

Hutter v Joey Taxi Inc.

2010 NY Slip Op 33161(U)

November 1, 2010

Supreme Court, Suffolk County

Docket Number: 08-6652

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 5-10-10
ADJ. DATE 10-13-10
Mot. Seq. # 001 - MG
002 - MotD
003 - MG
004 - MG

-----X
ALICIA HUTTER and TIMOTHY DOERING, :
 :
 : Plaintiffs, :
 :
 : - against - :
 :
 : JOEY TAXI INC., BABRA GURMEET SINGH, :
 SPARROW TRANS CORP., and JEAN ALFRED, :
 :
 : Defendants. :
-----X

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Upon the following papers numbered 1 to 10 read on this motion to reargue the prior motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 5; Notice of Cross Motion and supporting papers 6 - 8; Answering Affidavits and supporting papers 9 - 10; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (004) by plaintiffs for leave to reargue is granted, and upon reargument the Court vacates the order dated March 17, 2010 and issues the following order in its place and stead; and it is further

ORDERED that the motion (001) by defendants Sparrow Trans Corp. and Alfred Jean, sued herein as Jean Alfred, for summary judgment pursuant to CPLR 3212 dismissing the action as asserted against them is granted; and it is further

ORDERED that the cross motion (002) by defendants Joey Taxi, Inc. and Babra Gurmeet Singh, for summary judgment pursuant to CPLR 3212 dismissing the action as asserted against them on the ground that plaintiffs did not sustain serious injuries is granted to the extent that plaintiff Timothy Doerring did not sustain a serious injury; and it is further

ORDERED that the cross motion (003) by plaintiffs Alicia Hutter and Timothy Doering for partial summary judgment pursuant to CPLR 3212 on the issue of liability as against defendants Joey Taxi, Inc. and Babra Gurmeet Singh is granted.

Plaintiffs claim that the Court overlooked relevant facts regarding plaintiff Alicia Hutter's facial scar and that issues of fact exist regarding whether she and plaintiff Timothy Doering sustained serious injuries (Insurance Law § 5102 [d]). A motion for reargument is addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (CPLR 2221[d]). Despite defendants' protestations, a search of the record may be performed *sua sponte* in any event. Based upon the instant submissions, reargument is granted.

In this negligence action, plaintiffs Alicia Hutter and Timothy Doering seek damages for allegedly sustaining serious injuries in a motor vehicle accident which occurred on October 7, 2007. Plaintiffs allege that they were passengers in a vehicle owned by defendant Joey Taxi, Inc. and operated by defendant Babra Gurmeet Singh (hereinafter "the Joey Taxi defendants") which allegedly struck a vehicle owned by Sparrow Trans Corp. and operated by defendant Alfred Jean sued herein as Jean Alfred (hereinafter "the Sparrow defendants") in the rear. The Sparrow defendants move for summary judgment on the grounds that plaintiffs did not sustain serious injuries or, in the alternative, that they did not proximately cause the accident. The Joey Taxi defendants cross-move for summary judgment on the ground plaintiffs did not sustain serious injuries. Plaintiffs cross-move for partial summary judgment on the issue of liability as against the Joey Taxi defendants.

Under the Insurance Law, "'[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 hundred eighty days immediately following the occurrence of the injury or impairment" (Insurance Law § 5102 [d]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the defendants "to present evidence, in competent form, showing that plaintiff has no cause of action" (*Kuchero v Tabachnikov*, 54 AD3d 729, 864 NYS2d 459 [2d Dept 2008]). Once defendants have met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). A "significant disfigurement" within the meaning of the statute is one that "a reasonable person would view . . . unattractive, objectionable, or as the subject of pity or scorn" (*see* Insurance Law § 5102 [d]; *Landsman v Bunker*, 142 AD2d 986, 530 NYS2d 407 [4th Dept 1988]; *Hutchinson v Beth Cab Corp.*, 204 AD2d 151, 612 NYS2d 10 [1st Dept 1994], *sub app* 207 AD2d 283; *Dyagi v Newburgh Auto Auction Inc.*, 251 AD2 619, 675 NYS2d 872 [2d Dept 1998]).

In support of the motion, the Sparrow defendants submit, *inter alia*, the pleadings, the bill of particulars, sworn reports by Samuel J. Roth, M.D., and Sarasavani Jayaram, M.D., plaintiff Hutter's deposition testimony, and pictures of plaintiff's face. The Joey Taxi defendants adopt and incorporate by reference the evidence and arguments by the Joey defendants. By way of the bill of particulars, plaintiff Alicia Hutter alleges that she sustained the following injuries: a laceration to the forehead, headaches, memory loss, post concussion syndrome, low back pains and neck pains. She alleges that she was confined to a hospital for one day and was confined to her home for two weeks.

Dr. Roth avers that he performed a plastic surgery independent medical examination of plaintiff Hutter on February 27, 2009. He examined her facial scar, which was located on the right side of the forehead extending into the hair line measuring 4.5 cm by 1 mm. He stated that the scar was flat, soft, had good color, was nontender, and minimally visible. He noted that there was no functional disability and that there was no requirement for a further plastic surgical revision.

Dr. Jayaram avers that he performed a neurological independent medical examination of plaintiff Hutter on April 14, 2009. He observed and quantified no limitations of movement in plaintiff's neck or back as compared to normal ranges. He further stated that all objective tests were negative. He concluded that her injuries were resolved and that there was no residual injury or permanency. Plaintiff testified that she is embarrassed by her forehead scar and that she changed the way she parts the hair. She further stated that she is a teacher and coaches soccer and lacrosse. She was unable to participate in contact sports for one year after the accident to avoid any further head injuries. She also stated that she curtailed her soccer play with friends and going to the gym, however, she has recently returned to the gym three times a week. She continues to have problems with short term memory. The submitted pictures show plaintiff's facial scar.

The Court concludes that defendants failed to demonstrate their entitlement to judgment as a matter of law inasmuch as the scar on the injured plaintiff Hutter's face, as depicted in photographs in the record, raised a triable issue of fact as to whether she incurred a "significant disfigurement" as defined by Insurance Law § 5102 (d) (*Tugman v PJC Sanitation Service, Inc.*, 23 AD3d 457, 805 NYS2d 607 [2d Dept 2005]; *Dyagi v Newburgh Auto Auction Inc.*, 251 AD2d 619, 675 NYS2d 872 [2d Dept 1998]).

Turning to whether plaintiff Timothy Doering sustained a serious injury, defendants submit, *inter alia*, the affirmed report of Sarasavani Jayaram, M.D. and S. Farkas, M.D., as well as plaintiff Doering's deposition testimony. Dr. Jayaram avers that he performed a neurological examination of the plaintiff on March 24, 2009. He states that he used a goniometer to measure plaintiff's ranges of motion in the cervical spine, lumbar spine, wrists and elbows. He concluded that there were no limitations in movement as compared to normal ranges. He also described the objective tests he performed which were negative. He found no neurological disability.

Dr. Farkas avers that he performed an orthopedic examination of plaintiff Doering on February 28, 2009. He used a goniometer and quantified plaintiff's ranges of motion in the cervical spine, lumbar spine, right shoulder and right knee as compared to normal ranges. He noted no limitations in movement as compared to normal ranges. He stated that the examination was normal and found no orthopedic impairment. Plaintiff Doering testified at his deposition that prior to the accident, he played soccer and softball twice per week. He also regularly went to a gym. However, when he goes to the gym, he does not run as he could before. He is able to lift weights. He states that he has not played soccer since the accident.

Defendants have demonstrated their prima facie entitlement to judgment as a matter of law by establishing that plaintiff Doering did not sustain serious injuries (*see, Toure v Avis Rent A Car Sys., supra*). The burden of proof shifted to plaintiff to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*see, Gaddy v Eycler, supra*).

In opposition, plaintiff Doering submits, *inter alia*, the affidavit and office record of Jeff S. Silber, M.D., and a sworn report and office records of Steven Rokito, M.D. Dr. Silber avers that he examined plaintiff's right knee in October, 2007. However, Dr. Silber failed to detail his examination or discuss what objective tests he performed upon the plaintiff. Plaintiff also submitted certified copies of hospital records which fail to demonstrate the duration of his injuries or how substantial the injuries are (*see, Sotirhos v Pinello*, 209 AD2d 687, 619 NYS2d 319 [2d Dept 1994]; *Goebel v Harris*, 241 AD2d 539, 661 NYS2d 641 [2d Dept 1997]). Dr. Rokito avers that he examined plaintiff's right knee on March 24, 2008 and June 16, 2009. He noted normal gait and knee alignment. He also observed no warmth or swelling about the knee. He opines that the knee is stable and plaintiff sustained an osteochondral defect in the medial condyle which may require surgical correction.

This evidence fails to raise triable issues of fact in that his treating physicians failed to provide any information concerning the nature of the plaintiff's medical treatment (*see, Barbeito v Kesev Taxi*, 281 AD2d 379, 380, 721 NYS2d 279 [2d Dept 2001]; *Dominguez-Gionta v Smith*, 306 AD2d 432, 761 NYS2d 310 [2d Dept 2003]). Further, the plaintiff failed to submit competent medical evidence that the injuries he allegedly sustained in the accident rendered him unable to perform substantially all of his daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (*see, Bell v Rameau*, 29 AD3d 839, 814 NYS2d 534 [2d Dept 2006]). Accordingly, the defendants' motion and cross motion for summary judgment is granted to the extent that plaintiff Doering did not sustain a serious injury.

Turning to the issue of whether the Sparrow defendants proximately caused plaintiffs' injuries, 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 [2nd Dept 2003]; *Power v Hupart*, 260 AD2d 458, 688 NYS2d 194 [2nd Dept 1999]; *see also*, Vehicle and Traffic Law § 1129[a]). A rear-end collision with stopped or stopping vehicles 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 (*see, Rainford v Han*, 18 AD3d 638, 795 NYS2d 645 [2nd Dept 2005]; *Reed v N.Y. City Transit Auth.*, 299 AD2d 330, 749 NYS2d 91 [2d Dept 2002]; *Argiro v Norfolk Contract Carrier, Inc.*, 275 AD2d 384, 712 NYS2d 599 [2d Dept 2000]).

The Sparrow defendants contend that they cannot be held liable for causing the accident inasmuch as their taxi was struck in the rear by the taxi owned and operated by the Joey Taxi defendants in which the plaintiffs were passengers. In support, defendant Jean testified that he stopped the Sparrow taxi to allow his passenger to disembark and shortly thereafter he felt a heavy impact to the rear of the taxi. In opposition, the Joey Taxi defendants submitted an affirmation by their counsel which is not probative on a motion for summary judgment (*Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Thus, the Joey Taxi defendants failed to come forward with a nonnegligent explanation for the collision with the Sparrow defendants' taxi (*McNulty v DePetro*, 298 AD2d 566, 750 NYS2d 89 [2d Dept 2002]). In any event, there

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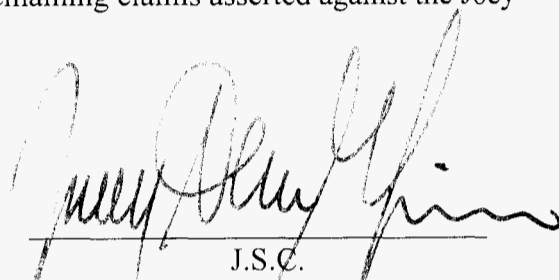
is no dispute that neither a representative of Joey Taxi, Inc. nor defendant Singh, the taxi driver, were produced for a deposition, and no opposition was submitted by the Joey Taxi defendants on the instant motion to reargue. Therefore, the Sparrow defendants successfully established that they were not negligent in causing the alleged collision between their taxi and the plaintiffs, and no evidence was submitted which suggested that they in any way contributed to the alleged collision (*Harris v Ryder*, 292 AD2d 499, 739 NYS2d 195 [2d Dept 2002]).

The Court also finds that plaintiffs' cross motion for partial summary as asserted against the Joey Taxi defendants on the issue of liability is granted.

Accordingly, the motion for summary judgment by the Sparrow defendants dismissing the action is granted; the cross motion by the Joey Taxi defendants for summary judgment is granted to the extent that plaintiff Doerring's allegations of serious injury are dismissed; and the plaintiffs' cross motion for partial summary judgment as asserted against the Joey Taxi defendants on the issue of liability is granted. Plaintiffs' claims against the Sparrow defendants, and plaintiff Doering's claims against the Joey Taxi defendants, dismissed herein, are severed and plaintiff Hutter's remaining claims asserted against the Joey Taxi defendants shall continue.

Serve a copy of this Order on the Clerk of the Court.

Dated: NOV 01 2010



J.S.C.

HON. JEFFREY ARLEN SPINNER

 FINAL DISPOSITION X NON-FINAL DISPOSITION