

Park v Moreiras

2011 NY Slip Op 31968(U)

July 5, 2011

Sup Ct, Nassau County

Docket Number: 1297/09

Judge: Ute W. Lally

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SCAW

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

EUNHA PARK and SOON JA LEE,
Plaintiffs,

-against-

FRANCELINA MOREIRAS,
Defendant.

MD, MG

Motion Sequence #1, #2
Submitted April 21, 2011

INDEX NO: 1297/09

The following papers were read on this motion for summary judgment:

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Upon the foregoing, it is ordered that this motion by the defendant Francelina Moreiras for an order pursuant to CPLR 3212 granting summary judgment in her favor and against both plaintiffs dismissing the plaintiffs' complaint in its entirety upon the grounds that plaintiffs have failed to prove that they sustained a serious injury as defined in Insurance Law § 5102(d) and required by Insurance Law § 5104(a) is denied. This cross motion by plaintiff Eunha Park for an order pursuant to CPLR 3212 granting summary judgment in favor of the cross-movant dismissing the defendant's counterclaim is granted.

This is an action in which the plaintiffs seek to recover money damages for serious personal injuries they allegedly sustained as the result of the defendant's negligence in the ownership and operation of her motor vehicle. Defendant has interposed a counterclaim against plaintiff Eunha Park. The subject occurrence took place on September 19, 2006. Plaintiff Soon Ja Lee was a passenger in the motor vehicle owned and operated by her mother plaintiff Eunha Park on Old Country Road at its intersection with Charles Street, Hicksville, Town of Oyster Bay, County of Nassau, State of New York. Said vehicle was stopped at a red light at said intersection when it was struck in the rear by the motor vehicle owned and operated by the defendant. Defendant indicates that the roadway was wet.

Defendant, in support of her motion, proffers two affirmed to medical reports of Alan J. Zimmerman, M.D., a Diplomate, American Board of Orthopedic Surgery both dated September 16, 2010 based upon physical examinations of both plaintiffs conducted on the above date, on behalf of the defendant. In addition, defendant submits six medical reports of Sondra J. Pfeffer, M.D. a Diplomate in Radiology dated March 7, 2010 each of said reports reviewing a different MRI examination, three of plaintiff Eunha Park and three of plaintiff Soon Ja Lee, as well as an affirmation amending said reports dated December 27, 2010.

In his report relating to plaintiff Eunha Park, Dr. Zimmerman recites a short history of the case, said plaintiff's present complaints, a list of the legal documents and medical records reviewed and describes the physical examination performed and his findings. He states that said plaintiff offered no complaints of pain upon the various tests he performed on said plaintiff's cervical spine, thoracic spine, shoulders and lumbar spine. He found no

muscle spasm, no tenderness, no atrophy, no deformity and no dislocation. He conducted objective range of motion testing, properly quantified and compared to normal using a goniometer. All of his findings were in normal ranges revealing no orthopedic disability regarding the subject occurrence.

In the report relating to plaintiff Soon Ja Lee, Dr. Zimmerman recites a short history of the case, said plaintiff's present complaints, a list of the legal documents and medical records reviewed and describes the physical examination performed and his findings. He states this plaintiff was in no apparent distress and offered no complains of pain upon the various tests he performed on said plaintiff's cervical spine, thoracic spine, lumbar spine, and knees. He found no muscle spasm, no tenderness, no atrophy and normal muscle strength. He conducted objective range of motion testing, properly quantified and compared to normal motion testing, properly quantified and compared to normal using a goniometer. All of his findings were in normal ranges revealing no orthopedic disability regarding the subject occurrences.

The six reports and purported affirmation of Dr. Pfeffer may not be considered by the Court in that they are not in admissible form. Although Dr. Pfeffer has attempted to affirm her reports and affirmation, all of said documents fail to include the required language contained in the statute which permits physicians authorized by law to practice medicine in the State of New York when "...subscribed and affirmed by him to be true under the penalties of perjury..." to submit an affirmation instead of and in place of an affidavit. (See CPLR 2106). Since this is an exception to normal procedure, strict compliance with the statute is required (*Offman v Singh*, 27 AD3d 284; see also *Grosso v Angerami*, 79 NY2d 813; *Rainey v Smith*, 300 AD2d 383).

Based thereon, it appears to the satisfaction of the Court that defendant has made a *prima facie* showing that each of the plaintiffs did not sustain a serious injury (*Gaddy v Eyer*, 79 NY2d 955).

Therefore, the burden now shifts to the plaintiffs to establish that they each sustained a serious injury (*Id.*)

In opposition so much of this motion relating to plaintiff Eunha Park, plaintiffs proffer the affirmation of Young S. Tak, M.D., a Diplomate of the American Board of Physical Medicine and Rehabilitation and said plaintiff's treating physician, who first examined said plaintiff on December 20, 2006, the day after the subject occurrence. Annexed to said affirmation are two medical reports of said doctor dated September 20, 2006 and March 10, 2011.

Dr. Tak indicates that Eunha Park complained of pain of her neck, lower back and right shoulder immediately after the accident. Said complaints were not present before the accident. She received medical treatment and was placed on an intensive physical therapy program. He performed objective range of motion testing, using a goniometer, and his initial findings, properly quantified and compared to normal were that there was a substantially reduced range of motion in her cervical and lumbar spine area and reduced range of motion in her right shoulder. Ms. Park was last seen on March 10, 2011 at which time Dr. Tak examined her again. His findings after said examination including objective range of motion testing using a goniometer, properly quantified and compared to normal indicates some improvement but continued disability casually related to this occurrence of a permanent nature.

Based therein it is the opinion of this Court that plaintiffs have sustained their burden of establishing that an issue of fact exists as to plaintiff Eunha Park and summary judgment must be denied (*Toure v Avis Rent-a-Car System*, 98 NY2d 345; *Grossman v Wright*, 268 AD2d 79).

In opposition to so much of this motion relating to plaintiff Soon Ja Lee, plaintiffs proffer the affirmation of Young S. Tak, M.D. a Diplomate of the American Board of Physical Medicine and Rehabilitation and said plaintiff's treating physician, who first examined said plaintiff on September 20, 2006, the day after the subject occurrence. Annexed to said affirmation are two medical reports of said doctor dated September 20, 2006 and March 10, 2011.

Dr. Tak indicates that Soon Ja Lee complained of pain of her neck, lower back and left knee immediately after the accident. Said complaints were not present before the accident. She received medical treatment and was placed on an intensive physical therapy program. He performed objective range of motion testing, using a goniometer, and his initial findings, properly quantified and compared to normal were that there was a substantially reduced range of motion in her cervical and lumbar spine area and reduced range of motion in her left knee. Ms. Lee was last seen on March 10, 2011 at which time Dr. Tak examined her again. His findings after said examination including objective range of motion testing, using a goniometer, properly quantified and compared to normal indicates some improvement but continued disability causally related to this occurrence of a permanent nature.

Based thereon, it is the opinion of this Court that plaintiffs have sustained their burden by establishing that an issue of fact exists as to plaintiff Soon Ja Lee, and summary

judgment must be denied (*Toure v Avis Rent-a-Car System, supra*; *Grossman v Wright, supra*).

Therefore, defendant's motion for summary judgment is denied in its entirety.

Plaintiff on the counterclaim herein seeks summary judgment on the issue of liability only based upon defendant's negligence as the operator of the rear motor vehicle involved in a two motor vehicle "rear end" collision.

A rear end collision with a stopped automobile creates a *prima facie* case of liability with respect to the operator of the moving vehicle, imposing a duty of explanation on its operator. (*Gambino v City of New York*, 205 AD2d 583; *Starace v Inner Circle Qonexions, Inc.*, 198 AD2d 493). The operator is required to rebut the inference of negligence created by the unexplained rear-end collision (*Pfaffenbach v White Plains Exp. Corp.*, 17 NY2d 132, 135), since the operator of the moving vehicle is in a better position "to excuse the collision either through a mechanical failure, or a sudden stop of the vehicle ahead, or an unavoidable skidding on a wet pavement, or any other reasonable cause" (*Carter v Castle Elec. Contr.*, 26 AD2d 83, 85). It is well established that a driver who approaches another vehicle from the rear is bound to maintain a reasonably safe rate of speed, maintain control of his vehicle and use reasonable care to avoid colliding with the other vehicle (*Benyarko v Avis Rest A Car System, Inc.*, 162 AD2d 572, 573).

Absent an exonerating excuse, under New York Law, failure to maintain a safe distance between the operator's vehicle and the vehicle ahead constitutes negligence as a matter of law (Vehicle & Traffic Law Sec. 1129[a]). An operator has a duty to remain vigilant to the movement of the car ahead when approaching from the rear and to operate

his vehicle at a safe rate of speed and in a manner so as to avoid colliding with the preceding vehicle (*Young v City of New York*, 113 AD2d 833). Further, absent excuse, it is negligence as a matter of law if a stopped car is hit in the rear (*Cohen v Terranella*, 112 AD2d 264; *DeAngelis v Kirschner*, 171 AD2d 593).

In opposing a motion for summary judgment a party must present evidentiary facts sufficient to raise triable issues of fact (*Freedman v Chemical Construction Corp.*, 43 NY2d 260). Conclusory allegations, bold assertions or speculation are simply insufficient to successfully oppose a motion for summary judgment (*Zuckerman v City of New York*, 42 NY2d 557; *Rotuba Extruders v Ceppos*, 46 NY2d 223).

“A rear-end collision with a stationary vehicle creates a *prima facie* case of negligence” requiring judgment for the driver and/or passenger of the stopped vehicle unless the operator of the moving vehicle can proffer “a non-negligent explanation” for his/her “failure to maintain a safe distance between cars”. It is not a sufficient claim that the vehicle in front “stopped short”. (*Mitchell v Gonzalez*, 269 AD2d 250, 251). In the Second Department it is clear that the rule is that a claim of a sudden stop is insufficient to defeat a *prima facie* case of negligence involving a rear end collision with a stopped vehicle (see *McKeough v Rogak*, 288 AD2d 196, lv. to appeal denied 98 NY2d 601; *Girolamo v Liberty Lines Trans*, 284 AD2d 371; *Dileo v Greenstein*, 281 AD2d 586; *Shamah v Richmond County Ambulance Service*, 279 AD2d 564; *Lifshits v Variety Poly Bags*, 278 AD2d 372; *Cacace v DiSefano*, 276 AD2d 457; *Tricoli v Malik*, 268 AD2d 469; *Levine v Taylor*, 268 AD2d 566).

Defendant having failed to demonstrate the existence of "a non-negligent explanation", this motion is granted.

Therefore, summary judgment on the issue of liability only is granted in favor of plaintiff on the counterclaim and against defendant and said counterclaim is dismissed.

Dated: JUL 5 2011


UTE WOLFF LALLY, J.S.C.

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