

Walsh v Double N Equipment Rental Corp.
2012 NY Slip Op 31153(U)
April 20, 2012
Sup Ct, Queens County
Docket Number: 10572/2010
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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ANNETTE WALSH, Index No.: 10572/2010
Plaintiff, Motion Date: 04/05/12
- against - Motion No.: 38
DOUBLE N EQUIPMENT RENTAL CORP., Motion Seq.: 2
SHANTI PRASAD and HRIDAYESHWER PRASAD,
Defendants.

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The following papers numbered 1 to 17 were read on this motion by defendants SHANTI PRASAD and HRIDAYESHWER PRASAD for an order(1) pursuant to CPLR 3212(b) granting defendants summary judgment on the issue of liability and (2)for an order granting summary judgment to the defendants and dismissing the plaintiff's action on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers Numbered

Notice of Motion-Affidavits-Exhibits-Memo of Law ...1 - 8
Affirmation in Opposition-Affidavits-Exhibits.....9 - 15
Reply Affirmation.....16 - 17

This is a personal injury action in which plaintiff, ANNETTE WALSH, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on December 10, 2007, at the intersection of 35th Avenue and 162nd Street, Queens County, New York.

At the time of the accident, the plaintiff's vehicle was proceeding through the intersection, which was controlled by a traffic light, when her vehicle was hit by the vehicle owned by defendant HRIDAYESHWER PRASAD and operated by defendant SHANTI PRASAD. Plaintiff claims that the light was green in her favor. Defendant concedes that she proceeded through a red light but did

so at the direction of a flagperson, employed by defendant DOUBLE N EQUIPMENT RENTAL CORPORATION, who was performing construction work at the intersection. As a result of the collision, the plaintiff allegedly injured her cervical spine and lumbar spine.

Plaintiff commenced an action against the defendants by filing a summons and complaint on April 28, 2010. Issue was joined by service of defendant Prasad's answer dated May 26, 2010. Co-defendant DOUBLE N EQUIPMENT RENTAL CORP., failed to answer the summons and complaint, and by decision dated October 6, 2010, this Court granted a default judgment in favor of the plaintiff on the issue of liability and set the matter down for an assessment of damages at the time of the trial of the remaining defendants.

The Prasad defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment on the issues of liability and serious injury and dismissing plaintiff's action against them. In support of the motion, the defendants submit an affidavit from counsel, Vera Tsai, Esq., a copy of the transcript of the examinations before trial of the plaintiff, Annette Walsh and defendant Shanti Prasad, the affirmed medical report of radiologist, Dr. Sheldon Feit, the affirmed medical report of orthopedic surgeon, Dr. John Lloyd and the affirmed medical report of neurologist, Dr. Daniel Feuer.

In her verified bill of particulars, plaintiff states that as a result of the accident, she sustained, inter alia, aggravation and exacerbation of prior cervical injury and prior lumbar injury; C3-C4 posterior disc bulge, C4-C5 through C6-C7 posterior disc herniations, C7-T1 disc herniation, T2-L1 through L2-3 disc bulges, and disc herniations at L3-L4, L4-5, L5-S1, L4-5 and L5-S1. The bill of particulars states that plaintiff was confined to bed for intermittent days and confined to home for intermittent days.

In her examination before trial, the plaintiff, Annette Walsh, age 51, testified that at the time of the accident she was employed as a teacher at the New York Institute for Special Education. She stopped working there in February 2010, however, when she was injured as a result of a slip and fall on ice at school. She stated that she injured her head, neck, shoulders, left elbow, and left hip as a result of the fall. She stated that she is still in physical therapy with Dr. Taverniat at J & M Physical Therapy as a result of the injuries sustained in the fall. She was also treated by Dr. Haas at Balance Rehabilitation for injuries she sustained in the subject car accident. With respect to the automobile accident, she stated that she was traveling eastbound on 35th Avenue headed to a gas station at Francis Lewis Boulevard. As she approached the intersection of 162nd Street she observed two or three construction

vehicles parked on 162nd Street to her left. She also observed an individual who she believed to be a flagperson directing traffic on 162nd Street. The traffic signal at the intersection was green in her direction. She stated that as she approached the intersection, she observed the flagperson waving cars through the intersection on 162nd Street. She stated that "the first time I noticed him, he is waving and there are cars directly in the intersection in front of me." She stated she observed him waving cars across the intersection from her left to her right on 162nd Street. She said she saw one car go across then she entered the intersection and was struck by defendants' vehicle. As she had the green light in her favor she continued through the intersection at a rate of 25 miles per hour. She stated that since she had the green light in her favor she believed she was safe. She stated that she hit her brake to try to stop when she saw defendants' vehicle entering the intersection, however, she was going too fast to stop. In addition, she testified that her vehicle continued into the intersection after she braked due to a black ice condition. As she entered the intersection her vehicle was struck on the front bumper by the vehicle driven by defendant Shanti Prasad. She testified that she saw the flagperson pointing and laughing after the impact. As a result of the impact, she sustained severe pain to her jaw, neck, left shoulder, and lower back.

Plaintiff testified that she was driven to the emergency room the same day and was diagnosed with severe whiplash and released. She then began treating with her chiropractor and her primary care physician. She also underwent MRIs of the cervical and lumbar spine. She testified that she went back to work the day after that accident and then took intermittent days off after that. She has continued her treatment with Dr. Haas. She stated that she had not yet recovered from her motor vehicle accident when her slip and fall accident occurred in 2010.

Defendant Shanti Prasad testified that on the date of the accident she was proceeding on 162nd Street on her way to take her son to school. Her son was sitting in the front passenger seat. She stated that the intersection with 35th Avenue was controlled by a traffic light. When she approached the intersection she stated that she observed construction people and a flagperson controlling the flow of traffic. She had intended to go straight through the intersection. She stopped when she got to the intersection but a flagperson standing on 35th Avenue asked her to proceed through the intersection. She stated that although the light was red in her direction, the flagperson waved her on and told her to go. As she proceeded through the intersection, the rear passenger side of her vehicle was struck by the plaintiff's vehicle which came from 35th Avenue. She testified that she did not see the plaintiff's vehicle at any time prior to the accident. When the police officer came to

the scene she told them "I was coming and I stopped on red light and he waved me, that guy, construction guy. He asked me to proceed, so as soon as I got into the intersection, the car hit me from my rear, you know, right side." Neither she nor her son were injured as a result of the accident.

In his affirmed report dated November 20, 2009, Dr. Feit, states that he performed an independent radiology review on Annette Walsh. After reviewing the MRI of the cervical spine performed on January 19, 2008, he reports that he observed bulging discs at the C3-4, C4-5, C5-6, C6-7 and C7-T1 levels. He did not observe any herniations. He states that "the disc bulges are not posttraumatic but are degenerative secondary to annular degeneration and/or chronic ligamentous laxity." He also states that "no posttraumatic changes are identified and there are no abnormalities causally related to the injury of 12/10/0." Similarly, with respect to the lumbar spine, he observed bulging discs at L1-L2, L2-L3, and L4-5 levels. He states that the disc bulges are pre-existing degenerative changes and not related to the subject motor vehicle accident.

Dr. Lloyd, an orthopedist, examined the plaintiff on May 17, 2011. The plaintiff presented with pain in the lower back and side and back of the left hip. In his examination, Dr. Lloyd found a significant limitation of range of motion of the cervical spine and lumbar spine. His diagnosis was irritation of pre-existing degenerative disc disease of the cervical and lumbar spines. He states that the diagnosis is causally related to the accident of 12/10/07 and was an irritation of pre-existing conditions in the cervical and lumbar spines. He states that the limitations which she exhibited are not based upon objective findings and he states that he believes there may be some degree of symptom magnification.

Dr. Feuer, a neurologist, examined the plaintiff at the request of the defendants on May 17, 2011. He found no limitations of range of motion of the cervical spine. However he found a limitation of range of motion of the lumbosacral spine which produced localized non-radiating low back pain. He states that plaintiff did not demonstrate any objective neurological disability or neurological permanence which is causally related to the accident of December 2007.

Defendants' counsel contends that the action must be dismissed against the Prasads because they have demonstrated their freedom from negligence in causing the accident. Counsel asserts that because the flagperson waved the defendant into the intersection that their actions conformed to Vehicle and Traffic Law §§ 1102 and 110.

VTL § 1102 entitled "Obedience to Police Officers and Flagpersons" states: "No person shall fail or refuse to comply with

any lawful order or direction of any police officer or flagperson or other person duly empowered to regulate traffic."

Although the defendant admitted to proceeding through the intersection while the light was red, she contends that she was excused from heeding the signal pursuant to VTL 1110(a) which states:

"Obedience to and Required Traffic-control Devices:

(a) Every person shall obey the instructions of any official traffic-control device applicable to him placed in accordance with the provisions of this chapter, unless otherwise directed by a traffic or police officer."

Thus, defendant states that as she only proceeded into the intersection under the direction of the flagperson that it cannot be concluded that the defendant driver was negligent in any way in the causation of the accident.

With respect to serious injury, defendants' counsel contends that the medical reports of Dr. Lloyd, Feit and Feuer together with the transcript of the plaintiff's examination before trial are sufficient to establish, prima facie, that the plaintiff 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 his 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.

In opposition to the motion, plaintiff's counsel, Joseph B. Viener, Esq. submits his own affirmation as well as a copy of the transcript of the plaintiff's deposition, an affidavit of merit from the plaintiff the affirmed medical reports of Dr. Robert Diamond, a radiologist, Dr. Liguori, a neurologist who first examined the plaintiff on January 24, 2008, and the affirmed medical report of Dr. de Moura an orthopedist, who last examined the plaintiff on December 2, 2010.

SERIOUS INJURY/THRESHOLD

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]).

Upon review and consideration of the defendants' motion, the plaintiff's affirmation in opposition and the defendants' reply thereto, this court finds that the defendants failed to meet their prima facie burden of demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car SYS., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

In support of the defendants' motion they relied on, inter alia, the affirmed medical report of Dr. John Lloyd, dated May 17, 2011 and the affirmed medical report of Dr. Feuer dated May 17, 2011. In his report, Dr. Lloyd, a orthopedic surgeon, noted that the plaintiff had significant limitations of range of motion in his cervical and lumbar spine. Dr. Feuer also found a limitation of range of motion of the lumbosacral spine (see Mondevil v Kumar, 74 AD3d 1295; Smith v Hartman, 73 AD3d 736; Quiceno v Mendoza, 72 AD3d 669; Giacomaro v Wilson, 58 AD3d 802). Although Dr. Lloyd stated that the limitations may be due to some degree of "symptom magnification" he failed to sufficiently explain with any objective medical evidence, the basis for his conclusion that the limitations that were noted were self-limited (see Quiceno v Mendoza, supra. As the independent physicals indicated that the plaintiff has limitations of range of motion 4 years post-accident plaintiff has failed to make a prima facie showing that the plaintiff does not have a physical injury as defined in the Insurance Law (see Katanov v County of Nassau, 91 AD3d 723 [2d Dept. 2012; Astudillo v MV Transp., Inc., 84 AD3d 1289 [2d Dept. 2011]).

Since the defendants failed to meet their prima facie burden, it is unnecessary to consider whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (see Torres v Torrano, 79 AD3d 1124 [2d Dept. 2011]; Coscia v 938 Trading Corp., 283 AD2d 538 [2d Dept. 2001]).

LIABILITY

The defendants established their prima facie entitlement to judgment as a matter of law through the submission of Ms. Prasad's deposition testimony in which she stated that she proceeded through the intersection at the direction of the flagperson from the construction company. There is no dispute that she was waved through the intersection by the flagperson. Plaintiff, Ms. Walsh, also testified that she observed the defendant being waved across before she entered the intersection. The deposition of the plaintiff was not sufficient to raise a question of fact as to whether defendant's actions may have been a factor in the causation of the accident.

Although the plaintiff entered the intersection with a green light in her favor it appears that she did so as a result of the flagperson improperly directing the flow of traffic.

Thus, the deposition testimony submitted in support of the motion demonstrated that the subject motor vehicle accident was not proximately caused by any negligence on the part of Ms. Prasad (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). "The proponent of a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law" (Pollack v Margolin, 84 AD3d 1341 [2d Dept. 2011]; also see Gardella v Esposito Foods, Inc., 80 AD3d 660[2d Dept. 2011]). As stated above pursuant to VTL § 1102 Ms. Prasad was required to comply with the direction of the flagperson directing traffic at the intersection. As defendant testified that she only proceeded into the intersection under the direction of the flagperson empowered to regulate traffic, she has demonstrated prima facie that she was not negligent in any way in the causation of the accident.

In the affirmation in opposition, plaintiff's counsel did not oppose this branch of the motion. Accordingly, as the plaintiff has failed to provide any evidence or raise a question of fact with respect to whether the defendant was in any way at fault in the happening of the accident, the defendants' motion for an order granting summary judgment dismissing the plaintiffs complaint against them is granted. The action shall continue against the remaining defendant.

Accordingly, based upon the foregoing it is hereby,

ORDERED, that the motion for summary judgment by defendants SHANTI PRASAD and HRIDAYESHWER PRASAD is granted and the plaintiff's complaint and all cross-claims are dismissed against said defendants and the Clerk of Court is directed to enter judgment in their favor.

Dated: Long Island City, N.Y.
April 20, 2012

ROBERT J. MCDONALD
J.S.C.

