

Washington v Regan
2008 NY Slip Op 32771(U)
August 25, 2008
Supreme Court, Nassau County
Docket Number: 19650/05
Judge: William R. LaMarca
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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA
Justice**

CAROLYN P. WASHINGTON,

**Motion Sequence #1
Submitted May 23, 2998**

Plaintiff,

-against-

INDEX NO: 19650/05

TIFFANY A. REGAN and BETSY A. REGAN,

Defendant.

The following papers were read on this motion:

Notice of Motion.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3
Supplemental Affirmation in Opposition.....	4

Requested Relief

Defendants, TIFFANY A. REGAN and BETSY A. REGAN, move for an order, pursuant to CPLR §3212 and Article 51 of the Insurance Law, dismissing the complaint of plaintiff, CAROLYN P. WASHINGTON, on the ground that the injuries alleged by the plaintiff do not satisfy the "serious injury" threshold requirement of Section 5102(d) of the Insurance Law of the State of New York and, as such, plaintiff has no cause of action under Section 5104(a) of the Insurance Law. Additionally, defendants seek an order, pursuant to CPLR §3212, dismissing the complaint on the ground that there are no issues

of fact with respect to the liability of defendants. Plaintiff opposes the motion which is determined as follows:

Background

In this personal injury action, plaintiff seeks to recover for injuries allegedly sustained in an automobile accident that occurred on November 23, 2004, at approximately 3:00 to 4:00 P.M., when she was traveling westbound on West John Street, Hicksville, New York, planning to make a left hand turn on to Charlotte Street. At her deposition, plaintiff testified that, at the intersection, she stopped for a red light while she was in the left hand turning lane, and when the traffic control signal turned green with a green left hand turn arrow, she proceeded into the intersection to make her left turn where she collided with defendant's vehicle. At the time, defendant was proceeding eastbound on West John Street and plaintiff claims that she did not see defendant's vehicle prior to the collision between the two (2) vehicle which was "hard".

Plaintiff testified that, as a result of the impact, her head hit the inside rearview mirror and her knee hit the dashboard of the car. She stated that her forehead was bleeding and she may have lost consciousness. She claims that she had never injured her right knee before but that she had a pre-existing injury to her right leg, which was exacerbated as a result of the accident. It appears that plaintiff was transported by ambulance from the scene of the accident to Nassau County Medical Center where she was seen in the emergency room and a plastic surgeon administered sutures to her forehead. A few days later, plaintiff was seen at Syosset Hospital complaining of an inability to stand and put weight on her foot and she was given a prescription for a boot that stabilized her right foot. Thereafter, plaintiff followed up with the surgeon that treated her

for the prior injury to the right leg, Dr. Neal Smith. Plaintiff claims that she did not return to work following the accident until February 1, 2005, more than two (2) months after the accident, and was only able to work a 40 hour week as an assistant manager in a group home for developmentally disabled individuals, and was unable to accept her usual substantial overtime of 20-30 hours additional hours per week until November 2005.

On December 9, 2005, plaintiff commenced the instant action for personal injuries against defendant by filing and later serving the Summons and Complaint. On or about February 3, 2006, defendant interposed an answer denying the material allegations of the complaint together with affirmative defenses. Following joinder of issue, plaintiff served a bill of particulars in which she alleged that she sustained the following serious injuries which are permanent and caused by the underlying accident:

- laceration over the left eyebrow requiring sutures
- injuries to the left eyelid and peri ocular;
- injury to the right knee, leg and ankle;
- re-injury of the right tibial fracture;
- contusion of the right tibia;
- contusions and increased swelling and pain to the right lower extremity; and
- scarring over the left eyebrow

See, Verified Bill of Particulars, Exhibit C, paragraph 12.

Plaintiff claims that the above listed injuries are "serious injuries" as defined by the New York Insurance Law and that she has sustained a significant disfigurement, a significant limitation of use of a body organ, member function or system; and/or a medically determined injury or impairment of a non-permanent nature which prevented the plaintiff from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the subject occurrence.

Upon the instant application, defendant, *inter alia*, now moves for summary judgment dismissing the complaint on the ground that the injuries claimed by the plaintiff fail to meet the "serious injury" threshold requirement of the No Fault Law. In support of the motion, defendant has submitted the deposition transcripts of the parties and the affirmed medical report of Frank M. Hudak, M.D., a board certified orthopedic surgeon, dated September 17, 2007. In his report, Dr. Hudak diagnosed plaintiff, after reviewing her medical records and a physical examination of her on September 17, 2007, with a contusion to the right leg which is causally related to the accident of November 25, 2004, "superimposed upon the prior fracture of the mid and distal third of the right tibia and fibula treated with an IM rod". He finds no orthopedic disability or permanency with regard to the accident and concludes that plaintiff is capable of normal activities of daily living including work activity and has returned to her job.

It is defendant's position that plaintiff injured the same part of her body, her right leg, that was injured in a prior accident, in June or July 2003, when she fell from a chair in her home while hanging curtains and fractured her right tibia which required the transfixing of an IM rod at the fracture site, and that there is no evidence that the accident exacerbated said injury. Counsel for defendant points out that the December 2, 2004 record of her treating doctor, Neal Smith, M.D., reflects that the fracture was completely healed and, after the accident, there was no new fracture, but a bone contusion to the right tibia and that plaintiff is "apparently doing well". On January 12, 2005, the record reflects that plaintiff was "doing much better and not complaining of pain". Counsel for defendant argues that the record is devoid on any evidence of plaintiffs continuing treatment, any need for treatment or why treatment ended with Dr Smith in January 2005. Counsel

asserts that when a contributing factor such as a pre-existing condition interrupts the chain of causation between the accident and the claim, summary judgment may be appropriate, citing *Pommells v Perez*, 4 NY3d 566, 979 NYS2d 38, 830 NE2d 278 (C.A. 2005). He contends that plaintiff must raise a triable issue of fact and must demonstrate a limitation in her range of motion, sustained by objective medical findings “based upon a recent examination of plaintiff” (*Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2nd Dept. 2000]; *Verderosa v Simonelli*, 260 AD2d 293, 689 NYS2d 45 [1st Dept. 1999]), which plaintiff has not done. Counsel for defendants urges that plaintiff has received no followup treatment for the laceration of her forehead, that there is no perceptible scar remaining, and has failed to establish a “serious injury”.

In opposition to the motion, counsel for plaintiff asserts that the motion must be denied because defendants have not satisfied their burden of proof and have not provided sufficient evidence to eliminate any material issue of fact. Counsel points out that plaintiff sustained a “significant disfigurement” and that there is not mention of the scar in the medical report. She annexes a series of photographs taken by her in May 2006, some eighteen (18) months after the accident, and in March 2008, some three (3) years following the accident, that she claims shows a clearly visible scar above plaintiff’s left eyebrow. Moreover, counsel for plaintiff points out that Dr. Hudak saw plaintiff on but one (1) occasion, some three (3) years after the accident and makes no comment with respect to plaintiff’s 90/180 day claim. Indeed, Dr. Hudak’s report finds that plaintiff’s injury to her right leg was causally related to the accident and notes a diminishment in the range of motion in both knees (0-120 degrees with 0-135 normal).

In a supplemental affirmation in opposition, submitted after the submission of the motion, plaintiff annexes the report of Bruce Brewer, M. D., a certified plastic surgeon, who examined plaintiff on April 9, 2008, and who found that plaintiff has a significant permanent scar of the forehead which does detract to a moderate degree from her appearance. Color photos taken by Dr. Brewer are annexed, and counsel urges that material issues of fact are present, as to whether plaintiff sustained a "significant disfigurement", and that the motion for summary judgment should be denied.

As to Liability

In support of the motion for summary judgment on the issue of liability, counsel for defendant asserts that plaintiff made a left hand turn into defendant's lane of traffic and was required to yield the right of way to any approaching vehicle. At her deposition, defendant testified that she had a green light as she proceeded through the intersection where the accident occurred and, therefore, plaintiff is in violation of Vehicle and Traffic Law §1141, which is negligent as a matter of law, and there are no issues of fact requiring a trial as to liability.

In opposition to the motion, counsel for plaintiff points out that questions of fact do exist because both parties testified that they had the green light. Counsel states that where there are discrepancies in the account of the accident, specifically regarding traffic signals, summary judgment is not appropriate, citing *Lestingi v Holland*, 297 AD2d 627, 747 NYS2d 522 (2nd Dept. 2002).

The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (see, *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]). Indeed, “[e]ven the color of a triable issue, forecloses the remedy” *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover “[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate” (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; see also *S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, significant NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party’s pleadings must be accepted as true (see *Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*). The burden on the moving party for summary judgment is to demonstrate a *prime facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 (C.A.1993); *Drago v King*, 283 AD2d 603, 725 NYS2d 859 (2nd Dept. 2001).

Under the “no-fault” law, in order to maintain an action for personal injury, a plaintiff must establish that a “serious injury” has been sustained. (*Licari v Elliot*, 57 NY2d 230, 455

NYS2d 570, 441 NE2d 1088;[C.A. 1982]). On the present motion, the burden rests on defendants to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a “serious injury.” (*Lowe v Bennett*, 122 AD2d 728, 511 NYS2d 603 [1st Dept. 1986], *affirmed*, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant’s motion is sufficient to raise the issue of whether a “serious injury” has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce *prima facie* evidence in admissible form to support the claim of serious injury. (*Licari, supra*; *Lopez v Senatore*, 65 NY2d 1017, 494 NYS2d 101 [1985]).

New York Vehicle and Traffic Law §1110, et seq, which requires drivers to come to a full stop before red traffic signals, provides that the operator of a motor vehicle traveling with a green signal in his favor has the right of way and has the right to anticipate that the other vehicle will obey the traffic laws which require that it yield. *Jacino v Sugarman*, 10 AD3d 593, 781 NYS2d 663 (2nd Dept. 2004) .

VTL §1111 provides, as follows:

Traffic, except pedestrians, facing a steady green arrow signal may cautiously enter the intersection only to make the movement indicated by such arrow. . .

Additionally, VTL §1141 directs that “[t]he driver of a vehicle intending to turn to the left within an intersection . . . 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.

Discussion

As to Serious Injury

After a careful reading of counsels' submissions, the Court finds that defendant's physician's report that plaintiff did not sustain a serious injury is insufficient to establish, as a matter of law, that plaintiff did not sustain a "serious injury". The doctor, who examined the plaintiff on but one occasion, opines in conclusory fashion that plaintiff has no disability at this time although he acknowledges that there is a diminution in plaintiff's range of motion in her knees. Furthermore, the medical report does not address the issue of plaintiff's scar or the 90/180 period following the accident when plaintiff asserts that she was out of work for two (2) months, and thereafter unable to perform any regular overtime for almost a year.

A defendant moving for summary judgment on the ground that the plaintiff did not sustain "serious injury" must make a *prima facie* showing of entitlement to judgment. *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (C.A. 1985); *Matthews v Cupie Transportation Corp.*, 302 AD2d 566, 758 NYS2d 66 (2nd Dept. 2003). Failure to do so requires dismissal of the motion regardless of the sufficiency of the opposing papers. *Winegrad v New York University Medical Center*, *supra*. The Court finds that defendant has not established a *prima facie* case. Under these circumstances, the Court need not consider whether the plaintiff's papers are sufficient to raise a triable issue of fact. *Basmajian v Wang*, 12 AD3d 471, 785 NYS2d 468 (2nd Dept. 2004); *McCluskey v Aguilar*, 10 AD3d 388, 781 NYS2d 130 (2nd Dept. 2004).

As to Liability

The Court finds that questions of fact remain on the issue of liability that precludes the granting of summary judgment. Whether defendant had a green light and, therefore, the right of way which required other cars to yield, is a question which requires a trial where the credibility of the parties can be tested. Cf., *Greco v Posillico, supra*. Both parties testified that they had the green light and, giving plaintiff every favorable inference, the Court finds that summary judgment is inappropriate.

Conclusion

It is therefore,

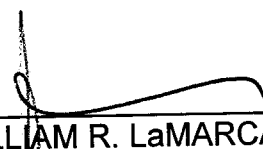
ORDERED, that defendants' motion for an order dismissing plaintiff's complaint on the ground that plaintiff has not sustained a "serious injury" is denied; and it is further

ORDERED, that defendants' motion for an order granting defendant summary judgment on the issue of liability is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: August 25, 2008


WILLIAM R. LaMARCA, J.S.C.

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