

Bucholz v Mashkabov
2010 NY Slip Op 30960(U)
March 12, 2010
Supreme Court, Nassau County
Docket Number: 10278/08
Judge: F. Dana Winslow
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

THOMAS G. BUCHOLZ,

**TRIAL/IAS, PART 5
NASSAU COUNTY**

Plaintiff,

MOTION DATE: 12/15/09

-against-

**MOTION SEQ. NO.: 002, 003
INDEX NO.: 10278/08**

VYACHESLAV MASHKABOV,

Defendant.

The following papers read on this motion (numbered 1-5):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3
Notice of Cross Motion.....4
Affirmation in Opposition.....5

The motion of defendant Vyacheslav Mashkabov for summary judgment pursuant to CPLR §3212 and the cross motion of plaintiff Thomas G. Bucholz for partial summary judgment pursuant to CPLR §3212 are determined as follows.

Plaintiff Thomas G. Bucholz, age 76, alleges that on February 10, 2007 at approximately 6:45 p.m., a motor vehicle owned and operated by him came into contact with a vehicle owned and operated by defendant Vyacheslav Mashkabov. The accident occurred on Sunrise Highway approximately one hundred feet east of Peninsula Boulevard, Lynbrook. Defendant now moves for an order dismissing plaintiff's complaint pursuant to CPLR §3212, on grounds that plaintiff failed to sustain a "serious injury" within the meaning of Insurance Law §5102(d). Plaintiff cross moves for partial summary judgment pursuant to CPLR §3212 on the issue of liability.

Defendant's motion for summary judgment on the grounds that plaintiff Thomas G. Bucholz failed to demonstrate a serious injury within the meaning of Insurance Law §5102(d)

Insurance Law §5102(d) provides that a “serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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” (numbered by the Court). The Court’s consideration in this action is confined to whether plaintiff’s injuries constitute a permanent consequential limitation of use of a body organ or member (7), a significant limitation of use of a body function or system (8), or a medically determined injury which prevented him from performing all of the material acts constituting his usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of his motion for summary judgment, defendant submits an affirmed report of examination, dated June 12, 2009, of orthopedist Michael J. Katz, MD, covering an examination performed on that date [Defendant’s Exh. G], and affirmed reports of radiologist David A. Fisher, MD, dated July 10, 2009, covering reviews of MRIs of plaintiff’s lumbar and cervical spines, and left knee [Defendant’s Exhs. H, I and J].

The Court finds that defendant did not adequately address plaintiff’s claim in his bill of particulars that he sustained a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident. Although plaintiff was retired at the time of the accident, in his bill of particulars plaintiff alleged that he was confined to bed and home from the day of the occurrence to the present time. Defendant’s examining orthopedist, Dr. Katz, who examined plaintiff two years and four months after the accident, failed to relate his findings to this period of time immediately following the accident. *See Ismail v. Tejada*, 65 AD3d 518; *Takaroff v. A.M. USA, Inc.*, 63 AD3d 1142; *Smith v. Quicci*, 62 AD3d 858; *Ken Fea Yung v. Eager*, 51 AD3d 638; *Tinsley v. Bah*, 50 AD3d 1019; *Holtzman v. Bishop*, 35 AD3d 815.

Accordingly, the Court finds that defendant has failed to make a *prima facie* demonstration that plaintiff Thomas G. Bucholz did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. Since defendant failed to make a *prima facie* showing that plaintiff did not suffer from a serious injury, it is unnecessary for the Court to consider whether plaintiff’s opposition is sufficient to raise a triable issue of fact. *See Park-*

Lee v. Voleriaperia, 2009 WL 3766572; **Menezes v. Khan**, 67 AD3d 654; **Loor v. Lozado**, 66 AD3d 847; **Negassi v. Royle**, 65 AD3d 1311; **Alvarez v. Dematas**, 65 AD3d 598; **Ismail v. Tejada**, *supra*; **Takaroff v. A.M. USA, Inc.**, *supra*; **Hossain v. Singh**, 63 AD3d 790; **Smith v. Quicci**, *supra*.

