Gonzalez v Chapnick

2008 NY Slip Op 32299(U)

August 14, 2008

Supreme Court, Richmond County

Docket Number: 0100284/2007

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No. : 100284/07
Calendar Nos. 724 - 001
1282 - 002
1322 - 003
1552 - 004
1555 - 005

KAREN GONZALEZ,

Plaintiff,

-against-

DECISION & ORDER
HON. JOSEPH J. MALTESE

CAROL H. CHAPNICK,

Defendant.

---x

CAROL H. CHAPNICK,

Index No: A100284/07

Third-Party Plaintiff,

-against-

SCOTT LAIDLAW,

Third-Party Defendant.

---x

The following papers numbered 1 to 10 were marked fully submitted on the 13th day of June, 2008:

	Pages Numbered
Notice of Motion by Third-Party Defendant Scott Laidlaw for Summary Judgment, with Supporting Papers	1
Affirmation in Opposition to Motion (dated April 17, 2008)	2
Reply Affirmation (dated June 12, 2008)	3
Notice of Motion by Defendant Carol Chapnick pursuant to CPLR 3126 and, *inter alia*, to Vacate the Note of Issue, with Supporting Papers	4
Affirmation in Opposition to Motion (dated May 21, 2008)	5
Notice of Cross Motion by Defendant Carol Chapnick for Summary Judgment, with Supporting Papers	6
Plaintiff's Affirmation in Opposition to Cross Motion (dated June 6, 2008)	7
Reply Affirmation (dated June 17, 2008)	8
Notice of Cross Motion by Third-Party Defendant Scott Laidlaw for Summary Judgment, with Supporting Papers	9
Notice of Cross Motion by Third-Party Defendant Scott Laidlaw pursuant to CPLR 3126, with Supporting Papers	10

GONZALEZ v. CHAPNICK

Upon the foregoing papers, (1) the motion (No. 724) of third-party defendant Scott Laidlaw for partial summary judgment dismissing the third-party complaint is granted; (2) his cross motions (Nos. 1552 and 1555) are denied as academic; (3) the motion (No. 1282) of defendant/third-party plaintiff Carol Chapnick, *inter alia*, to preclude plaintiff pursuant to CPLR 3126 from offering medical evidence or testifying at trial, and to vacate the note of issue is denied; and (4) her cross motion (No. 1322) for summary judgment dismissing the complaint on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law §5102(d) is also denied.

This personal injury action arises out of an automobile accident that occurred on May 25, 2006 on Arthur Kill Road in Staten Island, New York at or near its intersection with Richmond Avenue. Insofar as it appears, Ms. Chapnick was attempting to make a left-hand turn from the eastbound side of Arthur Kill Road into a commercial parking lot on the westbound side of the divided roadway. However, after crossing over the double yellow line and successfully traversing two of the three lanes of westbound traffic, her vehicle came into contact with a vehicle being operated by third-party defendant Scott Laidlaw which was traveling in the right-hand lane of westbound traffic. Plaintiff Gonzalez was a passenger in the Laidlaw vehicle.

In moving for partial summary judgment on the issue of liability, third-party defendant Laidlaw maintains that based upon the undisputed facts of this case, defendant/third-party plaintiff Chapnick violated Vehicle and Traffic Law §1141 which provides, in pertinent part, that "the driver of a vehicle intending to turn left within an intersection or into an alley, private road or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." In addition, movant maintains that she also violated Vehicle and Traffic Law §1163(a) which prohibits motorists from turning or moving upon a

roadway "unless and until such movement can be made with reasonable safety."

It is well established that "[a] driver is negligent if he or she has failed to see that which, through the proper use of senses, should have been seen" (Berner v Koegel, 31 AD3d 591, 592; *see* Gabler v Marly Bldg. Supply Corp. 27 AD3d 519, 520; Bongiovi v Hoffman, 18 AD3d 686, 687). Moreover, the driver with the right-of-way in this case (Laidlaw) was "entitled to anticipate that [Chapnick] would obey [the] traffic laws which required [her] to yield" (Rossani v Rana, 8 AD3d 548, 549; *see* Bongiovi v Hoffman, 18 AD3d at 687).

Consonant with these principles, it is the opinion of this Court that third-party defendant Laidlaw has demonstrated his prima facie entitlement to judgment as a matter of law by establishing that defendant/third-party plaintiff Chapnick violated Vehicle and Traffic Law §§1141 and 1163 when she made a left-hand turn directly into the path of his oncoming vehicle, without yielding the right of way and under circumstances when the turn could not be made with reasonable safety (*see* Maloney v Niewender, 27 AD3d 426; Moreback v Mesquita, 17 AD3d 420, 421; Torro v Schiller, 8 AD3d 364).

In this regard, the deposition testimony of the parties clearly establishes that defendant/third-party plaintiff Chapnick had stopped her vehicle at the double-yellow lines on the eastbound side of Arthur Kill Road with the intention of making a left-hand turn across the three lanes of westbound traffic to enter the driveway of "Safari Mini Golf", and that she had successfully maneuvered her vehicle between the stopped cars in the first two westbound lanes before crossing the path of the Laidlaw vehicle. According to Ms. Chapnick, as she was "inching forward [she] checked that right lane", and she was able to see "ten car lengths" down the roadway. However, she admittedly failed to see the Laidlaw vehicle at any time prior to the impact, and crossed into its path when it was hazardous to do so (*see* Gabler v Marly Building Supply Corp., 27 AD3d at 520; Maloney v

Niewender, 27 AD3d at 426; Torro v Schiller, 8 AD3d at 365). Accordingly, a prima facie case of negligence on her part has been demonstrated.

In opposition, the defendant/third-party plaintiff has failed to raise a triable issue of fact as to the comparative negligence of the third-party defendant in, *e.g.*, failing to take evasive action, operating his vehicle at an excessive rate of speed or in any other way contributing to the collision (*see* Meretskaya v Logozzo, 2 AD3d 599; *cf*. Lynch v Dobler Chevrolet, Inc., 49 AD3d 509; Gray v Melissa Dembeck, 48 AD3d 748).

Turning next to the cross motion for summary judgment dismissing the complaint on the ground that plaintiff has failed to meet the "serious injury" threshold required by Insurance Law §5102(d), Ms. Chapnick submits the affirmed independent medical evaluations of Dr. Anthony Spataro (an orthopedist) and Dr. C.M. Sharma (a neurologist), each of whom physically examined plaintiff on September 25, 2007. In their affirmations, both doctors opine that plaintiff (1) does not exhibit any neurological or orthopedic disability, (2) has no need for further testing and treatment, including physical therapy, and (3) is not limited in his usual work or activities.

As the proponents of summary judgment, defendants bear the initial burden of establishing that "plaintiff's injuries are not serious within the meaning of Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79, 83-84; *see* Licari v Elliott, 57 NY2d 230). If successful, "the burden [then] shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (Grossman v Wright, 268 AD2d at 84; *see* Gaddy v Eyler, 79 NY2d 955).

In this case, the cross movant (Chapnick) has submitted legally sufficient evidence of

objective medical findings to establish that plaintiff's post-accident injuries have fully resolved (*see* Toure v Avis Rent A Car Sys., 98 NY2d 345). Moreover, the expert opinions of Drs. Spataro and Sharma are each supported by "normal" and/or "negative" findings produced in a series of objective tests which included, *inter alia*, range of motion testing of the cervical and lumbar spines and deep tendon reflexes; Patrick's, Kemp's, Eli's, Lachman's, Hawkins, Apley's and Drop Arm tests; McMurray and LaSague signs; Sperling maneuver; and straight leg raising. Additionally, the cross movant cites to so much of plaintiff's deposition testimony wherein she admits that following the accident there was no period of time that she was confined to her home; that she missed only one day of work; and that her alleged injuries did not prevent her from going to work. As a result, the defendant/third-party plaintiff has met her burden of demonstrating prima facie that plaintiff did not sustain 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; [a] significant limitation of use of a body function or system"; or a personal injury under the 90/180 day category of Insurance Law §5102(d).

With this established, it became incumbent upon plaintiff to come forward with objective evidence of a "serious injury" in order to demonstrate the presence of a triable issue of fact.

To this end, plaintiff has submitted her own affidavit of merit, as well as the affirmed report of her treating physician, Dr. Perry Drucker, who performed an initial examination of the plaintiff on June 26, 2006, and re-examined the plaintiff on May 19, 2008. Dr. Drucker attests that as part of both evaluations he conducted range of motion testing relative to plaintiff's cervical and lumbar spine, which resulted in quantified findings of limitations of motion during each examination. He also attests based on the foregoing examinations that plaintiff's "symptoms and measured limitations" have persisted for more than two years,

although his treatment of plaintiff concededly terminated on September 30, 2006. According to the doctor, any further therapy or treatment would have provided plaintiff solely with "temporary relief"rather than cure her injuries. Dr. Drucker also noted that as of his May 19, 2008 evaluation, plaintiff had not fully recovered, and was suffering from "severe residual inflammatory pathology to the muscular supportive structures of the cervical and lumbar spines."

In further opposition, plaintiff submits the affirmed reports of two radiologists, Dr. Robert Schepp and Dr. Spencer Serras. Dr. Schepp attests that he supervised the X-ray examination of plaintiff's cervical spine, lumbar spine and left shoulder on June 12, 2006 which revealed: (1) straightening of the normal cervical curvature; (2) disc space narrowing at L5-S1; (3) increased lumbar lordosis; (4) left shoulder joint space narrowing; and (5) minimal hypertrophic changes of the bilateral zygapophyseal joints at L4-5 and L5-S1. For his part, Dr. Serras attests that on June 29, 2007, an MRI examination of plaintiff's lumbar spine revealed both a diffuse disc bulge with flattening of the ventral thecal sac at L3-4, and diffuse disc bulge with superimposed small to medium posterior central disc protrusion with bilateral neural foraminal narrowing at L4-5.

In view of the above, it is the opinion of the Court that plaintiff's allegations of "debilitating" pain in her lower back, neck and left shoulder are adequately supported by quantitatively and qualitatively sufficient expert evidence to defeat Chapnick's cross motion for summary judgment and raise a triable issue of fact as to the seriousness of her injuries under section 5102(d) of the Insurance Law (*see* Gaddy v Eyler, 79 NY2d 955, *supra*). Accordingly, the cross motion for summary judgment is denied.

Ms. Chapnick has also moved, *inter alia*, to (1) preclude plaintiff from testifying at trial or offering any medical evidence regarding her injuries for failing to provide discovery pursuant to CPLR 3126(a); (2) vacate the note of issue; and (3) extend her time to file a

further summary judgment motion until the outstanding discovery has been received from plaintiff.

Inasmuch as plaintiff's counsel has agreed to produce the requested discovery material (i.e., authorizations and medical treatment records relative to any "continuing treatment", including plaintiff's recent trigger point injections) and the defendant/third-party plaintiff has already moved unsuccessfully for summary judgment, this motion is denied in its entirety. However, in the absence of any opposition, so much of defendant's motion as is predicated on plaintiff's failure to provide either a supplemental bill of particulars or the records of her medical treatment for ulcers purportedly caused by the subject accident, these elements of damage shall be deemed withdrawn.

Accordingly, it is hereby:

ORDERED, that the motion of third-party defendant Scott Laidlaw for partial summary judgment dismissing the third-party complaint is granted; and it is further

ORDERED, that, in light of the above, the third-party defendant's cross motions are denied as academic; and it is further

ORDERED, that the motion of defendant/third-party plaintiff Carol Chapnick, *inter alia*, for an order of preclusion pursuant to CPLR 3126 is denied except to the extent that plaintiff's claims of causally related ulcers and their sequelae are deemed to have been withdrawn; and it is further

ORDERED, that the cross motion of defendant/third-party plaintiff Carol Chapnick for summary judgment dismissing the complaint on the ground that plaintiff has not

sustained a serious injury within the meaning of Insurance Law §5102(d) is denied; and it is further

ORDERED, that the Clerk enter judgment dismissing the third-party complaint.

All parties shall appear in DCM Part 3 on **September 7, 2008** at **9:30 a.m.** for a status conference.

E N T E R,

Dated: August 14, 2008

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Joseph J. Maltese
Justice of the Supreme Court