

Staton v Varriale
2012 NY Slip Op 30198(U)
January 24, 2012
Supreme Court, Queens County
Docket Number: 1066/09
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
 CIVIL TERM - IAS PART 34 - QUEENS COUNTY
 25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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MAGGIE STATON and MECCA STATON, an	Index No.: 1066/09
Infant over fourteen (14) years of age	
by her legal guardian, MAGGIE STATON,	Motion Date: 01/19/2012
Plaintiff,	Motion No.: 26
- against -	Motion Seq.: 2

STEPHEN VARRIALE, MADDIE MAY and
 NATHANIEL HAYES,

Defendants.

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The following papers numbered 1 to 19 were read on this motion by defendant Stephen Varriale for an order granting summary judgment dismissing plaintiffs' complaint and all cross-claims on the issue of liability; and secondly, dismissing the complaint of plaintiff MECCA STATON on the ground that said plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104; and the cross-motion of defendant NATHANIEL HAYES for an order granting summary judgment dismissing the complaint of MAGGIE STATON on the ground that she did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....	1 - 6
Defendant Hayes' cross-motion.....	7 - 11
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In this negligence action, plaintiffs MAGGIE STATON AND MECCA STATON, seek to recover damages for personal injuries they each sustained as a result of a motor vehicle accident that

occurred on April 17, 2011 between the vehicle owned and operated by defendant Stephen Varriale and the vehicle owned by defendants Maddie May and Nathaniel Hayes and operated by defendant Hayes. Maggie Staton and her granddaughter Mecca Staton were passengers in the Hayes vehicle. The accident took place on the New Jersey Turnpike Northbound at Route 75. Plaintiffs Maggie Staton and Mecca Staton were allegedly injured as a result of the accident.

The plaintiffs commenced this action by filing a summons and verified complaint on April 23, 2009. Issue was joined by service of defendant Varriale's verified answer dated June 11, 2009. Defendant Hayes served an answer with cross-claim dated June 8, 2009.

Defendant Varriale now moves for an order pursuant to CPLR 3212(b), dismissing plaintiffs' complaint and all cross-claims on the issue of liability; and secondly, dismissing the complaint of plaintiff MECCA STATON on the ground that said plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104 and dismissing the complaint of plaintiff Maggie Staton on the ground that the plaintiffs' bill of particulars does not state that Maggie Staton sustained any injuries as a result of the accident.

In support of the motion, the defendant submits an affidavit from counsel, Scott W. Driver, Esq., a copy of the pleadings; a copy of plaintiffs' verified bill of particulars; copies of the transcripts of the examinations before trial of Mecca Staton, Maggie Staton, Steven Varriale and Nathaniel Hayes; and the affirmed medical report of orthopedist Dr. Michael Katz regarding his examination of Mecca Staton.

Defendant Stephen Varriale, a resident of Long Island, testified at his examination before trial held on May 5, 2011, that on the date of the accident he was operating his vehicle on the New Jersey Turnpike on his way home from Maryland with his wife and two other passengers. He stated that he was driving in the far right lane and that traffic was moving at approximately 20 miles per hour when his vehicle was struck in the rear by the vehicle operated by the Nathaniel Hayes.

Defendant Nathaniel Hayes, age 79, testified on May 5, 2011, that he is a resident of Queens County and that he resides with Maddie May and his grandchild Mecca Staton, age 17. He stated that on the date of the accident he was operating the vehicle owned by Maddie May on the New Jersey Turnpike. He was returning home from a Thanksgiving trip to Richmond, Virginia with Maggie Staton in the front passenger seat and Mecca Staton in the rear

passenger seat. He stated that he was driving in the right lane in heavy traffic at about 30 miles per hour when the front of his vehicle hit the rear of the Varriale vehicle. He stated that the other vehicle slowed down and he "ran into him" while the other vehicle was still moving. He testified that he was issued a summons by the police for reckless driving.

Plaintiff, Maggie Staton testified at her deposition on March 22, 2011 that she lives with Nathaniel Hayes, her aunt Maddie May and her three grandchildren including Mecca. She testified that she is the legal guardian of Mecca. She stated that on the date of the accident she was a front seat passenger in the vehicle being driven by Nathaniel Hayes. She stated that before the accident she observed that the vehicle in front of hers was driving slowly in heavy traffic. She stated that the vehicle in front just stopped without giving any warning and Nathaniel struck the vehicle. She stated that Nathaniel did not get a summons at the scene.

Mecca Staton, age 17, testified that she lives with her grandmother and legal guardian, Maggie Staton and with Nathaniel Hayes. She stated that at the time of the accident she was in tenth grade and that she did not miss any school as a result of the accident. She testified that Nathaniel Hayes was driving and she was a rear seat passenger. Her grandmother, Maggie Staton was a front seat passenger. She stated that at the time of the impact she was resting with her eyes closed. She did not see her vehicle strike the car in front of it but she felt a heavy impact and felt her vehicle come to an abrupt stop. She stated that she hit her head on the driver's seat in front of her. She stated that an ambulance arrived at the scene and she told the personnel that she was fine and didn't feel any pain. However, Mecca testified that the next day, December 1, 2008, she began to feel pain in her neck, right shoulder, and back, and sought treatment at Innovation Motivation Medical Center where she received physical therapy three times per week for five months. She stated that she stopped treatment because, "I wasn't feeling that much pain. The only time I feel pain is when it rains". She also went to a chiropractor for six or seven months and she stopped because she wasn't feeling that much pain. She also testified that she did not injure her left shoulder nor her knees or left elbow. When asked if she has pain now she stated, "just when it rains."

Liability

The defendant Stephen Varriale contends that co-defendant Hayes was negligent in the operation of his vehicle in striking Varriale's vehicle in the rear. Varriale's counsel contends that

the accident was caused solely by the negligence of defendant Nathaniel Hayes in that his vehicle was traveling too closely in violation of VTL § 1129 and that Hayes failed to bring his vehicle to a stop prior to rear-ending the plaintiff's vehicle. Counsel contends, therefore, that Varriale is entitled to summary judgment dismissing the plaintiffs' action and all cross-claims against him because Hayes was solely responsible for causing the accident while Varriale was free from culpable conduct.

Hayes' attorney has not submitted an affirmation in opposition to Varriale's motion for summary judgment with respect to liability although he has made a cross-motion to dismiss Maggie Staton's complaint on threshold grounds. Plaintiff's counsel also has not submitted opposition to Varriale's motion for summary judgment dismissing the action against Varriale on the issue of liability.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his position (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

"When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (Macaulley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (see Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 [2d Dept. 2007]; Reed v New York City Transit Authority, 299 AD2d 330 [2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d 787 [2d Dept. 2004]).

Here, defendant Varriale testified that his vehicle was slowing down in traffic when it was struck from behind by Hayes' motor vehicle. Thus, Varriale satisfied his prima facie burden of establishing entitlement to judgment as a matter of law on the issue of liability dismissing the plaintiff's action and all cross-claims (see Volpe v Limoncelli, 74 AD3d 795 [2d Dept. 2010]; Vavoulis v Adler, 43 AD3d 1154 [2d Dept. 2007]; Levine v Taylor, 268 AD2d 566 [2000]).

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to plaintiff and/or co-defendant Hayes to raise a triable issue of fact as to whether Varriale was also negligent, and if so, whether that negligence contributed to the happening of the accident (see Goemans v County of Suffolk, 57 AD3d 478 [2d Dept. 2007]). Neither plaintiff nor Hayes opposed the motion on the issue of liability. Therefore, this court finds that the neither party provided evidence as to a non-negligent explanation for the accident sufficient to raise a triable question of fact (see Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Cavitch v Mateo, 58 AD3d 592 [2d Dept. 2009]; Garner v Chevalier Transp. Corp., 58 AD3d 802 [2d Dept. 2009]; Kimyagarov v Nixon Taxi Corp., 45 AD3d 736 [2d Dept. 2007]).

Accordingly, Varriale's motion to dismiss the plaintiff's action against him with respect to liability is granted.

Threshold

Defendant Varriale also moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that neither plaintiff, Maggie Staton nor Mecca Staton suffered a serious injury as defined by Insurance Law § 5102. Defendant Hayes cross-moves to dismiss the complaint of plaintiff Maggie Staton only and his counsel Ann Wang, Esq. states that she relies on the same grounds set forth in the affirmation submitted by Scott Driver, Esq., on behalf of Varriale.

In the plaintiff's verified bill of particulars, Mecca states that as a result of the accident she sustained, inter alia, "significant limitation of and/or consequential loss of use of cervical and lumbar spine and right shoulder" as well as bulging discs at L3-L4 and L5-S1, right shoulder sprain and traumatic right shoulder rotator cuff tear. She states that she was not confined to her bed or home after the accident but that she was partially disabled for 6 or 7 months after the accident. The bill of particulars does not set forth any injuries sustained by plaintiff Maggie Staton individually.

Defendant Varriale also submits the affirmed medical report of Dr. Michael J. Katz, a board certified orthopedic surgeon who examined plaintiff, Mecca Staton, on behalf of the defendants on August 1, 2011. Mecca told Dr. Katz that she injured her head, neck, back, both shoulders, the left elbow, and her left knee. At the time of the examination she stated that she had pain in her back when bending and that her neck and back hurt when it rains or snows. Dr. Katz performed objective and quantified range of motion testing and found that Mecca had no limitations of range of

motion of the cervical spine, thoracolumbosacral spine, right shoulder, left shoulder, left elbow and left knee. He concluded that Mecca sustained cervical strain, resolved; thoracolumbosacral strain, resolved; bilateral shoulder contusion resolved; left elbow contusion resolved; and left knee contusion, resolved. He states that the plaintiff is not disabled and shows no signs or symptoms of permanence relative to the musculoskeletal system and relative to the accident of 11/30/08.

Varriale's counsel contends that the medical report of Dr. Katz together with the transcript of Mecca Staton's examination before trial are sufficient to establish, prima facie, that Mecca Staton has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

With respect to Maggie Staton counsel asserts that her action should be dismissed as a matter of law as said plaintiff has not alleged any injuries in her bill of particulars and failed to provide any authorizations or any medical records regarding any claims of injury despite repeated demands.

In opposition, plaintiff's attorney Andrew Hirschhorn, Esq., submits his own affirmation as well as the affidavit of Maggie Staton dated September 30, 2011; the affirmed medical reports of Dr. Beck with regard to Maggie Staton dated May 3, 2009 and with respect to Mecca Staton dated May 4, 2010 and the report of Dr. Zhang with respect to Maggie Staton dated April 19, 2009.

Plaintiff Maggie Staton submits a report from Dr. Zhang indicating that Dr. Zhang examined Maggie Staton on April 19, 2009. That report indicates that plaintiff had limitations of range of motion of the cervical spine, right shoulder and lumbar spine. Dr. Beck states that he examined Maggie Staton on May 3, 2009 five months after the accident. At that time he found limitations of range of motion of the cervical spine, lumbar spine and right knee. He refers to MRI studies which are not submitted to the court which show partial tear of the ACL of the right knee and disc degenerations and protrusions. He states he treated the plaintiff with paraspinal lidocaine injections. Maggie Staton also submits an affidavit dated September 11, 2011 in which she describes the injuries and treatment of her granddaughter Mecca Staton. She does not provide any information regarding her own

injuries or treatment.

Plaintiff also submits the affirmation of Dr. Paul Beck as to Mecca Staton dated May 4, 2010. He states that his examination on March 28, 2010 date showed limitations of range of motion of the left elbow. On May 4, 2010, she exhibited loss of range of motion of the cervical spine, lumbar spine and right shoulder. He treated her with paraspinal injections of lidocaine. He last saw her on June 10, 2010 and administered additional injections.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) 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 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

As the complaint and all cross-claims were dismissed against Stephen Varriale on the issue of liability, Varriale's motion to dismiss the complaint on the issue of physical injury under the Insurance Law is academic.

In his cross-motion defendant Hayes moved only to dismiss the complaint of Maggie Staton individually. The motion to dismiss the complaint of Maggie Staton, individually with respect to physical injury under the insurance law is granted. Here, Maggie Staton filed a complaint in which she asserted a cause of action for damages alleging that she suffered a serious injury under the Insurance Law, however, the plaintiffs's bill of particulars does not set forth her injuries. In addition, her own affidavit in opposition does not mention any injuries she sustained in the accident but only discusses Mecca's injuries. As such the plaintiff Maggie Staton's action for damages is dismissed for failure to provide any specification of damages or to provide authorizations for medical care although duly requested.

For all of the aforesaid reasons, it is hereby

ORDERED that the motion of defendant Stephen Varriale to dismiss the complaint of both plaintiff MAGGIE STATON and MECCA STATON, an infant over fourteen(14)years of age by her legal

guardian, MAGGIE STATON and all cross-claims is granted without opposition on the ground that there are no triable issues of fact against said defendant, and it is further,

ORDERED, that the cross motion of defendant NATHANIEL HAYES to dismiss the verified complaint of plaintiff MAGGIE STATON, individually on the ground that said plaintiff failed to meet the threshold requirement is granted.

The clerk is directed to enter judgment accordingly.

Dated: January 24, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.