

Prota v Tang

2011 NY Slip Op 31239(U)

May 2, 2011

Supreme Court, Richmond County

Docket Number: 103212/06

Judge: Thomas P. Aliotta

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

-----X
NICOLE PROTA AND IRENE MOONEY,

Plaintiffs,

-against-

**STANLEY TANG, NEW YORK CITY TRANSIT
AUTHORITY, RITA CORULLA, JOANN
BUONOCORE AND PETROCELLI ELECTRIC,
CO. INC.,**

Defendants.

-----X

**NEW YORK CITY TRANSIT AUTHORITY AND
STANLEY TANG,**

Third-Party Plaintiffs,

-against-

THE CITY OF NEW YORK,

Third-Party Defendant.

-----X

RITA CORRULLA,

Plaintiff,

-against-

**STANLEY TANG, NEW YORK CITY TRANSIT
AUTHORITY AND PETROCELLI ELECTRIC
CO., INC.**

Defendants.

-----X

**NEW YORK CITY TRANSIT AUTHORITY
and STANLEY TANG,**

Third-Party Plaintiffs,

-against-

THE CITY OF NEW YORK,

Third-Party Defendant.

-----X

Part C-2

Present:

HON. THOMAS P. ALIOTTA

DECISION and ORDER

Action No. 1

Index No. 103212/06

Motion Nos: 2668-001

2730-002

3822-003

Index No.: A103212/06

Action No. 2

Index No.: 103211/06

Index No.: A103211/06

The following papers numbered 1 to 8 were fully submitted on the 15th day of March, 2011:

	Papers Numbered
Notice of Motion for Summary Judgment of Defendants/Third-Party Plaintiffs, NEW YORK CITY TRANSIT AUTHORITY and STANLEY TANG, as against Plaintiff in Action No. 2 and Defendant in Action No. 1, RITA CORRULLA (Affirmations in Support).....	1
Notice of Motion for Summary Judgment of Defendants/Third-Party Plaintiffs, NEW YORK CITY TRANSIT AUTHORITY and STANLEY TANG, as against Plaintiff in Action No.1, NICOLE PROTA (Affirmations in Support).....	2
Notice of Cross Motion for Summary Judgment of Defendants in Action No. 1, RITA CORRULLA and JOANN BUONOCORE (Affirmation in Support).....	3
Affirmation in Opposition of Plaintiff in Action No.1, NICOLE PROTA.....	4
Affirmation in Partial Opposition to NEW YORK CITY TRANSIT AUTHORITY and STANLEY TANG’S Motion for Summary Judgment as against Plaintiff in Action No. 2, RITA CORRULLA, of Defendant PETROCELLI ELECTRIC CO., INC.....	5
Affirmation in Partial Opposition to NEW YORK CITY TRANSIT AUTHORITY and STANLEY TANG’S Motion for Summary Judgment as against Plaintiff in Action No. 1, NICOLE PROTA, of Defendant PETROCELLI ELECTRIC CO., INC.....	6
Reply Affirmation of NEW YORK CITY TRANSIT AUTHORITY and STANLEY TANG to Plaintiffs’ Affirmation in Opposition in Action No. 1.....	7
Reply Affirmation of NEW YORK CITY TRANSIT AUTHORITY and STANLEY TANG to Plaintiff’s Affirmation in Opposition in Action No. 2.....	8

Upon the foregoing papers, (1) the motion for summary judgment of defendants New York City Transit Authority (“NYCTA”) and Stanley Tang (“Tang”) dismissing the complaint of plaintiff in Action No. 2, Rita Corrulla, on the ground that her injuries fail to meet the statutory threshold of “serious injury” as defined by Insurance Law §5102(d) is granted without opposition; (2) the motion

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(No. 2730) of defendants NYCTA and Tang for summary judgment dismissing the complaint of plaintiff Nicole Prota (“Prota”) on the ground that her injuries fail to meet the statutory threshold of “serious injury” as defined by Insurance Law §5102(d) is denied, and (3) the cross motion (No. 3822) of defendants Rita Corrulla (“Corrulla”) and Joann Buonocore (“Buonocore”) for like relief against plaintiff Nicole Prota is also denied.

This matter arises out of a two-vehicle accident occurring on January 18, 2006 between a NYCTA bus and a vehicle owned by defendant in Action No. 1, Joann Buonocore and operated by her mother, codefendant in Action No. 1 and plaintiff in Action No. 2 Rita Corrulla, at the intersection of Richmond Avenue and Victory Boulevard, Staten Island, New York. The two actions, which have since been consolidated for purposes of joint trial (*see* NYCTA’s Affirmation in Support of Summary Judgment, para 3), also name Petrocelli Electric Co., Inc. (“Petrocelli”) as a party-defendant, based on its alleged negligent maintenance and repair of the traffic light(s) controlling the subject intersection. Third-party actions were instituted in each action by the NYCTA and Tang against the City of New York (“City”) as a third-party defendant. It appears undisputed that at the time of the collision, Tang was driving a NYCTA bus northbound on Victory Boulevard while Buonocore’s 2003 Kia Sedona was proceeding perpendicularly along Richmond Avenue, although whether the vehicle was proceeding east or westbound is unclear. Prota, the daughter of defendant Buonocore and granddaughter of codefendant-driver, Corrulla, was seated in the rear passenger seat behind the co- plaintiff, Irene Mooney, who is not moving for any relief at the present time. To Prota’s left was another (unnamed) rear seat passenger.

Prota claims to have sustained “serious” personal injuries, *i.e.*, “a...consequential permanent

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limitation of use of a body organ and/or member, with specific reference to [her] right knee, [and] a significant limitation of use of a body function and/or skeletal or neurological systems, with specific reference to ...[the same] knee” as a result of the accident (*see* Plaintiffs’ January 26, 2007 Verified Bill of Particulars, para 10 [NYCTA’s Exhibit B]). More particularly, Protta claims that she sustained, *inter alia*, a “hairline fracture of the right knee; [a] tear involving the posterior horn of the medial meniscus in the right knee with pain in the anterior, patella, and patellar tendon; tenderness in the medial joint line of the right knee and pain intermittently in the right knee” (*id.*).

In support of their motions for summary judgment, defendants/third-party plaintiffs NYCTA and Tang have submitted the November 18, 2008 affirmation of an orthopedic surgeon, Dr. Robert Israel, who, after examining Protta and taking quantified objective measurements of *e.g.*, her ranges of motion, offered the impression that a “resolved sprain of the right knee” had been sustained (*see* NYCTA’s Exhibit D). Thus, Dr. Israel found “no disability [sustained by Protta] as a result of the accident” (*id.*).¹

In opposition, Protta argues that the injury to her right knee is “serious” within the meaning of Insurance Law §5102(d), and attaches in support, *inter alia*, the December 2, 2010 affirmation of orthopedic surgeon Dr. Richard Pearl, who not only conducted a quantified objective examination of this plaintiff, but had treated her on at least one occasion. In his affirmation, Dr. Pearl differed with Dr. Israel and concluded that plaintiff had suffered a fracture of the right knee, which “will require surgical intervention in the future including but not limited to a medial meniscectomy” (*see*

¹The Court is unable to consider movants’ Exhibit C, the unaffirmed and unsworn letter dated January 7, 2008 from defendants’ orthopedic surgeon, Dr. Wayne Kerness, inasmuch as it contravenes CPLR 2106 (*see also* Mezentseff v. Ming Yat Lau, 284 AD2d 379).

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Plaintiffs' Exhibit D).

On the papers presently before the Court, defendants have failed to demonstrate that the quantified reduction in range of motion of plaintiff's right knee is not causally related to the subject accident. Consequently, these defendants have not met their initial burden of proving that plaintiff did not sustain a causally related "serious injury" (*see Hyacinthe v. U-Haul Co.*, 278 AD2d 369; *Weiss v. D'Auria Transp.*, 278 AD2d 316). In this particular, it is worthy of note that defendants have attached no radiological evidence rebutting Dr. Pearl's impression of a fracture to plaintiff Prota's right knee.

To prevail on a motion for summary judgment under section 5102(d) of the Insurance Law, the defendant has the initial burden to present competent evidence showing that plaintiff has not sustained a "serious injury" (*Grossman v. Wright*, 268 AD2d 79). Such evidence may include affidavits or affirmations of medical experts who have examined the plaintiff and conclude that there are no objective medical findings which support plaintiff's claim (*Shinn v. Catanzaro*, 1 AD3d 195, 197, *quoting Grossman v. Wright*, 268 AD2d at 84 [*internal quotation marks omitted*]).

In this case, as previously indicated, the unaffirmed report of Dr. Kerness (Defendants' Exhibit C) is unavailing in support of dismissal, as is the affirmation of Dr. Israel, whose examination over two years *after* the accident reported plaintiff's flexion in her right knee as limited to "110 degrees, 130 degrees being normal," and noted a "cause and effect relationship between [his] diagnosis [albeit one of no disability] and the reported accident" (*see* Defendants' Exhibit D).

Contrary to plaintiff's argument, the cross motion of codefendants Corrulla and Buonocore in Action No. 1, even though made more than 120 days after the note of issue was filed, may

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nevertheless be considered on the merits inasmuch as it seeks relief nearly identical to the relief sought by defendants/third-party plaintiffs in their motion (*see e.g.*, Filannino v. Triborough Bridge and Tunnel Auth., 34 AD3d 280, 281). However, it, too, must be denied for the reasons previously articulated.

Accordingly, it is

ORDERED, that the motion of defendants/third-party plaintiffs New York City Transit Authority and Stanley Tang for summary judgment dismissing the complaint of plaintiff Rita Corrulla in Action No. 2 is granted without opposition, and said action and its derivative third-party action are dismissed; and it is further

ORDERED, that their remaining summary judgment motion and the cross motion for summary judgment in Action No. 1 by defendants Rita Corrulla and Joann Buonocore are denied; and it is further

ORDERED, that the Clerk enter judgment in accordance herewith.

E N T E R,

Dated: May 2, 2011

/s/
Hon. Thomas P. Aliotta
J. S. C.