

Beck v Zachery

2010 NY Slip Op 32761(U)

September 27, 2010

Sup Ct, Suffolk County

Docket Number: 10-33177

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

P R E S E N T :

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 3-22-10 (#002)
MOTION DATE 7-22-10 (#003)
ADJ. DATE 7-22-10
Mot. Seq. # 002 - MD
003 - MD

-----X
KENNETH M. BECK, :
 :
 :
 Plaintiff, :
 :
 :
 - against - :
 :
 AMANDA R. ZACHERY and WALFRED :
 MEARE SONI, :
 :
 Defendants. :
-----X

WALTER BECK, ESQ.
Attorney for Plaintiff
73 North Ocean Avenue, Suite 2
Patchogue, New York 11772

ANDREA G. SAWYERS, ESQ.
Attorney for Defendant Amanda R. Zachery
3 Huntington Quadrangle, Ste 102S, P.O. Box 9028
Melville, New York 11747

NICOLETTI GONSON SPINNER & OWEN, LLP
Attorney for Defendant Walfred Meare Soni
555 Fifth Avenue, 8th Floor
New York, New York 10017

Upon the following papers numbered 1 to 69 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 28; 29 - 31; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 32 - 61; 62 - 67; Replying Affidavits and supporting papers 68 - 69; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Walfred Meare Soni for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the motion by defendant Amanda Zachery for summary judgment dismissing plaintiff's complaint is denied.

Plaintiff Kenneth Beck commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred in Riverhead, New York on December 30, 2006. At the time of the accident, plaintiff's vehicle was stopped at the exit of a parking lot of a Walmart store, and defendant Walfred Meare Soni's vehicle was making a left turn into the parking lot. The vehicles of

defendant Zachery and defendant Soni allegedly collided, causing defendant Soni's vehicle to strike plaintiff's vehicle. By his bill of particulars, plaintiff alleges that he suffered thoracic and lumbar sprain and strain, myositis, and chest wall contusion.

Defendant Soni now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support, defendant Soni submits a copy of the pleadings, transcripts of the parties' deposition testimony, an affirmed medical report of Dr. Arthur Bernhang, and various medical records regarding plaintiff's treatment.

Defendant Zachery moves for summary judgment dismissing the complaint against her on the ground that defendant Soni's vehicle was the sole proximate cause of the subject accident. Specifically, defendant Zachery argues that co-defendant Soni failed to yield the right-of-way when making a left turn into the parking lot. In support of her motion, defendant Zachery submits the transcripts of the parties' deposition testimony.

Plaintiff opposes the motion by defendant Soni, arguing that the medical proof submitted by him fails to demonstrate *prima facie* that he did not suffer a serious injury. Plaintiff also opposes defendant Zachery's motion for summary judgment, arguing that defendant Zachery contributed to the happening of the accident. In opposition, plaintiff submits an affirmation of Dr. Andrea Coladner, and various medical records. Defendant Soni partially opposes defendant Zachery's motion on the issue of liability and submits transcripts of the parties' deposition testimony and photographs of defendant Zachery's vehicle.

At his examination before trial, plaintiff testified that at the time of the subject accident, he was stopped at a red traffic light which controlled the exit of the parking lot. He testified that defendant Soni was driving a sports utility vehicle traveling westbound on Route 58, and that he was trying to make a left turn into the parking lot where plaintiff was stopped. He testified that defendant Zachery's vehicle, which was traveling eastbound on Route 58, struck defendant Soni's vehicle, causing it to collide with plaintiff's vehicle. He testified that he observed the left turn signal for westbound traffic on Route 58 turn yellow and then disappear, and that defendant Soni turned left after the turn signal disappeared. Plaintiff further testified that the rear driver side of defendant Soni's vehicle struck the front of his vehicle.

At her examination before trial, defendant Zachery testified that at the time of the subject accident, she was traveling eastbound on Route 58, and that she was stopped at a red light at the intersection of Route 58 and the entrance to the parking lot. She testified that she was the first vehicle stopped at the traffic light. She testified that she observed defendant Soni's vehicle change lanes from westbound Route 58 into the left turn lane, and that it stopped at the subject intersection. She testified the traffic light that she was stopped under turned green, and she proceeded to enter the intersection when defendant Soni "gunned it right in front of me." She testified that when she observed defendant Soni's vehicle in front of her, she stepped on the brakes and turned her vehicle to the left, but the two vehicles collided. Defendant Zachery testified that the front right side of her vehicle came into contact

with the rear right side of defendant Soni's vehicle. She testified that at the time of the accident, she was traveling about 25 miles per hour.

At his examination before trial, defendant Soni testified that at the time of the subject accident he was making a left turn into the parking lot of the Walmart store. He testified that after he entered the left turn lane, he proceeded to make a left turn at the subject intersection, and that the traffic light was green. He testified that he was traveling approximately 15 miles per hour, and that he did not observe any vehicles coming in the opposite direction as he was turning. He testified that he was more than halfway complete with the left turn when defendant Zachery's vehicle struck his vehicle. Defendant Soni further testified that the front portion of defendant Zachery's vehicle struck the rear of his vehicle, causing it to collide with plaintiff's vehicle. He testified that when he made the left turn, the traffic signal was green, but he does not recall if there was a left turn arrow.

Insurance Law § 5102 (d) defines "serious injury" as "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 hundred eighty days immediately following the occurrence of the injury or impairment."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (see *Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2001]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [1994]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [1993]; *Pagano v Kingsbury*, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (see *Gaddy v Eycler*, *supra*; *Pagano v Kingsbury*, *supra*; see generally, *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

To qualify as a serious injury within the 90/180 category, there must be objective medical evidence of a medically-determined injury or impairment of a non-permanent nature, as well as evidence that plaintiff's activities were significantly curtailed due to such injury (see *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Hamilton v Rouse*, 46 AD3d 514, 846 NYS2d 650 [2007]; *Ocasio v Henry*, 276 AD2d 611, 714 NYS2d 139 [2000]). In addition to demonstrating an inability to perform "substantially all" usual activities for at least 90 days of the 180 days following the accident, a plaintiff

asserting a 90/180 claim must show through competent medical evidence that his or her inability to perform such activities was medically indicated and causally related to the subject accident (*see Penaloza v Chavez*, 48 AD3d 654, 852 NYS2d 315 [2008]; *Hamilton v Rouse*, *supra*; *Roman v Fast Lane Car Serv., Inc.*, 46 AD3d 535, 846 NYS2d 613 [2007]; *Sainte-Aime v Ho*, 274 AD2d 569, 712 NYS2d 133 [2000]).

Here, defendant Soni's moving papers failed to specifically address plaintiff's allegations, as contained in his verified bill of particulars, that as a result of the accident he sustained injuries which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activity for a period of not less than 90 days during the 180 days immediately following the accident (*see Chicac v Catalano*, 39 AD3d 686, 833 NYS2d 625 [2007]; *DeVillie v Barry*, 41 AD3d 763, 839 NYS2d 216 [2007]; *Sayers v Hot*, 23 AD3d 453, 805 NYS2d 571 [2005]). Plaintiff testified during his deposition that he was unable to return to work for 4½ months after the accident due to his injuries. He further testified that when he resumed work, he worked in a part-time capacity for 7½ months before returning to full-time employment. The medical report of Dr. Bernhang fails to relate his findings to this category of serious injury for the period of time immediately following the accident (*see Neuburger v Sidoruk*, 60 AD3d 650, 875 NYS2d 144 [2009]; *Ali v Rivera*, 52 AD3d 445, 859 NYS2d 713 [2008]; *Faun Thai v Butt*, 34 AD3d 447, 824 NYS2d 131 [2006]). Also, despite claims that plaintiff suffered injuries to his lumbar spine, Dr. Bernhang only lists his findings of plaintiff's lateral flexion in that region. He failed to evaluate the amount of extension and rotation in that region. Furthermore, he failed to explain in his report the significance of certain findings made during plaintiff's examination, such as "dorsolumbar expansion with the knees extended is 7½" (*see Buchanan v Celis*, 38 AD3d 819, 832 NYS2d 637 [2007]; *Connors v Flaherty*, 32 AD3d 891, 822 NYS2d 555 [2006]). Inasmuch as defendant Soni failed to meet his initial burden of establishing a *prima facie* case, the sufficiency of plaintiff's opposition papers need not be considered (*see Figueroa v Dalmar Car Serv. Corp.*, 41 AD3d 422, 835 NYS2d 916 [2007]; *Paulino v Dedios*, 24 AD3d 741, 807 NYS2d 397 [2005]; *Birnbaum v Constanza*, 17 AD3d 304, 791 NYS2d 853 [2005]). Accordingly, defendant Soni's motion for summary judgment dismissing the complaint against him is denied.


As to defendant Zachery's motion for summary judgment, Vehicle and Traffic Law § 1141 provides that a left turning vehicle must yield the right of way to a vehicle approaching from the opposing direction (*see Loweth v Estate of Agnes Cusack*, 273 AD2d 283, 708 NYS2d 720 [2000]). However, a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle already in the intersection (*see Sirot v Troiano*, 66 AD3d 763, 886 NYS2d 504 [2009]; *Cox v Weil*, 66 AD3d 634, 887 NYS2d 170 [2009]; *Demant v Rochevet*, 43 AD3d 981, 842 NYS2d 74 [2007]). While a driver who has the right of way is entitled to anticipate that other vehicles will obey the traffic laws that require them to yield (*see Moreno v Gomez*, 58 AD3d 611, 872 NYS2d 143 [2009]; *Palomo v Pozzi*, 57 AD3d 498, 869 NYS2d 153 [2008]; *Jenkins v Alexander*, 9 AD3d 286, 780 NYS2d 133 [2004]), he or she is not entitled to blindly or wantonly enter an intersection (*see* Vehicle and Traffic Law § 1180; *King v Washburn* 273 AD2d 725, 710 NYS2d 185 [2000]; *Greco v Boyce*, 262 AD2d 734, 691 NYS2d 599 [1999]). Under the doctrine of comparative negligence, a driver who lawfully enters an intersection still may be found partially at fault for an accident if he or she failed to use reasonable care to avoid a collision with another vehicle in the intersection (*Romano v 202 Corp.*,

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305 AD2d 576, 577, 759 NYS2d 365 [2003]; **Siegel v Sweeney**, 266 AD2d 200, 697 NYS2d 317 [1999]; *see also* **Bodner v Greenwald**, 296 AD2d 564, 745 NYS2d 711 [2002]).

Here, defendant Zachery failed to make a *prima facie* showing of entitlement to judgment as a matter of law (*see* **Kuris v Albano**, 38 AD3d 849, 832 NYS2d 674 [2007]; **Fleming v Graham**, 34 AD3d 525, 824 NYS2d 376 [2006]; **Calemine v Hobler**, 263 AD2d 495, 693 NYS2d 622 [1999]). Defendant Soni testified that he was more than halfway into the left turn when the accident occurred, and that he did not observe defendant Zachery's vehicle prior to the accident. It is also undisputed that the right front portion of defendant Zachery's vehicle collided with the rear of defendant Soni's vehicle. Defendant Zachery testified that she was traveling 25 miles per hour at time of the accident, and that both vehicle were stopped at a red light prior to defendant Soni "gunning" his vehicle in front of her vehicle. Thus, triable questions exist as to whether plaintiff exercised due care as she entered the intersection and, if not, whether such lack of care was a proximate cause of the accident (*see* **Gorham v Methun** 57 AD3d 480, 869 NYS2d [2008]; **Fleming v Graham**, *supra*; **Calemine v Hobler**, *supra*). Furthermore, as there is conflicting deposition testimony regarding the facts surrounding the accident, defendant Zachery failed to establish, *prima facie*, that defendant Soni's conduct was the sole proximate cause of the accident (*see* **Todd v Godek**, 71 AD3d 872, 895 NYS2d 861 [2010]; **Borukhow v Cuff**, 48 AD3d 726, 851 NYS2d 374 [2008]; **Gordon v Honig**, 40 AD3d 925, 837 NYS2d 197 [2007]).

Dated: 9/27/2010



 Hon. Joseph Farneti
 Acting Justice Supreme Court

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION