daily activities with no restrictions.

On September 29, 2006, plaintiff underwent an independent neurological examination by Dr. Ranga Krishna, a board-certified neurologist. Dr. Krishna's affirmed report states that he reviewed plaintiff's history, and conducted, among other things, a cranial nerve examination, a motor system examination, and a sensory examination. He found everything within normal limits. He concluded that plaintiff's cervical and lumbar strain injury had been resolved, that she did not require any further testing or treatment, and that "there is no neurological indication of a disability or permanency."

The medical evidence submitted in support of defendants' motions for summary judgment indicates that plaintiff has not suffered a serious injury or disability as a result of the accident, thereby shifting the burden to plaintiff to make a prima facie showing of serious injury.

Although a bulging or herniated disc may constitute a serious injury within the meaning of Insurance Law § 5102 (d) (see Pommels v Perez, 4 NY3d 566, supra; Naqbe v Minigreen Hacking Group, Inc., 22 AD3d 326 [1st Dept 2005]; Arjona v Calcano, 7 AD3d 279 [1st Dept 2004]), a plaintiff must submit proof in admissible form of the extent or degree of the alleged physical limitations resulting from the disc injury and their duration (id.; Simms v APA Truck Leasing Corp., 14 AD3d 322 [1st Dept 2005]).

A CT scan or positive MRI may constitute objective evidence to support subjective complaints (see Arjona v Calcano, supra; Lesser v Smart Cab Corp., 283 AD2d 273 [1st Dept 2001]). Furthermore, evidence of range of motion limitations, and straight-leg raising tests are objective evidence, and can be used to substantiate a claim of serious injury sufficient to defeat a motion for summary judgment see Toure v Avis Rent A Car Systems, 98 NY2d 345, supra; Brown v Achy, 9 AD3d 30 [1st Dept 2004]; Toledo v A.P.O.W. Auto Repair/Towing, 307 AD2d 233 [1st Dept 2003]).

Plaintiff's opposition to defendants' motions includes, among other things, an affirmed report of Dr. Irving Friedman, a board certified neurologist, dated February 2, 2007, with regard to plaintiff's current condition, which was based upon objective medical observations, as well as objective testing such as range of motion tests. Dr. Friedman details plaintiff's symptoms, including recurring neck pain, and limitations of movement. He notes that he reviewed plaintiff's medical history, and reviewed all of plaintiff's medical records, including the reports and films of MRIs taken of plaintiff's cervical spine dated February 18, 2003, October 20, 2004, and an MRI of the thoracic spine performed on September 8, 2006.

Dr. Friedman performed a physical examination on plaintiff wherein he measured and quantified the plaintiff's cervical spine range of motion to be guarded to less than 15 degrees in flexion, extension and rotation.³ Dr. Friedman noted that plaintiff's grip was diminished in both hands; that she had muscle atrophy in both hands; and that Deep Tendon Reflexes were diminished in both upper extremities. He also noted that "1+Spasm with multiple myofascial trigger points were present in the para-lumbar regions. [Plaintiff] was able to forward flex 45 degrees out of

Plaintiff notes that Dr. Toterò, defendant's own expert, confirmed in his report that the normal range of motion for cervical rotation is between 75-80 degrees and that extension should be 50 degrees.

90. Straight leg raising was positive bilaterally at 45 degrees out of 90."

Dr. Friedman opined that, as a result of the accident, plaintiff sustained, among other things: disc herniations at level C4-5, disc bulge at level C5/6, and chronic cervical myofascitis/spasm with bilateral cervical radiculopathy. He further opined that the congenital fusion, although not causally related to the accident, has made plaintiff "more prone to permanent structural deficits due to whiplash-type injury."

Dr. Friedman concluded that plaintiff "remains with a significant and painful disability at this time. She remains with marked spasm, limitation of range of motion and radicular symptoms of the cervical spine." He also concluded that plaintiff's "neuro-spinal deficits are directly and causally related to the injuries sustained on January 19, 2003, and that her prognosis for any further functional improvement is extremely poor," and should be considered permanent.

Plaintiff also submits various unsworn medical reports and records, including, among other things, an MRI report of Dr. Norman Schoenberg, dated February 18, 2003, which revealed a protrusion at level C4-5 with impression on the spinal cord at the spine level, and congenital fusion at levels C6-7 and C7-T1; an MRI report of the surgical spine performed at Dove Open MRI, dated October 24, 2004, which confirmed a disc herniation at

level C4-5 compressing at the spinal cord and the congenital fusion at C6-7, C7-T1; a medical report by Dr. Mladen Djurasovic, an orthopedic surgeon, dated March 4, 2003, which noted limited range of motion; two medical reports by Dr. Neil Rosenthal, a neurologist, dated May 8, 2003 and May 12, 2003, noting disc bulges and congenital fusion; a medical report by Dr. Taras Odulak, a chiropractor, dated January 20, 2003, who performed various objective tests, and assessed that plaintiff was suffering from, among other things, "a cervical subluxation complex"; and "progress notes" of Dr. Patrick Kerr, a chiropractor, showing treatment dates starting in May 2004 and continuing until October 2006.

Defendants argue that plaintiff's unsworn medical reports and records are inadmissible as evidence in opposition to defendant's motion, and that the affirmed report of Dr. Friedman is insufficient inasmuch as he relied on these reports. This argument is unavailing against all of plaintiff's unsworn submissions, except for Dr. Kerr's unsworn notes and the unaffirmed 2006 MRI report, since the defendants themselves refer to the unsworn or unaffirmed reports in their moving papers, and their doctors refer to them in their medical reports (Kearse v New York City Transit Authority, 16 AD3d 45 [2d Dept 2005]; Brown v Achy, 9 AD3d 30, supra).

Plaintiff's submission of Dr. Friedman's affirmed report, and defendants' own doctor, Dr. Toterio's affirmed report, which confirm the findings of range of motion limitations, and the findings of positive straight-leg raising, and positive MRI test results, together with Dr. Friedman's conclusion that plaintiff's disc herniations and disc bulge were traumatically induced and the cause of plaintiff's pain and restriction of range of motion, raise a triable issue of fact as to whether plaintiff sustained a serious injury as defined by the Insurance Law (see Aguilar v N.Y.C. Water Works, Inc., 298 AD2d 245 [1st Dept 2002]; Puma v Player, 233 AD2d 308 [2d Dept 1996]).

This court notes that plaintiff has offered no competent medical proof that directly substantiates her claim that she could not perform substantially all of her daily tasks for 90 of the first 180 days due to an injury or impairment caused by the accident (see Perez v Rodriguez, 25 AD3d 506 [1st Dept 2006]).

Finally, in their reply papers, defendants raise a gap in treatment defense. Generally, summary judgment should be granted on the issue of serious injury within the meaning of Insurance Law § 5102 (d) where the plaintiff fails to proffer a sufficient explanation for an extended period of time during which he or she was not treated for the alleged injuries claimed to have arisen from a car accident (see Pommells v Perez, 4 AD3d 101 [1st Dept 2004], affd 4 NY3d 566 [2005]). However, since defendants did

not raise the issue of a gap in treatment in their motion papers, and defendants do not claim that this defense was first revealed by plaintiff's evidence in opposition to defendants' motions, this court will not consider this issue raised for the first time in reply (see e.g. McNair v Lee, 24 AD3d 159 [1st Dept 2005]).

Accordingly, defendants' motions to dismiss the complaints based upon plaintiff's failure to meet the threshold limits of the Insurance Law are denied.

Summary Judgment on the Issue of Liability

Schumacher argues that he is entitled to summary judgment dismissing the action against him since no triable issue concerning his liability has been raised. In support of his motion for summary judgment, Schumacher proffers, among other things, his own sworn deposition testimony, dated September 6, 2006, wherein he testified that when he came to the subject intersection, he saw that the hanging traffic light was turning red, and that he came to a full stop at the traffic light for approximately three minutes. He stated that when the traffic light turned green, he looked to the left, to the right and then left again, and then proceeded, at approximately five miles per hour, through the intersection, when he was hit on the driver's side by a car driven by McCormack, who entered the intersection against the red light. He claimed that everything happened very

fast at the point of impact, which occurred on his side and windshield area, and that he did not hear any sound prior to the impact that would have alerted him to the fact that another car was approaching, nor did he see the other vehicle.

