Nunez v Mikucki

2010 NY Slip Op 30429(U)

February 19, 2010

Supreme Court, Suffolk County

Docket Number: 07-29711

Judge: Denise F. Molia

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

INDEX No. 07-29711
CAL. No. 09-00773-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 9-11-09
ADJ. DATE 11-6-09
Mot. Seq. # 001 - MG
002 - XMD

ROSA NUNEZ and FAUSTINO RODRIGUEZ,

Plaintiffs,

- against -

ZIGMUND MIKUCKI,

Defendant.

NICHOLAS PANZINI, ESQ.
Attorney for Plaintiffs
365 Broadway, Suite 2C
Amityville, New York 11701

RUSSO, APOZNANSKI & TAMBASCO
Attorneys for Plaintiff Nunez, on Counterclaim
875 Merrick Avenue
Westbury, New York 11590

NICOLINI, PARADISE, FERRETTI & SABELLA
Attorneys for Defendant
114 Old Country Road, P.O. Box 9006
Mineola, New York 11501

Upon the following papers numbered 1 to 42 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; Notice of Cross Motion and supporting papers 24 - 25; Answering Affidavits and supporting papers 26 - 34; 35 - 40; Replying Affidavits and supporting papers 41 - 42; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that plaintiff Rosa Nunez's motion for summary judgment dismissing defendant Zigmund Mikucki's counterclaim against her is granted, and it is further

ORDERED that defendant Zigmund Mikucki's cross motion for summary judgment dismissing the claim as to plaintiff Faustino Rodriguez on the grounds that he did not sustain "serious injury" within the meaning of Insurance Law § 5104(d) is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Faustino Rodriguez as a result of a motor vehicle accident that occurred at the intersection of Straight Path Road and Sunrise Highway in the Town of Babylon on April 3, 2007. Faustino Rodriguez was a passenger in a vehicle driven by his daughter, plaintiff Rosa Nunez. The accident allegedly occurred when a vehicle

[* 2]

driven by defendant Zigmund Mikucki struck the rear of the vehicle driven by plaintiff Rosa Nunez. The bill of particulars alleges that as a result of the subject accident plaintiff Rodriguez suffered various injuries including disc herniation at levels L2-3, L4-5, L5-S1; and a tear of the distal supraspinatus tendon. In addition to asserting affirmative defenses to the negligence claims against him, defendant interposed a counterclaim for contribution against plaintiff Nunez.

Plaintiff Nunez now moves for summary judgment dismissing the counterclaim on the ground that plaintiff Rodriguez did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Plaintiff Nunez also argues that the counterclaim should be dismissed on the ground that she was not negligent for the happening of the accident because her vehicle was stopped when it was rear-ended by defendant's vehicle. In support of her motion, she submits, among other things, a copy of the pleadings, transcripts of the deposition testimony of plaintiffs, an excerpt of defendant's deposition testimony, and a copy of the police accident report. She also submits a medical report of Louis Filardi, a chiropractor; an affirmed medical report of Dr. Michael Katz; a magnetic resonance imaging (MRI) report regarding plaintiff Rodriguez's lumbar spine; and an MRI report regarding plaintiff's right knee. The Court notes that the report of the chiropractor was not in affidavit form, and therefore was without probative value (see CPLR 2106; ***Casas v Montero***, 48 AD3d 728, 853 NYS2d 358 [2008]; ***Kunz v Gleeson***, 9 AD3d 480, 781 NYS2d 50 [2004]).

Defendant Mikucki cross-moves for summary judgment dismissing the complaint as to plaintiff Rodriguez on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Defendant adopts the arguments and evidence concerning serious injury in plaintiff Nunez's motion papers. However, defendant Mikucki partially opposes plaintiff Nunez's motion dismissing the counterclaim on the basis of liability, arguing that plaintiff Nunez's sudden stop caused the accident. In partial opposition, he submits a copy of the police accident report and transcripts of the deposition testimony of both plaintiffs.

Plaintiff Rodriguez opposes the motion and cross motion, arguing that the medical evidence presented in opposition to the motions raises triable issues as to whether he suffered significant limitation in his right shoulder. In opposition, he submits a copy of the police accident report, a transcript of defendant's deposition testimony, his own affidavit, an affirmed medical report of Dr. Christopher Durant, and an MRI report regarding his right shoulder from Dr. Ron Mark. The Court notes that plaintiff Rodriguez's affidavit is in inadmissible form inasmuch as it was apparently signed and notarized in the Dominican Republic and was not accompanied by the required certificate of conformity with the laws of the Dominican Republic (*see* CPLR 2309 [c]; Real Property Law § 301-a).

At her examination before trial, plaintiff Nunez testified that she was driving a vehicle owned by her son, and that her father, plaintiff Rodriguez and her mother were passengers in the vehicle when the accident occurred. She testified that her vehicle was stopped at a red light on the right turn lane at the intersection of Straight Path Road and Sunrise Highway when defendant's vehicle struck her in the rear. She testified that traffic was light, and that she was stopped at the red light for about one minute before defendant's vehicle collided with her vehicle.

At his examination before trial, defendant testified that on the day of the accident he was

traveling northbound on Straight Path Road. He testified that when he arrived at the intersection of Straight Path Road and Sunrise Highway the traffic light was red, and that plaintiff's vehicle was in front of his vehicle on the right turning lane. He testified that his vehicle was stopped behind plaintiff's vehicle for 10 seconds, and that there was 10 feet between the two vehicles. He further testified that when plaintiff started to make a right turn onto Sunrise Highway moving about five feet, he started to move his vehicle also. He testified that plaintiff's vehicle suddenly stopped, and their vehicles collided. He testified that when the accident occurred, the traffic light was still red and there was "plenty" of traffic traveling eastbound on Sunrise Highway.

When a driver approaches another vehicle from the rear, he or she is bound to maintain a reasonable rate of speed, to maintain control of his or her vehicle, and to use reasonable care to avoid colliding with the other vehicle (*see* ***Gaeta v Carter***, 6 AD3d 576, 576, 775 NYS2d 86 [2004]; ***Chepal v Meyers***, 306 AD2d 235, 236, 762 NYS2d 95 [2003]; ***Power v Hupart***, 260 AD2d 458, 458, 688 NYS2d 194 [1999]). Thus, the occurrence of a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the operator of the following vehicle and imposes a duty on that operator to come forward with a non-negligent explanation for the collision (*see* ***Emil Norsic & Son, Inc. v L.P. Transp., Inc.***, 30 AD3d 368, 815 NYS2d 736 [2006]; ***Carhuayano v J & R Hacking***, 28 AD3d 413, 813 NYS2d 162 [2006]; ***Neidereger v Misuraca***, 27AD3d 537, 811 NYS2d 758 [2006]; ***Rainford v Han***, 18 AD3d 638, 795 NYS2d 645 [2005]). The operator of the moving vehicle is required to rebut the inference of negligence created by an unexplained rear-end collision because he or she is in the best position to explain the cause of such collision. If the operator of the moving vehicle is unable to come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law (*see* ***Mendiolaza v Novinski,*** 268 AD2d 462, 703 NYS2d 49 [2000]).

Plaintiff Nunez established prima facie her entitlement to judgment as a matter of law as to defendant's counterclaim by demonstrating that defendant's vehicle struck her vehicle in the rear as it was stopped at an intersection (*see* ***Nozine v Anuray***, 38 AD3d 631, 831 NYS2d 511 [2007]; ***Campbell v City of Yonkers***, 37 AD3d 750, 833 NYS2d 101 [2007]). The burden, then, shifted to defendant to offer a non-negligent explanation for the accident sufficient to raise a triable issue of fact (*see* ***Emil Norsic & Son, Inc. v L.P. Transp., Inc.***, *supra*; ***Rainford v Han***, *supra*; ***Irmiyayeva v Thompson***, 296 AD2d 439, 745 NYS2d 199 [2002]). In opposition, defendant's evidence is insufficient to raise triable issues of fact. Defendant testified that plaintiff's vehicle and his vehicle were stopped at a red light on the right turn lane, and that plaintiff's vehicle started to make a right turn but suddenly stopped. He also testified that the traffic light controlling Straight Path Road was red, and that there were many vehicles traveling eastbound on Sunrise Highway. Under the prevailing traffic conditions, even if plaintiff suddenly stopped her vehicle just before the accident, such an action must be anticipated by defendant driver, since he is under a duty to maintain a safe distance between his vehicle and the vehicle ahead (*see* Vehicle and Traffic Law §1129[a]; ***Shamah v Richmond County Ambulance Service, Inc.***, 279 AD2d 564, 719 NYS2d 287 [2001]; ***Levine v Taylor***, 268 AD2d 566, 702 NYS2d 107 [2000]; ***Mascitti v Greene***, 250 AD2d 821, 673 NYS2d 206 [1998]). Accordingly, plaintiff Nunez's motion for summary judgment dismissing defendant's counterclaim is granted.

Insurance Law § 5102 (d) defines "serious injury" 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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2001]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251 [1993]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The evidence submitted in support of defendant's cross motion is sufficient to establish prima facie that plaintiff Rodriguez did not suffer a serious injury as a result of the subject accident (*see* ***Shevardenidez v Vaiana***, 60 AD3d 660, 875 NYS2d 119 [2009]; ***Smeja v Fuentes***, 54 AD3d 326, 863 NYS2d 689 [2008]; ***Morris v Edmond***, 48 AD3d 432, 850 NYS2d 641 [2008]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2005]). In Dr. Katz's medical report, he states that there is no swelling, erythema or induration to plaintiff's right arm and shoulder. He states that a range of motion examination of plaintiff Rodriguez's right arm and shoulder reveals normal range of motion. He further states that there is no crepitation at the AC joint, and no joint line tenderness. Dr. Katz concludes that Mr. Rodriguez shows no signs or symptoms of permanent loss of use relative to his back and right shoulder. He further opines that Mr. Rodriguez is currently not disabled, and is capable of his activities of daily living.

The burden, therefore, shifted to plaintiff Rodriguez to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*). In Dr. Durant's medical report, he states that an examination of plaintiff Rodriguez's cervical spine revealed extension to be limited to 30 degrees, and lateral rotation to be limited to 60 degrees. He states that an examination of Rodriguez's right shoulder revealed positive impingement sign noted on forward flexion at about 140 degrees, and audible crunching noted during passive range of motion tests. He states that Mr. Rodriguez continues to experience pain and significant limitation of motion of his right shoulder. Dr. Durant opines that there is no potential for improvement of Mr. Rodriguez's right shoulder without arthroscopic repair of the rotator cuff and partial acromioplasty. He

concludes that Mr. Rodriguez will experience further progression in his pain and loss of function in his right upper extremity, and that these problems will continue to limit his ability to participate in his normal activities of daily living. Furthermore, the report by Dr. Mark states that a review of the MRI scans of Mr. Rodriguez's right shoulder shows that there is a "full thickness retracted tear of the distal supraspinatus tendon to the 12 o'clock position approximately 2.8 centimeters proximal to its insertion at the greater tuberosity."

Here, plaintiff Rodriguez's submissions raised triable issues of fact as to whether he suffered a serious injury as a result of the subject accident (*see* ***Djetoumani v Transit, Inc.***, 50 AD3d 944, 857 NYS2d 601 [2008]; ***Grullon v Perez*** 41 AD3d 783, 839 NYS2d 194 [2007]; ***Balanta v Stanlaine Taxi Corp.***, 307 AD2d 1017, 763 NYS2d 840 [2003]). In Dr. Durant's affirmed medical report, he noted that Mr. Rodriguez had decreased range of motion in his cervical and lumbar spines, and also indicated that he had limited range of motion in his right shoulder. Moreover, Dr. Durant's finding of restricted range of motion was supported by an MRI report of Dr. Mark which revealed a tear of the distal supraspinatus tendon. Accordingly, the cross motion by defendant for summary judgment dismissing the claim as to plaintiff Rodriguez is denied.

Dated: 2-19-10

Hon Denise F. Molia

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**