

Hernandez v Town of Islip

2008 NY Slip Op 31755(U)

May 21, 2008

Supreme Court, Suffolk County

Docket Number: 0005023/2006

Judge: Joseph C. Pastorella

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SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY

PRESENT:
HON. JOSEPH C. PASTORESSA

Mot Seq: #001-MD
#002-MD

_____ x
MARIA R. HERNANDEZ, ROSALI SALVADOR
AND SULEYMA HERNANDEZ,

DATE: May 21, 2008

Plaintiff(s),

PLTF'S ATTORNEY:

CANNON & ACOSTA, LLP
1923 NEW YORK AVENUE
HUNTINGTON STATION, NY 11746

-against-

PLTF'S ATTORNEY CT CLAIM:

PICCIANO & SCAHILL, P.C.
900 MERCHANTS CONCOURSE
SUITE 310
WESTBURY, NY 11590

TOWN OF ISLIP and JOAN JOHNSON,

Defendant(s),

DEFT'S ATTORNEY:

ZAKLUKIEWICZ, PUZO & MORRISSEY,
LLP
2701 SUNRISE HIGHWAY, STE. 2
ISLIP TERRACE, NY 11752

_____ x

Pages Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and Affidavits (Affirmations) Annexed 1, 4
Opposing Affidavits (Affirmations) 2, 5
Reply Affidavits (Affirmations) 3, 6
Affidavit (Affirmation) _____
Other Papers _____

Upon the foregoing papers, the defendants move pursuant to CPLR §3212 for an order granting summary judgment dismissing the plaintiffs' complaint upon the grounds that no trial issue of fact exists and that as a matter of law the plaintiffs' have not sustained a "serious injury" as required by §5102 and §5104 of the Insurance Law of the State of New York; and plaintiff, Maria Hernandez, moves for an order (motion sequence #002) pursuant to CPLR §3212 for summary judgment against the defendants on their counterclaim.

This is an action to recover damages for personal injuries allegedly sustained by plaintiffs Maria R. Hernandez (hereinafter "MH"), Rosali Salvador (hereinafter "RS") and Suleyma Hernandez (hereinafter "SH") on March 20, 2005 at approximately 9:45 a.m. when the vehicle that plaintiff MH was operating was struck in the rear by a vehicle owned by defendant Town of Islip and operated by defendant Joan Johnson at or near the intersection of Carleton Avenue and Saint John's Avenue in Central Islip, New York. The plaintiffs each allege that as a result of said accident they sustained a

“serious injury” as defined in Insurance Law §5102 (d).

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, Inc., 96 NY2d 295). 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 NY 2d 345). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (Licari v Elliott, 57 NY2d 230).

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). 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). 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). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (Pagano v Kingsbury, 182 AD2d 268). The proof must be viewed in a light most favorable to the non-moving party, here, the plaintiffs (Cammarere v Villanova, 166 AD2d 760).

MARIA HERNANDEZ

In support of the motion the defendants submit, *inter alia*, the pleadings; plaintiff’s verified bill of particulars; plaintiff’s deposition transcripts; Dr. Cohen’s affirmed independent orthopedic evaluation conducted on March 29, 2007; Dr. Tikoo’s affirmed independent neurological evaluation conducted on March 29, 2007; and Dr. Tantleff’s affirmed independent radiology review of an MRI of the plaintiff’s cervical spine dated April 25, 2005 conducted on June 4, 2007.

The plaintiff, MH, alleges in her verified bill of particulars, that as a result of said accident, she sustained disc herniations of the C3-4, C4-5, C5-6; straightening of the cervical curvature; cervical strain; lumbosacral strain; and left elbow strain. The plaintiff, MH, further avers that she was disabled from March 20, 2005 through July 18, 2005 having been confined to a bed for approximately two days and home for four months. The plaintiff testified, at her deposition, that she was out of work for four months after the accident and her bill particulars states that she was out of work from March 20, 2005 until July 18, 2005. Thus, the plaintiff was out of work four out of the first six months post-accident.