Schumacher also relies on the deposition testimony of plaintiff, dated May 17, 2006. The plaintiff, who was sitting next to Schumacher at the time of the accident, testified that when the traffic light changed to green, Schumacher started to move his vehicle slowly through the intersection, and that that was when McCormack's car came fast and hit Schumacher's car.

Schumacher also submits the deposition testimony of McCormack, dated June 20, 2006, wherein McCormack appears to be somewhat confused and contradictory, and unable to respond to plaintiff's counsel's questions without difficulty⁴. The record reflects that McCormack's responses were inaudible, and that plaintiff's counsel ceased questioning McCormack on the basis that it was not possible to take a meaningful deposition of McCormack. Finally, Schumacher submits the deposition testimony of Mrs. McCormack, who testified that she did not remember if her husband stopped for any red lights from the time they entered the roadway up to the time of the accident, and that she never saw Schumacher's vehicle before the accident.

Counsel for McCormack affirms that McCormack suffers from "Shy-Drager's Syndrome," a neurological condition, which results in his inability to provide meaningful testimony.

In opposition to Schumacher's motion for summary judgment, defendants/third-party plaintiffs argue that issues of fact exist concerning whether Schumacher was negligent and/or contributed to the happening of the accident, which issues should be submitted to the jury. Defendants/third-party plaintiffs submit the deposition of Mrs. McCormack, wherein she states that she noticed that the traffic light was green in McCormack's favor up until the time the accident occurred, and that the accident happened so quickly that she couldn't tell how much time had passed from the first time she saw the green light until the time of the accident.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Thus, the opposing party to a summary judgment motion is entitled to all favorable inferences that can be drawn from the submitted evidence (Assaf v Ropog Cab Corp., 153 AD2d 520 [1st Dept 1989]). It is well settled that the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (Alvarez v Prospect Hospital, 68 NY2d 320 [1986]; Winegrad v New York University Medical Center, 64 NY2d 851 [1985]; Rose v Da Ecib USA, 259 AD2d 258 [1st Dept 1999]). When the existence of a triable issue of fact is even debatable, summary judgment should be denied (Stone v Goodson, 8 NY2d 8 [1960]).

A driver of a motor vehicle must "exercise reasonable care notwithstanding the invitation to proceed by the green light" (Siegel v Sweeney, 266 AD2d 200 [2d Dept 1999]). Moreover, pursuant to the doctrine of comparative negligence, a driver who lawfully enters an intersection may still be held partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection (Costalas v City of New York, 143 AD2d 573 [1st Dept 1988]).

Here, Schumacher has failed to establish that no issues of fact exist regarding whether he was guilty of negligence. Although McCormack was unable to provide meaningful testimony at his deposition regarding the accident, and notwithstanding that when questions were put to her concerning details of the accident, Mrs. McCormack answered either that she did not remember or that she did not know, she clearly testified that the light was green in McCormack's favor when they proceeded into the intersection. At the very least, this court is left with the inquiry regarding whether Schumacher used reasonable precautions to avoid the accident (see generally Alvarez v Prospect Hospital, 68 NY2d 320, supra). Accordingly, Schumacher's motion to dismiss the complaint on the grounds of liability is denied.

Accordingly, it is

ORDERED that the branch of the motion of third-party defendant Steven J. Schumacher which seeks summary judgment dismissing the complaint on the issue of serious injury as defined by Insurance Law § 5102(d) and the cross-motion of defendants Toyota Motor Credit Corporation and Harold McCormack for the same relief is granted to the extent that that portion of the complaint which asserts a claim under the "90/180" category of serious injury is dismissed and that motion and cross-motion are otherwise denied; and it is further,

ORDERED that the branch of the motion of third-party defendant Steven J. Schumacher which seeks summary judgment dismissing the complaint as to him on the issue of liability is denied.

DATED: December 5, 2007

ENTER:

Deborah Ky

J.S.C.

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