

Artiles v Trust

2008 NY Slip Op 30274(U)

January 30, 2008

Supreme Court, Suffolk County

Docket Number: 0011895/2005

Judge: Robert W. Doyle

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10-5-07
ADJ. DATE 12-19-07
Mot. Seq. # 001 - MD
002 - XMotD

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Upon the following papers numbered 1 to 37 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers 16 - 25; Answering Affidavits and supporting papers 26 - 31; 32 - 33; Replying Affidavits and supporting papers 34 - 35; 36 - 37; Other___; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendants Mark Mergler and Sloan Mergler for summary judgment dismissing the complaint against them on the ground that plaintiff Elysa Artiles did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the cross motion by defendants Vault Trust and Susan Simonds for summary judgment dismissing the complaint against them on the ground that plaintiff has failed to prove that the aforementioned defendants were negligent and plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is determined as set forth below.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Elysa Artiles (“plaintiff”) when her vehicle collided with a vehicle operated by defendant Susan Simonds and owned by defendant Vault Trust at the intersection of Route 110 and South Service Road in Melville, New York, on October 10, 2004. The following facts are undisputed. There were three vehicles involved in

the accident. Prior to colliding with the plaintiff vehicle, the Simonds vehicle came in contact with the vehicle operated by defendant Sloan Mergler and owned by defendant Mark Mergler.

By their bill of particulars, plaintiffs allege that plaintiff sustained serious injuries as a result of the subject accident, including herniated discs at T2-T3, T4-T5, T6-T7, T7-T8, T8-T9, T9-T10 and T10-T11; bulging discs at L1-L2, L2-L3, L3-L4, L4-L5 and L5-S1; cervical and lumbar spine sprain; lumbalgia; and cervical myofascial pain syndrome. In addition, plaintiff claims that she was confined to bed and home for approximately one week.

Defendants Mark Mergler and Sloan Mergler move for summary judgment in their favor dismissing the complaint on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, the aforementioned defendants submit, *inter alia*, the pleadings; a bill of particulars; the medical report dated December 7, 2004 of plaintiff's treating neurologist, Dr. Frederic Mendelsohn; the affirmed report dated May 5, 2005 of no-fault carrier's chiropractor, Dr. John Whitaker; the affirmed report dated February 9, 2007 of their examining neurologist, Dr. Beatrice Engstrand, based on an examination of plaintiff on February 7, 2007; the affirmed report dated February 7, 2007 of their examining orthopedist, Dr. Craig Ordway; the affirmed MRI report dated January 8, 2007 of their examining radiologist, Dr. Stephen Lastig, based on his review of the MRI examinations of plaintiff's thoracic spine, taken on November 11, 2004, and lumbar spine, taken on November 16, 2004.

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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that

such serious injury exists (*Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [1990]).

Here, defendants Mark Mergler and Sloan Mergler failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see, Nembhard v Delatorre*, 16 AD3d 390, 791 NYS2d 144 [2005]). Dr. Lastig's MRI report indicated that he reviewed two MRI studies of plaintiff's thoracic spine, taken on November 11, 2004, and lumbar spine, taken on November 16, 2004. The MRI report revealed that plaintiff had herniated discs at T2-T3, T6-T7, T7-T8, T8-T9, T9-T10 and T10-T11 and bulging discs at L1-L2, L2-L3, L3-L4 and L4-L5. Dr. Lastig opined that plaintiff had multilevel degenerative disc disease and degenerative spondylosis and such pathology was not related to the subject accident. For a bulging or herniated disc to constitute a serious injury, there must be objective evidence of the extent or degree of the alleged limitation resulting from the injury and its duration (*see, Guzman v Paul Michael Mgt.*, 266 AD2d 508, 698 NYS2d 719 [1999]). On May 5, 2005, approximately seven months after the subject accident, no-fault carrier's chiropractor, Dr. Whitaker, examined plaintiff, using certain orthopedic and neurological tests including Kemp's test, Valsalva's test, cervical compression test, distraction test, Soto-Hall test, Bragard's test, O'Donoghue's test, Straight Leg Raising test, Milgram's test and Patrick's test. All the test results were negative. Although Dr. Whitaker found that plaintiff's range of motion for flexion, extension, lateral bending and rotation in her cervical and lumbar spine was "within normal limits," he failed to specify the degree of range of motion in plaintiff's cervical and lumbar spine in support of his conclusion that plaintiff did not sustain a serious injury (*see, Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2006]). Moreover, Dr. Whitaker also found that "[f]lexion and right lateral bending [in the lumbar spine] provoked pain at the end range" and that "[p]alpation was remarkable for lumbosacral and sacroiliac tenderness." Palpable trigger points, spasms and/or tenderness may constitute objective medical evidence of a serious injury (*see, Clements v Lasher*, 15 AD3d 712, 788 NYS2d 707 [2005]; *Santos v Marcellino*, 297 AD2d 440, 746 NYS2d 111 [2002]). In his report dated December 7, 2004, Dr. Mendelsohn stated that he examined plaintiff, using certain neurological tests and found that all the test results were normal. Dr. Mendelsohn did not discuss initial or subsequent loss of range of motion in plaintiff's cervical and lumbar spine. On February 7, 2007, approximately two years and four months after the subject accident, Dr. Ordway examined plaintiff, using certain orthopedic and neurologic test including Straight Leg Raising test and Foraminal Closure test. Dr. Ordway found that all the test results were negative or normal and that there was no spasm in plaintiff's back. Although Dr. Ordway reported his findings with respect to the various ranges of motion of plaintiff's lumbar spine, he failed to specify the degree of range of motion in extension of plaintiff's lumbar spine (*see, Browdame v Candura, supra*). Moreover, Dr. Ordway also failed to compare his findings with a normal range of motion (*see, Baudillo v Pam Car & Truck Rental*, 23 AD3d 420, 803 NYS2d 922 [2005]; *Aronov v Leybovich*, 3 AD3d 511, 770 NYS2d 741 [2004]). Furthermore, he failed to discuss the range of motion of plaintiff's cervical spine. On February 7, 2007, Dr. Engstrand examined plaintiff, using certain orthopedic and neurological tests including Straight Leg Raising test, Tinel's sign and Phalen's sign. All the test results were negative or normal. Dr. Engstrand reported her findings with respect to the various ranges of motion of plaintiff's cervical and lumbar spine and compared those findings to the normal ranges of motion. Although Dr. Engstrand found that plaintiff had normal range of motion in the cervical and lumbar spine, she failed to set forth the objective tests that

were performed to support her conclusion that plaintiff did not suffer from any limitation of the range of motion in her cervical spine (*see, Vazquez v Basso, supra; Kennedy v Brown, supra*).

Thus, defendants Mark Mergler and Sloan Mergler failed to objectively demonstrate that plaintiff's injuries were not casually related to the subject accident or that they were not serious within the meaning of Insurance Law § 5102 (d) (*see, Browdame v Candura, supra; Zavala v DeSantis, 1 AD3d 354, 766 NYS2d 598 [2003]*). Thus, the aforementioned defendants failed to establish, prima facie, their entitlement to judgment as a matter of law. Under the circumstances, it is unnecessary to consider the sufficiency of plaintiff's opposition papers (*see, Barrett v Jeannot, 18 AD3d 679, 795 NYS2d 727 [2005]*).

Defendants Vault Trust and Susan Simonds cross-move for summary judgment dismissing the complaint against them on the ground that plaintiff has failed to prove that the aforementioned defendants were negligent and plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support, the aforementioned defendants submit, *inter alia*, the deposition testimony given by defendants Susan Simonds and Sloan Mergler. Nevertheless, the aforementioned defendants have not submitted a copy of the complaint and the medical evidence required by CPLR 3212 (b) in support of their cross motion, and instead, attempt to incorporate by reference the proof submitted by defendants Mark Mergler and Sloan Mergler in support of their motion. Not only is this method of seeking summary judgment procedurally incorrect, but inasmuch as the court has already determined that defendants Mark Mergler and Sloan Mergler failed to establish that plaintiff did not sustain a serious injury, the branch of the cross motion on the issue of serious injury must be denied, as without substantive merit.

Defendants Vault Trust and Susan Simonds also seek summary judgment in their favor on the ground that plaintiff has failed to prove that they were negligent.

At her examination before trial, defendant Simonds testified to the effect that she had been traveling in the eastbound center lane of South Service Road when she came to a complete stop at a red light at the intersection of South Service Road and Route 110. When the light turned green for her, she looked both ways, southbound and northbound traffic on Route 110, and began to move her vehicle. At the time, there was nothing to obstruct her vision of northbound traffic on Route 110 coming from her right. Approximately five seconds later, she was hit by the Mergler vehicle. Defendant Simonds testified that she did not see the Mergler vehicle until a "split second before" the impact. As a result of the first impact, the hood of the Simonds vehicle went up and the car spun around. A few seconds thereafter, she felt a second impact, although she did not know what vehicle she had the second impact with.

At his deposition, defendant Sloan Mergler testified to the effect that, on the day of the accident, he was driving his father's vehicle with permission, in which his brother and two sisters were passengers, and he was traveling in the northbound left lane of Route 110. He was involved in an accident with another vehicle "within an intersection." He testified that, at the time of the contact, he was "looking straight ahead" and did not see the other vehicle "at any time before the contact." He also testified that he did not find that the intersection was controlled by a traffic control light until after the accident. Moreover, he testified that there was nothing "in the last 300 feet that [he] travelled to obstruct [his] view of the intersection where the accident occurred." After the accident, police arrived at the scene of the accident and asked him to complete a statement about how the accident occurred. Defendant Sloan

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Mergler admitted that he wrote in the statement that “[he] was passing a sign,” which indicates a traffic light.

Here, defendants Vault Trust and Susan Simonds have established a prima facie showing that defendant Simonds was driving in a reasonable and prudent manner by testifying, at her deposition, that she came to a complete stop at a red light at the subject intersection; that, when the light turned green for her, she looked both ways, southbound and northbound traffic on Route 110, and began to move her vehicle; and that she could not avoid the collision. Under these circumstances, the aforementioned defendants have also established that the sole proximate cause of the subject accident was defendant Sloan Mergler’s negligence – his failure to stop at the red traffic light when proceeding into the intersection (*see, Shapiro v Munoz*, 28 AD3d 638, 813 NYS2d 755 [2006]; *Klein v Byalik*, 1 AD3d 399, 766 NYS2d 687 [2003]; *Puccio v Caputo*, 272 AD2d 387, 707 NYS2d 478 [2000]; *Matt v Tricil [N.Y., Inc.]*, 260 AD2d 811, 687 NYS2d 828 [1999]). Thus, the burden of demonstrating a material issue of fact shifts to non-movant.

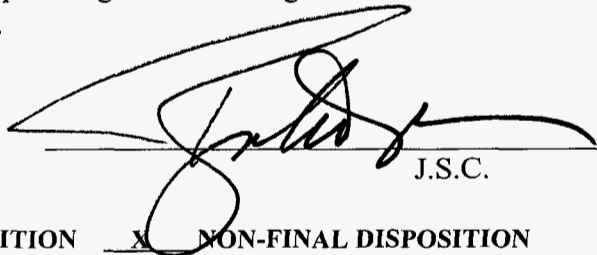
In opposition, defendants Mark Mergler and Sloan Mergler contend that there are questions of fact as to whether defendant Simonds moved her vehicle too slowly after the traffic light turned green for her; whether she failed to see what there has to be seen; and whether she could be able to avoid the collision.

A driver with the right of way has no duty to watch for and avoid a driver who might fail to stop at a stop sign or a traffic light (*see, Jenkins v Alexander*, 9 AD3d 286, 780 NYS2d 133 [2004]; *Espinoza v Loor*, 299 AD2d 167, 753 NYS2d 29 [2002]). Moreover, an operator who has the right of way is entitled to anticipate that other vehicles will obey the traffic laws that require them to yield (*see, Mosch v Hansen*, 295 AD2d 717, 744 NYS2d 222 [2002]; *Matt v Tricil [N.Y., Inc., supra]*).

The Court notes that defendants Mark Mergler and Sloan Mergler offered no evidence that defendant Simonds was moving too slowly or was otherwise comparatively negligent (*Puccio v Caputo, supra*). The aforementioned defendants failed to raise a triable issue of fact as to whether defendant Simonds was in any way at fault in the happening of the accident (*see, Shapiro v Munoz, supra; Puccio v Caputo, supra*). Thus, the branch of the cross motion by defendants Vault Trust and Susan Simonds on the issue of liability is granted.

Accordingly, the motion by defendants Mark Mergler and Sloan Mergler for summary judgment on the issue of serious injury is denied. The cross motion by defendants Vault Trust and Susan Simonds for summary judgment dismissing the complaint against them is granted. The action is severed and shall continue against the remaining defendants.

Dated: JAN 30 2008



 J.S.C.

____ FINAL DISPOSITION NON-FINAL DISPOSITION