

Girardi v Ramirez

2011 NY Slip Op 32953(U)

October 31, 2011

Sup Ct, Suffolk County

Docket Number: 09-44060

Judge: Jeffrey Arlen Spinner

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

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 3-22-11 (#003)
MOTION DATE 5-17-11 (#004)
ADJ. DATE 10-19-11
Mot. Seq. # 003 - MD
004 - XMG

-----X			
RAQUEL GIRARDI,	:	EWALL & EWALL	
	:	Attorney for Plaintiff	
	:	946 Park Avenue	
Plaintiff,	:	Huntington, New York 11743-4548	
- against -	:		
	:		
LILIAN C. RAMIREZ and SUFFOLK	:	LEWIS JOHS AVALLONE AVILES, LLP	
TRANSPORTATION SERVICE, INC.,	:	Attorney for Defendants	
	:	425 Broad Hollow Road, Suite 400	
Defendants.	:	Melville, New York 11747	
-----X			

Upon the following papers numbered 1 to 29 read on this motion for summary judgment and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers 11 - 22; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 23 - 27; 28 - 29; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Lilian Ramirez and Suffolk Transportation Service, Inc. seeking summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that this cross motion by plaintiff Raquel Girardi seeking summary judgment in her favor on the issue of liability is granted.

Plaintiff Raquel Girardi commenced this action against defendants Lilian Ramirez and Suffolk Transportation Service, Inc. to recover damages for injuries allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Edgewood Avenue and Landing Avenue in Smithtown, New York on April 14, 2008. By her complaint, plaintiff alleges that her stopped vehicle was struck in the rear by the vehicle operated by defendant Lilian Ramirez and owned by defendant Suffolk Transportation Service, Inc. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject accident, including a disc bulge at level C3-C4; retrolithesis at level L5-S1; uncoverteral disc disease at level C3-C4; cervical and lumbar sprain/strain; cervical muscle spasm; straightening of the normal cervical lordosis; cervicalgia; lumbosacral myofascial pain syndrome; and aggravation of pre-existing neck and back conditions. In addition, plaintiff alleges that she has been partially disabled since the date of the accident.

Defendants now move for summary judgment on the basis that plaintiff's alleged injuries do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendants submit copies of the pleadings and the affirmed medical report of Dr. Noah Finkel. Dr. Finkel conducted an independent orthopedic examination of plaintiff at defendants' request on November 17, 2010. Plaintiff opposes the motion on the ground that defendants failed to meet their prima facie burden that she did not sustain an injury within the meaning of Insurance Law § 5102(d) as a result of the accident. In the alternative, plaintiff asserts that she sustained an injury within the "limitations of use" categories of the Insurance Law. In opposition to the motion, plaintiff submits the affirmed medical reports of her treating orthopedist, Dr. Thomas Dowling, and her primary care physician, Dr. Debra Pincus, as well as the affirmed medical reports of Dr. Alvan Hassankhani, a radiologist who reviewed the magnetic resonance imaging ("MRI") film of plaintiff's cervical spine, and of Dr. Vinodkumar Velayudhan, a radiologist who reviewed the MRI film of plaintiff's lumbar spine. Plaintiff also submits her own affidavit, and the certified records of New York Physical Therapy and St. Catherine of Siena Medical Center Emergency Room.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (*Dufel v Green*, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see also Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Porcano v Lehman*, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; *Nolan v Ford*, 100 AD2d 579, 473 NYS2d 516 [2d Dept], *affd* 64 NYS2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102(d) defines a "serious injury" as "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."

To recover under the "limitations of use" categories, a plaintiff must present objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (*see Magid v Lincoln Servs. Corp.*, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; *Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). A sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part may also suffice (*see Toure v Avis Rent A Car Systems, Inc.*, *supra*; *Dufel v Green*, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]). Further, evidence of pain and discomfort alone, unsupported by credible medical evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (*see Scheer v Koubek*, 70 NY2d 678, 518 NYS2d 788 [1987]).

Unsworn medical reports of a plaintiff's examining physician or chiropractor are insufficient to defeat a motion for summary judgment (*see Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]). However, a plaintiff may rely upon unsworn MRI reports if they have been referred to by a defendant's examining expert (*see Caulkins v Vicinanza*, 71 AD3d 1224, 895 NYS2d 600 [3d Dept 2010]; *Ayzen v Melendez*, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]).

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see Dufel v Green*, *supra*; *Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; *Pagano v Kingsbury*, *supra*). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see Burns v Stranger*, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; *Rich-Wing v Baboolal*, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendants have failed to establish their prima facie entitlement to judgment as a matter of law that plaintiff did not sustain an injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see Charley v Goss*, 12 NY3d 750, 876 NYS2d 700 [2009]; *Toure v Avis Rent A Car Sys.*, *supra*; *Smith v Hartman*, 73 AD3d 736, 899 NYS2d 648 [2d Dept 2010]). Despite Dr. Finkel concluding in his report that the strains that plaintiff sustained to her cervical and lumbar spines as a result of the subject accident have resolved, and that there is no evidence of "sequelae relative to the motor vehicle accident in question," Dr. Finkel found significant range of motion limitations in the cervical and lumbar regions of plaintiff's spine during an examination of plaintiff conducted more than two years after the accident (*see Britt v Bustamante*, 77 AD3d 781, 909 NYS2d 138 [2d Dept 2010]; *Kjono v Fenning*, 69 AD3d 581, 893 NYS2d 157 [2d Dept 2010]; *Held v Heideman*, 63 AD3d 1105, 883 NYS2d 246 [2d Dept 2009]). In addition, Dr. Finkel failed to address whether the subject accident aggravated a previously quiescent degenerative condition, even though he states in his report that plaintiff suffers from degenerative changes in her cervical and lumbar spines (*see Keenum v Atkins*, 82 AD3d 843, 918 NYS2d 547 [2d Dept 2011]; *Benson v Lillie*, 72 AD3d 1619, 901 NYS2d 769 [2d Dept 2010]; *McKenzie v Redl*, 47 AD3d 775, 850 NYS2d 545 [2d Dept 2008]).

Furthermore, defendants failed to meet their prima facie burden of showing that plaintiff did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts constituting her usual and customary activities for not less than 90 days during the 180 days immediately following the accident (*see Marmar v IF USA Express, Inc.*, 73 AD3d 868, 899 NYS2d 884 [2d Dept 2010]; *Ismail v Tejada*, 65 AD3d 518, 882 NYS2d 915 [2d Dept 2009]; *Scinto v Hoyte*, 57 AD3d 646, 870 NYS2d 61 [2d Dept 2008]). Dr. Finkel failed to relate any of his findings to 90/180 category of serious injury (*see Ballard v Cunneen*, 76 AD3d 1037, 908 NYS2d 443 [2d Dept 2010]; *Torres v Performance Auto. Group, Inc.*, 36 AD3d 894, 894, 829 NYS2d 181 2d Dept [2007]). While a defendant is permitted to use a plaintiff's deposition testimony to establish that he or she did not sustain a nonpermanent injury that prevented him or her from performing substantially all of his or her material daily activities for at least 90 of the 180 days immediately following the accident (*see e.g. Neuburger v Sidoruk*, 60 AD3d 650, 875 NYS2d 144 [2d Dept 2009]; *Shaw v Jalloh*, 57 AD3d 647, 869 NYS2d 189 [2d Dept 2008]; *Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664, 852 NYS2d 287 [2d Dept 2008]), in the instant matter, defendants failed to submit plaintiff's deposition transcript or any other evidence to refute plaintiff's claim (*see Ismail v Tejada, supra; Hossain v Singh*, 63 AD3d 790, 882 NYS2d 137 [2d Dept 2009]). Thus, the proof submitted by defendants failed to objectively demonstrate that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see Fudol v Sullivan*, 38 AD3d 593, 831 NYS2d 504 [2d Dept 2007]; *Abraham v Bello*, 29 AD3d 497, 816 NYS2d 118 [2d Dept 2006]).

Inasmuch as 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 Pfeiffer v New York Cent. Mut. Fire Ins. Co.*, 71 AD3d 971, 900 NYS2d 71 [2d Dept 2010]; *McKenzie v Redl, supra*). Accordingly, defendants' motion for summary judgment is denied.

Plaintiff cross-moves for summary judgment in her favor on the issue of liability, arguing that Lilian Ramirez's negligent operation of the Suffolk Transportation Service, Inc. vehicle was the sole proximate cause of the subject accident. Plaintiff also contends that defendants are unable to provide a non-negligent excuse for the subject accident's occurrence. In support of the cross motion, plaintiff submits the certified police accident report and her own affidavit. Defendants oppose the motion on the ground that there are material issues of fact as to whether plaintiff brought her vehicle to a sudden stop at a green light, thus causing the subject collision. In opposition to the motion, defendants submit a copy of plaintiff and Lilian Ramirez's deposition transcripts.


It is well settled that "where a vehicle is lawfully stopped, there is a duty imposed upon the operators of vehicles traveling behind it in the same direction to come to a timely halt" (*Edney v Metropolitan Suburban Bus Authority*, 178 AD2d 398, 398, 577 NYS2d 102 [2d Dept 1991]; *see Napolitano v Galletta*, 85 AD3d 881, 925 NYS2d 163 [2d Dept 2011]; *Ortiz v Hub Truck Rental Corp.*, 82 AD3d 725, 918 NYS2d 156 [2d Dept 2011]). Moreover, a driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle (*see Kastritsios v Marcello*, 84 AD3d 1174, 923 NYS2d 863 [2d Dept 2011]; *Plummer v Nourddine*, 82 AD3d 1069, 919 NYS2d 187 [2d Dept 2011]; *Nsiah-Ababio v Hunter*, 78 AD3d 672, 913 NYS2d 659 [2d Dept 2010]). Therefore, a rear-end collision establishes a prima facie case of negligence on the part of the operator of the rear

vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see Tutrani v County of Suffolk*, 10 NY3d 906, 861 NYS2d 610 [2008]; *Scheker v Brown*, 85 AD3d 1007, 925 NYS2d 528 [2d Dept 2011]; *Klopchin v Masri*, 45 AD3d 737, 846 NYS2d 311 [2d Dept 2007]). A non-negligent explanation may include evidence of mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause (*see DeLouise v S.K.I. Wholesale Beer Corp.*, 75 AD3d 489, 904 NYS2d 761 [2d Dept 2010]; *Lampkin v Chan*, 68 AD3d 727, 891 NYS2d 113 [2d Dept 2009]; *Leal v Wolff*, 224 AD2d 392, [2d Dept 1996]).

Here, plaintiff has established a prima facie case that she was not the proximate cause of the subject collision by submitting her affidavit, in which she avers that she brought her vehicle to a gradual stop when the vehicle ahead of her stopped to allow another vehicle to make a left turn, and that she was stopped for a few seconds before her vehicle was impacted from the rear by a bus owned by Suffolk Transportation Service, Inc. and operated by Lilian Ramirez (*see Volpe v Limoncelli*, 74 AD3d 795, 902 NYS2d 152 [2d Dept 2010]; *Campbell v City of Yonkers*, 37 AD3d 750, 833 NYS2d 101 [2d Dept 2007]; *Maccauley v ELRAC, Inc.*, 6 AD3d 584, 775 NYS2d 78 [2d Dept 2004]; *see generally Winegrad v New York Univ. Med. Ctr.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). In opposition to plaintiff's prima facie showing, defendants failed to provide a non-negligent explanation for the subject accident's occurrence (*see Hill v Ackall*, 71 AD3d 829, 895 NYS2d 837 [2d Dept 2010]; *Johnson v First Student, Inc.*, 54 AD3d 492, 863 NYS2d 303 [3d Dept 2008]; *Faul v Reilly*, 29 AD3d 626, 816 NYS2d 502 [2d Dept 2006]). "A claim that the driver of the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence" (*Ayach v Ghazal*, 25 AD3d 742, 743, 808 NYS2d 759 [2d Dept 2006]; *see Franco v Breceus*, 70 AD3d 767, 895 NYS2d 152 [2d Dept 2010]; *Ramirez v Konstanzer*, 61 AD3d 837, 878 NYS2d 381 [2d Dept 2009]; *Jumandeo v Franks*, 56 AD3d 614, 867 NYS2d 541 [2d Dept 2008]). Thus, Lilian Ramirez's allegations that she was approximately 20 feet away from plaintiff's vehicle when she noticed the brakes lights come on, and that plaintiff's vehicle came to a sudden stop at the intersection under a steady green light, fail to raise a triable issue of fact or to demonstrate any negligence on the part of plaintiff that contributed to the accident (*see Cortes v Whelan*, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; *Staton v Ilic*, 69 AD3d 606, 892 NYS2d 486 [2d Dept 2010]; *Kosinski v Sayers*, 294 AD2d 407, 743 NYS2d 124 [2d Dept 2002]). Accordingly, plaintiff's motion for partial summary judgment is granted.

Plaintiff is directed to serve a copy of this order with notice of its entry upon the Calendar Clerk of this Court. Upon such service, the Calendar Clerk is directed to place this matter on the CCP calendar for the next available date.

Dated: OCT 31 2011



J.S.C.
JAMES S. COUGHLIN, JUDGE

____ FINAL DISPOSITION NON-FINAL DISPOSITION