

McHugh v Martin

2012 NY Slip Op 31173(U)

April 26, 2012

Supreme Court, Suffolk County

Docket Number: 37944/10

Judge: Arthur G. Pitts

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Supreme Court of the State of New York
IAS Part 43 - County of Suffolk

PRESENT:

Hon. ARTHUR G. PITTS

COPY

 SYREETA C. MCHUGH,

Plaintiff,

-against-

GLENN J. MARTIN,

Defendant.

ORIG. RETURN DATE:10/7/11

ADJOURNED DATE:2/23/12

MOTION SEQ. NO.:001-MD

002-MG

PLTF'S/PET'S ATTY:

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Upon the following papers numbered 1 to - 31 read on this motion summary judgment./cross summary judgment
 Notice of Motion and supporting papers 1-12; Notice of Cross-Motion and supporting papers 13-25
 Affirmation/affidavit in opposition and supporting papers 26-28; Affirmation/affidavit in reply and supporting papers 29-31; Other
_____; (and after hearing counsel in support of and opposed to the motion) it is,

ORDERED that the defendant Glenn J. Martin's motion for summary judgment is denied under the circumstances presented herein. (CPLR 3212; Insurance Law 5102 (d)) It is further

ORDERED that the plaintiff's cross motion for summary judgment as to the issue of liability only, is granted.

The matter at bar is one for personal injuries sounding in negligence that arose out of a motor vehicle accident that occurred on June 29, 2010 on Expressway Drive North at or near the entrance to the Sunken Meadow Parkway, Smithtown, Suffolk County, New York. By way of her complaint, plaintiff Syreeta C. McHugh alleges that as a result thereof, she sustained serious personal injuries. As a basis of the instant motion, the defendant asserts that the plaintiff has not sustained such serious injury as defined by Insurance Law 5102 (d).

Said section provides in part that "serious injury means 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 and eighty days immediately following the occurrence of the injury or impairment." (Insurance Law 5102 (d)) In the context of the plaintiff's claims, the term "consequential" means important or significant (*Kordana v. Pomellito*, 121 A.D.2d 783, 503 N.Y.S.2d 198 , 200 [3rd Dept. 1986] , App. Dis. 68 N.Y.2d 848, 508 N.Y.S.2d 425) The term, "significant" as it appears in the statute has been defined as "something more than a minor limitation of use" and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment" (*Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 [1982])

On a motion for summary judgment to dismiss the complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law 5102 (d), the initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (*Rodriguez v. Goldstein*, 182 A.D.2d 396, 582 N.Y.S.2d 395, 396 [1st Dept. 1992]) . Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists. (*DeAngelo v. Fidel Corp. Services, Inc.*, 171 A.D.2d 588, 557 N.Y.S.2d 454, 455 [1st Dept. 1991]). Such proof in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 [2nd Dept. 1992]). The proof must be viewed in a light most favorable to the non-moving party. (*Cammarere v. Villanova*, 166 A.D.2d 760, 562 N.Y.S.2d 808, 810 [3rd Dept. 1990]).

The plaintiff has alleged by way of a verified bill of particulars that she has sustained the following injuries as a result of the aforesaid accident: Left upper convexity of the thoracic curvature; large extruded disc herniations left of midline both T6/7 and T7/8 that impresses the thecal sac; T6/7 is more left paramedian and impresses on the left ventral cord; T7/8 is more left sided and impresses the left thecal sac and comes in close proximity to the cord and is abutting its contour and flattening the left anterolateral margin; disc hydration loss with anterior disc extension T7/8; T9/10 central subligamentous disc herniation that impresses on the thecal sac; left convexity of lumbar curvature; reversal of lordosis with apex at L1/2; posterior disc bulges impress the thecal sac at L1/2 and L2/3; inferior endplate Schmorl's Node at L4 level; uniform increase in degree of lumbar lordosis with apex remaining at L1/2; relative straightening of lumbar curvature from L2 through L5; reversal of the cervical lordosis; posterior disc bulges impress on the thecal sac from C2/3 and C7/T1; abutting of the ventral margin of the cord at the C4/5 and C5/6; increase in the degree of reversal of the cervical lordosis; pain in the back radiating into buttocks with numbness or tingling of the lower lateral legs and lateral feet; cervical and lumbar sprain/strain with a radiculopathy; thoracic sprain/strain; post concussion syndrome; muscle spasm; headaches; pain in neck radiation into both shoulders; bruise to big toe of right foot with pain; bilateral shoulder pain; and contusions under eyes.

In support of the instant motion, the defendant has submitted the affirmed reports of Jeffrey Guttman, M.D., an orthopedist, who had the opportunity to examine the plaintiff and/or review all relevant medical records on May 27, 2011 and, after such examination, concluded as follows: As to the cervical

spine, there is a normal maintenance of the cervical curvature. "Range of motion revealed flexion to 45 degrees (45 normal), extension to 45 degrees (45 normal), right and left lateral bending to 45 degrees, (45 normal) and right left rotation to 80 degrees (80 normal) There is no paravertebral tenderness and no muscle spasms or trigger points upon palpation. Compression test and Spurling test are normal." As to the plaintiff's thoracolumbar spine, after examination Dr. Guttman found "maintenance of the normal lordotic curvature. Range of motion of flexion was to 90 degree (90 degrees normal), extension to 30 degrees (30 degrees normal), right and left lateral bending to 30 degrees (30 degrees normal) and right and left rotation. (30 degrees normal) Straight leg raise testing is negative, performed to 90 degrees bilaterally in the sitting position. There is no paravertebral tenderness and no muscle spasms or trigger points elicited upon palpation." In summation, he diagnosed the plaintiff with "status post cervical and lumbar strain" and that there was no evidence of an orthopedic disability. Accordingly, based upon the foregoing report, the defendant has demonstrated, as a matter of law, that the plaintiff has not sustained a serious injury. (see *Reeves v. Scopaz*, 227 A.D.2d 606, 643 N.Y.S.2d 620 [2nd Dept. 1996] ; *Horan v. Mirando*, 221 A.D.2d 506, 633 N.Y.S.2d 402 [2nd Dept. 1995])

In opposition thereto, the plaintiff has submitted the affirmed report of her treating physician, Timothy J. Mosomillo, D.O. and the affirmed reports of Steven Winter, M.D., a radiologist dated August 13, 2010, August 16, 2010 and September 7, 2010 "To successfully oppose the motion, plaintiffs 'must set forth competent medical evidence based upon objective medical findings and diagnostic tests to support [their] claim * * * ' of a serious injury (*Tankersley v. Szesnat*, 235 A.D.2d 1010, 1012, 653 N.Y.S.2d 184, quoting *Eisen v. Walter & Samuels*, 215 A.D.2d 149, 150, 626 N.Y.S.2d 109)." (*Trotter v. Hart*, 285 A.D.2d 772, 728 N.Y.S.2d 561, 562 [3rd Dept 2001]) However, it is well settled that "mere subjective complaints of pain alone, as well as medical opinions clearly based upon such complaints, are insufficient to raise a triable issue of fact" (*Barrett v. Howland*, 202 A.D.2d 383, 608 N.Y.S.2d 681, 682 [2nd Dept.1994]) unless such a finding by a medical expert describes the qualitative nature of the plaintiff's limitations (including specific designation of numeric percentages of the plaintiff's loss of range of motion after testing) which is based on the normal function, purpose and use of the body part, and attributed to such limitations to the injuries sustained together with further medical evidence (MRI reports indicating disc herniations) which collectively are sufficient to raise a triable issue of fact as to whether such serious injury was sustained as defined in Insurance Law 5102 (d). (*Toure v. Avis Rent a Car*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 [2002])

Herein, Dr. Mosomillo, the plaintiff's treating physician, states by way of his affirmed report that on September 19, 2011 he performed various range of motion testing with a hand held goniometer and concluded the following results on the cervical spine: rotation right 70 degrees (normal 80 degrees); rotation left 70 degrees (normal 80 degrees); flexion is 75 (normal 90); extension 25 degrees (normal 30 degrees; left lateral flexion is 35 (normal is 45); right lateral flexion is 35 (normal is 45). He further concluded after testing the following results as to the plaintiff's lumbar/thoracic spine: flexion 70 degrees (normal 90); extension 20 degrees (normal 30); left rotation 35 degrees (normal 45); right rotation 40 degrees (normal 45); left side bending 35 (normal 45); right side bending 35 (normal 45). After examination and review of MRI reports from Dr. Winter, as well as the films , he diagnosed the plaintiff with having sustained the following injuries as a result of the motor vehicle accident which occurred on

June 29, 2010: lumbar displace disc/bulging discs; lumbar radiculopathy; cervical displaced discs and bulging discs; cervical radiculopathy;; and thorasic herniated discs/displaced discs. He concluded that "it is my opinion that within a reasonable degree of medical certainty that the patient....has suffered a serious injury, namely a significant limitation in the use and function of her cervical thoracic and lumbar spine.

