

Bortugno v Aero Mech. of NY, Inc.

2011 NY Slip Op 31817(U)

June 29, 2011

Supreme Court, Suffolk County

Docket Number: 09-20628

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10-20-10 (#002)
MOTION DATE 11-30-10 (#003)
ADJ. DATE 3-4-11
Mot. Seq. # 002 - MG
003 - XMD

-----X	
JOSEPHINE A. BORTUGNO,	ROSENBERG & GLUCK, LLP
	Attorney for Plaintiff
Plaintiff,	1176 Portion Road
	Holtsville, New York 11742
- against -	
	CASCONE & KLUEPFEL, LLP
AERO MECHANICAL OF NY, INC., and JOHN	Attorney for Defendants
M. SIGNORELLO,	1399 Franklin Avenue, Suite 302
	Garden City, New York 11530
Defendants.	
-----X	

Upon the following papers numbered 1 to 40 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers 9 - 24; Answering Affidavits and supporting papers 25 - 27; 28 - 36; Replying Affidavits and supporting papers 37 - 38; 39 - 40; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by the plaintiff for partial summary judgment on the issue of liability is granted; and it is further,

ORDERED that the cross-motion by the defendants for summary judgment dismissing the complaint is denied.

The instant action arises from a three car rear-end motor vehicle accident which occurred on April 1, 2008 at the intersection of Ronkonkoma Avenue and the Long Island Expressway South Service Road in the Town of Brookhaven, New York. At the time of the accident, the plaintiff was the first vehicle stopped at a red light. The accident purportedly occurred when a vehicle owned by defendant Aero Mechanical of NY, Inc. and operated by defendant John M. Signorello collided with the rear of a vehicle,

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which was stopped behind the plaintiff's vehicle, and caused such vehicle to collide with the rear of the plaintiff's vehicle.

The plaintiff alleges that she sustained serious and permanent injuries as a result of the defendants' negligence in causing the accident. Specifically, by way of the bill of particulars, she alleges that she sustained serious and permanent injuries including a herniated disc at L4-5; lumbar disc herniation; lumbar spondylolysis; bilateral spondylolysis and first degree forward slipping of L5 over the sacrum involving the L5-S1 level; bilateral spondylolysis at L5-S1 with anterior subluxation of L5 over S1; grade I spondylolisthesis of S1; spondylolysis of the lower facet joints of S1; lumbar instability with grade L5-S1 spondylolisthesis with loss of height; L5-S1 spondylolisthesis with radiculopathy; lumbar radiculopathy; cervical and lumbar radiculitis; cervical sprain; paresthesia; numbness; decreased sensation in the lateral calf and buttock; restricted range of motion in back; cervical tenderness with spasm; neck tenderness; lower back tenderness; low back pain radiating into the left buttock, leg and calf; neck pain radiating down into the right arm; right shoulder pain; back pain; neck pain; and coccyx pain. By way of the supplemental verified bill of particulars, plaintiff further alleges that she sustained a herniated disc at C4-5 with cord impingement; reversing of the normal lordotic curvature of the cervical spine; cervical myofascial pain; lumbosacral spine sprain with sacroiliac joint derangement; aggravation of pre-existing herniated disc L4-L5; lumbar and gluteal myofascial pain; limited range of motion in cervical spine and lumbosacral spine; numbness in bilateral arms, hands and fingers; shooting pains in bilateral legs; and bilateral shoulder pain. The plaintiff alleges that the injuries she sustained were serious within the meaning of the Insurance Law in that she suffered a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body, function or system; and a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence.

The plaintiff now moves for partial summary judgment on the issue of liability. The defendants cross-move for summary judgment dismissing the complaint on the grounds that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

The plaintiff established a *prima facie* entitlement to partial summary judgment on the issue of liability. A rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of liability with respect to 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 Ballatore v HUB Truck Rental Corp.*, __AD3d__, 922 NYS2d 180 [2d Dept 2011]; *John v Leyba*, 38 AD3d 496, 831 NYS2d 488 [2d Dept 2007]; *Garces v Karabelas*, 17 AD3d 633, 794 NYS2d 75 [2d Dept 2005]; *Gaeta v Carter* 6 AD3d 576, 775 NYS2d 86 [2d Dept 2004]). In support of her motion for partial summary judgment on the issue of liability, the plaintiff submits, *inter alia*, her own affidavit and a certified police accident report. This evidence demonstrated the plaintiff's entitlement to judgment, as a matter of law, by showing that her vehicle was stopped at a red traffic light when the vehicle stopped behind her was caused to collide with her after being struck in the rear by the defendants' vehicle (*see Zdenek v Safety Consultants, Inc.*, 63 AD3d 918, 883 NYS2d 57 [2d Dept 2009]; *Ramirez v Konstanzer*, 61 AD3d 837, 878 NYS2d 381 [2d Dept 2009]; *Allstate Ins. Co. v Bader*, 57 AD3d 811, 868 NYS2d 918 [2008]). Indeed, defendant Signorello admits in a written statement, which is contained in the certified police accident report, that when he went to stop at the red light, his van wouldn't stop and skidded into the vehicle in front of him, which then hit the plaintiff's vehicle (*see Vaden v Rose*, 4 AD3d 468, 771 NYS2d 670 [2d Dept 2004]; *Kemenyash v McGoey*, 306 AD2d 516, 762 NYS2d 629 [2d Dept 2003]; *cf.*, *Scott v Kass*, 48 AD3d 785, 851 NYS2d 649 [2d Dept 2008]; *compare*, *Cheul Soo Kang v Violante*, 60 AD3d 991, 877 NYS2d 354 [2d Dept 2009]; *Noakes v Rosa*, 54 AD3d 317, 862 NYS2d 573 [2d Dept 2008]; *Imamkhodjaev v Kartvelishvili*, 44 AD3d 619, 843 NYS2d 160 [2d Dept 2007]).

In opposition, the defendants failed to raise a triable issue of fact as to their liability. Contrary to the defendants' contention, the evidence submitted was insufficient to substantiate a finding that the accident resulted from sudden and unanticipated brake failure. In instances where the operator of the moving vehicle alleges that the rear-end collision was caused by brake failure, it is incumbent upon that party to show that the brake problem was unanticipated and that reasonable care was exercised to keep the brakes in good working order (*see Ballatore v HUB Truck Rental Corp.*, *supra*; *Reid v Rayamajhi*, 17 AD3d 557, 795 NYS2d 56 [2d Dept 2005]; *Hollis v Kellog*, 306 AD2d 244, 761 NYS2d 253 [2d Dept 2003]; *Vidal v Tsitsiashvili*, 297 AD2d 638, 747 NYS2d 524 [2d Dept 2002]). The evidence, here, was insufficient to establish either that the brakes failed (*cf.*, *Ballatore v HUB Truck Rental Corp.*, *supra*) or that such failure was unanticipated and they exercised reasonable care to keep the brakes in good working order (*see Hollis v Kellog*, *supra*; *Vidal v Tsitsiashvili*, *supra*). The affidavit of Joseph Matera, president of Aero Mechanical, was insufficient for this purpose. Matera was not present during the accident and did not have personal knowledge of the cause of the accident. In addition, Matera's statement that, on information and belief, the vehicle passed annual inspection and defendant Signorello inspected and tested the brakes on the vehicle date of the accident, was unsubstantiated, conclusory and speculative.

Accordingly, the plaintiff's motion for partial summary judgment on the issue of liability is granted.

Turning to the defendants' cross-motion, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold (*see Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). A defendant may satisfy this burden by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim (*Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]). Once this showing has been made the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to overcome the defendant's submissions by demonstrating a triable issue

of fact that a serious injury was sustained within the meaning of the Insurance Law (*see Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Grossman v Wright*, *supra*; *Pagano v Kingsbury*, *supra*; *see also, Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

In support of the cross-motion, the defendants submit, *inter alia*, the plaintiff's deposition testimony from this action, an expert witness disclosure for Dr. Alan Greenfield, an affirmed report by Edward M. Weiland, M.D., an affirmed report by Sanford R. Wert, M.D., the verified bill of particulars from plaintiff's slip and fall lawsuit, the plaintiff's deposition transcript from the slip and fall lawsuit, lumbar spine MRI reports dated July 13, 2007, April 24, 2008 and April 23, 2009, an addendum to a MRI report dated May 1, 2008, and a lumbosacral spine CT scan dated January 10, 2008. This evidence fails to demonstrate the defendants' *prima facie* entitlement to summary judgment on the grounds that the plaintiff did not sustain a "serious" injury as a result of the subject accident (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Liataud v Joseph*, 59 AD3d 394, 871 NYS2d 920 [2d Dept 2009]).

At the outset, the Court notes that Dr. Greenfield's expert opinion has not been submitted in admissible form. Although the expert disclosure notice was submitted, the papers do not include Dr. Greenfield's affidavit or affirmation. In any event, the evidence presented raises triable issues of fact as to whether the plaintiff sustained permanent consequential and significant limitations to, *inter alia*, her lumbar spine, cervical spine, and shoulders as a result of the injuries she sustained in the subject accident. In this regard, the defendant's own expert, Dr. Wert, finds limitations in the plaintiff's range of motion (*see Kim v Orourke*, 70 AD3d 995, 893 NYS2d 892 [2010]; *Landman v Sarcona*, 63 AD3d 690, 880 NYS2d 168 [2009]; *Powell v Prego*, 59 AD3d 417, 872 NYS2d 207 [2009]; *compare, Tai Ho Kang v Young Sun Cho*, 74 AD3d 1328, 904 NYS2d 743 [2010]; *see also, Gaccione v Krebs*, 53 AD3d 524, 863 NYS2d 444 [2008]). Dr. Wert examined the plaintiff on June 22, 2010. Upon examination of her cervical spine, he found pain and limitations on extension. Upon examination of her shoulders, he found limitations in the range of motion of her right shoulder and severe pain and limitations in the range of motion of her left shoulder. Upon examination of the plaintiff's lumbosacral spine, Dr. Wert found pain and limitations in her flexion and extension.

Dr. Weiland examined the plaintiff on June 17, 2010 and noted subjective complaints of pain and evidence of "give-away" motor resistance in her right arm. He concluded that the plaintiff had sustained a cervical sprain, which had resolved, and an exacerbation of her pre-existing lumbar myofascial pain disorder. Although Dr. Weiland measured the range of motion of the plaintiff's cervical spine, lumbosacral spine, and shoulders and found them to be normal, he reports vastly different values as normal findings than those reported by Dr. Wert (*see Sanon v Moskowitz*, 44 AD3d 926, 843 NYS2d 510 [2d Dept 2007]).

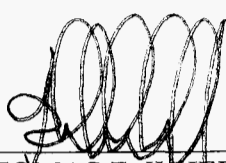
Contrary to the defendants' contention, the evidence submitted also fails to establish that the limitations suffered by the plaintiff are not causally related to the subject accident. In this regard, the defendants posit that any limitations suffered by the plaintiff stem from injuries sustained in a prior slip-and-fall accident. Notably, however, the defendants fail to submit any objective medical evidence to substantiate this contention. Moreover, the evidence submitted demonstrates that the plaintiff has alleged the existence of several new injuries, including a herniated disc in her cervical spine, as a result of the subject accident. Furthermore, she has alleged an exacerbation of the prior injury to her lumbar spine.

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Inasmuch as the evidence submitted by the defendants failed to establish their *prima facie* entitlement to judgment as a matter of law, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact (*see Nembhard v Delatorre*, 16 AD3d 390, 791 NYS2d 144 [2d Dept 2005]; *McDowall v Abreu*, 11 AD3d 590, 782 NYS2d 866 [2d Dept 2004]; *Coscia v 938 Trading Corp.*, 283 AD2d 538, 725 NYS2d 349 [2d Dept 2001]).

Accordingly, the defendants' motion for summary judgment dismissing the complaint is denied.

Dated: 6/29/11



THOMAS F. WHELAN, J.S.C.