Conway v Beach

2010 NY Slip Op 31440(U)

June 1, 2010

Supreme Court, Nassau County

Docket Number: 6672/08

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

AMY CONWAY, Plaintiff, - against - BRIAN M. BEACH, DL PETERSON TRUST, ANGELA M. BAREA and DANIEL RODRIGUEZ, Defendants.	TRIAL / IAS PART 29 NASSAU COUNTY Action No. 1 Index No. 6672/08 Motion Sequence No. 002, 003, 004

BRIAN M. BEACH and D.L. PETERSON TRUST,

Third Party Plaintiffs,

- against -

MICHAEL T. MALONE,

Third Party Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	1, 2, 3
Answering Affidavits	4, 5
Replying Affidavits	6, 7
Briefs: Plaintiff's / Petitioner's	
Defendant's / Respondent's	

The defendant/third party plaintiffs Brian M. Beach and DL Peterson Trust move pursuant to CPLR 3212, under motion sequence number 2 for summary judgment dismissing the plaintiff's complaint on the ground there are no material issues of fact as to their liability. Beach and DL Peterson Trust also seek sanctions in the amount of $25,000.00, as well as $20,000.00 in costs due

to the frivolous nature of the underlying action. The defense attorney for Beach and DL Peterson Trust details, in a December 21, 2009 affirmation with other moving papers, the circumstances of the litigation, and the reasons for this motion where Beach was stopped at a traffic light when struck in the rear on April 12, 2005, on Hempstead Turnpike near the intersection of Centre Lane, Levittown, New York, by the vehicle operated by defendant Angela M. Barea where the plaintiff was a passenger. The defense attorney for Beach and DL Peterson Trust points to the deposition testimony of the three drivers and the plaintiff together with other moving papers to support this motion. The defense attorney for Beach and DL Peterson Trust contends the plaintiff's actions with respect to the litigation is frivolous, and should be sanctioned by the Court.

The plaintiff partially opposes motion sequence number 2. The plaintiff's attorney states, in a March 28, 2010 affirmation, the plaintiff sought to discontinue the underlying action against Beach and DL Peterson Trust on or about March 19, 2010, but the defense attorney indicated an inability to stipulate, and withdraw motion sequence number 2. The plaintiff's attorney asserts sanctions should be denied because the plaintiff's conduct was not frivolous under 22 NYCRR § 130-1.1. The plaintiff's attorney also avers the defense request for costs is not supported by any documentation nor sworn statements setting forth what constitutes the $20,000.00 amount nor is there any relationship to any alleged frivolous conduct by the plaintiff. The plaintiff's attorney adds the hearsay police report cannot serve as a basis for or against a lawsuit where the source of the information within it is unknown. The plaintiff's attorney points out there were settlement negotiations, and incomplete discovery prior to the October 13, 2009 certification conference which affect any imposition of sanctions. The plaintiff's attorney notes 22 NYCRR § 130-1.2 limits the sanctions to $10,000.00 for any single occurrence of frivolous conduct.

The defense attorney for Beach and DL Peterson Trust states, in a March 31, 2010 reply

affirmation, while it is true the plaintiff's attorney offered to sign a discontinuance on March 19, 2010, it was after almost two years of litigation and thousands of dollars in legal costs with numerous requests by this affirmant for discontinuances. The defense attorney for Beach and DL Peterson Trust maintains the plaintiff's attorney present offer is merely an attempt to justify the plaintiff's actions. The defense attorney for Beach and DL Peterson Trust argues the plaintiff's reference to the police report ignores the plaintiff's deposition testimony regarding the proximate cause of the April 12, 2005 accident which shows Beach's vehicle was stopped at a traffic light when the vehicle operated by Barea struck it in the rear.

The defendants Angela M. Barea and Daniel A. Rodriguez move pursuant to CPLR 3212, under motion sequence number 3 for summary judgment dismissing the complaint, and any cross claims against them. The defense attorney for Barea and Rodriguez states, in a January 5, 2010 affirmation with other supporting papers, third party defendant Michael T. Malone struck the rear of the vehicle operated by Barea, and submits there can be no negligence imputed to Barea and Rodriguez. The defense attorney for Barea and Rodriguez points to the deposition testimony of Beach, Barea, the plaintiff, and Malone which show Barea and Rodriguez were not negligent since their vehicle was stopped in traffic when struck in the rear by Malone's vehicle.

The defense attorney for Barea and Rodriguez also contends the plaintiff fails to show a serious injury as required by Insurance Law §§ 5102 (d)and 5104 (a). The defense attorney for Barea and Rodriguez asserts the plaintiff sought a chiropractor who was already treating the plaintiff for an October 2004 accident while working full time as a dog groomer never missing time for her job. The defense attorney for Barea and Rodriguez notes Vartkes Khachadurian, M.D., an orthopedist, performed an independent medical examination of the plaintiff with range of motion tests on February 25, 2009. Dr. Khachadurian opined, in a March 2, 2009 affirmation, the cervical

sprain and lumbar sprain had no evidence of neuromotor deficits, no clinical evidence of herniated discs, radiculitis nor radiculopathy, and were resolved. The defense attorney for Barea and Rodriguez also notes Mathew M. Chacko, M.D., an orthopedist, performed an independent medical examination of the plaintiff with range of motion tests on February 25, 2009. Dr. Chacko opined, in a February 25, 2009 affirmation, the history of cervical and lumbar strains, resolved for an objective neurological standpoint; no clear focal neurological deficits are noted; there are no findings consistent with cervical nor lumbar radiculitis; there is no muscle weakness, reflect asymmetry, or focal sensory changes; the plaintiff exhibits mild limitation of cervical and lumbar range of motion, but it should be noted there are voluntary movements filly [sic] under the control of the person being examined and hence not a truly objective finding.

The plaintiff opposes motion sequence number 3. The plaintiff's attorney states, in a March 19, 2010 affirmation, Barea and Rodriguez fail to make a *prima facie* showing the plaintiff did not sustain a serious injury as defined within the Insurance Law § 5102 (d). The plaintiff's attorney points to the neurological submission of the independent medical examination by Mathew M. Chacko, M.D., who found a causal relationship between the plaintiff's complaint and the April 12, 2005 accident. The plaintiff's attorney notes Dr. Chacko revealed the existence of limitations of motion in the plaintiff's cervical spine. The plaintiff's attorney Dr. Chacko's report, after range of motion testing of the cervical and lumbar spine, fails to shift the burden, as a matter of law, as to the significant limitation of use category, and the permanent consequential limitation of use category. The plaintiff's attorney contends Dr. Chacko's report quantifies limitations in the range of motion of the plaintiff's cervical and lumbar spine as compared to the average person, so there are triable issues of fact about whether the plaintiff sustained a serious injury. The plaintiff's attorney asserts there are inconsistencies in the independent medical examination reports of Dr. Chacko and Dr.

Khachadurian, so there is an insufficient showing the plaintiff did not sustain a serious injury. The plaintiff's attorney avers Barea and Rodriguez fail to establish the third party defendant Michael T. Malone was the sole proximate cause of the April 12, 2005 accident. The plaintiff's attorney point out Barea should have observed Malone's vehicle prior to the moment of impact, so there is an issue of comparative negligence for the trier of fact. The plaintiff's attorney observes Barea and Rodriguez fail to cite Malone's deposition testimony which raises questions of fact about Barea's liability for the accident, and states Barea's deposition testimony contradicts Malone's deposition testimony.

The third party defendant Michael T. Malone moves pursuant to CPLR 3212, under motion sequence number 4 for summary judgment dismissing the third party complaint on the ground the Amy Conway, the plaintiff has not sustained a serious injury as defined within the Insurance Law § 5102. The attorney for Malone states, in a January 5, 2010 affirmation with other moving papers, the plaintiff suffered only minor strains and sprains from the April 12, 2005 accident, and there is no objective evidence of serious or permanent neurological or orthopedic disability. The attorney for Malone details the procedural history and the accident circumstances and its aftermath while pointing to the deposition testimony of the parties, and medical examination results of the plaintiff. The attorney for Malone adds the plaintiff's deposition testimony, and admissions in the verified bill of particulars show the plaintiff has not suffered a serious injury. The attorney for Malone indicates Malone adopts the results of the independent medical examination reports of Dr. Chacko and Dr. Khachadurian, asserts the medical evidence shows the plaintiff fails to meet the thresholds defined in Insurance Law § 5102 (d), so summary judgment should be granted.

The attorney for Malone reiterates, in a March 25, 2010 reply affirmation, Malone's contentions the plaintiff fails to show a serious injury as defined in Insurance Law § 5102 (d). The

attorney for Malone points again to the evidence, to wit the plaintiff's deposition testimony, and admissions in the verified bill of particulars, and the results of the independent medical examination reports of Dr. Chacko and Dr. Khachadurian.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion. Under CPLR 3212(b), a motions for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 325; ***Andre v. Pomeroy***, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (***see, Whelen v. G.T.E. Sylvania Inc.***, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (***see, e.g., Sillman v. Twentieth Century-Fox Film Corp.***, 3 N.Y.2d 395; ***Gervasio v. Di Napoli***, 134 A.D.2d 235, 236; ***Assing v. United Rubber Supply Co.***, 126 A.D.2d 590). Nevertheless, "the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (***Gervasio v. Di Napoli, supra***, 134 A.D.2d at 236, quoting from ***Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo***, 110 A.D.2d 616, ***aff'd*** 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (***see, Andre v. Pomeroy***, 35 N.Y.2d at 364; ***Assing v. United Rubber Supply Co., supra***).

The Second Department holds:

> A rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see Gaeta v Carter*, 6 AD3d 576 [2004]; ***Colonna v Suarez***, 278 AD2d 355 [2000]). A sudden, negligent, or unexplained stop of the lead vehicle can constitute a nonnegligent explanation because the lead driver has a duty not to stop suddenly or slow down without proper signaling so as to avoid a collision when there is opportunity to give such signal (*see* Vehicle and Traffic Law § 1165 [3]; ***Carhuayano v J&R Hacking***, 28 AD3d 413, 414 [2006]; ***Taveras v Amir***, 24 AD3d 655, 656 [2005]). Thus, where the frontmost driver also operates his vehicle in a negligent manner, the issue of comparative negligence is for a jury to decide (***see Gaeta v Carter, supra*** at 577; ***Mundo v City of Yonkers***, 249 AD2d 522, 523 [1998])

John v. Leyba, 38 A.D.3d 496, 497, 831 N.Y.S.2d 488 [2nd Dept., 2007].

The defendant/third party plaintiffs Brian M. Beach and DL Peterson Trust established a *prima facie* showing with respect to liability. The plaintiff fails to raise the existence of any bona fide issues of fact to warrant a denial of summary judgment to Beach and DL Peterson Trust on the issue of liability. There are no material issues of fact on this issue.

The Court of Appeals holds:

> In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury (***see e.g. Dufel***, 84 NY2d at 798; ***Lopez***, 65 NY2d at 1020). An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (***see Dufel***, 84 NY2d at 798). When supported by objective evidence, an expert's qualitative assessment of the seriousness of a plaintiff's injuries can be tested during cross-examination, challenged by another expert and weighed by the trier of fact. By contrast, an expert's opinion unsupported by an objective basis may be wholly speculative, thereby frustrating the legislative intent of the No-Fault Law to eliminate statutorily-insignificant injuries or frivolous claims.

Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 350-351, 746 N.Y.S.2d 865 [2002].

The Court of Appeals also held:

> This case concerns a different category of serious injury--the "90/180" category. Although this statutory category lacks the "significant" and "consequential"

> terminology of the two categories at issue in ***Toure*** and ***Manzano***, a plaintiff must present objective evidence of "a medically determined injury or impairment of a non-permanent nature" (Insurance Law § 5102 [d]; ***see also Licari***, 57 NY2d at 236-239)

Toure v. Avis Rent A Car Systems, Inc., supra, at 357.

Here, the submissions by the defendant/third party plaintiffs Brian M. Beach and DL Peterson Trust, defendants Barea and Daniel A. Rodriguez, and the third party defendant Michael T. Malone shifted the burdens of coming forward with evidence to the plaintiff to show a serious injury causally related to the April 12, 2005 motor vehicle accident (***Pommells v. Perez***, supra, at 579). In opposition, the plaintiff has not made that showing as to a serious injury causally related to the April 12, 2005 motor vehicle accident. This Court finds the defendants and the third party defendant have established a *prima facie* entitlement to summary judgment as a matter of law as to a serious injury causally related to the April 12, 2005 motor vehicle accident, and the plaintiff has failed to properly oppose that showing.

22 NYCRR § 130-1.1 (a) provides:

> The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part.

22 NYCRR § 130-1.1 (c) provides:

> For purposes of this Part, conduct is frivolous if: 1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or

not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

This Court has considered all of the criteria set forth in 22 NYCRR § 130-1.1 (c). The Court determines defendant/third party plaintiffs Brian M. Beach and DL Peterson Trust has not met the burden with respect to this provision.

Accordingly, all three motions for summary judgment are granted without sanctions.

So ordered.

Dated: **June 1, 2010**

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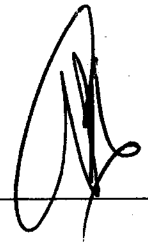

J.S.C.

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