Bryan v Berger
2008 NY Slip Op 31007(U)
March 28, 2008
Supreme Court, Richmond County
Docket Number: 0100339/2005
Judge: Joseph J. Maltese
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Action No. 1

ELAINE BRYAN,

Plaintiff

Index No.: 100339/05
Motion No.: 6, 7 and 8

against

JENNIFER BERGER,
CINDY BERGER, THE CITY OF NEW YORK,
THE NEW YORK CITY TRANSIT AUTHORITY
and DONNA CODY,

DECISION & ORDER

HON. JOSEPH J. MALTESE

Defendants

JENNIFER BERGER,

Action No. 2

Plaintiff

Index No. 101581/05

against

NEW YORK CITY TRANSIT AUTHORITY
and DONNA CODY,

Defendants.

The following items were considered in the review of this motion for summary judgment

Papers	Numbered
Notice of Motion and Affidavits Annexed	1, 4, 7
Answering Affidavits	2, 5
Replying Affidavits	3, 6
Exhibits	Attached to Papers

In Action No.1, defendants, Jennifer Berger ("Jennifer") and Cindy Berger's ("Cindy") motion for summary judgment pursuant to CPLR §3212 against the defendant, New York City Transit Authority ("NYCTA") is granted. Defendants, Jennifer, Cindy and NYCTA's motion for summary judgment pursuant to CPLR § 3212 and Insurance Law § 5102 is denied in all respects.

Facts

This case arises out of a motor vehicle accident that occurred at the intersection of Forest Avenue and Hart Boulevard in Staten Island, New York. Plaintiff, Elaine Bryan, was a passenger on a New York City Transit Authority (NYCTA) bus that collided with the rear end of defendant, Jennifer's vehicle as she waited to make a left turn. Plaintiff, Elaine Bryan, alleges that prior to impact she was a standing passenger on the bus. She alleges that at the moment of impact, she was thrown to the ground and sustained various injuries.

Defendants, Jennifer and Cindy, move this court for a summary judgment order pursuant to CPLR § 3212, arguing that by virtue of being struck in the rear by the bus, they are not liable as a matter of law. Defendants, Jennifer, Cindy and NYCTA, move for a summary judgment order pursuant to CPLR § 3212 and Insurance Law § 5102 claiming that plaintiff, Elaine Bryan, failed to sustain a "serious injury" as that term is defined by statute.

Discussion

Summary Judgment: Struck from Behind

An operator of a motor vehicle is negligent as a matter of law when, without the absence of a non-negligent explanation, his vehicle strikes another in the rear.

> It is well settled that a rear end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the moving vehicle, requiring the operator of that vehicle to come forward with a non-negligent explanation for the accident (citation omitted). Conclusory assertions of a sudden and unexpected stop are insufficient to rebut the inference of negligence (citations omitted). Moreover, vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead (see, *Vehicle and Traffic Law* § 1129[a]).[1]

[1] *Shamah v. Richmond County Ambulance Service, Inc.*, 279 AD2d 564 [2nd Dept. 2001].

The burden is on a party opposing summary judgment to produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests.[2] Bald conclusory assertions, general allegations of negligence, expressions of hope or unsubstantiated allegations or assertions are all insufficient to defeat a motion for summary judgment.[3]

While negligence cases do not generally lend themselves to resolution by motion for summary judgment, such a motion will be granted where the facts clearly point to the negligence of one party without any fault or culpable conduct of the other party.[4]

In the instant case, the testimony of defendant, Donna Cody, the operator of the NYCTA bus that struck Jennifer, indisputably establishes she observed Jennifer's break lights at a distance of ten feet, but failed to avoid contact with her vehicle. There is no material issue of fact sufficient to deny summary judgment to the defendants, Jennifer and Cindy, on the issue of liability. Plaintiff did not oppose defendants Jennifer and Cindy's motion. Plaintiff's complaint against Jennifer and Cindy Berger is therefore dismissed.

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[2] *Gilbert Frank Corp. v. Federal Insurance Co.*, 70 NY2d 966 [1988]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980].

[3] *Spaulding v. Benenati,* 57 NY2d 418 [1982].

[4] *Goldberg v. Nelson*, 202 AD2d 390 [2nd Dept. 1994].

Summary Judgment: Failure to Sustain a Serious Injury

Defendants seek summary judgment on the ground that the plaintiff has not sustained a "serious injury" as defined by *Insurance Law* § 5102(d).[5] The serious injury threshold set forth in Insurance Law § 5104(a) can only be established under these categories.[6] Thus, the mere fact that one has been injured, even seriously, does not establish that a "serious injury" has been sustained.[7] Rather, a plaintiff must show that he or she sustained a personal injury, i.e., bodily injury, sickness or disease,[8] that results in one of the nine serious injury threshold categories.[9]

It is important to keep in mind the policies underlying the enactment of the No-Fault Law and the law's structure when litigating no-fault related issues. Courts have consistently held that the No-Fault Law must be interpreted to fulfill the policies the legislature had in mind.[10] It is for the court to decide in the first instance whether a plaintiff has made a *prima facie* showing of "serious injury."[11]

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[5] A serious injury must be a personal injury "[W]hich 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 constitutes 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]).

[6] *Coon v. Brown*, 192 AD2d 908 [3rd Dept 1993]; *Daviero v. Johnson*, 88 AD2d 732 [3rd Dept 1982].

[7] *Jones v. Sharpe*, 98 AD2d 859 [3rd Dept 1989], *aff'd* 63 NY2d 645 [1984].

[8] 11 *NYCRR* § 65-2.1[e].

[9] *See, Van Norstrand v. Regina*, 212 AD2d 883 [3rd Dept 1995].

[10] *See, Oberly v. Bangs Ambulance*, 96 NY2d 295 [1991]; *Scheer v. Koubek*, 70 NY2d 678 [1987]; *Maida v. State Farm*, 66 AD2d 852 [2nd Dept 1978].

[11] *See*, e.g., *Licari v. Elliott*, 57 NY2d 230, 237.

A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law §5102(d) by submitting the affidavits or affirmation of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim.

Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations.[12] The burden, in other words, shifts to plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury.[13] In the case before the court, defendants came forward with reports from independent medical exams. Defendant presented sworn statements from Dr. Robert Israel, an orthopedist; and Dr. Michael Carciente, a neurologist. Each affirmed statement utilized objective tests and determined that plaintiff's injuries are subjective and that any previous conditions are resolved. Defendants have sufficiently challenged plaintiff's allegation that she sustained a serious injury.

The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient.[14] Additionally, a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings which are based on a recent examination of the plaintiff.

In order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law § 5102(d), the plaintiff's expert must submit *quantitative objective findings*, in addition to an opinion as to the significance of the injury[15] (emphasis added).

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[12] *See, Kordana v. Pomellito*, 121 AD2d 783, appeal dismissed, 68 NY2d 848.

[13] *See, Gaddy v. Eyler*, 79 NY2d 955; *Grossman v. Wright*, 268 AD2d 79 [2nd Dept 2000].

[14] *Id.*

[15] *Grossman v. Wright*, 268 AD2d 79 [2nd Dept 2000].

Where it is alleged that there is a permanent consequential limitation of use of a body member and significant limitation of the use of a body function or system, the resultant injury must be more than "minor, mild or slight," as contrasted to the loss-of-use category, which requires proof of a "total loss" of use.[16] There are, however, differences between them. The "consequential limitation of use" category requires that the limitation be permanent, whereas the "significant limitation of use" category does not require that the limitation be permanent.[17] Furthermore, the "consequential limitation of use" must be with respect to a body organ or member, whereas the "significant limitation of use" must be with respect to a body function or system.

A designation set forth by medical proof of a numeric percentage or degree of a plaintiff's loss of range of motion can be used to establish a limitation of use.[18] An unspecified percentage or degree of restricted range of motion is not enough.[19]

Alternatively, medical proof of a functional impairment not involving a loss of range of motion can suffice. This will involve a medical expert's qualitative assessment of the plaintiff's condition which will compare the plaintiff's impairment or limitation to the normal function, purpose and use of the affected body organ, member, function or system.[20]

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[16] *See, Oberly v. Bangs Ambulance, Inc*., 96 NY2d 295 [2001]; *Gaddy v. Eyler*, 79 NY2d 955 [1992].

[17] *See, Lopez v. Senatore*, 65 NY2d 1017 [1985; *Lanuto v. Constantine*, 192 AD2d 989 [3rd Dept 1993]; *Decker v. Rassaert*, 131 AD2d 626 [2nd Dept 1987].

[18] *Toure v. Avis Rent a Car Systems*, 98 NY2d 345 [2002]; *Molina v. Nosa Choi*, 298 AD2d 508 [2nd Dept 2002].

[19] *See, Herman v. Church*, 276 AD2d 471 [2nd Dept 2000]; *Barbarulo v. Allery*, 271 AD2d 897 [3rd Dept 2000]; *Owens v. Nolan*, 269 AD2d 794 [4th Dept 2000].

[20] *Toure v. Avis Rent A Car System, supra*; *Dutel v. Green*, 84 NY2d 795 [1985]; *June v. Gonet*, 298 AD2d 811 [3rd Dept 2002].

For the claimed limitation of use to be "consequential" or "significant," which terms are synonymous, there must be proof that it is more than a "minor, mild or slight" limitation of use.[21] It must be "important" or "meaningful."

This requirement relates to the limitation of use's medical significance, and involves a comparative determination of the degree or qualitative nature of the limitation based on the normal function, purpose and use of the affected body part.[22] In other words, a medical expert must describe the qualitative nature of plaintiff's limitation based on the normal function, purpose or use of plaintiff's affected body part.[23]

As to the causation element, it will be necessary for the plaintiff to establish this element by expert opinion, namely, that the specified degree or percentage of loss of range of motion or limitations in plaintiff's physical activities are a natural and expected medical consequence of plaintiff's injuries, which injuries are demonstrated by competent medical proof.[24]

Plaintiff directs the court's attention to the follow up report of Dr. Shay S. Pathare dated March 5, 2007 and a surgical report from a procedure performed on March 15, 2007. The March 5, 2007 report demonstrates objectively that plaintiff has diminished range of motion with respect to lumbar flexion. In addition, the straight raise test performed by Dr. Pathare demonstrates a reduction in the range of motion that can possibly be attributed to an injury to plaintiff's back.

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[21] *Toure v. Avis Rent A Car System, supra.*; *Gaddy v. Eyler, supra*; *Nolan v. Ford*, 64 NY2d 681 [1984]; *Licari v. Elliott*, 57 NY2d 230, 235 [1982].

[22] *See, Route v. Avis Rent A Car System*, 98 NY2d at 353, supra.

[23] *Id.* at 355.

[24] *See, Toure v. Avis Rent A Car System*, 98 NY2d at 353, 355, *supra*.

Conclusion

The motion of defendants, Jennifer and Cindy, for summary judgment pursuant to CPLR § 3212 is granted dismissing plaintiff's complaint and the cross-claim brought by co-defendant NYCTA with prejudice.

Plaintiff, through the use of objective evidence, raises an issue of fact with respect to whether her injuries are permanent and meet the "serious injury" threshold as defined by statute. Defendants failed to demonstrate to this court that plaintiff did not suffer a permanent injury as a matter of law.

Accordingly, it is hereby:

ORDERED, that the motion of defendants, Jennifer Berger and Cindy Berger, to dismiss the complaint and all cross claims pursuant to CPLR § 3212 on the basis that there is no material issue of fact regarding the liability of these defendants is granted in it entirety; it is further

ORDERED, that the motion of defendants, Jennifer Berger, Cindy Berger and New York City Transit Authority, for summary judgment and to dismiss plaintiff's complaint on the ground that plaintiff did not sustain a "serious injury" are denied in their entirety; and it is further

ORDERED, that all parties shall return to DCM Part 3 at 9:30 a.m. on **April 16, 2008** for a status conference.

ENTER,

DATED: March 28, 2008

Joseph J. Maltese
Justice of the Supreme Court