

Schaefer v Dennehy

2008 NY Slip Op 31632(U)

June 5, 2008

Supreme Court, Nassau County

Docket Number: 6102-06/

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

NANCY SCHAEFER.

Plaintiff.

- against -

Sequence No.: 001 & 002
Index No.: 016102/06

SHELIA DENNEHY.

Defendant.

The following named papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion and Affidavits Annexed</u>	<u>X</u>
<u>Notice of Cross-Motion and Affidavits Annexed</u>	<u>X</u>
<u>Answering Affidavits</u>	<u>X</u>
<u>Replying Affidavits</u>	<u>X</u>

Upon reading the papers submitted and due deliberation having been had herein, defendant's motion for summary judgment dismissing the complaint is hereby denied. Plaintiff's cross-motion for summary judgment on the issue of liability is granted.

Plaintiff herein allegedly suffered personal injuries as a result of an automobile accident between the car in which she was driving and that which was owned and operated by defendant on February 2, 2006. Defendant moves for summary judgment on the basis that plaintiff did not suffer serious injury as defined by Insurance Law §5102(d). Plaintiff cross-moves for summary judgment on the issue of liability upon the ground that defendant's vehicle struck plaintiff's stopped vehicle in the rear.

In order to succeed on a motion for summary judgment, defendant must demonstrate that there are no issues of fact by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). In opposing a motion for summary judgment, plaintiff must demonstrate an issue of fact through admissible evidence. Zuckerman v. City of New York, supra.

Defendant's Motion

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 alleges that she suffered the following injuries:

“Non-displaced fracture of the right 5th through 7th ribs; difficulty upon breathing; pain upon palpation; severe cervical sprain/strain; cervical radiculopathy, with pain radiating down and through the upper extremities and throughout the trapezius musculature; loss of range of motion in all directions; right-sided pain radiating into the right S1 joint; lumbosacral sprain/strain; loss of range in all directions; difficulty sleeping.”

Plaintiff alleges in her bill of particulars that she suffered serious injuries as defined by the Insurance Law in that they suffered personal injuries resulting in 1) fractures; 2) significant limitation of use of a body function or system; and 3) medically determined impairment of a non-permanent nature which prevents plaintiff from performing substantially all of the material acts which constitute her 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, ¶6).

In support of her motion defendant annexes the medical affirmation of John C. Killian, M.D., an orthopedist and Steven L. Mendelson, M.D., a radiologist.

Dr. Killian fails to address plaintiff’s claim that she was unable to perform substantially all of the acts which constitute her usual and customary daily activities for ninety out of 180 days following the accident. The court will find that defendant has failed to meet her *prima facie* burden on a summary judgment motion such as the instant one where, as here, plaintiff alleges to have suffered serious injury under this category and defendant’s medical expert does not address this allegation in his affirmation. See, Nemhard v. Delatorre, 16 A.D.3d 390 (2nd Dep’t 2005). See, also, Sayers v. Hot, 23 A.D.3d 453 (2nd Dep’t 2005); Perez v. Ali, 23 A.D.3d 363 (2nd Dep’t 2005); Peplow v. Murat, 304 A.D.3d 633 (2nd Dep’t 2003). Neither does Dr. Killian address at all whether or not plaintiff suffered a right rib fracture, except to opine that if she did, “one would anticipate uneventful healing without residua.” A fracture constitutes a serious injury as a

matter of law as defined by Insurance Law §5102. See, Tagger v. Olympic Van Line, Inc., 38 A.D.3d 646 (2nd Dep't 2007); Moffit v. Murray, 2 A.D.3d 1110 (3rd Dep't 2003). The court therefore finds Dr. Killian's affirmation to be of little probative value.

While Dr. Mendelson arguably makes a *prima facie* showing in his affirmation that plaintiff did not suffer a fracture as alleged, he, like Dr. Killian fails to at all address plaintiff's allegation that she was unable to perform substantially all of the activities that constituted her customary and usual activities for ninety out of 180 days following the accident. See, Nemhard v. Delatorre, *supra*.

Where, as here, defendant fails to meet her *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 is therefore denied.

Plaintiff's Cross-Motion

In her affidavit plaintiff avers that:

1) On February 21, 2006 she was operating her vehicle on Long Beach Boulevard and was at a complete stop at the intersection with Pine Street in Long Beach in the center of three lanes facing in the southbound direction; and

2) while stopped she was rear ended by the vehicle operated by defendant.

Where, as here, plaintiff demonstrates that defendant's vehicle struck plaintiff's stopped vehicle in the rear, there is a presumption of negligence on defendant's part which shifts the burden to defendant to demonstrate a non-negligent explanation for the occurrence of the accident. Davis v. Quinones, 295 A.D.2d 394 (2nd Dep't 2002).

In opposition defendant points to her deposition testimony and affidavit in which defendant asserts that on the date of the accident her contact lens came loose just prior to the accident. The resulting pain caused her foot to move from the brake to the gas pedal resulting in the collision with the rear of plaintiff's vehicle. Defendant contends that such raises an issue of fact as to whether the accident was the result of a "medical emergency" for which defendant may not be charged with negligence.

Defendant fails to set forth a non-negligent explanation for the accident's occurrence. Generally, the court will find that defendant has met her burden of demonstrating a non-negligent explanation for the accident's occurrence where the defendant demonstrates that she was faced with an unforeseen medical emergency which caused the accident. See, State of New York v. Susco, 254 A.D.2d 854 (3rd Dep't 1997). Such has been held to apply to situations where the defendant driver experienced such medical emergencies as a heart attack, a diabetic occurrence resulting in unconsciousness and a cramp in the foot. See, State v. Susco, *supra*.; McGinn v. New York City Transit Authority, 240 A.D.2d 378 (2nd Dep't 1997); Dalchand v. Missigman, 288 A.D.2d 956 (4th Dep't 2001).

Notwithstanding defendant's assertion to the contrary, the court is not willing to accept an explanation that a dislodged contact lens and its accompanying discomfort constitutes a medical emergency which would cause defendant's foot to move from the brake to the gas pedal. Accordingly, the court finds that defendant has failed to meet her burden.

Thus, based upon the foregoing the cross-motion is granted and it is directed that defendant is found solely liable for the occurrence of the accident.

So Ordered.

Dated: June 5, 2008


A.J.S.C.

ENTERED

JUN 11 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE