

Marcelli v Bonnet

2010 NY Slip Op 32730(U)

September 28, 2010

Supreme Court, Richmond County

Docket Number: 100341/09

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.: 100341/09
Motion No.:001, 002

GAYLE MARCELLI,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

MICHAELLE BONNET,

Defendant

The following items were considered in the review of the following motions for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 4
Answering Affidavits	2, 5
Replying Affidavits	3, 6
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiff moves for summary judgment on the issue of liability only. The defendant moves for summary judgment dismissing the plaintiff's complaint arguing that the plaintiff has failed to demonstrate a serious injury as that term is defined by Insurance Law § 5102(d). The plaintiff's motion is granted; the defendant's motion is denied.

Facts

This is an action for personal injuries allegedly sustained as a result of a motor vehicle accident. The uncontested testimony of the parties is that the plaintiff's vehicle was struck in the rear by a vehicle operated by the defendant while the plaintiff was stopped.

The defendant submits the affirmations of Drs. Arnold T. Berman, Maria Audrie DeJesus and Jessica Berkowitz that state the plaintiff did not sustain a serious injury as that term is defined by Insurance Law § 5102(d). In opposition, the plaintiff submits the affidavit of Michael DeMartinis, D.C. and the Dr. Robert Scott Schepp.

Discussion

Summary judgment is a drastic remedy that will only be awarded when there is no triable issue of fact and the court can render a decision as a matter of law.¹ It is well established that summary judgment should be granted only if there are no material and triable issues of fact. It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather whether there exists a genuine issue of fact. Issue-finding rather than issue determination is the key to summary judgment and the affidavit should be scrutinized in the light most favorable to the party opposing the motion.²

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any triable issue of fact.³ If on any branch of a summary judgment motion, the movant fails to meet the initial burden, the burden never shifts to the opponent, and the movant's motion should be denied without regard to the sufficiency of the opposition papers.

Plaintiff's motion for Summary Judgment on Liability

The plaintiff argues that she is entitled to summary judgment on liability as a matter of

¹ *Barclay v. Denckla*, 182 AD2d 658, [2d Dept 1992].

² *Hantz v. Fishman*, 155 AD2d 415, [2d Dept 1989].

³ *Dempster v. Overview Equities, Inc.*, 4 AD3d 495, [2d Dept 2004].

law based on her vehicle being struck in the rear by the defendant's vehicle. "A rear end collision with a stationary vehicle creates a prima facie case of liability in favor of the operator of the stationary vehicle unless the operator of the moving vehicle can come forward with an adequate, non-negligent explanation for the accident"⁴ Moreover, the Appellate Division, Second Department has held that "[a] rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability against 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."⁵

The defendant has not come forward with a non-negligent explanation for the collision. As such summary judgment on liability shall be entered in favor of the plaintiff.

Defendant's Motion for Summary Judgment Dismissing the Complaint

The defendant moves to dismiss the plaintiff's complaint arguing that plaintiff failed to sustain a serious injury as the term is defined by Insurance Law § 5102(d).

Contrary to the plaintiff's contentions, the defendant demonstrated a prima facie entitlement to judgment as a matter of law. Plaintiff's argument that the defendant's medical experts failed to address the plaintiff's claim under the 90/180 criteria is belied by the plaintiff's testimony taken during her examination before trial. At that time the plaintiff testified that there were no activities which she has difficulty with or cannot perform. Furthermore, she testified that she was confined to her bed/home for about two months.

The affirmed reports of Drs. Arnold T. Berman, Maria Audrie DeJesus and Jessica

⁴ *Ramrattan v. Pondfield Trip Service, Inc.*, 269 AD2d 513 [2d Dept 2000], citing *Mundo v. City of Yonkers*, 249 AD2d 522, 523 [2d Dept 1998]

⁵ *Argiro v. Norfolk Contract Carrier, Inc.*, 275 AD2d 384 [2d Dept 2000]

Berkowitz demonstrate an entitlement to judgment as a matter of law. It is now incumbent on the plaintiff to come forward with evidence demonstrating an issue of material fact.

The affidavits of both the plaintiff and Michael DeMartinis, D.C. satisfactorily explain the gap in plaintiff's treatment. It was determined that the plaintiff's no fault benefits had expired on March 6, 2007 and that she had reached her optimal level of improvement.

Additionally, the Dr. DeMartinis first examined the plaintiff on November 10, 2006. At that time he conducted range of motion examinations of the plaintiff's cervical, thoracic and lumbar spine, as well as in her right knee. All tests demonstrated a significant loss of range motion. A more recent examination conducted by Dr. DeMarinis reveals that the plaintiff still complains of pain in her cervical and lumbar spine, as well as pain in her right knee. A designation set forth by medical proof of a numeric percentage or degree of a plaintiff's loss of range of motion can be used to establish a limitation of use.⁶

As such, the plaintiff has raised a triable issue of fact.

Accordingly, it is hereby:

ORDERED, that Gayle Marcelli's motion for summary judgment on liability is granted in its entirety and the Clerk shall enter judgment of liability in favor of the plaintiff; and it is further

ORDERED, that Michaëlle Bonnet's motion for summary judgment dismissing the plaintiff's complaint is denied in its entirety; and it is further

⁶ *Toure v. Avis Rent a Car Systems*, 98 NY2d 345 [2002]; *Molina v. Nosa Choi*, 298 AD2d 508 [2nd Dept 2002]

ORDERED, that the parties shall return to DCM Part 3 on **Monday, October 25, 2010 at 9:30 a.m.** for a pre-trial conference.

ENTER,

DATED: September 28, 2010

Joseph J. Maltese
Justice of the Supreme Court