

Spainer v Zipper

2008 NY Slip Op 31848(U)

June 23, 2008

Supreme Court, Nassau County

Docket Number: 7613-06/

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X
STEPHEN SPAINER and LAUREN SPAINER,

Plaintiffs,

-against-

MATTHEW G. ZIPPER and GEORGE K. ZIPPER,

Defendants.
-----X

**MICHELE M. WOODARD,
J.S.C.**

TRIAL/IAS Part 16

Index No.: 17613/06

Motion Seq No.: 01, 02

DECISION AND ORDER

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Plaintiffs have moved in motion sequence number one, by Notice of Motion, for an order granting Summary Judgment on the issue of liability as to Plaintiff Stephen Spainer. This action was commenced by Service of the Summons and Complaint on Defendants on November 7, 2006. Issue was joined on December 9, 2006 by way of service of the Defendant's Answer upon Plaintiffs.

The Plaintiffs commenced the instant negligence action alleging that Stephen Spainer sustained personal injuries on July 9, 2005, when a vehicle owned by George K. Zipper and operated by Defendant Matthew G. Zipper struck the Plaintiff's vehicle in the rear, which was being driven by Plaintiff Stephen Spainer. Plaintiff Lauren Spainer is suing for loss of consortium.

Plaintiffs' Motion for Summary Judgment

Plaintiffs allege that by Defendant's own admission, Defendant Matthew Zipper is the sole

cause of the accident per his testimony during the Examination Before Trial on May 30, 2007.

Mr. Zipper testified that while driving eastbound on Sunrise Highway, in Wantagh New York, he did not see the Plaintiff's car prior to impact and struck the vehicle in the rear, although there was nothing obstructing his view. Thus, Plaintiffs maintain that because there is no evidence that the Plaintiff, Stephen Spainer, was negligent, there are no genuine issues of fact with regards to the Defendant's negligence as it was a rear-end collision.

In opposition, Defendants argue that there are questions of fact as to whether the Plaintiff, Stephen Spainer, could have taken evasive actions or "used reasonable care to avoid the happening of the accident and whether this was the proximate or contributing cause of the accident."

In general, "[a] rear-end collision with a stopped vehicle establishes *prima facie* that the driver of the moving vehicle was negligent and imposes a duty on him or her to explain how the accident occurred." *Dileo v Greenstein*, 281 AD2d 586 (2d Dept 2001). "If the operator of the moving vehicle cannot come forward with any evidence to rebut the inference of negligence, the driver of the lead vehicle may properly be awarded judgment as a matter of law." *Dileo*, 281 AD2d at 586. Pursuant to CPLR § 3212, summary judgment "shall be granted, if upon all the papers and proof submitted, the cause of action shall be established sufficiently, to warrant the Court as a matter of law in directing judgment in favor of any party." *Fresh Meadow Country Club, Inc., v Village of Lake Success*, 158 AD2d 581 (2d Dept 1990).

In the instant case, the Plaintiffs met their *prima facie* burden of proof on the issue of liability by testifying that their stopped vehicle was struck in the rear by the Defendant's vehicle. *Ditrapani v Marciante*, 10 AD3d 628 (2d Dept 2004). Further, the Defendants' mere contention

that the Plaintiffs could have taken measures to avoid the accident or that they may have proximately caused the collision, without putting forth any facts in support of the allegations, is insufficient to raise a triable issue of fact to rebut the presumption of negligence on the part of the Defendants. Thus, Plaintiffs' motion for Summary Judgment on the issue of the Defendants' liability is **granted**.

Defendants' Cross-Motion for Summary Judgment

Defendants cross-move for an order, pursuant to CPLR § 3212 and New York Insurance Law §5102(d), granting summary judgment to Defendants and dismissing Plaintiff Stephen Spainer's First Cause of Action for personal injuries on the ground that the injuries alleged did not satisfy the "serious injury" threshold requirement pursuant to New York Insurance Law. As a result, Defendants allege that Mr. Spainer's claim for non-economic loss is barred by § 5104(a) of the New York Insurance Law. Defendants also seek an order dismissing the derivative Second Cause of Action by Plaintiff Lauren Spainer for loss of services, on the ground that the failure of Plaintiff Stephen Spainer to satisfy the "serious injury" threshold requirement mandates the dismissal of her derivative claim for loss of services.

In his Bill of Particulars, the Plaintiff, Stephen Spainer, claims that he suffered the following personal injuries in the accident:

Central disc herniation at C6-7; cervical myofascitis with radiculopathy; bulging disc at C6-7 with loss of disc space height and anterior osteophyte formation; cervical spine derangement, cervical compression and cervical distraction; limited range of motion of the cervical spine; hyperesthesia of right upper extremity, market paravertebral muscle spasm and

spasm of right SCM; decreased cervical lordosis; tenderness to palpation to the left side of the trapezius at the left mid scapula; bulging disc L4 through L4; bulging disc L5 through S1; lumbar spine derangement with decreased sensation to the left S1 distribution; right L5-S1 radiculopathy; severe neck pain with stiffness radiating into the upper extremities; sphincter disturbance involving urinary, bowel and sexual function; possible sacral dysfunction; spinal shock; swelling and severe pain and tenderness to palpation of the 4th and 5th UCP joints on the right hand and collateral ligaments with limited range of motion, flexion and extension; severe pain and tenderness over the proximal phalanx of the 4th and 5th digits and metacarpals of the right hand;

The Defendants' claim that the Plaintiff's injuries fail to fall into any of the nine categories of serious injury specified in Insurance Law §5102(d).

Upon presenting at the Emergency Room after the accident, the treating physician examined the Plaintiff and reported that he was conscious and oriented with no neurological deficits; his pupils equal, round and reactive to light in accommodation. The physician further reported that his right hand was positive for contusion; that his cervical spine-positive for tenderness; his mid-thoracic/lumbar spine was positive for tenderness; chest, pelvis and abdomen were negative. The attending physician sent Plaintiff for x-rays of his cervical spine, lumbar spine, right hand and chest, all of which were negative. Dr. Chhabra diagnosed Plaintiff with right hand contusion, cervical sprain, musculoskeletal pain, all soft tissue injuries, and no urological injury of any kind. Further, according to the radiologist Dr. Ephram Weingarten, the x-rays of the Plaintiff showed degenerative conditions that pre-date the accident.

The Plaintiffs oppose the Defendants' application. The Plaintiff Stephen Spainer claims that he sustained traumatic cervical and lumbar myofascitis, cervical disc herniation at C6-7,

cervical disc bulge at C5-6, lumbar disc bulge at L5-SL, lumbar disc bulge at L4-5 with annular tear, cervical and lumbar radiculopathy, right triad contusion, chronic urinary dysfunction and sexual dysfunction which prevented him from performing substantially his usual and customary daily activities for 90 days during the 180 days immediately following the accident.

The Defendants argue that the Plaintiff's injuries are preexisting and degenerative in nature. The Defendants have submitted several physician's reports to support their argument.

The Plaintiffs have submitted several expert reports indicating that the Plaintiff Stephen Spainer's injuries are causally related to the subject accident.

When the parties proffer conflicting medical evidence on the existence of a serious injury, the existence of such an injury is a matter for the jury's determination. *Greene v Frontier Central School District*, 214 AD 2d 947 (4d Dept 1995).

ORDERED, that the Defendant's Cross- Motion for Summary Judgment is hereby **denied** and the parties are directed to appear for trial in DCM on June 30, 2008 at 9:30 am.

Any relief not specifically granted herein is **denied**.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: June 23, 2008
Mineola, N.Y.

ENTER:


HON. MICHAEL M. WOODARD.
ENTERED

JUN 25 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE