

Duran v Kabir

2011 NY Slip Op 34049(U)

August 15, 2011

Sup Ct, Bronx County

Docket Number: 304856/09

Judge: Diane A. Lebedeff

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This opinion is uncorrected and not selected for official publication.

PART 17

AUG 26 2011

- Case Disposed
- Settle Order
- Schedule Appearance

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

-----X
DURAN,CLAUDIA

Index No. **0304856/2009**

-against-

Hon. **DIANE A. LEBEDEFF**

KABIR,HUMAYUN

Justice.

-----X

The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGEMENT DEFENDANT**
 Noticed on **March 14 2011** and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	3	
Replying Affidavit and Exhibits	4	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law	2	

Upon the foregoing papers this

Motion is Respectfully Referred to:
 Justice: _____
 Dated: _____

**MOTION IS DECIDED IN ACCORDANCE WITH
 THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 8/15/2011

Hon. 
DIANE A. LEBEDEFF, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 17
-----X

CLAUDIA DURAN,

Plaintiff,

-against-

Index No.: 304856/09

HUMAYUN KABIR,

Defendant.

-----X

HON. DIANE A. LEBEDEFF:

Defendant Humayun Kabir moves for summary judgment and dismissal of plaintiff's complaint on the grounds that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d) and that he is not liable for plaintiff's alleged injuries.

In the complaint, plaintiff Claudia Duran seeks to recover for the serious injuries she allegedly sustained in a motor vehicle accident which occurred on August 29, 2008 at approximately 7:30 pm at the intersection of West End Avenue and 96th Street in Manhattan. Plaintiff, then 30-years old, was seat-belted driver of a vehicle when it came into contact with defendant's vehicle. The facts surrounding the circumstances of the accident are in dispute.

Serious Injury Motion

Plaintiff claims that, as a result of the accident, she has sustained a "serious injury," as defined by the Insurance Law. According to plaintiff's Bill of Particulars, she sustained disc bulges, decreased range of motion in her cervical and lumbar spines, radiculopathy and exacerbation of pre-existing, asymptomatic degeneration of the cervical and lumbar spines.

Threshold

Pursuant to Insurance Law § 5102 (d), a “serious injury” is defined, in relevant part, as follows:

“a personal injury which results in ... 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.”

“Because summary judgment is a drastic measure that deprives a party of its day in court, it may be granted only if no genuine triable issue of fact is presented” (*F. Garofalo Elec. Co., Inc. v New York Univ.*, 300 AD2d 186, 188 [1st Dept 2002], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Plaintiff’s Cervical and Lumbar Spines

In support of his motion, defendant argues that, based upon the submission of his physicians’ affirmed reports, plaintiff did not suffer a serious injury. Plaintiff was examined by defendant’s designated neurologist on December 8, 2010. Following what he characterized as a normal neurological examination, the neurologist found and concluded that plaintiff had full range of motion in all areas of her back and had no permanency or residuals as a result of the subject accident (Dr. Sachdev affirmation, dated December 8, 2010, p. 5). Defendant’s radiologist reviewed MRI studies of plaintiff’s lumbar and cervical spines taken four weeks after the accident. With respect to plaintiff’s cervical spine, the radiologist reported regional discogenic changes consistent with plaintiff’s age and unrelated to the accident (Dr. Tantleff affirmation, dated January 5, 2010, p. 1). With regard to plaintiff’s lumbar spine the radiologist

found regional discogenic changes consistent with longstanding degenerative disc disease and no evidence of acute or recent injury. He opined that these findings were also not causally related to the accident (Dr. Tantleff affirmation, p. 2).

In opposition, plaintiff submits the affirmed reports of her treating physicians and the affirmed report of an IME physician. Plaintiff was treated by a physiatrist and a neurologist, and she was examined by another physiatrist, at the direction of her insurance carrier. Each of these physicians relate that plaintiff's complaints and restrictions of motion are causally related to the accident. Plaintiff's physicians specifically conclude that, following the accident, plaintiff suffered significant limitations of range of motion with respect to her cervical and lumbar spines and that those limitations continue presently.

Additionally, plaintiff's physicians concluded that her injuries are "permanent and will require lifelong medical care" (Dr. Guy affirmation, undated, ¶ 5) and address any gap in treatment argument asserted by defendant by stating that plaintiff did not respond well to physical therapy treatment and that such therapy "reached an endpoint ... for the cervical, thoracic and lumbar spine" (Dr. Roth affirmation, dated January 8, 2009, pp. 4-5).

Plaintiff also submitted to MRI studies. As to the cervical spine, plaintiff's radiologist reported multiple bulges with central canal stenosis (Dr. Diamond report, dated September 26, 2008, p. 2). As to the lumbar spine, plaintiff's radiologist again reported multiple bulges and flattening of the ventral thecal sac (Dr. Diamond report, dated October 3, 2008, p. 1). Contrary to defendant's argument, plaintiff's MRI reports, although unsworn, are admissible because they are referenced by defendant's expert, Dr. Tantleff (*see Zarate v McDonald*, 31 AD3d 632, 633 [2d Dept 2006], "Because the results of the MRI report were referred to in the affirmed medical

report of the defendant's examining neurologist, the plaintiff and his treating physician properly submitted and relied on the MRI report in opposition to the motion"; *cf. Clemmer v Drah Cab Corp.*, 74 AD3d 660 [1st Dept 2010]).

Plaintiff's reporting physicians, thus, conclude that her injuries are traumatically related to the accident. Together, these reports raise material issues of fact and conflict with the findings and conclusions of defendant's reporting physicians.

Based upon the foregoing, the issue presented cannot be determined as a matter of law. Conflicting medical proof submitted on the motion, precludes summary judgment (*see Tsamos v Diaz*, 81 AD3d 546 [1st Dept 2011], citing *Grill v Keith*, 286 AD2d 247 [1st Dept 2001]). Accordingly, the motion is denied on the issue of whether plaintiff sustained a "serious injury" within the meaning of the Insurance Law.

90/180 Category

The Court will not address defendant's argument with respect to a claim by plaintiff under the 90/180 day category of the Insurance Law because such claim is neither alleged in plaintiff's bill of particulars nor addressed by plaintiff in her opposition. In addition, given plaintiff's choice to not assert a 90/180 day claim against defendant in the first instance, plaintiff is precluded from asserting such claim at a later date.

* * *

Liability Motion

The circumstances surrounding the subject accident are in dispute. Indeed, defendant testified that, shortly after picking up passengers in his cab at the intersection of 102nd or 103rd Streets, he continued southbound on West End Avenue toward 96th Street (Kabir deposition,

dated May 13, 2010, pp. 13, 15-16). He further testified that his highest rate of speed was 20-25 miles per hour (Kabir deposition, p. 28). Defendant testified that, while he proceeded into the intersection of West End Avenue and 96th Street on a green light, the vehicle driven by plaintiff, traveling northbound on West End Avenue, made a sudden and unexpected turn into 96th Street, and the front of plaintiff's vehicle collided with the left front 1/4 of defendant's vehicle (Kabir deposition, pp. 30, 33). Defendant argues that plaintiff's turn was in violation of State and City traffic statutes (*see* New York City Traffic Code §§ 4-03, 4-03[a][4] & Vehicle and Traffic Law § 1141).

In contrast, plaintiff testified that, upon approaching the subject intersection, she saw defendant's vehicle in the right southbound lane just north of 96th Street, where he was picking up passengers (Duran deposition, dated August 4, 2010, p. 51). She further testified that she stopped in the left turn lane on West End Avenue, in preparation for turning into 96th Street (Duran deposition, p. 48). Plaintiff testified that, upon seeing the green turn arrow in her favor, she began her left turn while defendant was still picking up passengers (Duran deposition, pp. 50-51). She further testified that upon making her turn into 96th Street, she felt a heavy impact of defendant's vehicle hitting her right front passenger side door (Duran deposition, p. 60).

Given the vastly differing accounts of the accident, as testified to by plaintiff and defendant, whereby both testified that the other's vehicle hit their own, and each testified that defendant picked up passengers from different locations, numerous issues of fact are raised, making summary resolution of this portion of the motion inappropriate (*see Zhinminay v Cavus*, 41 AD3d 289, 289 [1st Dept 2007], "Neither plaintiff nor defendant ... gave clear testimony on precisely what happened immediately before the accident, instead offering equivocal

recollections of the relevant events. Given the inconsistencies, lack of clarity and issues of credibility in the record, the cause of the accident should be resolved ... before a fact-finder, rather than on summary judgment”; internal citations omitted; *see also McFadden v Bruno*, 37 AD3d 177, 177 [1st Dept 2007], “conflicting testimony ... raise triable issues regarding credibility and comparative fault that are not appropriate for resolution on a motion for summary judgment”; *Williams v Bonowicz*, 296 AD2d 401, 401 [2d Dept 2002], “The conflicting deposition testimony concerning the incident presents credibility issues for the jury”).

Accordingly, the motion is denied on the issue of liability.

* * *

In accordance with the foregoing, the motion is denied.

This decision constitutes the order of the Court.

Dated: August 15, 2011



Diane A. Lebedeff, J.S.C.