

Roldan v County of Suffolk

2008 NY Slip Op 31730(U)

April 10, 2008

Supreme Court, Suffolk County

Docket Number: 0001418/2005

Judge: Joseph C. Pastorella

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COMP

INDEX No. 05-1418
CAL. No. 07-02474-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 12-24-07 (002)
MOTION DATE 1-22-08 (003)
ADJ. DATE 2-19-08
Mot. Seq. # 002 - MD
Mot. Seq. # 003 - XMD

-----X
CARLOS ROLDAN and CARMEN TORRES, :
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 :
 Plaintiffs, :
 :
 - against - :
 :
 COUNTY OF SUFFOLK, THERESA M. :
 BRODTMAN, LAURA A. SORGIE and :
 JOSEPH G. SORGIE, JR., :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 43 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers 20 - 28; Answering Affidavits and supporting papers 29 - 35; 36 - 37; Replying Affidavits and supporting papers 38 - 39; 40 - 41; Other 42 - 43; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by defendants, County of Suffolk and Theresa M. Brodtman, pursuant to CPLR 3212 and Vehicle and Traffic Law § 1104 dismissing the complaint on the basis they bear no liability in that the officer did not act in reckless disregard, and pursuant to Insurance Law §5102(d) on the basis that plaintiff does not meet the serious injury threshold, is denied; and it is further

ORDERED that this cross-motion (003) by defendants Laura A. Sorgie and Joseph Sorgie, Jr. pursuant to CPLR 3212 and Insurance Law §5102(d) on the basis that plaintiff does not meet the serious injury threshold, is denied.

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This is an action to recover damages for personal injuries allegedly sustained by plaintiff Carlos Roldan and a derivative claim on behalf of his spouse, Carmen Torres, when he was involved in a motor vehicle accident which occurred on January 21, 2004 at approximately 2:35 p.m. at the intersection of Washington Avenue and Express Drive South, Town of Islip, County of Suffolk, State of New York. Mr. Roldan was a passenger in the vehicle operated by Jose A. Lopez-Nieves whose vehicle was allegedly stopped at a red light while facing southbound on Washington Avenue and struck by a vehicle owned by the Suffolk County Police Department and operated by Theresa M. Brodtman, after the police vehicle had just been involved in a collision with an automobile operated by Joseph G. Sorgie, Jr. and owned by Laura A. Sorgie.

Defendants County of Suffolk and Theresa Brodtman now seek summary judgment dismissing the complaint on the basis plaintiff cannot demonstrate any triable issue of fact evidencing any negligence or recklessness on their part, and that they are afforded immunity from liability in the operation of the police vehicle in that it was not operated with a reckless disregard for the safety of others. The County of Suffolk, Theresa Brodtman, Joseph G. Sorgie, Jr., and Laura A. Sorgie seek summary judgment dismissing the complaint on the basis plaintiff has not sustained a serious injury within the definition of Insurance Law §5102(d).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499 [1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

Initially, the Court notes that the unsworn MV-104 police accident report witness statement constitutes hearsay and is inadmissible (*see, Lacagnino v Gonzalez*, 306 AD2d 250 [2d Dept 2003]; *Hegy v Collier*, 262 AD2d 606 [2d Dept 1999]).

LIABILITY

Under New York Vehicle & Traffic Law §114-b, an emergency operation is one involving certain

specified operations, including responding to a police call and alarm of fire (*Sims v Town of Ramapo*, 177 Misc.2d 302 [Sup Ct Rockland County 1998]). An officer responding to a radio call concerning a burglary in progress is engaged in an emergency operation (*Sims v Town of Ramapo*, supra). The uncontradicted testimony of defendant Police Officer Brodtman established that while alone operating a Suffolk County Police Department vehicle she was responding to a police radio call concerning a stabbing. It is therefore determined Officer Brodtman was engaged in an emergency operation of said vehicle.

NY Vehicle & Traffic Law §1104(b) 2 provides in pertinent part that authorized emergency vehicles may proceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation. Subdivision 4 provides that authorized emergency vehicles may disregard regulations governing directions of movement or turning in specified directions. Subdivision 4 (e) provides in pertinent part that the 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. “As the driver of an authorized emergency vehicle, a defendant by statute is permitted to proceed past a steady red signal but only after slowing down to a speed necessary for safe operation and to exceed the maximum speed limits of the municipality so long as he does not endanger life or property. His right to be so exempted is qualified by the requirement that he sound such an audible signal by siren as is reasonably necessary and does not relieve him from the duty to drive with due regard for the safety of all persons” (*Meighan v Wehnau*, 17 AD 2d 879 [3rd Dept 1962]). “A police car that is on an emergency trip has the right of way, even against a red light, provided it is driven with caution and adequate warning is sounded” (*Brennan v City of Albany*, 284 AD2d 997 [3rd Dept 1954], citing NY Veh. & Traf. Law §§ 82, 84). When engaged in an emergency operation, an officer is subject to the reckless disregard standard under section 114-b of the Vehicle and Traffic Law (*Town of Ramapo*, supra).

Officer Brodtman testified that when she received the police radio call concerning a stabbing at a laundromat on Fifth Avenue, Bay Shore, she was on Motor Parkway and turned on her siren and full lights, the overhead rack and the headlights. She traveled southbound on Washington Avenue which she described as having one travel lane in each direction separated by a double yellow line with no shoulder or parking on either side. There were cars in front of her, so she thought she was straddling the double yellow line. She came to an intersection and stopped for about two or three seconds in about the middle of the travel lanes about six feet before the intersection as there was a red light for southbound and northbound traffic. She looked to the right as “it was only a one way” so the cars came only from the right. During the next several seconds, maybe five, she stated the fast lane (left) stopped so she inched forward to make sure there were no cars in the right lane. She proceeded further into the intersection and saw there were no oncoming cars. She accelerated and continued into the intersection, and out of the corner of her eye, about eighty feet from her, a white blur came at her from the right heading eastbound at about fifty or sixty miles per hour. She testified she was moving about fifteen, no more than twenty, miles per hour, and floored her vehicle; seconds later the front of the other vehicle and the passenger rear side of the police vehicle made contact, spinning the police vehicle 180 degrees. The police vehicle then hit into the front passenger side of a van that was stopped at the light heading northbound, and after the impact, continued to move about a car length and stopped as if they were parked right next to each other. She did

not get out of her vehicle and radioed for assistance.

Mr. Roldan testified he was in the front passenger seat in a vehicle owned and operated by Jose Lopez, traveling northbound on Washington Avenue when they reached the intersection of Washington Avenue and the service road for the Long Island Expressway. As they approached the intersection, they had a red light and Mr. Lopez stopped for about ten seconds waiting for the light to change. He heard an "alarm" (siren) and saw the overhead emergency lights on a police car right in front of him. He testified that she (the police car) stopped a little bit on the other side of the street and then continued into the intersection when the police car was hit by a car coming from the expressway service road, the police car started to spin and struck the passenger side bumper of the van he was a passenger in.

Joseph Sorgie, Jr. testified he was traveling on the south service road of the expressway traveling eastbound in the left lane at about thirty to thirty five miles per hour. About one hundred yards or so from the intersection with Washington Avenue, he was traveling about eight or more car lengths behind another vehicle and saw the traffic light which was green for eastbound traffic on the service road. He testified that an impact occurred with the police car as he entered into the intersection. He testified he did not hear a siren or see flashing lights. He first saw the police car a split second right in front of him when his front bumper was about two car lengths from the intersection, and he was traveling about twenty miles per hour, before the impact occurred. He then saw the lights and heard the siren. He testified he hit his brake heavy when he saw the police car and attempted to veer to the right by turning his steering wheel to the right. The front driver's side and the rear of the police car then made contact. His car stopped in the middle of the intersection.

In considering the aforementioned testimonies, statutes and case law, it is determined by this Court that there are factual issues concerning whether the driver of the emergency vehicle acted with due regard for the safety of all persons, whether the driver acted in reckless disregard of the safety of others in entering the intersection, whether the driver endangered life or property of plaintiff, whether the driver drove with caution, whether the emergency vehicle sufficiently stopped or slowed down in entering the intersection to observe traffic entering the intersection from the east on the south service road immediately prior to the accident, and whether either vehicle failed to yield the right of way in the intersection. The standard of reckless disregard for the safety of others 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 (*Lorber v Town of Hamburg*, 225 AD2d 1062 [4th Dept 1996], citing *Saarinen v Kerr*, 84 NY2d 494, 501 [1993]; see also *Campbell v City of Elmira*, 84 NYS2d 505 [1994]). Whether the conduct of the operator of the vehicle demonstrated a reckless disregard for the safety of others is an issue of fact in the instant action (see, *Molinari v City of New York*, 267 AD2d 436 [2nd Dept 1999]). Based upon the testimony presented, this Court cannot conclude as a matter of law that defendant police officer did not act recklessly by failing to see defendant Sorgie's vehicle immediately before it entered the intersection and then proceeding into the intersection accelerating into his path as Mr. Sorgie's vehicle was entering the intersection while taking evasive action by braking and veering to his right.

Accordingly, motion (002) by defendants for summary judgment dismissing the complaint on the

basis that defendants did not act recklessly is denied.

SERIOUS INJURY

Carlos Roldan has claimed in his bill of particulars that as a result of this accident he sustained serious and permanent injuries consisting of aggravation and/or exacerbation of herniated discs at C4-5, C5-6 and C6-7; aggravation and/or exacerbation of disc bulges at L1-2, L2-3, L3-4, and L4-5; lumbosacral spine sprain; cervical spine sprain; cervical radiculopathy, lumbosacral radiculopathy; bilateral carpal tunnel syndrome; cervico-lumbar intervertebral disc syndrome; left ankle sprain; left forearm contusion; left thigh contusion; headaches; left hip bursitis; and anxiety.

Pursuant to Insurance Law § 5102(d), “ [s]erious injury’ means 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 medical 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.”

The term “significant,” as it appears in the statute, has been defined as “something more than a minor limitation of use,” and the term “substantially all” has been construed to mean “that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (*Licari v Elliot*, 57 NY2d 230).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to “present evidence in competent form, showing that plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396 [1992]). Once defendant has met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*DeAngelo v Fidel Corp. Services, Inc.*, 171 AD2d 588 [1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268 [1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (*Cammarere v Villanova*, 166 AD2d 760 [1990]).

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 Inc.*, 96 NY2d 295 [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 “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 Systems, Inc.*, 98 NY2d 345 [2000]). A minor, mild or slight limitation of use is

considered insignificant within the meaning of the statute (*Licari v Elliott* (supra)).

It is for the court to determine in the first instance whether a prima facie showing of “serious injury” has been made out (see, *Tipping-Cestari v Kilhenny*, 174 AD2d 663 [2d Dept 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 [1st Dept 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 Eycler*, 79 NY2d 955 [1992]).

The medical records submitted by defendants indicate that Mr. Roldan presented to the emergency department at Southside Hospital with complaints of paraspinal neck and back pain, and an abrasion on his left thigh/femur. Follow up care was obtained at Padova Physical Rehabilitation Medicine, and the examination by Dr. Yehudian on March 18, 2004 revealed Mr. Roldan still complained of severe back pain with paresthesias (in the C5-C6-C7 and L5-S1 dermatomal distribution) of the upper and especially lower extremities on an intermittent basis, and that the pain is so bad at times that he cannot bend.

Dr. Joseph Stubel set forth in his report dated April 21, 2006 that he examined plaintiff in an independent orthopedic evaluation on that date and stated that Mr. Roldan received physical therapy, chiropractic treatment and acupuncture treatment for neck, mid back and lower back pain, as well as injections over a 2-3 month period. Dr. Stubel indicates in his report that he reviewed the MRI report of the L5 spine dated October 6, 2003, thoracic spine dated October 6, 2003 and cervical spine dated September 13, 2003, taken after the previous accident as well as reports from Dr. Yehudian and Dr. Borenstein and an initial acupuncture exam, emergency room record from Southside Hospital and chiropractic treatment notes on various dates. He did not review any x-rays. Dr. Stubel performed an examination of plaintiff’s cervical spine, quantified the range of motion findings and compared them to the normal ranges of motion, but omitted cervical extension. He indicates that biceps, triceps and brachioradialis reflexes were bilaterally symmetrical and 2+, but does not indicate if the finding was normal. Vascular examination of the upper extremities was grossly intact, but Dr. Stubel does not set forth what this examination consisted of. Upon examination of Mr. Roldan’s lumbar spine, Dr. Stubel set forth quantified ranges of motion as compared to the normal ranges of motion, but did not address lumbar extension. Reflexes at the Achilles and patella tendons were bilaterally symmetrical and 2+ but Dr. Stubel does not indicate whether this was normal. Additionally, motor strength and sensation in the lower extremities was grossly normal as was vascular exam, however, Dr. Stubel does not set forth the testing which was done to make this determination. Again, extension of the thoracic spine is not addressed by Dr. Stubel although he does quantify the remaining ranges of motion and compare them to the normal ranges of motion.