Plaintiff's cross motion for partial summary judgment on the issue of liability

At a deposition held on April 20, 2009, plaintiff testified both (1) that he was stopped at a red light on Sunrise Highway when his vehicle was struck in the rear by defendant's vehicle [Deposition testimony, p. 9]; and (2) that he was struck by defendant's vehicle when the light turned green and plaintiff was starting to move. [Deposition testimony, p. 11]. Plaintiff also testified at said deposition that as a result of the impact with defendant's vehicle, his vehicle was pushed forward into the vehicle in front of him [Deposition testimony, p. 11] and that the vehicle which plaintiff hit, left the scene of the accident [Deposition testimony, p. 17]. In addition, on February 11, 2008, plaintiff testified at a deposition as a non party witness in an action by his passenger Catherine Pontillo against defendant (the "Pontillo Action"), that his vehicle was stopped for a red light when he felt the impact to the rear of his vehicle [Deposition testimony, pp. 18-19].

The Court finds that plaintiff has set forth a *prima facie* case of negligence whether plaintiff's vehicle was stopped or even if it was starting to move after being stopped at a red light. A rear-end collision with a stopped vehicle establishes a *prima facie* case of negligence on the part of the operator of the moving vehicle, and imposes a duty on him or her to explain how the accident occurred. **Mascitti v. Greene**, 250 AD2d 821; **Leal v. Wolff**, 224 AD2d 392; **Gambino v. City of New York**, 205 AD2d 583. If the operator of the moving vehicle cannot come forward with evidence to rebut the inference of negligence with a nonnegligent explanation, the driver of the lead vehicle may properly be awarded judgment as a matter of law. **Ditrapani v. Marciante**, 10 AD3d 628; **Dileo v. Greenstein**, 281 AD2d 586; **Tricoli v. Malik**, 268 AD2d 469. Moreover, a driver of a motor vehicle is obligated not to "follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." **NY Vehicle and Traffic Law § 1129(a)**. In the case at bar, even if plaintiff's vehicle was not at a complete stop, defendant was under a duty to maintain a safe distance between his vehicle and the vehicle operated by the plaintiff. A defendant's failure to do so, in the absence of an adequate explanation, constitutes negligence as a matter of law. **Hernandez v. Burkitt**, 271 AD2d 648; **Zakutny v. Gomez**, 258 AD2d 521.

To rebut the presumption of negligence, defendant relies in part on the deposition of defendant held on May 20, 2008 in the Pontillo Action. Defendant testified at said deposition that an unknown vehicle, described as a sport car, crossed the divider on Sunrise

Highway, made an illegal U-turn and hit the front left fender of his vehicle. As a result of said impact, his vehicle was pushed from the left lane into the middle lane where his car skidded into plaintiff's vehicle [Deposition testimony, pp. 28-34, 36-40].

The Court finds defendant's deposition testimony that he was hit by an unknown vehicle making an illegal U-turn which caused him to come into contact with the rear of plaintiff's vehicle, is a sufficient nonnegligent explanation to create an issue of fact. See generally *Oguzturk v. General Electric Co.*, 65 D3d 1110; *Connors v. Flaherty*, 32 AD3d 891; *Briceno v. Milbry*, 16 AD3d 448.

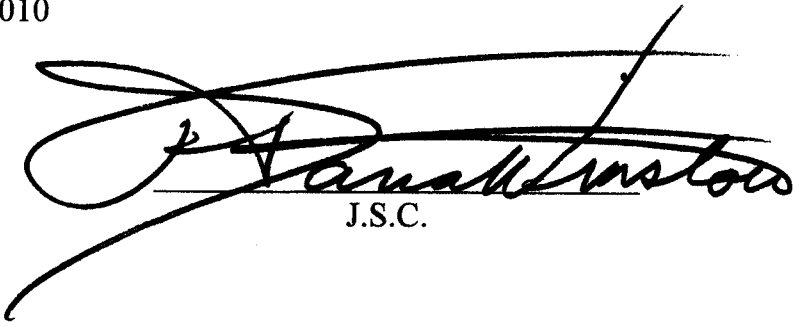
On the basis of the foregoing, it is

ORDERED, that the motion by defendant Vyacheslav Mashkabov for summary judgment pursuant to CPLR §3212 dismissing the complaint of plaintiff Thomas G. Bucholz on the grounds that plaintiff failed to sustain a "serious injury" within the meaning of Insurance Law §5102(d) is denied; and it is further

ORDERED, that the cross motion by plaintiff Thomas G. Bucholz for partial summary judgment pursuant to CPLR §3212 on the issue of liability is denied.

This constitutes the Order of the Court.

Dated: 3/12/2010


J.S.C.

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