Laveglia v Engel
2009 NY Slip Op 32410(U)
October 20, 2009
Supreme Court, Greene County
Docket Number: 08-1174
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

APRIL LAVEGLIA & JOHN LAVEGLIA,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 08-1174
RJI NO. 19-09-4075

MILTON C. ENGEL,

Defendant.

Supreme Court Greene County All Purpose Term, October 2, 2009
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

On May 10, 2007, April Laveglia (hereinafter "Plaintiff") was driving her daughter to preschool when her automobile was struck by Milton C. Engel's (hereinafter "Defendant") vehicle. Plaintiff, with her husband derivatively, commenced this action seek to recover for her personal injuries. Issue was joined, discovery is complete and a trial date certain is set. Plaintiff now moves for summary judgment of two issues, to wit: (1) that the Defendant was negligent, while the Plaintiff was not negligent, in causing the above motor vehicle accident, and (2) that

the Plaintiff suffered an Insurance Law §5102(d) serious injury[1]. Defendant opposes the motion. Because Plaintiff demonstrated her entitlement to judgment as a matter of law on both issues and no issue of fact was raised by Defendant, her summary judgment motion is granted.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]).

On a motion for summary judgment, the movant must "make a prima facie showing of entitlement to judgment as a matter of law." (Ferluckaj v. Goldman Sachs & Co., 12 NY3d 316 [2009] quoting Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). "It... is incumbent upon the proponent to tender sufficient evidentiary proof in admissible form to warrant a judgment in its favor." (Salas v. Town of Lake Luzerne, 265 AD2d 770 [3d Dept. 1999]; see CPLR §3212[b] [stating that a summary judgment motion "shall be supported by affidavit, [which] shall be by a person having knowledge of the facts..."]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). In opposing a motion for summary judgment, one must produce "evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (Id. at 562).

Insurance Law §5104(a) provides that an individual who has been injured in an automobile accident may seek compensation for non-economic loss only if she has suffered a

[1] Plaintiff also moved for summary judgment dismissing Defendant's affirmative defense of Plaintiff's failure to wear a seat belt. Defendant did not opposes such motion, but rather withdrew that affirmative defense. As such, this portion of Plaintiff's motion is denied as moot.

"serious injury". A "serious injury" is defined by Insurance Law §5102(d), in part, as a "fracture". "It is well established that to satisfy the statutory serious injury threshold, plaintiff must have sustained an injury that is identifiable by objective proof." (Tuna v. Babendererde, 32 AD3d 574 [3d Dept. 2006]). "[S]ubjective complaints alone are not sufficient." (Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345, 350 [2002] quoting Dufel v. Green, 84 NY2d 795 [1995]).

Here, Plaintiff established that she suffered a "serious injury" as a matter of law. Plaintiff submits an affidavit, in which she alleges that her femur was "fractured" in the accident, which required "open reduction surg[ery] to repair the femur and a rod inserted." Additionally, Plaintiff submits her certified deposition testimony,[2] which established that she was transported via ambulance to Albany Medical Center Hospital. She stayed in the hospital for two weeks, during which time the above surgery was conducted. Without considering the inadmissible "Report of Operation", the above amply demonstrates as a matter of law, objective proof of Plaintiff's fracture, by definition a "serious injury". Plaintiff's allegations are simply not subjective complaints of pain.

In opposition, Defendant failed to demonstrate the existence of an issue of fact. Defendant offers no "evidentiary proof in admissible form". (Zuckerman, supra). Rather, Defendant relies solely upon the affirmation of his attorney, which is insufficient to raise a triable factual issue.

Accordingly, Plaintiff's motion for summary judgment finding that she suffered an

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[2] Although Plaintiff's deposition transcript is unsigned, because it is certified, the Defendant does not object to its consideration and the Defendant uses the transcript to assert factual arguments in support of his opposition, it is considered on this motion.

Insurance Law §5102(d) serious injury is granted.

Turning next to Plaintiff's motion for summary judgment seeking a determination that Defendant was negligent and that she was not negligent, she demonstrated her entitlement to judgment as a matter of law. In support of her motion, Plaintiff submits her own affidavit and her deposition transcript. She alleges that on the day of the accident at issue, she was driving, with the right of way, through an intersection. She stated that she was familiar with the intersection from prior experience, and that the intersecting street is controlled by a yield sign. She alleged that she was traveling within the speed limit and that her vehicle was mechanically sound when it was struck by Defendant's vehicle. She describes how she saw Defendant's vehicle slow down at the intersection but that it did not stop at the yield sign, and how she took evasive action to avoid the collision. Plaintiff also submitted Defendant's affidavit[3]. Defendant admitted that a yield sign required him to yield the right of way to Plaintiff's vehicle, and that, although he slowed down, he did not stop for her vehicle. Such proof demonstrates Plaintiff's entitlement to judgment as a matter of law because "an unexcused violation of the Vehicle and Traffic Law constitutes negligence per se." (Aloi v. County of Tompkins, 52 AD3d 1092, 1093 [3d Dept. 2008]; Vehicle & Traffic Law §1142[b]; Hazelton v. DA Lajeunesse Building and Remodeling, Inc., 38 AD3d 1071 [3d Dept. 2007]). While Defendant alleged that Plaintiff may have been speeding, such allegation creates no viable excuse or issue of fact, because it is wholly

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[3] "An unsigned but certified deposition transcript of a party can be used by the opposing party as an admission in support of a summary judgment motion." (Morchik v. Trinity School, 257 AD2d 534, 536 [1st Dept. 1999]). In contrast, however, Plaintiff failed to authenticate the proffered police officer's "Supporting Deposition" or "710.30 CPL-Notice", or lay a proper foundation for their admission as business records. As such, neither are considered on this motion.

speculative. Defendant first alleged that he did not know Plaintiff's speed. He then speculated about the speed limit and opined that Plaintiff was driving in excess of that speculative speed limit. Because Defendant's allegations are speculative and unsupported by any foundational proof, they are of no probative value. As such, Plaintiff demonstrated her entitlement to judgment as a matter of law on this issue.

Again, because Defendant submits only his attorney's affirmation he has failed to demonstrate the existence of an issue of fact with "evidentiary proof in admissible form". (Zuckerman, supra). Accordingly, Plaintiff's motion for summary judgment on the issue of negligence is granted.

This Decision and Order is being returned to the attorneys for the Plaintiffs. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: October 20, 2009
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated September 9, 2009, Affirmation of William Simon, dated September 4, 2009, Affidavit of April LaVeglia, dated September 8, 2009, with Exhibits "A" - "H".
2. Affirmation of Paul Hurley, dated September 24, 2009.
3. Reply of William Simon, dated September 28, 2009, Affirmation of Robert Schneider, dated September 28, 2009.