Although defendants submitted the report of the examination by Dr. Yehudian on March 18, 2004 which revealed Mr. Roldan still complained of severe back pain with paresthesias (in the C5-C6-C7 and L5-S1 dermatomal distribution) of the upper and especially lower extremities on an intermittent basis, defendants have not submitted the report of an examining neurologist, and Dr. Stubel does not address the same. Although plaintiff has claimed bilateral carpal tunnel syndrome as a result of the within accident, Dr. Stubel does not address this injury in his report. Accordingly, defendants have raised a factual issue in

this regard to also preclude summary judgment on this basis.

Dr. Stubel sets forth that he cannot establish causal relationship of the injuries claimed in this accident of January 21, 2004 because it was noted in one of the notes in the review of records that Mr. Roldan had a previous accident on August 3, 2003, that he had MRI's done of his cervical, lumbar and thoracic spine prior to this accident and there were positive findings, however, he does not set forth what those findings were. It is noted defendants exhibits include the lumbar MRI report of September 22, 2003 and October 2, 2003 which reveals straightening of the curvature, posterior bulges at L1-L2 and L2-L3, retrolisthesis and posterior bulge at L3-4 and posterior bulge at L4-L5; and a cervical MRI report of September 12, 2003 which reveals straightening of curvature and posterior herniations at C4-C5 which indents the thecal sac, C5-C6 and C6-C7 which indents the thecal sac. It is further noted, however, that plaintiff is claiming aggravation and/or exacerbation of these conditions in his bill of particulars. Mr. Roldan does not claim these conditions revealed on the MRI's were caused by this accident.

Dr. Stubel opines that having had the medical record evidence of a prior accident, he cannot determine a causal relationship to this accident as Mr. Roldan had injury to the same areas. Dr. Stubel does not indicate which medical records he is addressing, or what the positive findings were that he is referring to, and does not address or rule out whether Mr. Roldans' prior injuries were exacerbated or aggravated by this accident. Dr. Stubel does not indicate he examined plaintiff for carpal tunnel syndrome, does not rule in or rule out carpal tunnel syndrome or address the issue of proximate cause concerning the same.

Based upon the foregoing multiple deficits in Dr. Stubel's report based upon his orthopedic examination of plaintiff, defendants have not demonstrated prima facie entitlement to summary judgment.

Here, defendants failed to satisfy their burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see, Agathe v Tun Chen Wang*, NYS2d ___, 2006 WL 2965205, 2006 NY Slip Op 07434 [NYAD 2 Dept Oct 17, 2006]; *see also, Walters v Papanastassiou*, 31 AD3d 439 [2d Dept 2006]) as defendants' examining physician failed to provide specific range of motion measurements for plaintiff's cervical, thoracic or lumbar extension and failed to compare those findings with normal ranges of motion (*see, Hypolite v International Logistics Management, Inc.*, 43 AD3d 461, 842 NYS2d 453 [2nd Dept 2007]; *Somers v Macpherson*, 40 AD3d 742 [2nd Dept 2007]; *Browdame v Candura*, 25 AD3d 747 [2nd Dept 2006]). By failing to quantify the range of motion findings in degrees for the aforementioned extensions, the report of defendants' examining physician leaves it to this Court to speculate as to whether the ranges of motion concerning plaintiff's cervical, thoracic or lumbar extension are normal or abnormal (*see, Rodriguez v Schickler*, 229 AD2d 326 [1st Dept 1996], *lv denied* 89 NY2d 810 [1997]). Nor has Dr. Stubel addressed the claimed injury of bilateral carpal tunnel syndrome. He does not indicate the testing he did for the same or rule out that it is causally related to the within accident. The report of defendants' examining physician does not establish that plaintiff's injuries were not causally related to this accident and do not exclude the possibility that plaintiff suffered a serious injury in the accident; therefore, the defendants are not entitled to summary judgment (*see, Peschanker v Loporto*, 252 AD2d 485 [2d Dept 1998]).

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Since defendants failed to establish their entitlement to judgment as a matter of law, it is not necessary to consider whether plaintiffs' papers in opposition to defendants' motions were sufficient to raise a triable issue of fact (*see, Agathe v Tun Chen Wang, supra; Walters v Papanastassiou, supra*).

Accordingly, motions (002) and cross-motion (003) for summary judgment dismissing the complaint on the issue that plaintiff did not sustain serious injury within the definition of Insurance Law §5102(d) is denied.

Dated: Apr 10, 2008



JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION