

**Cappello v Selman**

2008 NY Slip Op 31898(U)

June 25, 2008

Supreme Court, Nassau County

Docket Number: 9622-06/

Judge: Michele M. Woodard

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

-----x  
EVA CAPPELLO a/k/a EVA BASHER,

Plaintiff,

-against-

TERRIANE C. SELMAN,

Defendant.

MICHELE M. WOODARD,  
J.S.C.  
TRIAL/IAS Part 16  
Index No.: 9622/06  
Motion Seq. Nos.: 01 , 02 & 03

**DECISION AND ORDER**

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Defendant, Terriane C. Selman, in motion sequence number 01, moves by Notice of Motion for an order pursuant to CPLR § 3212, dismissing the Plaintiff's Complaint and granting Summary Judgment to the Defendant on the ground that the Plaintiff has not met the "serious injury" requirements of Insurance Law § 5102(d). The instant action was commenced by Summons and Verified Complaint dated June 12, 2006. Issue was joined by Defendant's Answer and Demand for Verified Bill of Particulars dated October 23, 2006. Plaintiff completed said Bill of Particulars on December 7, 2006.

Plaintiff, Eva Cappello (a/k/a Eva Basher), in motion sequence number 02, cross moves by Notice of Cross-Motion for an order dismissing Defendant's motion as defective, granting summary judgment, requesting an inquest and an assessment of damages, and striking the Defendant's first, second, third, and fourth affirmative defenses.

Defendant then cross-moves in motion sequence number 03, for an order granting leave to amend his Answer to add the affirmative defense of medical emergency. As a procedural matter, the Court will address the procedural issue of the Defendant's application to Amend the Defendant's Verified Answer first.

**III. Defendant's Cross-Motion & Affirmation in Opposition**

In motion sequence number 03, Defendant cross-moves for an order granting leave to amend his Answer to add the affirmative defense of medical emergency as a non-negligent explanation for this accident and in opposition to the Plaintiff's cross-motion for Summary Judgment. Defendants allege that at the time of the accident, the Defendant was suffering from a sudden medical

emergency in the form of an unforeseen allergic attack, and as a result, the Defendant was unable to control the vehicle and/or pull over to the side of the road. In opposition, the Plaintiff raises numerous procedural grounds for dismissing the Defendant's cross-motion, including the fact that the motion was made returnable on short notice.

It is well settled that amendments are given liberally, and "the legal sufficiency or merits of proposed amendments will not be examined on a motion to amend unless the insufficiency or lack of merit is clear and free from doubt." *Ficorilli v Thomsen*, 262 AD2d 602, 603 (2d Dept 1999). A Court has discretion to permit a Defendant to amend his answer to assert an affirmative defense so long as "the defense was meritorious and the plaintiffs failed to establish prejudice or surprise." *Ficorilli*, 262 AD2d at 603.

The Court finds that all of the grounds stated, if true, did not prejudice the Plaintiff. Further, because the Plaintiff has failed to raise the issue of prejudice or surprise in her opposition to the Defendant's motion, and because the affirmative defense of medical emergency is a meritorious one, the Defendant is granted leave to amend her Answer.

### **I. Defendant's Summary Judgment motion**

In motion sequence number 01, Defendant seeks Summary Judgment against the Plaintiff on the grounds that the Plaintiff has not met the "serious injury" requirements of Insurance Law § 5102(d). Generally, in order for a Plaintiff to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident, a Plaintiff must prove a "serious injury" pursuant to Insurance Law § 5102(d), which is defined 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."

Plaintiff opposes the Defendant's motion for summary judgment by cross-motion and alleges to have sustained serious and permanent personal injuries as a result of a motor vehicle accident on April 27, 2006 when she was hit in the rear by the vehicle driven by the Defendant, while she was stopped at a red light. Plaintiff's Affidavit and Bill of Particulars, as well as the Affirmations and medical reports from several treating physicians, radiologists and cardiologists, allege that as a result of the accident, Plaintiff sustained a herniated disc in her lumbar spine and central herniations in her cervical spine, causing impingement and pressure on the thecal sac and spinal cord. Further, the sworn Affidavits and Affirmations of medical reports, including chiropractic and neurological reports, confirm the Plaintiff's significant restrictions of motion.

Defendant maintains that the Plaintiff's alleged cervical and lumbar herniations do not rise to the level of either a permanent loss of use of a body organ, member function or system; a permanent consequential limitation of use of a body organ or member; or a significant limitation of

use of a body function or system. Defendant alleges that summary judgment is warranted because on October 18, 2007, Dr. Leon Sultan, diplomat of the American Academy of Orthopedic Surgeons, conducted an examination of the Plaintiff on behalf of the Defendant and concluded that the Plaintiff was orthopedically stable and neurologically intact.

In order to grant summary judgment, the Defendant has a prima facie burden to establish “that the Plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident.” *D’Onofrio v Floton, Inc.*, 45 AD3d 525 (2d Dept 2007). In opposition, the Plaintiff must raise a triable issue of fact. *D’Onofrio v Floton, Inc.*, 45 AD3d at 525. It is well settled that, “the mere existence of a bulging [herniated] disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration.” *Perdomo v Scott*, 50 AD3d 1115, (2d Dept 2008).

In the instant case, the medical reports submitted by the Plaintiff are sufficient to raise a triable issue of fact that would preclude summary judgment because they are submitted in admissible form and show a limitation of the Plaintiff’s range of motion that is contemporaneous with the subject accident. *Perdomo*, 50 AD3d at 1115. Thus, because the parties have submitted conflicting expert evidence on the issue of serious injury, Defendant’s motion for summary judgment is denied.

#### **A. Plaintiff’s request to dismiss Defendant’s motion as defective**

In motion sequence 02, in addition to defending the Defendant’s motion for summary judgment, the Plaintiff also cross-moves for separate relief. Specifically, Plaintiff cross-moves for an order dismissing Defendant’s motion for summary judgment as defective because it includes the Plaintiff’s EBT, Errata Sheet and an executed transcript that were never served on Plaintiff, and fails to include an Affidavit from the Defendant or the Defendant’s EBT.

Here, the Court finds that pursuant to CPLR § 3212, Defendant’s motion for summary judgment is defective on the ground that it failed to submit an affidavit from the Defendant herself or a person with personal knowledge of the facts either denying the Plaintiffs’ allegations or offering a non-negligent explanation for the collision. *Piltser v Donna Lee Management Corp.*, 29 AD3d 973 (2d Dept 2006). Thus, the Defendant’s motion for summary judgment is defective as a matter of law and should nevertheless be dismissed as well as being denied on the merits.

#### **B. Plaintiff’s request for Summary Judgment**

Next, the Plaintiff cross-moves for Summary Judgment on the issue of liability against the Defendants on the claims stated in the Verified Complaint and setting the action down for an inquest and an assessment of damages. Plaintiff alleges that there are no triable issues of fact for a jury in that it is clear that the Plaintiff was lawfully stopped at a red light when the Defendant caused her vehicle to strike the Plaintiff’s vehicle in the rear.

Defendant testified that at the time of the accident, she did not know whether or not the Plaintiff’s vehicle was stopped in front of her because her complete attention was not focused at what was in front of her. Defendant alleges that she was suffering from allergies that caused her to

feel that “hundreds of ants were crawling on her face” and had “itchy eyes and uncontrollable sneezing.” Defendant alleges that although she was looking ahead while she was driving, she was nevertheless distracted because of the allergy attack.

Generally, “[a] rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability with respect to the operator of the rear vehicle, requiring a nonnegligent explanation for the collision.” *David v New York City Bd. of Educ.*, 19 AD3d 639 (2d Dept 2005). When it is undisputed that a passenger in a vehicle is rear-ended, the passenger is entitled to summary judgment on the issue of liability. *Moore v Tappen*, 242 AD2d 526, 527 (2d Dept 1997).

In the instant case, the Defendant conceded that she was distracted and as such, did not continuously observe the Plaintiff who was driving immediately in front of her. Further, there is no evidence in the record that the Plaintiff acted in “such a way as to cause the accident, such as by stopping suddenly or by veering in front of defendant.” *Somers v Condlin*, 39 AD3d 289 (1st Dept 2007). Thus, the Court finds that on the papers alone, the Defendant has failed to put forth a sufficient, non-negligent excuse for the collision.

However, because of the Amendment to add the affirmative defense of medical emergency to the Defendant’s Answer, a questions of fact is raised with regards to the liability of the Defendant which preclude full summary judgment on the issue of liability. Thus, summary judgment in favor of the Plaintiff is granted in part on the issue of liability to the extent that even if the Defendant is found negligent at trial, there are no issues of fact with regards to the comparative negligence on the part of the Plaintiff. Therefore, there will be no trial on the issue of comparative negligence.

### **C. Plaintiff’s request to strike Defendant’s affirmative defenses**

Lastly, the Plaintiff cross-moves to strike the Defendant’s first, second, third and fourth affirmative defenses. Defendant’s first defense asserts that any judgment against the Defendant should be diminished in the proportion “which the culpable conduct attributable to the Plaintiff bears to the total culpable conduct which caused the damages.” Defendant’s second defense asserts that the Plaintiff failed to take reasonable precautions to mitigate damages by failing to wear an available seat belt. Next, the Defendant’s third defense asserts that any expenses incurred by the Plaintiff for medical, dental, custodial, or other economic loss be replaced or indemnified for collateral sources as defined in CPLR § 4545(c). Lastly, Defendant’s fourth defense asserts that the Plaintiff’s Complaint failed to state a cause of action against because the Plaintiff fails to meet the serious injury requirement of Insurance Law § 5102(d).

Plaintiff contends that the affirmative defenses contained in the Verified Answer should be stricken as there is no evidence which can in any way support the claim of culpable conduct, no assumption of the risk on the part of the Plaintiff, nor failure to use a seatbelt. The Plaintiff testified to wearing a seatbelt at the time of the accident and there are no facts to suggest that the Plaintiff, while legally stopped at a red light, could have caused or contributed to the accident, or assumed the risk of the Defendant’s negligent conduct.

Generally, “[u]pon a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed.” *Federici v Metropolis Night Club*,

*Inc.*, 48 AD3d 741 (2d Dept 2008). Given this liberal standard to survive a motion to strike, the Court finds that the Defendant's third and fourth affirmative defenses fall within this purview and are best left to be determined at trial. However, the Defendant's first and second affirmative defenses as they relate to the Plaintiff's potential culpable conduct are stricken and dismissed because the Court finds that there is no question of fact with regards to the Plaintiff's comparative negligence. Thus, the Plaintiff's motion to strike the Defendant's affirmative defenses is denied in part and granted in part.

Based on the foregoing, it is hereby

**ORDERED**, that Defendant Terriane C. Selman's cross-motion, sequence number 03, for leave to Amend the Answer to add the affirmative defense of medical emergency is **GRANTED**. Defendant has ten (10) days to serve the Amended Answer on the Plaintiff Eva Capello a/k/a Eva Basher, and Plaintiff must respond within thirty (30) days from the date of service. It is further,

**ORDERED**, that Defendant's motion for Summary Judgment, sequence number 01, against the Plaintiff is **DENIED** on the issue of serious injury,

**ORDERED**, that Plaintiff's cross motion sequence number 02, for Summary Judgment against the Defendant is **GRANTED** in part on the issue of liability, to the extent that there is no issue of fact with regards to the Plaintiff's comparative negligence;

**ORDERED**, that the Plaintiff's motion to strike the Defendant's affirmative defenses is **DENIED** in part with regards to the Defendant's third and fourth affirmative defenses and **GRANTED** in part with regards to the Defendant's first and second affirmative defenses.

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

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

**DATED:** June 25, 2008  
Mineola, N.Y.

**ENTER:**



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

**ENTERED**

JUN 30 2008

**NASSAU COUNTY**  
COUNTY CLERK'S OFFICE