The plaintiff’s bill of particulars avers that she sustained a serious injury in the categories of permanent loss of use of a body organ, member, function or system; permanent consequential limitation; a significant limitation; a non-permanent injury which prevented her from performing substantially all of the material acts which constitute substantially all of her usual and customary

daily activities for a period of not less than ninety days during the one hundred and eighty days immediately following the injury or impairment.

The defendants failed to make a prima facie showing that the plaintiff MH did not sustain a serious injury within the meaning of Insurance Law §5102 (d) as a result of the subject accident (see, Loure v Avis Rent A Car Sys., supra; Gaddy v Eyler, supra). The defendants' motion papers did not adequately address the plaintiff's claim, set forth in her bill of particulars, that she sustained a medically-determined injury or impairment which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days following the accident. The defendants' affirmed medical reports of Dr. Cohen and Dr. Tikoo, each of whom examined the plaintiff approximately two years after the accident occurred, did not relate any of their findings to this category for the period of time immediately after the accident. Accordingly, the defendants failed to meet their prima facie burden of showing that the plaintiff MH did not sustain a serious injury within the meaning of Insurance Law §5102 [d] (see, Daddio v Shapiro, 44 AD3d 699; Lopez v Geraldino, 35 AD3d 398; Nakanishi v Sadaqat, 35 AD3d 416; Kouros v Mendez, 41 AD3d 786; Deville v Barry, 41 AD3d 763; Torres v Performance Auto. Group, Inc., 36 AD3d 894; Faun Thai v. Butt, 34 AD3d 447; Museau v New York City Tr. Auth., 34 AD3d 772; Talabi v Diallo, 32 AD3d 1014; Volpetti v Yoon Kap, 28 AD3d 750; Sayers v Hot, 23 AD3d 453). Since the defendants failed to meet their prima facie showing it is unnecessary to reach the question whether the plaintiff's papers were sufficient to raise a triable issue of fact (see, Zamaniyan v Vrabeck, 41 AD3d 472; Kolios v Znack, 237 AD2d 333). In any event, in opposition the plaintiff raised a triable issue of fact on this category, as well as to whether she sustained a serious injury under the permanent, consequential, and/or significant limitation of use categories of Insurance Law §5102(d) to the cervical and/or lumbar regions of her spine as a result of the accident on the basis of her chiropractor's affidavit and other submissions. The opinion of the plaintiff's treating chiropractor was based on his recent examinations of the plaintiff as well as examinations which were contemporaneous with the subject accident. The treating chiropractor also based his opinion on his review of the affirmed cervical magnetic resonance imaging report prepared by the plaintiff's treating radiologist, which was submitted in opposition to the defendants' motion for summary judgment (see, Kasel v Szczecina, ___ AD2d ___, 2008 NY Slip Op 4654 [May 20, 2008]; Edriste v Morales, ___ AD2d ___, 2008 NY Slip Op 2103 [March 11, 2008]; Casas v Montero, 48 AD3d 728; Zarante v McDonald, 31 AD3d 632; Ayzen v Melendez, 299 AD2d 381). The cervical magnetic imaging report documented disc herniations at the C3-4 level, C4-5 level, and C5-6 level. The plaintiff's treating chiropractor opined that the plaintiff's injuries and range of motion limitations observed were significant and permanent, were causally related to the subject accident, and were not caused by any pre-existing condition (see, Kasel v Szczecina, supra; Edriste v Morales, supra; Altreche v Gilmar Masonry Corp., 49 AD3d 479; Clervoix v Edwards, 10 AD3d 626; Hyun Jun Kim v Collazo, 38 AD3d 842; Cordero v Ford Credit Titling Trust Ins. Ctr., 39 AD3d 796; Lim v Tiburzi, 36 AD3d 671).

ROSALI SALVADOR

In support of the motion the defendants submit, *inter alia*, the pleadings; plaintiff's verified bill of particulars; plaintiff's deposition transcripts; Dr. Cohen's affirmed independent orthopedic evaluation conducted on March 29, 2007; Dr. Tikoo's affirmed independent neurological evaluation conducted on March 29, 2007; and Dr. Tantleff's affirmed independent radiology review of MRI of the lumbar spine dated May 4, 2005 conducted on January 3, 2007.

The plaintiff, RS, alleges in his verified bill of particulars, that as a result of said accident,

he sustained disc herniations of the C2-3, C3-4, C4-5, C5-6, C6-7, C7-T1; L5-S1; disc bulge L2-3, L3-4 and L4-L5 with encroachment upon the ventral thecal sac; retrolisthesis of L4 and L5; straightening of the cervical curvature; loss of normal cervical lordosis; and straightening of the lumbar spine. The plaintiff's bill of particulars avers that he was totally disabled for five months following the accident.

The plaintiff's bill of particulars avers that the plaintiff sustained a serious injury in the categories of permanent loss of use of a body organ, member, function or system; permanent consequential limitation; a significant limitation; a non-permanent injury which prevented him from performing substantially all of the material acts which constitute substantially all of his usual and customary daily activities for a period of not less than ninety days during the one hundred and eighty days immediately following the injury or impairment.

The defendants' proof established a prima facie case that RS did not sustain a "serious injury" as defined in Insurance Law §5102 [d] (see, Toure v Avis Rent A Car Sys., supra; Gaddy v Eyler, supra). In opposition, however, the plaintiff raised a triable issue of fact as to whether he sustained a serious injury under the permanent, consequential, and/or significant limitation categories of Insurance Law §5102(d) to the cervical and/or lumbar regions of his spine as a result of the accident on the basis of his chiropractor's affidavit and other submissions. The plaintiff's treating chiropractor based his opinion on the examination of the plaintiff contemporaneous with the subject accident and a reexamination on November 30, 2007, as well as a review of the sworn report from plaintiff's radiologist of magnetic resonance imaging tests of his lumbar and cervical spine (see, Kasel v Szczecina, supra; Edriste v Morales, supra; Casas v Montero, supra; Zarante v McDonald, supra; Ayzen v Melendez, supra). The magnetic imaging tests of the plaintiff's cervical and lumbar spine documented cervical herniations at the C2 to C7 levels and a lumbar herniation at the L5-S1 level. The plaintiff's chiropractor opined that RS sustained a cervical and lumbar derangement diagnostically confirmed by cervical herniations at the C2 to C7 levels and the lumbar herniation at the L5-S1 level. In addition, the plaintiff's treating chiropractor opined that plaintiff's spinal injuries and range of motion limitations observed were significant and permanent, and were causally related to the subject accident and were not caused by degeneration (see, Kasel v Szczecina, supra; Altreche v Gilmar Masonry Corp., supra; Clervoix v Edwards, supra; Edriste v Morales, supra; Hyun Jun Kim v Collazo, supra; Cordero v Ford Credit Titling Trust Ins. Ctr., supra; Lim v Tiburzi, supra).

SULEYMA HERNANDEZ

In support of the motion the defendants submit, *inter alia*, the pleadings; plaintiff's verified bill of particulars; plaintiff's deposition transcripts; Dr. Cohen's affirmed independent orthopedic evaluation; Dr. Tikoo's affirmed independent neurological evaluation; and Dr. Tantleff's affirmed independent radiology review of MRI of the lumbar spine.

The plaintiff, SH, alleges in her verified bill of particulars, that as a result of said accident, she sustained disc herniations of the C3-4, C4-5, C5-6; disc bulge L2-3; straightening of the cervical curvature; and loss of normal cervical lordosis.

The plaintiff's bill of particulars avers that the plaintiff sustained a serious injury in the categories of permanent loss of use of a body organ, member, function or system; permanent consequential limitation; a significant limitation; a non-permanent injury which prevented her from performing substantially all of the material acts which constitute substantially all of her usual and customary daily activities for a period of not less than ninety days during the one hundred and eighty days immediately following the injury or impairment.

The defendants' proof established a prima facie case that RS did not sustain a "serious injury" as defined in Insurance Law §5102 [d] (see, Toure v Avis Rent A Car Sys., supra; Gaddy v Hyler, supra). In opposition, however, the plaintiff raised a triable issue of fact as to whether she sustained a serious injury under the permanent, consequential, and/or significant limitation categories of Insurance Law §5102(d) to the cervical and/or lumbar regions of her spine as a result of the accident on the basis of her chiropractor's affidavit and other submissions. The opinion of the plaintiff's treating chiropractor was based on a recent examination of the plaintiff as well as examinations which were conducted immediately following the accident. In addition, the plaintiff's treating chiropractor based his opinion on a review of the magnetic imaging reports conducted by the plaintiff's treating radiologist. The plaintiff submits an affidavit of her treating chiropractor which specifies the range of motion in her cervical and lumbar spine as evidenced by objective findings, along with evidence of herniated and bulging discs in the cervical and lumbar spine as confirmed by the plaintiff's radiologist report of the magnetic resonance imaging tests of her cervical spine and lumbar spine (see, Kasel v Szczecina, supra; Edriste v Morales, supra; Casas v Montero, supra; Zarante v McDonald, supra; Ayzen v Melendez, supra). The plaintiff's radiologist's report found disc herniations at the C3-C6 levels as well as a disc bulge at the L2-3 level. The plaintiff's treating chiropractor opined that plaintiff's spinal injuries and range of motion limitations observed were significant and permanent and causally related to the subject accident (see, Kasel v Szczecina, supra; Altreche v Gilmar Masonry Corp., supra; Clervoix v Edwards, supra; Edriste v Morales, supra; Hyun Jun Kim v Collazo, supra; Cordero v Ford Credit Titling Trust Ins. Ctr., supra; Lim v Tiburzi, supra).

LIABILITY

The plaintiff, MH, moves for summary judgment on the issue of liability, averring that the rear end collision is prima facie evidence of negligence on the part of the defendant and no issues of fact exist which would warrant a trial on the issue of liability. In support the plaintiff submits, inter alia, copies of pleadings, copies of the transcripts of the deposition testimony given by Maria Hernandez, Rosali Salvador, Suleyma Hernandez and Joan Johnson. In opposition, the defendants aver that issues of fact exist as to whether the plaintiff suddenly stopped and failed to signal, thereby precluding the granting of summary judgment to the plaintiff on the issue of liability.

The driver of an automobile approaching another vehicle from the rear is bound to maintain a reasonably safe rate of speed, to maintain control over the vehicle and to use reasonable care to avoid colliding with the other vehicle (see, Abramowicz v Roberto, 220 AD2d 374). It is well settled that a rear-end collision creates a prima facie case of liability with respect to the operator of the moving vehicle and imposes a duty on that operator to come forward with a non-negligent explanation for the collision (see, Levin v Chaudhry, 26 AD3d 472). The operator of the moving vehicle must rebut the inference of negligence created by an unexplained rear-end collision, as he or she is in the best position to explain the cause, and if he or she cannot come forward with any evidence to rebut the inference, then, as a matter of law, the plaintiff may be awarded summary judgment (see, Leal v Wolf, 224 AD2d 392). Here, there are triable issues of fact raised by the defendant Johnson's deposition testimony that plaintiff "stopped short without a signal" in mid street and not at a traffic device or stop sign, and indeed plaintiff herself admits that she may have been stopped for as little as one second prior to impact. The defendant's averment that the plaintiff, MH, made a sudden stop and failed to give proper signals establishes conflicting affidavits as to the cause of the accident and provides an alleged non-negligent explanation for the rear-end collision, thereby raising a triable issue of fact (see, Klopchin v Masri, 45 AD2d 737; Simpson v Eastman, 300

AD2d 647; Maschka v Newman, 262 AD2d 615; Artis v Jamaica Buses, 262 AD2d 511). Accordingly, the plaintiff's motion for summary judgment is denied.

This shall constitute the decision and order of the court.

DATED: May 21, 2008



HON. JOSEPH C. PASTORESSA, J.S.C.