

Lefcort v City of New York

2011 NY Slip Op 31646(U)

June 10, 2011

Supreme Court, New York County

Docket Number: 116352/09

Judge: Geoffrey D. Wright

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEOFFREY D.S. WRIGHT
Justice

PART 62

Samantha Lefcort

INDEX NO. 116352/09

Plaintiff/Petitioner(s)

MOTION DATE _____

- v -

City of New York

MOTION SEQ. NO. 002

Defendant/Respondent(s)

The following papers, numbered 1 to 5 were read on this motion/petition for Summary Judgement.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

	Papers Numbered
Notice of Motion/Petition Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits _____	3,5
Replying Affidavits _____	4
Other (Cross-motion) & Exhibits Annexed _____	2, memo

Cross-Motion: X Yes No

This motion and cross-motion for summary judgement are both denied as per the annexed decision.


GEOFFREY D. WRIGHT
AJSC

Dated: June 10, 2011

J.S.C.

Check one: FINAL DISPOSITION XNON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTRY OF NEW YORK: Part 62

-----X

SAMANTHA LEFCORT

Plaintiffs,

-against-

THE CITY OF NEW YORK, CRAIG D.
ALBARELLA, MAZHAR HUSSAIN, and AANAS A.
SAFDAR,

Defendants.

-----X

Index # 116352/09

Motion Cal. #

Motion Seq. #

DECISION/ORDER

Present:

Hon. Geoffrey Wright

Judge, Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion for Summary Judgement

PAPERS	NUMBERED
Notice of Motion, Affidavits & Exhibits Annexed-----	1
Order to Show Cause, Affidavits & Exhibits-----	
Answering Affidavits & Exhibits Annexed-----	2,5
Replying Affidavits & Exhibits Annexed-----	3
Other (Cross-motion) & Exhibits Annexed-----	Memo, 4

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

The present case arises out of a motor vehicle accident that occurred on July 25, 2009. Plaintiff Samantha Lefcort was a backseat passenger in a taxicab operated by Aanas A. Safdar and owned by Mazhar Hussain that was moving west on 51st Street. P.O. Craig D. Albarella was moving north on Third Avenue. Responding to an emergency call, Albarella proceeded through a red light and collided with the taxicab striking it on the rear fender with the driver's side of the front of his vehicle. Lefcort alleges that she sustained a herniated disc, cervical sprain/strain, and left shoulder injury resulting from the collision

Defendants Hussain and Safdar now move for an order pursuant to Civil Practice Laws and Rules § 3212 granting summary judgement on the grounds that the injuries sustained by the plaintiff are not serious injuries as defined by Insurance Law 5104 (a). Defendants Albarella and the City of New York filed a cross-motion for summary judgement on the grounds that the plaintiff's injuries do not meet the serious injury threshold and that Albarella was operating his vehicle responsibly.

Insurance Law 5104 (a) requires one to have sustained serious injuries in order to recover non-economic loss. Insurance Law 5102 (d) defines serious injury:

“Serious injury” means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of 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 organ or member; 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.

By the plaintiff’s own admission, she missed no school or work as a result of her injuries. In determining a motion for summary judgement where the issue is whether plaintiff sustained a serious injury defined by Insurance Law § 5102(d), the defendant bears the initial burden to present competent evidence that the plaintiff has no cause of action.” *Brown v. Achy*, 9 A.D.3d 30, 776 N.Y.S.2d 56, 2004 N.Y. Slip Op. 03703. The defendants met this initial burden by providing the affirmations of Dr. Robert Tantliff, Dr. Lisa Nason, and Dr. Maria DeJesus. Dr. Tantleff, a radiologist, found no herniation in Lefcort’s spine and disc desiccation consistent with her age. He asserted that there is no causal relationship between the accident and the plaintiff’s injuries. After performing an orthopedic evaluation, Dr. Nason affirmed that the plaintiff retained normal ranges of motion in her cervical spine and left shoulder. Dr. DeJesus also affirmed spinal function to be within the normal range of motion and did not find any permanent limitations of the use of the cervical spine.

The burden now falls on the plaintiff to raise issues of material fact as to whether she sustained “permanent consequential limitation of use of a body organ or member” or a “significant limitation of use of a body function or system.” *Toure v. Avis Rent A Car Systems*, 98 N.Y.2d 345, 774 N.E.2d 1197, 746 N.Y.S.2d 865, 2002 N.Y. Slip Op. 05748. It must be shown that the sustained injuries are significant, permanent, and were caused by the accident. To be considered by the court, the proffered evidence must be in admissible form. Unsworn medical statements must be disregarded. *Grasso v. Angerami*, 79 N.Y.2d 813, 588 N.E.2d 76, 580 N.Y.S.2d 178. The report of Dr. Joshua S. Dines is not affirmed and therefore will not be considered.

To establish the significance and permanence of the injuries, the plaintiff presents the affirmation of Dr. Joseph Gregorace. After examining Lefcort, he reported that the range of motion of her cervical spine is limited and provided the degrees of Lefcort’s range of motion as compared to the norm. He also found cervical spine spasms. With his examination occurring eighteen months after the accident, Dr. Gregorace contends that the injury to the cervical spine is permanent in nature. The affirmation is sufficient to raise issues of fact regarding the significance and permanence of the injuries.

To establish causation, the plaintiff must provide medical evidence of the limitations contemporaneous to the incident. *Shu Chi Lam v. Wang Dong*, 922 N.Y.S.2d 381, 2011 N.Y. Slip

Op. 03915. To satisfy this requirement, the plaintiff presented the medical report of Dr. Peter M. Swerz. Dr. Swerz, a chiropractor, examined Lefcort two days after the accident. His report affirmed that there were immediate range of motion limitations and that there was a causal relationship between the accident and Lefcort's injuries. The contemporaneous affirmation of a chiropractor is sufficient to establish causation. *De La Cruz v. Hernandez*, —N.Y.S.2d —, 2011 WL 2039669 (N.Y.A.D. 1 Dept.), 2011 N.Y. Slip Op. 04377.

The plaintiff has presented sufficient competent medical evidence to overcome the defendants' prima facie showing of lack of material facts.

It now becomes necessary to examine the City of New York and Albarella's cross-motion for summary judgement. Because it has already been established that Lefcort has met the serious injury threshold, the court will discuss only the defendants' argument that they are not liable because Albarella operated his marked police vehicle responsibly when he responded to an emergency situation at the time of the accident.

Operators of emergency vehicle performing emergency operations are not bound by the same rules of the road as other. *Vehicle and Traffic Law § 1104 (b)*. Albarella, at the time of the accident, was engaged in an emergency operation as defined by VTL § 114-b, which defines emergency operations as:

The operation, or parking, of an authorized emergency vehicle, when such vehicle is engaged in transporting a sick or injured person transporting prisoners, pursuing an actual or suspected violator of the law, or responding to, or working or assisting at the scene of an accident, disaster, police call, alarm of fire, actual potential release of hazardous material or other emergency. Emergency operation shall not include returning from such service.

Albarella, prior to the accident, had received an emergency call of "confirmed shots fired." Responding to such a call may be classified as an emergency operation pursuant to VTL § 114-b. As such, Albarella was in his right when he proceeded through the red light as permitted by VTL § 1104 (b).

However, VTL § 1104 (e) provides that emergency vehicle drivers are not protected from driving with reckless disregard for the safety of others. To show that Albarella used reasonable precaution, the defendants provide Albarella's deposition claiming that Albarella came to a complete stop before proceeding into the intersection and had the vehicle's lights and sirens on from the time of receiving the emergency call through the time of the accident.

To raise a triable issue of fact, the opposition must present evidence that the operator of an emergency vehicle operated his vehicle with reckless disregard of the safety of others. This standard "requires proof that the officer intentionally committed an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow." *Badalamenti v. City of New York*, 30 A.D.3d 452, 817 N.Y.S.2d 134, 2006 N.Y. Slip Op. 04788. Without such evidence, there is no basis for civil liability. *Hemingway v. City of New York*, 81

A.D.3d 595, 916 N.Y.S.2d 167, 2011 Slip Op. 00646. The opposition meets this burden with the deposition of Aanas Safdar. He claims to have heard only heard the siren when he was well into the intersection. This raises questions as to when Albarella activated the siren and turret lights. If they were not activated until after Albarella entered the intersection, that may be considered to be reckless disregard for the safety of others. *Badalamenti v. City of New York*, 30 A.D.3d 452, 817 N.Y.S.2d 134, 2006 N.Y. Slip Op. 04788. The angle of collision also raises an issue of fact as to whether Albarella came to a complete stop before the intersection as he claimed. Albarella hit the taxicab in the rear fender with the front of his car, therefore this raises an issue of fact whether Albarella should have been able to see the taxicab if he did come to a full stop.

When considering a motion for summary judgement, "issue-finding, rather than issue-determining, is the key to the procedure." *Esteve v. Abad*, 271 A.D. 725, 68 N.Y.S.2d 322 N.Y.A.D. 1 Dept. 1947. Issues of fact have been raised in response to both the motion and the cross-motion and both are denied.

This constitutes the decision and order of the Court.


GEOFFREY D. WRIGHT
AJSC

June 10, 2011

FILED

JUN 20 2011

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