SHORT FORM ORDER

INDEX No. 04-21916
CAL. No. 07-0700761-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 11-2-07
Mot. Seq. # 002 - MG

PAULA D. MAYO, Plaintiff, - against - CHRISTOPHER SANCHEZ, THE COUNTY OF SUFFOLK and the COUNTY OF SUFFOLK POLICE DEPARTMENT, Defendants.	MATTHEW A. GLASSMAN, ESQ. Attorney for Plaintiff 1227 main Street, 3rd Floor Port Jefferson, New York 11777
	CHRISTINE MALAFI, ESQ., Suffolk Cty Atty. By: Christopher A. Jeffreys, Esq. Attorneys for Defendants 100 Veterans Memorial Highway, P.O. Box 6100 Hauppauge, New York 11788-0099

Upon the following papers numbered 1 to 18 read on this motion for leave to reargue ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 9 - 18 ; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants for leave to renew a prior motion for summary judgment dismissing the complaint and cross claims against them is granted, and upon renewal the motion for summary judgment is denied.

By order dated September 18, 2007 (Doyle, J.), this court denied defendants' motion for summary judgment based upon a procedural defect, the defect now having been corrected, their request for leave to renew is granted, and their motion for summary judgment dismissing the complaint and cross claims against them is determined on its merits.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Paula Mayo, when her vehicle collided with a marked police vehicle owned by defendant Suffolk County Police Department and operated by defendant Christopher Sanchez, a Suffolk County police officer, in the parking lot of Brookhaven Memorial Hospital in the Town of Brookhaven, Suffolk County, on July 21, 2003. Plaintiff was involved in three unrelated vehicle accidents in 1983, May 17, 2003 and August 29, 2005.

Defendants now move for summary judgment in their favor dismissing the complaint on the ground that defendants are immune from liability pursuant to Vehicle and Traffic Law § 1104, asserting that defendant Sanchez was operating a police vehicle in an emergency operation, and therefore is entitled to application of the reckless disregard standard. Defendants assert that plaintiff is unable to establish that defendant Sanchez acted recklessly at the time of the accident. Defendants also assert that plaintiff did not suffer a "serious injury" as defined in Insurance Law § 5102 (d). In support, defendants submit, *inter alia*, the pleadings; a bill of particulars; an amended bill of particulars; the transcript of the deposition testimony given by plaintiff and defendant Sanchez; the medical record dated May 18, 2003 of Brookhaven Memorial Hospital; the MRI report dated June 25, 2003 of Dr. David Panasci, concerning plaintiff's cervical spine; the medical record dated August 29, 2005 of Brookhaven Memorial Hospital; the CT scan report dated August 29, 2005 of plaintiff's head; the X-Ray report dated September 6, 2005 of plaintiff's treating radiologist, Dr. Mahendra Sharma, concerning plaintiff's cervical and thoracic spine; the medical record dated July 21, 2003 of Brookhaven Memorial Hospital; the report dated May 3, 2004 of plaintiff's treating orthopedist, Dr. Ira Chernoff; the affirmed report dated January 29, 2007 of defendants' examining neurologist, Dr. Howard Reiser; and the affirmed report dated January 26, 2007 of defendants' examining orthopedist, Dr. Arthur Bernhang, based on an examination of plaintiff on January 19, 2007.

At his examination before trial, defendant Sanchez testified to the effect that, on the day of the accident, he had been a police officer for less than a year and was assigned to a 4:00 p.m. to 12:00 a.m. shift. It was 3:45 p.m. when he got into a marked police vehicle parked in the parking lot of Brookhaven Memorial Hospital for the very first time on the day of the accident. After he signed on, he received a radio assignment directing him to go to a suicide site. He was driving west in the parking lot and approached an intersection of the roadways in the parking lot. Although he did not come to a complete stop at the intersection, he slowed down to a speed of approximately 10 miles per hour and checked left and right. He did not see any other vehicle coming from both directions and was in the process of making a left hand turn toward the south exit. At the time, he saw the plaintiff's vehicle in front of him "moments before the accident." He applied his brake hard and "attempted to move to [his] left." The front of his vehicle struck the driver's side of the plaintiff's vehicle, causing it to strike a parked vehicle. As a result of the impact, his vehicle came to a complete stop. Finally, defendant Sanchez testified that, prior to the impact, he turned on his overhead lights but did not activate a siren or any audible signal. In addition, he testified that the assignment call that he received is a "general aided call."

At her deposition, plaintiff testified to the effect that, on the day of the accident, she was working as a nurse's aid at Brookhaven Memorial Hospital. At about 3:45 p.m. or 3:50 p.m., plaintiff was traveling southbound on the main road of the employee's parking lot, heading toward the south exit. When she first made a left onto the road, there was no vehicle in front of and behind her, and she had been driving at a speed of about 10 miles per hour. Prior to the accident, she was looking "straight ahead, to [her] right or left" and observed no other vehicle coming from the opposite direction. After she had passed two intersecting roadways, she got hit by a police vehicle, causing her vehicle to move about four or five feet towards the right and hit another parked vehicle. When she got hit, she "put the brakes on." Before the impact, she neither heard the sound of a horn nor saw flashing lights.

Vehicle and Traffic Law § 1104 (a) states that "[t]he driver of an authorized emergency vehicle, when involved in an emergency operation, may exercise the privileges set forth in this section, but subject to the conditions herein stated." Vehicle and Traffic Law § 1104 (e) states that "[t]he foregoing provisions

shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others." A police officer operating an emergency vehicle engaged in an emergency operation of the vehicle is provided with a qualified privilege under the Vehicle and Traffic Law and is exempt from certain rules of the road (*see*, Vehicle and Traffic Law § 1104; ***Criscione v City of New York***, 97 NY2d 152, 736 NYS2d 656 [2001]; ***Saarinen v Village of Massena***, 84 NY2d 494, 620 NYS2d 297 [1994]; ***Campbell v City of Elmira***, 84 NY2d 505, 620 NYS2d 302 [1994]). However, an officer's conduct in a vehicular operation that is classified as an emergency operation will not come within the qualified privilege if the officer failed to exercise due regard for the safety of others or acted with a reckless disregard for the safety of others (***Szczerbiak v Pilat***, 90 NY2d 553, 664 NYS2d 252 [1997]; ***Gonyea v County of Saratoga***, 23 AD3d 790, 803 NYS2d 764 [2005]; ***Turini v County of Suffolk***, 8 AD3d 260, 778 NYS2d 66 [2004]). The reckless disregard standard requires evidence 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 (*see*, ***Shephard v City of New York***, 39 AD3d 842, 835 NYS2d 297 [2007]; ***Turini v County of Suffolk,*** 8 AD3d 260, 778 NYS2d 66 [2004]). In a proper case, the question of a defendant's "recklessness" may properly be put before a jury (*see*, ***Szczerbiak v Pilat***, *supra*). While the nature of the underlying police call or the officer's perception of its urgency is irrelevant for purpose of ascertaining whether the officer was engaged in an emergency operation within the meaning of the statute, the nature of the call nevertheless is relevant in determining whether a responding officer's conduct was in reckless disregard for the safety of others (*see*, ***Muniz v City of Schenectady***, 38 AD3d 989, 830 NYS2d 622 [2007]; ***O'Banner v County of Sullivan***, 16 AD3d 950, 792 NYS2d 230 [2005]).

Here, the adduced evidence indicates that defendant Sanchez in a marked police vehicle responding to a police call is engaged in an emergency operation within the meaning of Vehicle and Traffic Law § 114-b and, thus, he is entitled to the qualified immunity afforded by Vehicle and Traffic Law § 1104; the sole question for this court's review is whether defendant Sanchez' conduct at the time of the accident rises to the level of recklessness. There are disputed issues of fact and credibility regarding the parties' sharply differing versions of the happening of the accident, notably, the existence of audible emergency soundings. In addition, defendant Sanchez testified that the assignment call that he received is a "general aided call." Under the circumstances, this court finds that there is a triable issue of fact whether defendant Sanchez acted with reckless disregard for the safety of others in his operation of the police vehicle. Thus, summary judgment on the issue of liability is inappropriate (*see*, ***Campbell v City of Elmira***, *supra*; ***Muniz v City of Schenectady***, *supra*; ***Allen v Town of Amherst***, 8 AD3d 996, 778 NYS2d 598 [2004]).

Defendants also seek summary judgment on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d).

By her bill of particulars, plaintiff alleges that she sustained serious injuries as a result of the accident, including herniated discs at C3/C4-C5/C6; radiculopathy at C6 and L5/S1; knee internal derangement; arthritis; left knee patellofemoral pain syndrome with chondromalacia; and cervical and lumbosacral sprain.

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 Eyler***, 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 must demonstrate that plaintiff's injury was either not causally related to the subject accident or not serious within the meaning of Insurance Law § 5102 (d) (***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2006]; ***Zavala v DeSantis***, 1 AD3d 354, 766 NYS2d 598 [2003]). Defendants 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. Panasci's MRI report of plaintiff's cervical spine, performed on June 25, 2003, approximately one month prior to the July 21, 2003 accident, revealed that plaintiff had right-sided disc herniation at C6/C7 and smaller disc herniations at C3/C4, C4/C5 and C5/C6. The CT scan report of plaintiff's head, performed on August 29, 2005, revealed that plaintiff had "soft tissue swelling and subgaleal hemorrhage anterior to the left frontal bone." Dr. Sharma's X-ray report of plaintiff's cervical spine revealed that "there is moderate to severe degree of foraminal narrowing involving the right C6-7 foramina." Dr. Chernoff's report dated May 3, 2004 revealed that plaintiff had neck and lower back pain and "arthritis of the knee with degenerative changes and meniscal changes." On January 29, 2007, approximately three and a half years after the July 21, 2003 accident, defendants' examining neurologist, Dr. Reiser, examined plaintiff and found that straight

leg raising signs were negative and that all the neurological test results were negative or normal. Although Dr. Reiser concluded that plaintiff did not sustain a serious injury causally related to the July 21, 2003 accident, he failed to specifically quantify the range of motion restriction in plaintiff's cervical and lumbar spine in support of his conclusion (*see*, ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2006]). On January 19, 2007, defendants' examining orthopedist, Dr. Bernhang, examined plaintiff, using certain orthopedic and neurological tests including Straight Leg Raising test, supine Straight Leg Raising test, and FABER and FADIR tests. All the test results were negative or normal. He reported his findings with respect to the various ranges of motion of plaintiff's cervical spine, shoulders and knee and found that plaintiff had range of motion restrictions when compared to average range of motion: 30 degrees extension (38 degrees average) and 35/35 degrees lateral flexion (43 degrees average) in her cervical spine; 85/85 degrees abduction (170 degrees average), 90/90 degrees flexion (158 degrees average) and 15/15 degrees internal rotation (70 degrees average) in her shoulder; and 115/115 degrees flexion (134 degrees average) in her knee. Moreover, Dr. Bernhang failed to provide objective test measurements for plaintiff's lumbar extension, flexion and rotation. Dr. Bernhang's report indicates that "[d]orsal lumbar expansion with the knees extended is 6" [and] lateral flexion is 20/20 degrees (20 being normal)." Dr. Bernhang indicated that he had reviewed Dr. Panasci's MRI report, performed on June 25, 2003, and opined that plaintiff's "mild restriction of the cervical spine, noted on examination, would appear consistent with" the MRI report. Dr. Bernhang also indicated that he had reviewed an MRI report of plaintiff's lumbar spine, allegedly taken on July 15, 2003, which had found that plaintiff had disc herniation at L5-S1. Dr. Bernhang opined that, "since there is no subsequent MRI [reports] of [plaintiff's] cervical and [lumbar] spine available" to him, "it would appear that no material or substantial injury to the cervical [and lumbar] spine had occurred as a result of the July 21, 2003 accident." Dr. Bernhang also opined that plaintiff's "degenerative arthritis of the left knee *** is in all medical probability a pre-existing condition." Dr. Bernhang failed to submit evidence to support his conclusion that plaintiff's injuries were not causally related to the July 21, 2003 accident (*see*, ***Tricarico v Vicale***, 5 AD3d 761, 773 NYS2d 572 [2004]).

Thus, defendants failed to establish, prima facie, their entitlement to judgment as a matter of law. Accordingly, their motion for summary judgment dismissing the complaint on the grounds that defendants are immune from liability pursuant to Vehicle and Traffic Law § 1104 and that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d) is denied. 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]).

Dated: FEB 13 2008

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION