

Leto v Troy Ambulance Serv., Inc.

2008 NY Slip Op 30000(U)

January 3, 2008

Supreme Court, Rensselaer County

Docket Number: 0213807/2008

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF RENSSELAER

MICHELE LETO and MICHAEL A. LETO,

Plaintiff,

-against-

TROY AMBULANCE SERVICE, INC. and
ALAYNA L. ISBY,

Defendants.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJ: 41-0490-05 Index No. 213807

Appearances: The Proskin Law Firm
 Attorneys For Plaintiff
 423 Loudon Road
 Albany, New York 12211

 Shantz & Belkin
 Attorneys For Defendant
 26 Century Hill Drive, Suite 202
 Latham, NY 12110

DECISION/ORDER

George B. Ceresia, Jr., Justice

The above-captioned action arises out of a motor vehicle accident which occurred on November 9, 2002 when an ambulance owned by defendant Troy Ambulance Service,

Inc., operated by defendant Alayna L. Isby Loranjo (“Loranjo”)¹, came in contact with a vehicle operated by the plaintiff. The accident occurred at the intersection of State Route 43 and Washington Avenue in the Town of North Greenbush, Rensselaer County. At the time of the accident the ambulance was responding to an emergency call regarding accident in the Town of Sand Lake. The ambulance was traveling eastbound on Route 43 as it approached the intersection. The traffic light at the intersection initially was red as Loranjo approached. Defendant Loranjo steered the ambulance over the double yellow line into the left westbound lane of Route 43. Plaintiff’s vehicle, was stopped up ahead in the left eastbound lane at the traffic light, waiting to make a left turn. The traffic light turned green. Defendant Loranjo then noticed plaintiff’s vehicle attempting to make a left turn onto Washington Avenue. Defendant Loranjo applied her brakes and attempted to steer right to avoid plaintiff’s vehicle. The front of the ambulance struck the left rear of plaintiff’s vehicle. Defendant Loranjo estimated her speed to be twenty five or thirty miles per hour at the time of impact. According to defendant Loranjo, the ambulance had its flashing lights and siren operating at the time of the accident.

The defendants have made a motion for summary judgment on grounds that because the ambulance was an authorized emergency vehicle responding to an emergency, it is protected from liability by virtue of Vehicle & Traffic Law § 1104. Defendants also contend that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff opposes the motion.

¹Since the date of the accident Alayna L. Isby was married, and is now known as Alayna Isby Loranjo.

Under Vehicle and Traffic Law § 1104 (a) operators of authorized emergency vehicles are exempted from the requirements of certain traffic laws when they are "involved in an emergency operation"². "[T]he statute 'precludes the imposition of liability for otherwise privileged conduct except where the conduct rises to the level of recklessness'" (Muniz v City of Schenectady, 38 AD3d 989, 990-991 [3rd Dept., 2007] quoting Saarinen v Kerr, 84 NY2d 494, 497 [1994], citing Vehicle and Traffic Law § 1104 [e], Campbell v City of Elmira, 84 NY2d 505, 510 [1994], and O'Banner v County of Sullivan, 16 AD3d 950, 952 [2005]). "The 'reckless disregard' standard requires a showing that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow" and has done so with conscious indifference to the outcome'" (Green v Covington, 299 AD2d 636, 637-638 [3rd Dept., 2002], quoting Saarinen v Kerr, *supra*, 501, quoting Prosser and Keaton, Torts § 34, at 213 [5th ed]; see also Szczerbiak v Pilat, 90 NY2d 553, 557 [1997]).

It is undisputed that defendant Loranjo crossed a double yellow line to proceed into

²Emergency operation is defined as follows:

"The operation, or parking, of an authorized emergency vehicle, when such vehicle is engaged in transporting a sick or injured person, transporting prisoners, delivering blood or blood products in a situation involving an imminent health risk, pursuing an actual or suspected violator of the law, or responding to, or working or assisting at the scene of an accident, disaster, police call, alarm of fire, actual or potential release of hazardous materials or other emergency. Emergency operation shall not include returning from such service." (Vehicle and Traffic Law § 114-b)

oncoming traffic as she approached a busy intersection controlled by a traffic light which was red at the time, but which could turn green at any moment. Plaintiff has testified that she did not hear a siren, and does not recall seeing flashing lights prior to the collision. Defendant Loranjo testified that her vehicle was traveling at twenty five to thirty miles per hour at impact. In the Court's view there is a triable issue with regard to whether defendant Loranjo consciously disregarded a grave risk that her actions would cause a collision and probable harm to plaintiff (see Lupole v Romano, 307 AD2d 697, 698 [3rd Dept., 2003]; O'Banner v County of Sullivan, 16 AD3d 950, 952 [3rd Dept., 2005]; Muniz v City of Schenectady, supra, 990-991).

Turning to the No-Fault Insurance issues, under Insurance Law § 5102 (d) a serious injury is defined 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.” (Insurance Law § 5102 [d])

With regard to the no-fault serious injury threshold, as the moving party, defendant in the first instance is required to present evidence in admissible form sufficient to establish that plaintiff did not, as a result of the motor vehicle accident, suffer a serious injury within

the meaning of Insurance Law § 5102 [d] (see, Tankersley v Szesnat, 235 AD2d 1010, 1011; Tompkins v Burtnick, 236 AD2d 708 [3rd Dept., 1997]; Podwirny v De Caprio, 194 AD2d 1057 [3rd Dept., 1993]; Weaver v Derr, 242 AD2d 823, 824 [3rd Dept., 1997]; Kristel v Mitchell, 270 AD2d 598 [3rd Dept., 2000]). Once such a showing is made, the burden shifts to plaintiff to proffer competent medical evidence based upon objective medical findings and diagnostic tests to support his or her claim (see, Gaddy v Eyler, 79 NY2d 955, 957 [1992]; Eisen v Walter & Samuels, 215 AD2d 149, 150 [First Dept., 1995]; Tankersley v Szesnat, *supra*; Jordan v Baine, 241 AD2d 894, 895 [3rd Dept., 1997]). The findings, in addition to being objective, must also be verifiable (see, Grossman v Wright, 268 AD2d 79 [2d Dept., 2000]). A mild or minor limitation should be classified as insignificant (see, Grossman v Wright, *supra*). Subjective complaints of pain, absent other proof are insufficient to establish “serious injury” (Eisen v Walter & Samuels, *supra*; Tankersley v Szesnat, *supra*).

Plaintiff’s injuries, as described in her bill of particulars are as follows:

“Plaintiff was placed on strict bed rest for a month and then had limitations for the duration of the pregnancy, necessitated delivery by cesarean section due to the injuries sustained in the collision, mild disc bulge (L4 to L5), injured pelvis, weakness in left leg, injury to sciatic nerve, numbness of the left leg from thigh to foot, pain when bending, lifting, kneeling, walking stairs, walking, getting up from a seated position.”

Defendant’s demand for a bill of particulars contained Demand Item 16 which recited as follows:

“Set forth in what manner it will be claimed that plaintiff Michele Leto herein has sustained a serious injury as defined by the Insurance Law of the State of New York or other applicable statute, referring specifically to the particular section or subdivision under which plaintiff Michele Leto has allegedly sustained a serious injury, together with the manner in which the injuries fall within those sections or subdivisions.”

Plaintiff’s bill of particulars contained the following response to Demand Item 16::

“Plaintiff has sustained permanent injuries including chronic pain and limitations of strength, stamina and activities constituting a serious injury as defined by the Insurance Law.”

While this statement was clearly unresponsive to the demand, defendant never requested a further bill. Nonetheless, from the injuries identified by the plaintiff in her bill of particulars (supra), the Court finds that the following serious injury threshold categories may be eliminated from consideration: death; dismemberment; significant disfigurement; a fracture; and loss of a fetus. This leaves the following serious injury threshold categories arguably remaining: 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; and the 90/180 day serious injury threshold category.

The Court of Appeals has determined that in order establish a permanent loss of use of a body organ, member, function or system the loss of use must be total (see, Oberly v Bangs Ambulance Inc., 96 NY2d 295 [2001]). The Court finds that the report of defendant’s expert, Christopher S. Calder, M.D., Ph.D. demonstrated, prima facie, the absence of a total loss of a use of a body organ, member, function or system. Plaintiff failed to present

evidence to demonstrate a triable issue of fact. The Court therefore finds that defendant is entitled to summary judgment with respect to this serious injury threshold category.

With regard to the significant limitation of use serious injury threshold category, the term “significance” relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part (see Dufel v Green, 84 NY2d 795, 798 [1995]; Toure v Avis Rent A Car Systems, Inc., 98 NY2d 345, 353 [2002]). The permanent consequential limitation serious injury threshold category requires that the injury to the body organ or member not only be permanent, but also consequential, that is more than a mild, minor or slight limitation (see Oberly v Bangs Ambulance Inc., 271AD2d 135 [3rd Dept., 2000], *affd* Oberly v Bangs Ambulance Inc., 96 NY2d 295 [2001]).

Dr. Calder indicates that there are no objective signs of injury as a result of the motor vehicle accident. He relies upon MRI report dated June 17, 2003 which found the deterioration of the L4-L5 disc to be the result of degenerative disc disease, rather than acute injury. Dr. Calder indicates that plaintiff did not see Dr. McCormack until a month after delivery of her baby; and that she has required only over-the-counter medication for her pain. He also maintains that several factors suggest symptom magnification.

It is well settled that where the defendant demonstrates that there was a pre-existing medical condition, the burden shifts to the plaintiff to come forward with evidence addressing defendant's claimed lack of causation (see Franchini v Palmieri, 1 NY3d 536,

537 [2003]; Pommells v Perez, 4 NY3d 566, 580 [2005]; Knoll v Seafood Express, 5 NY3d 817, [2005]). In this instance, because plaintiff did not produce objective medical evidence to controvert the chronic degenerative nature of the injury at L4-L5, the Court finds that plaintiff failed to demonstrate a triable issue of fact with regard to the absence of a causal link between plaintiff's lower back injuries and the motor vehicle accident which occurred on November 9, 2002.

In addition, the Court is of the view that Dr. Calder's report established that any residual symptoms which the plaintiff still experiences as a result of the instant motor vehicle accident are mild or minor, thus demonstrating that the significant limitation and permanent consequential limitation serious injury threshold categories have no merit. The Court finds that plaintiff failed to demonstrate a triable issue of fact with regard to these serious injury threshold categories.

The Court further finds however, that Dr. Calder's report failed to adequately address the 90/180 day serious injury threshold category in that it did not demonstrate that plaintiff was not prevented from performing substantially all of the material acts which constitute her usual and customary daily activities for the 90/180 day period immediately following the accident.

Accordingly, it is

ORDERED, that defendants' motion for summary judgment is granted in part and denied in part; and it is further

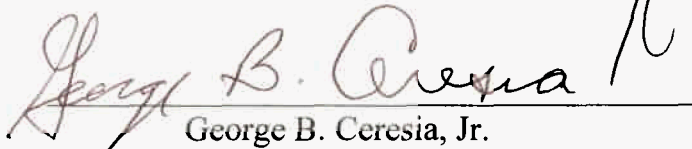
ORDERED, that defendants' motion is granted to the extent that all claims with respect to the following serious injury threshold categories are dismissed: death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; and significant limitation of use of a body function or system ; and it is further

ORDERED, that plaintiff's claim with regard to injuries to her lower back are hereby dismissed; and it is further

ORDERED, that defendants' motion is otherwise denied.

This shall constitute the decision and order of the Court. All papers are returned to the attorney for the defendant, who is directed to enter this Decision/Order without notice and to serve all attorneys of record with a copy of this Decision/Order with notice of entry.

Dated: January 3, 2008
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated July 20, 2007, Supporting Papers and Exhibits
2. Affirmation in Opposition of Lisa Anne Proskin, Esq., dated September 11, 2007
3. Affidavit of Frederick F. Shantz, Esq., sworn to September 17, 2007