Batik v Verpent
2010 NY Slip Op 32656(U)
September 27, 2010
Supreme Court, Greene County
Docket Number: 09-461
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

TIMOTHY BATIK and
SHIRLEY BATIK, his wife,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 09-461
RJI NO. 19-09-4600

KENNETH W. VERPENT and
J. VENTO MOTORS, INC.,

Defendants.

Supreme Court Greene County All Purpose Term, September 3, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

On November 10, 2008, Timothy Batik (hereinafter "Plaintiff") was driving in the Town of Newburgh, New York, when his vehicle was struck from behind by a vehicle driven by Kenneth W. Verpent and owned by J. Vento Motors, Inc.[1] Plaintiff commenced this action, with his wife derivatively, seeking to recover for the injuries he sustained in the accident. Issue was joined by Defendants, discovery is complete and a trial date certain is set. Defendants now move

[1] Kenneth W. Verpent and owned by J. Vento Motors, Inc. will hereinafter be referred to collectively as Defendants.

for summary judgment claiming that Plaintiff suffered no causally related "serious injury" (Insurance Law §5102[d]) and, alternatively, by operation of the emergency doctrine. Plaintiff opposes the motion. Because Defendants failed to demonstrate their entitlement to judgment as a matter of law, their motion is denied.

Considering first that portion of Defendants' motion that claims Plaintiff suffered no Insurance Law §5102(d) serious injury, "the defendant bears the initial burden of establishing by competent medical evidence that plaintiff did not sustain a serious injury caused by the accident." (Howard v. Espinosa, 70 AD3d 1091, 1092 [3d Dept. 2010], quoting Haddadnia v. Saville, 29 AD3d 1211 [3d Dept. 2006]; Wolff v. Schweitzer, 56 AD3d 859, 860 [3d Dept. 2008]; Pommells v. Perez, 4 NY3d 566 [2005]; Franchini v. Palmieri, 1 NY3d 536 [2003]). Moreover, the evidence must be viewed "in a light most favorable to plaintiffs" (Hildenbrand v. Chin, 52 AD3d 1164, 1166 [3d Dept. 2008]) and "[s]ummary judgment... 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]). If the movants establish their right to judgment as a matter of law, the burden then shifts to the plaintiff to "set forth competent medical evidence based upon objective medical findings and tests to support his claim of serious injury and to connect the condition to the accident." (Wolff, supra 861quotiong Blanchard v. Wilcox, 283 AD2d 821[3d Dept. 2001]; Nowak v. Breen, 55 AD3d 1186, 1187 [3d Dept. 2008]).

In support of their motion, Defendants offer their expert's affidavit, which incorporates his own "independent medical examination" (hereinafter "IME"). While the IME is duly affirmed and admissible, the affidavit is conclusory, duplicative of the IME and of no additional evidentiary value. The IME was based on a review of Plaintiff's medical records, a complete set

of which were not attached to the motion, and a thirty five minute physical exam conducted almost one and a half years after the accident. Such submissions, fail to properly demonstrate Defendants' entitlement to judgment as a matter of law.

Plaintiff's medical records, properly attached to Defendants' motion (Tuna v. Babendererde, 32 AD3d 574, 575 [3d Dept. 2006]), contain an MRI of his cervical spine taken three months after the accident. It noted "C4-5 mild left neural foraminal stenosis... C5-6 moderate right neural foraminal stenosis... [and] C4-5 and C5-6 degenerative disc disease without acute herniation or central spinal stenosis." Also attached to Defendants' motion was Doctor Connolly's affirmation, which noted that Plaintiff's cervical spine "[r]otation is limited to the left and right about 60 degrees."

Defendants' IME acknowledged the above MRI and stated that "although [the MRI] was not entirely normal, [it] did not reveal findings that would be easily attributable to a traumatic spine injury." Such opinion is neither fully explained nor sufficiently concrete to demonstrate, as a matter of law, that the Plaintiff suffered no objective physical injury as a result of the accident. Moreover, the IME failed to explain why the MRI's further "degenerative disc disease" finding was asymptomatic prior to the accident. (see Ashquabe v. McConnell, 46 AD3d 1419 [4th Dept. 2007]; Colavito v. Steyer, 65 AD3d 735 [3d Dept. 2009]; Madden v. Dake, 30 AD3d 932 [3d Dept. 2006]). Nor did Defendants' IME "adequately address plaintiff's condition or limitations within the first 180 days following the accident, which was necessary to foreclose the 90/180-day category of serious injury." (Colavito, supra at 736). Additionally, while the IME specifically references Doctor Connolly's affirmation, it failed to discuss and refute its range of motion limitation. Instead, without any factual predicate, the IME concludes that there is no "significant

limitation" on Plaintiff's range of motion. Because Defendants did not sufficiently address, explain and refute Plaintiff's medical records, they failed to demonstrate their entitlement to judgment as a matter of law obviating the need to "address the sufficiency of plaintiffs' proof." (Kropp v. Corning, Inc., 69 AD3d 1211, 1213 [3d Dept. 2010]).

Turning next to the emergency doctrine portion of Defendants' motion, again they failed to demonstrate their entitlement to judgment as a matter of law. "Generally, whether a driver acted reasonably in the face of an emergency situation is a question to be decided by the trier of fact. Summary resolution is possible, however, when the driver presents sufficient evidence to establish the reasonableness of his or her actions and there is no opposing evidentiary showing sufficient to raise a legitimate question of fact on the issue." (Smith v. Brennan, 245 AD2d 596, 597 [3d Dept. 1997][internal citations omitted]; Cancellaro v. Shults, 68 AD3d 1234 [3d Dept. 2009]; Hazelton v. D.A. Lajeunesse Bldg. and Remodeling, Inc., 38 AD3d 1071 [3d Dept. 2007]; Dearden v. Tompkins County, 6 AD3d 783 [3d Dept. 2004]).

On this record, Defendants failed to proffer sufficient evidence to establish the reasonableness of their actions. This portion of Defendants' motion is supported by only their attorney's affidavit and the unsigned deposition transcript of defendant Verpent. Because Defendants' attorney's affidavit was not based upon first-hand knowledge of the accident it "lacked any evidentiary value." (Groboski v. Godfroy, 74 AD3d 1524 [3d Dept. 2010] citing Ahlers v. Wildermuth, 70 AD3d 1154, 1155 [2010]; 2 North St. Corp. v. Getty Saugerties Corp., 68 AD3d 1392, 1395 [2009], lv denied 14 NY3d 706 [2010]). Similarly, because defendant Verpent's deposition is unsigned, and Defendants failed to otherwise demonstrate its admissibility, such deposition it is not properly before this Court and is of no probative value.

(*See generally* Martinez v. 123-16 Liberty Ave. Realty Corp., 47 AD3d 901 [2d Dept. 2008]). As such, Defendants failed to demonstrate their entitlement to judgment as a matter of law pursuant to the emergency doctrine.

Accordingly, Defendants' motion is denied in its entirety.

This Decision and Order is being returned to the attorneys for the Plaintiff. 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: September 27, 2010
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated July 22, 2010; Affidavit of Panagiota Hyde, dated July 22, 2010, with attached Exhibits A-I.
2. Affidavit of John Kingsley, dated August 13, 2010, with attached Exhibits 1-6.
3. Reply Affidavit of Panagiota Hyde, dated August 31, 2010.