

King v Falko

2009 NY Slip Op 30506(U)

February 27, 2009

Supreme Court, Suffolk County

Docket Number: 05-753

Judge: Ralph T. Gazzillo

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ORDERED that the cross motion (005) by plaintiff, William G. King, for an order pursuant to CPLR 3212 granting partial summary judgment in his favor on the issue of liability, is denied; and it is further

ORDERED that the cross motion (006) by plaintiff, Susan B. King, for an order pursuant to CPLR 3212 granting partial summary judgment in her favor on the issue of liability, is denied.

In this action, plaintiffs William and Susan King allege that they sustained serious injuries in a motor vehicle accident which occurred on December 31, 2004. Plaintiffs allege that a vehicle operated by defendant, Robert F. Falko (Falko), suddenly entered the intersection at Route 25A and Pipe Stave Hollow Road and ran a red light which caused plaintiffs' vehicle to collide with the Falko vehicle, causing personal injuries. Plaintiffs also allege that defendant, Chris Mendolia, was negligent in chasing the Falko vehicle into the intersection, which caused the collision. Defendant Mendolia moves for summary judgment dismissing the action on the ground that he did not proximately cause plaintiffs' injuries and dismissing Susan King's allegations of serious injury. Defendant, Keith Falko, as administrator of the estate of Robert Falko, moves for summary judgment dismissing Susan King's allegations of serious injury. William King cross-moves for partial summary judgment on the issue of liability. Susan King also cross-moves for partial summary judgment on the issue of liability.

In support of his motion, defendant Mendolia submits, among other things, the pleadings, bill of particulars, examination before trial transcripts of plaintiff Susan King, defendants Mendolia and Falko, and non-party Gina Mendolia. In support of their cross motions, plaintiffs submit, among other things, the certified police report of the accident, supplemental reports of William King, Chris Mendolia, and Robert Falko, and the personal affidavit of William King. Plaintiffs allege in their bill of particulars that defendants Mendolia and Falko failed to operate their vehicles at prudent rates of speed under the circumstances, operated their vehicles in disregard for the plaintiffs' safety, and operated their vehicles in a careless, reckless and unlawful manners. Plaintiffs further allege that defendant Mendolia negligently chased defendant Falko onto Route 25A and followed Falko's vehicle too closely. Plaintiffs allege that Falko failed to reduce his speed at the intersection where the accident happened, failed to stop his vehicle at a red traffic control signal, and failed to yield the right of way when exiting from the parking lot of Eddie G's restaurant.

At his examination before trial, Falko testified that he was visiting with non-party Gina Mendolia on the night of the accident. Ms. Mendolia worked at Eddie G's restaurant as a bartender and met Falko at the end of her shift at approximately 12:00 midnight. Falko stated that he had been to the restaurant earlier in the evening and sat at the bar conversing with Ms. Mendolia. He stated that they were beginning a relationship. Ms. Mendolia sat in his truck for approximately ten minutes, where they were talking and listening to music. Falko stated that Ms. Mendolia looked up and saw a vehicle belonging to her husband, defendant Chris Mendolia, enter the parking lot and she became anxious. Chris Mendolia pulled up along side Falko's vehicle and got out of the vehicle. He walked toward Falko's vehicle with a pipe wrench in his hand and began to hit the driver's side of Falko's vehicle. Falko stated that Ms. Mendolia quickly became quite upset and told him to drive away. Falko stated that he drove out of the parking lot and onto Route 25A. He did not see the color of the traffic light and thought he had enough time for the turn. He did not see another vehicle approaching and his vehicle was struck by plaintiffs' vehicle, on the driver's side. He stated that the impact occurred approximately

70 feet west of the traffic light. After he exited his vehicle from the passenger side, he observed Chris Mendolia driving out of the parking lot and onto Route 25A. He saw Chris Mendolia exit from his vehicle and walk toward him with the pipe wrench in his hand. Chris Mendolia asked Falko who he was and why was his wife sitting in Falko's car. The police arrived and took statements from them and, eventually, Chris Mendolia left the scene of the accident.

Chris Mendolia testified at his deposition that he was married to Gina Mendolia at the time of the accident. He was unaware that Gina was seeing another man. On the evening of the accident, he received a telephone call from Gina that she would be home later than usual, and she sounded nervous. He stated that he was worried and went to the restaurant. He saw Gina's vehicle and a pickup truck in the parking lot. He drove up to the truck and heard his wife screaming, and he thought that she was being assaulted. He then saw the pickup truck leave the parking lot. As he was returning to his vehicle, he heard a loud bang. He observed that a collision had occurred between the truck and the plaintiffs' vehicle. Chris Mendolia stated that he drove out of the parking lot to where the accident occurred and stepped out of his van, with a pipe wrench. When he saw Gina exit the pickup truck, he left the scene. He denied hitting Falko's pickup truck with his pipe wrench. He further stated that, after the accident, Gina asked him to lie about the incident and to support her version of the occurrence, which he refused to do.

Gina Mendolia testified at her deposition that she was working as a bartender at Eddie G's restaurant on December 30, 2004. She saw defendant Falko enter the restaurant at approximately 9:00 p.m. and he left shortly before she closed the restaurant. He stated that he would wait for her in the parking lot. Gina then called her husband, defendant Chris Mendolia, to tell him that she would be late getting home, to have some time to spend with Falko. At approximately 12:30 a.m., she left the restaurant with her manager, who got into his vehicle and left the parking lot. She got into Falko's front passenger seat and they talked for approximately ten minutes. She saw her husband's van enter the parking lot and she recalled telling Falko to get out of there. Her husband pulled up along side Falko's vehicle. Falko floored the accelerator and the accident with the plaintiffs' vehicle occurred just outside the parking lot on Route 25A. She stated that there was no confrontation before the accident, however, after the impact, her husband approached Falko with a silver wrench and spoke with him in a loud voice. Gina denied asking her husband to change his version of the incident. She also denied observing Chris damage Falko's vehicle with his wrench before the accident.

Susan King testified at her deposition that she was a passenger in her husband's vehicle in the early morning hours of December 31, 2004. She stated that they were driving eastbound on Route 25A, heading toward the intersection with Pipe Stave Hollow Road, when a white truck pulled out in front of them going northbound on Pipe Stave Hollow Road and a collision occurred. The light at the intersection was green in their favor. It appeared that the white truck ran the red light. Within seconds of observing the white truck, their vehicle collided with the truck. William King averred in his affidavit that the truck came out in the middle of the intersection so fast that he did not have an opportunity to either slow down or stop.

The certified police report reveals that Mr. King, the operator of vehicle #1, stated to the police officer that he was eastbound on Route 25A, approaching the intersection of Pipe Stave Hollow Road, with the green light in his favor when Mr. Falko, the operator of vehicle #2, who was northbound on

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Pipe Stave Hollow road, proceeded through a red light causing Mr. King to collide into the driver's side of Falko's vehicle. In addition, Mr. King wrote in the Suffolk County Police Department Supplemental Accident Report that he was driving his vehicle eastbound on Route 25A with the green light in his favor at the intersection with Pipe Stave Hollow Road when a white pickup truck proceeded northbound through the red traffic light, causing King's vehicle to collide with the pickup truck. Mr. Falko wrote in the Suffolk County Police Department Supplemental Accident Report that he took off in his truck, after learning that Gina's husband had driven into the parking lot, he drove forward in a panic, pulled into the intersection and was hit by another car.

The Court finds that the conflicting testimonies of defendants Mendolia and Falko of the events leading up to the accident represent an issue of credibility, which is a matter strictly for the jury to determine (see, *Pannetta v Ramo*, 138 AD2d 686, 687, 526 NYS2d 500 [2d Dept 1988]). Accordingly, that branch of defendant Mendolia's motion for an order granting partial summary judgment in his favor on the liability issue, is denied. Turning to plaintiffs' cross motions for partial summary judgment, a driver who lawfully enters an intersection may still be found negligent if he or she fails to use reasonable care to avoid a collision with another vehicle (see, *Siegel v Sweeney*, 266 AD2d 200, 697 NYS2d 317 [2d Dept 1999]; *Gorham v Methun*, 2008 NYAppDiv LEXIS 9274, 869 NYS2d 182 [2d Dept 2008]). Here, plaintiffs have failed to demonstrate their prima facie entitlement to judgment as a matter of law on the issue of liability by failing to establish that plaintiff, William King, used reasonable care to avoid the accident after he observed the pickup truck. Accordingly, the plaintiffs' cross motions for partial summary judgment on the issue of liability are also denied.

Turning to the branch of defendant Mendolia's motion which seeks an order granting summary judgment in his favor on the issue of whether plaintiff, Susan King, sustained a serious injury, defendant submits, among other things, the bill of particulars and sworn reports by Craig B. Ordway, M.D. and Sondra J. Pfeffer, M.D. Defendant Falko moves for identical relief in his motion for summary judgment and incorporates by reference the submissions by co-defendant Mendolia. By way of the bill of particulars, plaintiff Susan King alleges that she sustained the following injuries: post traumatic headaches, cervical pain and bilateral c6/7 radiculopathy, disc herniation at C5/6, lumbar myofascitis, trauma to sternum, post traumatic head injury, numbness to upper and lower extremities. Plaintiff further alleges that she was confined to bed and home for approximately one month, and was incapacitated from work for approximately one month and intermittently to date.

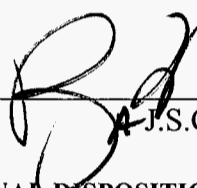
Dr. Ordway avers that he performed an orthopedic examination upon plaintiff Susan King on January 17, 2007. He reported range of motion measurements for plaintiff's cervical spine and shoulder but failed to compare those findings to what is deemed normal ranges of motion for those areas of plaintiff's body (see, *McLaughlin v Rizzo*, 38 AD3d 856, 832 NYS2d 666 [2d Dept 2007]; *Harman v Busch*, 37 AD3d 537, 829 NYS2d 680 [2d Dept 2007]; *Iles v Jonat*, 35 AD3d 537, 825 NYS2d 540 [2d Dept 2006]). Absent a comparison with normal measurements, it cannot be concluded that any limitations were mild, minor or slight, so as to be considered insignificant within the meaning of the no-fault statute (see, *McLaughlin v Rizzo*, *supra*; *Harman v Busch*, *supra*; *Iles v Jonat*, *supra*). Thus, defendants Mendolia and Falko failed to establish, prima facie, that plaintiff Susan King did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (see, *Cruz v Williams*, 34 AD3d 719, 825 NYS2d 510 [2d Dept 2006]).

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Inasmuch as defendants failed to establish their prima facie entitlements to judgment as a matter of law based on whether plaintiff Susan King sustained a serious injury, it is unnecessary to consider whether plaintiffs' position papers were sufficient to raise a triable issue of fact on that matter (*see, Nembhard v Delatorre*, 15 AD3d 390, 791 NYS2d 144 [2d Dept 2005]; *McDowall v Abreu*, 11 AD3d 590, 782 NYS2d 866 [2d Dept 2004]; *Coscia v 938 Trading Corp.*, 283 AD2d 538, 725 NYS2d 349 [2d Dept 2001]). Accordingly, that branch of the motion by defendant Mendolia which seeks an order granting summary judgment dismissing plaintiff's allegations of serious injury is denied, as is the motion by defendant Falko, which seeks the same relief.

In summary, that branch of the motion by defendant Mendolia which seeks an order pursuant to CPLR 3212 granting summary judgment in his favor on the issue of liability, is denied, and that branch of Medolia's motion which seeks summary judgment in his favor in that plaintiff Susan King did not sustain a serious injury, is also denied; the motion by defendant Falko for an order pursuant to CPLR 3212 granting summary judgment in his favor in that plaintiff Susan King's did not sustain a serious injury, is denied; and the cross motions by plaintiffs for partial summary judgment on the issue of liability are denied. Nevertheless, nothing herein shall be understood to be an adjudication on the issue of whether or not plaintiffs sustained threshold injuries which could have been found to have occurred solely as the result of defendants' negligence (*Zecca v Riccardelli*, 293 AD2d 31, 742 NYS2d 76 [2d Dept 2002]).

Dated: 22/27/09



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION