

<b>Schuster v Vespermann</b>
2010 NY Slip Op 32108(U)
August 3, 2010
Sup Ct, Suffolk County
Docket Number: 05-18430
Judge: Ralph F. Costello
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opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499 [2<sup>nd</sup> Dept 1989]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (Castro v Liberty Bus Co., 79 AD2d 1014 [2<sup>nd</sup> Dept 1981]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]).

In support of this motion the defendant has submitted, inter alia, an attorney’s affirmation; a copy of the summons and complaint; defendant’s verified answer; a copy of the verified bill of particulars; copies of the transcripts of the examinations before trial of Alexandre Vespermann s/h/a A. F. Vespermann dated June 4, 2009, Stephen Schuster and Jenny Aguilera both dated October 14, 2008; copies of photographs of a vehicle; statement of Barbara Vespermann dated October 10, 2005; statement of Pedro Vespermann dated October 27, 2005; a copy of the sworn report of Julio Westerland, M.D., orthopedist, dated February 12, 2009 and a copy of the sworn report of Arthur Fruauff, M.D., radiologist, dated July 8, 2009 regarding Stephen Schuster; a copy of the sworn report of Edward M. Weiland, M.D. Psychiatry and neurology dated March 3, 2009 and a copy of the report of Nestor D. Blyznak, M.D., orthopedist dated June 19, 2009, and a copy of the sworn report of Arthur Fruauff, M.D. radiologist dated July 8, 2009 concerning Jenny Aguilera.

It is noted that the statements of Barbara Vespermann and Pedro Vespermann are not in admissible form as they are not in affidavit form, are not notarized or sworn to and are therefore not considered on this motion for summary judgment.

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (Chepel v Meyers, 306 AD2d 235, 762 NYS2d 95 [2003]; Power v Hupart, 260 AD2d 458, 688 NYS2d 194 [1999]; *see also*, Vehicle and Traffic Law § 1129[a]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, and unavoidable skidding on a wet pavement or some other reasonable excuse (*see*, Rainford v Han, 18 AD3d 638; 795 NYS2d 645 [2005]; Thoman v Rivera, 16 AD3d 667, 792 NYS2d 558 [2005]; Power v Hupart, *supra*).

Stephen Schuster testified to the effect that the accident occurred on August 17, 2003 at about 1:00 a.m. in Queens on the Grand Central Parkway just after the Jackie Robinson exit. He was driving a silver Chrysler Sebring. Jenny Aguilera was seated in the front passenger seat. He was traveling to LaGuardia Airport to pick up his mother. He was traveling westbound in the middle of three travel lanes. Traffic was heavy. He had brought his vehicle to a stop and remained so for about five seconds as traffic in front of him had stopped, when he felt an impact to the rear of his vehicle which caused his vehicle to move forward striking the vehicle in front of him. He states his vehicle was struck in the rear by a white Jeep and the vehicle in front of his was a green Jeep. Prior to the first impact, through his rear view mirror he saw the white Jeep behind him approaching rapidly, striking his vehicle with a heavy impact.

Jenny Aguilera testified to the effect that she was involved in the accident which occurred on Grand Central Parkway, westbound, in the middle lane, and was a passenger in the front seat of Stephen Schuster’s

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Chrysler. It was warm and the roads were dry. It was night time but the parkway lights were lit. Three vehicles were involved in the accident involving two impacts to their car. The first impact was to the rear of their vehicle and the second was to the front of their vehicle. They were stopped for about five to six seconds due to traffic at the time of the first impact and were located about four to five feet in back of the green Jeep in front of them. She never saw the white Jeep behind them prior to the first impact which occurred when that Jeep struck their vehicle in the rear. She described the impact as heavy, causing their vehicle to move forward and to strike the Jeep in front of them with a medium impact. After the second impact, they all moved their vehicles over to the right shoulder.

In the within action, the defendant Vespermann testified to the effect that the accident occurred on August 17, 2003 about midnight. He was traveling from Mineola driving a white Jeep Cherokee to Astoria to a Brazilian bar and restaurant. While he was traveling in the left lane on the ramp going westbound from Northern Parkway to Grand Central, the accident occurred just before the Grand Central starts. He described traffic as light. He was traveling about fifty-five miles per hour and began to slow his vehicle by slamming on his brakes on the ramp as the four or five vehicles ahead of him were coming to a stop. He was about one car length behind the car in front of him when he slammed on his brakes. He was not sure if the plaintiffs' vehicle in front of him, a burgundy Chrysler, had come to a stop or was moving when he slammed on his brakes. Still traveling about twenty miles per hour, before he made a complete stop, his vehicle, he states, was struck in the rear by a silver Honda Civic. He described that first impact as medium, causing his vehicle to move forward and hit the Chrysler with a light to medium impact, which caused the Chrysler to move forward. His vehicle then came into contact with another Jeep Cherokee which was in front of the Chrysler. He then testified that the Chrysler was the car that struck the Jeep Cherokee in front of it. He states the Honda Civic left the scene but he did not see it leave. The last time he saw the Honda Civic was about five minutes prior to the first impact to the rear of his vehicle.

Based upon the foregoing, it is determined that the defendant has not demonstrated prima facie entitlement to summary judgment dismissing the complaint on the basis that he is not liable for the occurrence of the accident. In the within action, the defendant, Vespermann, has not established that his vehicle was struck in the rear by another vehicle as there are no evidentiary submissions in support of his conclusory claim that he was struck in the rear. Even if the supporting affidavits were considered, there are factual issues raised in those affidavits including the lane the defendant was traveling in and whether another vehicle struck the defendant's car prior to the defendant striking the plaintiff's vehicle. Additionally, the last the defendant saw the vehicle behind him which he claims struck his vehicle was about five minutes before the first impact, and he did not keep that vehicle under his constant observation. Therefore, there are factual issues raised in the defendant's testimony concerning whether or not that vehicle was still behind him and whether a vehicle struck his vehicle in the rear. Such issues of credibility are for jury determination. There are also factual issues concerning whether the defendant was traveling a safe distance behind the plaintiff's vehicle as he testified he was one car length behind the plaintiff's vehicle when he slammed on his brakes. Further, he did not know if the plaintiff's vehicle was stopped or moving when he slammed on his brakes.

Accordingly, summary judgment dismissing the complaint on the issue of liability is denied.

Pursuant to Insurance Law §5102(d), "[s]erious injury" means 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

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hundred eighty days immediately following the occurrence of the injury or impairment.”

The term “significant” as it appears in the statute has been defined as “something more than a minor limitation of use,” and the term “substantially all” has been construed to mean “that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment, Licari v Elliot, 57 NY2d 230 [1982].

In order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system, Oberly v Bangs Ambulance Inc., 96 NY2d 295 [2001]. To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part, Toure v Avis Rent A Car Systems, Inc., 98 NY2d 345 [2000]. A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute, Licari v Elliott, supra.

It is for the court to determine in the first instance whether a prima facie showing of “serious injury” has been made out, see, Tipping-Cestari v Kilhenny, 174 AD2d 663 [2d Dept 1991]. The initial burden is on the defendant “to present evidence, in competent form, showing that the plaintiff has no cause of action,” Rodriguez v Goldstein, 182 AD2d 396 [1st Dept 1992]. Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists, Gaddy v Eyler, 79 NY2d 955 [1992].

The defendant must satisfy his burden of establishing, prima facie, that the plaintiff did not sustain a “serious injury” within the meaning of Insurance Law 5102 (d), see, Agathe v Tun Chen Wang, 3 AD3d 737 [2nd Dept 2006]; see also, Walters v Papanastassiou, 31 AD3d 439 [2d Dept 2006]. The examining physician must set forth ranges of motion within the normal range of motion instead of comparing those findings with the variations within the normal range of motion, see, Hypolite v International Logistics Management, Inc., 43 AD3d 461 [2nd Dept 2007]; Somers v Macpherson, 40 AD3d 742 [2nd Dept 2007]; Browdame v Candura, 25 AD3d 747 [2nd Dept 2006]. By failing to compare the results reported to the normal range of motion value, the Court must speculate as to what the normal range of motion value depending upon the circumstances, see, Rodriguez v Schickler, 229 AD2d 326 [1st Dept 1996], *lv denied* 89 NY2d 810 [1997].

When the examining orthopedist and/or neurologist performs a range of motion testing by visual observation without demonstrating that their results were objectively measured such as through the use of a goniometer or arthroidal protractor or inclinometer, compare, Staff v Yshua, 59 AD3d 614 [2nd Dept 2009]; Martin v Pietrzak, 273 AD2d 361 [2nd Dept 2000]; Kraemer v Henning, 237 AD2d 492 [2nd Dept 1997], the defendant fails to meet their prima facie burden of showing that the plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) as a result of the subject accident, see, Kelly v County of Suffolk, 62 AD3d 837 [2nd Dept 2009]. In addition, when the measurements that the defendant’s examining orthopedist and the examining neurologist considered normal differ, see, Sanon v Moskowicz, 44 AD3d 926 [2nd Dept 2007] the Court is left to speculate as to which is the correct normal value, see, Frey v Fedorciuc, 36 AD3d 587 [2nd Dept 2007]; see, Rodriguez v Schickler, 229 AD2d 326 [1st Dept 1996], *lv denied* 89 NY2d 810 [1997].

In the instant action, the reports of the independent examining physicians do not exclude the possibility that the either plaintiff suffered a serious injury in the accident, and therefore, the moving parties are not

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entitled to summary judgment, *see, Peschanker v Loporto*, 252 AD2d 485 [2d Dept 1998]. The defendant's proof failed to objectively demonstrate that the plaintiffs did not sustain a permanent consequential or significant limitation of the use of the cervical and lumbar spine as a result of the subject accident, *see, Kouvaras v Hertz Corp.*, 27 AD3d 529 [2nd Dept 2006]. To prevail on their motion for summary judgment dismissing the complaint, the defendant was required to make a prima facie showing that the plaintiffs did not sustain a serious injury within the meaning of Insurance Law §5102(d), *see, Toure v Avis Rent a Car Sys.*, 98 NY2d 345; *Gaddy v Eyler*, 79 NY2d 955 [1992]. Here, the defendants failed to satisfy that burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d), *see, Agathe v Tun Chen Wang*, *supra*; *see also, Walters v Papanastassiou*, *supra*.

By way of his verified bill of particulars, the plaintiff, Stephan G. Schuster, claims that as a result of this accident he sustained, inter alia, straightening of the curvature of the lumbar spine; posterior disc bulge at L4-L5; straightening of the curvature of the cervical spine; posterior bulges at C3-C4, C4-C5, and posterior herniation at C5-C6 to the right and midline extending to the origin of the right foramen, impinging on the exiting right C6 nerve of the cervical spine; right shoulder strain; left hand contusion; left wrist sprain; post-traumatic headaches; and loss of range of motion.

Following the accident, Stephen Schuster complained of pain in his neck, upper and lower back and left wrist. Treatment was first obtained at Good Samaritan Hospital where he was x-rayed and advised nothing was broken and was discharged home. He had follow up care at Bay Shore Physical Therapy for a few months, three to four days a week, consisting of massage therapy, electric stimulation, acupuncture and heat packs to his back and neck and a brace and acupuncture for his wrist. He wore the brace on his left wrist for a couple months. He also received adjustments to his neck from Dr. Lafosse. Several months following the accident he began to experience dizziness and light-headedness and was seen by his family doctor, Sisselman, who ordered an MRI of his upper back, neck and brain. He was prescribed pain medication and stretching exercises. He was also treated by a neurologist who recommended that he obtain a second opinion. Additional follow up treatment was with Dr. Balsamo. He missed one day from work at the Long Island Railroad as a network engineer. As a result of the accident he states he is limited in the amount of weight that he can lift with free weights and universal machines and can only lift very light weights as compared to prior to the accident. He now only attends about once a month if he feels ok.

Julio Westerband, M.D. conducted an independent orthopedic examination of Stephen Schuster on February 12, 2009, and using a goniometer, determined the cervical and lumbar range of motion and right shoulder and left wrist. He set forth the normal value in ranges of degrees for each measurement to which he compare his findings. By Dr. Westerband comparing his range of motion findings with normal values set forth in ranges, it leaves it to this court to speculate under what circumstances the variation in the normal is to be applied. Dr. Westerband indicates he reviewed the MRI report of Mr. Schuster's cervical spine dated October 25, 2003 which revealed posterior disc bulges at C3-4, C4-5 and posterior herniation at C5-6. He states the MRI report of the lumbar spine dated October 31, 2003 reveals a posterior bulge at L4-5. Dr. Westerband's impression is that of cervical spine sprain/strain resolved, lumbar spine sprain/strain resolved, right shoulder sprain/strain resolved, and left wrist/hand/sprain/strain resolved. He states there are no objective findings of disability or permanency. Dr. Westerband does not comment on whether the MRI findings were causally related to the accident and does not rule out that they were not.

The defendant's moving papers raise factual issues which preclude summary judgment. Although Dr. Westerband set forth the MRI findings from the cervical and lumbar MRI's as set forth above, indicating bulging cervical discs at C3-4 and C4-5 and posterior herniation at C5-6 with a lumbar posterior bulge at L4-5, Dr. Fruauff, MD. submitted a report concerning his review of the lumbar MRI and sets forth in a conclusory,

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unsupported manner that the MRI of Mr. Schuster's lumbar spine was normal with no disc bulge or herniation, thus raising a factual issue. Dr. Fruauff does not opine as to the findings on Mr. Schuster's cervical spine and has not submitted a radiology report concerning Mr. Schuster's cervical MRI. Although Mr. Schuster was treated by a neurologist concerning the injuries sustained in the accident, no report of an independent neurological examination has been submitted by the defendant, also leaving it to his court to speculate as to the any result of a neurological examination.

By way of her verified bill of particulars the plaintiff, Jenny Aguilera, claims that as a result of this accident she sustained, inter alia, bilateral C5-C6 cervical radiculopathy; reversal of the curvature of the spine with distal straightening of the cervical spine; posterior herniation at C5-C5 with flattening of the thecal sac and abutting the cord; straightening of the lumbar spine; thoracic kyphosis; bilateral should strain; and loss of range of motion.

Jenny Aguilera testified to the effect that after the accident she received treatment at Good Samaritan Hospital for complaints of pain in her neck and lower back which were x-rayed at the hospital. She was told she had no fractures and was prescribed Motrin and was discharged home. She missed one day from work. Thereafter, she obtained treatment at Bay Shore Physical Therapy for a period of three to four months. Massage therapy, manual manipulation, and acupuncture were administered for her headaches and neck pain for two to three months, about two to three times a week. Massage therapy and heat pads were used to treat her back. She was seen by Dr. Thompson, an orthopedist following the accident. She also followed with Dr. Chang for her continuous pain in her neck and was treated with neck massages and pain medication. MRI's of her neck and back were conducted. She experiences pain in her neck and back on a daily basis.

Dr. Edward Weiland performed an independent neurological examination of Jenny Aguilera on February 18, 2009. He indicates he reviewed the narrative report of an MRI study of Ms. Aguilera's cervical spine by Dr. Rigney dated September 26, 2003, revealing reversal of the curvature of the spine with distal straightening, and posterior herniation at C5-6 which flattens the thecal sac and abuts the cord. He also reviewed, inter alia, the narrative report of the MRI study of the thoracic spine by Dr. Rigney with the impression of reversal of the cervical curvature with distal straightening with no evidence of bulge or herniation. He further indicates that a narrative report of an EMG/NCV of the cervical paraspinous regions and upper extremities submitted by Dr. Trimba dated October 14, 2003 is consistent with bilateral C5-C6 cervical radiculopathy. He sets forth the normal range of motion for the cervical spine, shoulders, and lumbar spine in ranges and states there are normal range of motion findings, however, he does not set forth his findings upon examination or how he obtained such measurements such as with the use of a goniometer or other instrument to measure the range of motion. His ranges in the normal range of motion values leaves it to this Court to speculate under what circumstances the range may vary. His impression is that of subjective headache disorder of undetermined etiology; cervical strain/sprain resolved; and lumbosacral sprain/strain resolved. He states that he can find no evidence of a lateralizing neurologic deficit, but does not set forth what a lateralizing neurologic deficit is. He does not rule out that the injuries claimed were not caused by the accident and does not dispute the findings set forth in the MRI reports of the cervical and lumbar spines.

Although Ms. Aguilera was treated by an orthopedist, no report from an independent orthopedic examination has been submitted, leaving it to this court to speculate as to any findings.

Arthur Fruauff, M.D. has prepared a report concerning the MRI of Ms. Aguilera's cervical spine which raises a factual issue when compared with the results of the reports stated by Dr. Edward Weiland. Dr. Fruauff sets forth in his report that there is no fracture, dislocation, or herniated disc seen on the MRI of the cervical spine and sets forth in a conclusory opinion that there are no findings on this study related to the accident of August 17, 2003. He does not address whether or not there is flattening of the thecal sac as noted by Dr. Weiland in his

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 review of the MRI report.

To prevail on their motion for summary judgment dismissing the complaint, the defendant was required to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) (see, Toure v Avis Rent a Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Here, defendants failed to satisfy the burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (see, Agathe v Tun Chen Wang, 33 AD3d 737 [2<sup>nd</sup> Dept 2006]; see also, Walters v Papanastassiou, 31 AD3d 439 [2<sup>nd</sup> Dept 2006]). Inasmuch as the examining physicians' and radiologist's affirmed reports do not exclude the possibility that the plaintiff s suffered a serious injury in the accident with regard to the claimed injuries, and in that there was no report of an examination by a neurologist for Mr. Schuster and no report of an examination from an orthopedist for Ms. Aguilera, and in addition to the other reasons set forth above, the defendant has not established prima facie entitlement to summary judgment on the issue of serious injury and is not entitled to summary judgment, see, Peschanker v Loporto, 252 AD2d 485 [2<sup>nd</sup> Dept 1998].

Since the defendant failed to establish entitlement to judgment as a matter of law, it is not necessary to consider whether plaintiffs' papers in opposition to defendant's motion were sufficient to raise a triable issue of fact, see, Walker v Village of Ossining, 18 AD3d 867 [2<sup>nd</sup> Dept 2005]; Krayn v Torella, 40 AD3d 588 [2<sup>nd</sup> Dept 2007] as the burden has not shifted to the plaintiffs to establish that there are issues of fact to preclude an order granting summary judgment, CPLR 3212[b]; Zuckerman v City of New York, supra.

Accordingly, summary judgment dismissing the complaint by Stephen Schuster and Jenny Aguilera on the basis they did not sustain a serious injury within the meaning of Insurance Law §5102 is denied.

Dated: Aug 3, 2010

  
 J.S.C.

\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION