

Sung Ho Cho v Kelly

2007 NY Slip Op 34241(U)

December 14, 2007

Supreme Court, Nassau County

Docket Number: 6061-05/

Judge: Daniel Martin

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SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

SUNG HO CHO, MOON BAE CHO and AMANDA CHO, A MINOR, BY HER MOTHER and NATURAL GUARDIAN, MOON BAE CHO.

Plaintiffs.

Sequence No.: 001 & 002
Index No.: 016061/05

- against -

JOSEPH M. KELLY.

Defendant.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Plaintiff on the counterclaim moves for summary judgment on the issue of liability and dismissal of the counterclaim. Under separate notices of motion defendant respectively moves for summary judgment dismissing the complaint on the grounds that defendant is not liable for the accident and alternatively, dismissing the complaint as asserted by plaintiffs Sung Ho Cho and Moon Bae Cho on the grounds that these plaintiffs did not suffer serious injuries as defined by Insurance Law §5102(d).

The following facts are undisputed. On August 26, 2004 at around 8:30 p.m. plaintiffs were in the vehicle which was owned and operated by plaintiff on the counterclaim Sung Ho Cho and proceeding southbound on Route 94 in Warwick New York. Defendant was driving northbound on Route 94 in the vehicle he owned when his vehicle struck a deer and defendant thereafter collided with plaintiffs' vehicle. Plaintiffs commenced the instant action, asserting causes of action for negligence against defendant. Defendant answered and maintains a counterclaim against plaintiff Sung Ho Cho for contribution.

Plaintiff on the counterclaim moves for summary judgment on the issue of liability on the grounds that defendant crossed over the median and into his lane of traffic and that defendant was solely liable for the occurring of the accident by operation of law. Defendant moves for

summary judgment dismissing the complaint on the basis that he was faced with an emergency not of his own making, acted reasonably in reaction thereto and is therefore not liable for the accident. Defendant also moves under separate notice for summary judgment dismissing the complaint of plaintiffs Sung Ho Cho and Moon Bae Cho on the basis that these plaintiffs did not suffer serious injuries as required by Insurance Law §5104 and as defined by Insurance Law §5102(d).

A party moving for summary judgment must demonstrate that there are no issues of fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557. A party opposing a summary judgment motion must demonstrate a triable issue of fact through admissible evidence. Zuckerman v. City of New York, supra.

Plaintiff on the counterclaim moves for summary judgment on the basis that as reflected in the relevant deposition testimony defendant's automobile crossed over the double yellow line and struck the plaintiffs' vehicle, causing Mr. Cho and the other plaintiffs who were passengers to suffer personal injuries. (See, deposition transcript of Sung Ho Cho, pp. 9-24; deposition transcript of Moon Bae Cho, pp. 18-20; and deposition transcript of Joseph Kelly, pp.12-20). Mr. Cho is not required to anticipate that the driver of a vehicle going in the opposite direction will cross over into his lane of traffic. See, Williams v. Econ, 221 A.D.2d 429. Thus, the court finds that plaintiff on the counterclaim has met his burden of demonstrating entitlement to summary judgment dismissing the counterclaim, shifting the burden to defendant. Zuckerman v. City of New York, supra.

In support of his own motion and in opposition to plaintiff on the counterclaim's motion defendant points to his deposition testimony wherein he testified:

- 1) the area of the accident was dark with trees and brush on both sides of the road;
 - 2) as he was driving a deer appeared in front of him and he hit it immediately;
 - 3) he applied his brakes and struck the deer;
 - 4) after contact with the deer his airbag deployed and hit him in the face;
 - 5) the next thing he recalled his car came to a stop in the middle of the road, straddling the double yellow line;
 - 6) he observed a car toward the left of and facing his car with front end damage; and
 - 7) he did not recall the impact with the other car, only striking the deer and the air bag deploying in his face.
- (See, deposition transcript of Joseph Kelly, pp.11, 14, 16-20, 22 and 27).

Defendant asserts that he was faced with an emergency not of his own making and that he cannot be held liable for the accident. A person who is faced with an emergency and who acts without an opportunity to consider the alternatives is not negligent so long as he acted in the same way that a reasonable, prudent person would have when faced with the same emergency even if he did not make the safest choice of action at the time of the accident. See, Caristo v.

Sanzone, 96 N.Y.2d 172. Summary disposition of whether the party who alleges to have been faced with the emergency is only proper where that party submits evidence that he acted reasonably under the circumstances and there is no evidence submitted in opposition which raises an issue of fact as to the reasonableness of the action taken. See, Ghjar v. Shah, 31 A.D.3d 377.

Defendant has demonstrated that he was faced with the deer under circumstances where the deer stepped immediately into the path of defendant's vehicle, defendant responded by slamming on his brakes and the collision caused his airbag to deploy into his face. Under these circumstances the court finds that defendant has demonstrated he was faced with an emergency not of his own making and that he reacted reasonably under the circumstances, if he could have reacted at all. See, e.g., Rowlands v. Parks, 2 N.Y.2d 64; Moller v. Lieber, 156 A.D.2d 434.

In opposition to defendant's motion plaintiff on the counterclaim relies upon the deposition transcript of plaintiff-operator Sung Ho Cho. At his deposition Mr. Cho testified that he observed defendant's vehicle before he saw the deer which was approximately sixty meters from his own vehicle and approximately eight seconds prior to the accident. Mr. Cho responded by slowing down from forty to ten miles per hour. (See deposition transcript of Sung Ho Cho, pp. 18-22). Further, defendant testified that his view was not obstructed and he looked directly in front of him while driving. (See, deposition transcript of Joseph M. Kelly, 13, 16-17).

A driver is negligent if he fails to see that which through the proper use of his senses he should have seen. See, Berner v. Koegel, 31 A.D.3d 591. Plaintiff on the counterclaim raises issues of fact as to whether defendant failed to observe that which he was required to see. Accordingly, defendant's cross-motion for summary judgment dismissing the complaint is denied.

Plaintiff on the counterclaim's motion to dismiss the counterclaim is a different matter. Mr. Cho, where he is lawfully operating his vehicle on his side of the road and defendant crosses over the median, is not required to anticipate that a vehicle traveling in the opposition direction will cross over into oncoming traffic and is not required to take evasive action. See, Williams v. Econ, 221 A.D.2d 429; Wright v. Morozinis, 220 A.D.2d 496; Glick v. City of New York, 191 A.D.2d 677.

Accordingly, the court grants defendant on the counterclaim's motion and dismisses the counterclaim.

The sole remaining issue is whether defendant is entitled to summary judgment dismissing plaintiffs Sung Ho Cho and Moon Bae Cho's claims on the grounds that they did not suffer serious injuries as defined by Insurance Law §5102(d).

Insurance Law §5104(a) provides "[n]otwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of

recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss.”

Insurance Law §5102(d) defines a “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 nonpermanent 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 Sung Ho Cho alleges that he suffered the following injuries:

“Lumbar Spine: Central herniation indenting the thecal sac with frank spinal stenosis; disc bulge at L5-S1 indenting the thecal sac;
Cervical Spine: Posterior disc herniations at C5-6 and at C6-7 impinging on the anterior aspect of the spinal canal centrally at C5-6 abutting the right anterolateral aspect of the spinal cord at C6-7”.

Plaintiff Moon Bae Cho alleges to have suffered the following injuries:

“Lumbar Spine: straightening of the lumbar lordosis, possibly due to spasm disc bulges indenting the thecal sac all levels;
Cervical Spine: Posterior disc herniations at C3-4, C4-5 and at C5-6 and abutting the anterior aspect of the spinal cord; cervical sprain/strain with myofascitis; lumbosacral sprain/strain with myofascitis;
Head: Post concussion syndrome.”

It is undisputed that these plaintiffs allege to have suffered serious injuries as defined by the Insurance Law in that they suffered personal injuries resulting in 1) a permanent consequential limitation of use of a body organ or member; 2) significant limitation of use of a body function or system; and 3) medically determined impairment of a non-permanent nature which prevents plaintiffs from performing substantially all of the material acts which constitute their usual and customary daily activities for not less than ninety out of 180 days immediately following the occurrence or impairment. (See, plaintiff’s bill of particulars, ¶8).

In support of his motion for summary judgment against plaintiff Sung Ho Cho defendant annexes the medical affirmations of Malcolm H. Gottesman, M.D., an neurologist, Gregory

Lieberman, M.D., an orthopedist and Melissa Sapan Cohn, M.D., a radiologist. With regard to plaintiff Moon Bae Cho, defendant submits the affirmations of Vartkes Khachadurian, M.D., an orthopedist, Gregory Lieberman, M.D., an orthopedist and Melissa Sapan Cohn, a radiologist.

Drs. Lieberman, Gottesman and Khachadurian all fail to address plaintiffs' claims that they were unable to perform substantially all of the acts which constitute their usual and customary daily activities for ninety out of 180 days following the accident. The court will find that defendant has failed to meet his *prima facie* burden on a summary judgment motion such as the instant one where, as here, plaintiffs allege to have suffered serious injury under this category and defendants' medical experts do not address this allegation in their affirmations. See, Nemhard v. Delatorre, 16 A.D.3d 390 (2nd Dep't 2005). See, also, Perez v. Ali, 23 A.D.3d 363 (2nd Dep't 2005); Peplow v. Murat, 304 A.D.3d 633 (2nd Dep't 2003).

The court also finds unavailing Dr. Cohn's conclusion that plaintiffs' conditions are degenerative in nature. It has been held that where an accident causes a pre-existing condition to be symptomatic, that an issue of fact exists. See, e.g., Schaming v. Saunders Construction Carriers, 172 A.D.2d 957 (3rd Dep't 1991).

Where, as here, defendant fails to meet his *prima facie* burden, the court will deny the motion regardless of the sufficiency of the opposition papers. Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993). The motion for summary judgment on the grounds that plaintiffs did not suffer serious injuries is therefore denied.

So Ordered.


A.J.S.C.

Dated: December 14, 2007

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