As set forth above, it is well settled that " in order to successfully oppose the motion for summary judgment, the plaintiff must set forth competent medical evidence based upon objective medical findings and diagnostic tests to support the claim. (*Tankersley v. Szesnat*, supra) Upon review of the record before the Court, it is clear that the reports proffered by the plaintiff are competent medical evidence that raise triable issues of fact as to whether she sustained a serious injury. (see *Shay v. Jerkins*, 263 A.D.2d 475, 692 N.Y.S.2d 730 [2nd Dept. 1999] Accordingly, pursuant to the foregoing and under the circumstances presented herein, the defendant's motion for summary judgment is denied.

The plaintiff has cross moved for summary judgment as to the issue of liability only. As set forth above, the plaintiff alleges that she sustained serious injuries as a result of a motor vehicle accident that occurred on June 29, 2010. She testified at her examination before trial that she was traveling in the left lane of the north service road of the Long Island Expressway, near the entrance to Sunken Meadow Parkway, when she heard her tire pop. She pulled over into the left shoulder, her car remaining partially in the lane, turned on her hazard lights and called her insurance company. While in the car looking for a phone number in the glove compartment, she was struck in the rear by a vehicle driven by defendant Glenn Martin. The defendant testified at his deposition that he was driving in the left lane of the service road of the Long Island Expressway when he struck the rear of the plaintiff's car. Immediately prior to the collision, he was looking down adjusting the car radio.

The extraordinary remedy of summary judgment should only be granted when the movant demonstrates the absence of a material issue of fact (*Benincasa v. Garrubbo*, 141 A.D.2d 636 [1988]). Summary judgment "is rarely granted in negligence cases since the very question of whether a defendant's conduct amounts to negligence is inherently a question for the trier of fact in all but the most egregious instances. (*Johannsdotter v. Knoh*, 90 A.D.2d 842, citing *Wilson v. Sponable*, 81 A.D.2d 1, 5; Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3212:8, p. 430). "Even where facts are conceded there is often a question as to whether the defendant or the plaintiff acted reasonably under the circumstances. This can rarely be decided as a matter of law..." (*Andre v. Pomeroy*, 35 N.Y.2d 361, 364 [1974]).

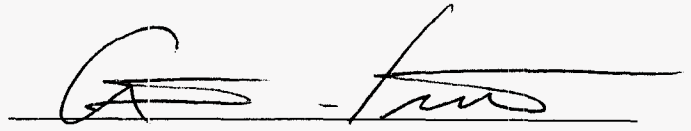
However, "a rear-end collision with a stopped automobile creates a prima facie case of liability with respect to the operator of the moving vehicle, imposing a duty of explanation on the operator" (*Hurley v. Izzo*, 248 A.D.2d 674, 670 N.Y.S.2d 575 [2nd Dept.1998], citing *Gambino v. City of New York*, 205 A.D.2d 583, 613 N.Y.S.2d 417; *Starace v. Inner Circle Qonexions*, 198 A.D.2d 493, 604 N.Y.S.2d 179; *Edney v. Metropolitan Suburban Bus Auth.*, 178 A.D.2d 398, 577 N.Y.S.2d 102; *Benyarko v. Avis Rent A Car Sys.*, 162 A.D.2d 572, 556 N.Y.S.2d 761). "When a driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate of speed and use reasonable care to avoid colliding with the other vehicle." (*Caputo v. Schumeyer*, 252 A.D.2d 514, 675 N.Y.S.2d 372 [2nd Dept. 1998])

In opposition thereto, the defendant has submitted an affirmation of his counsel which raises no issue of fact as to the conduct of the parties. Clearly, the defendant is required to maintain a reasonably safe distance from the plaintiff's vehicle and also to be aware of traffic conditions (Vehicle and Traffic Law § 1129[a]). He also had the duty to operate his automobile with reasonable care with regard to the actual and potential hazards existing from road and traffic conditions; that is, to have his vehicle under reasonable control and to see that which, under the facts and circumstances, he should have seen by the proper use of his senses (1 NY PJI2d at 224, 225 ; *McCarthy v. Miller*, 139 A.D.2d 500, 526 N.Y.S.2d 848 [2nd Dept.1988]) Herein, it is undisputed that the plaintiff's disabled vehicle was stopped and the plaintiff testified that her hazard lights were on. The defendant failed to dispute such assertion. As such, the defendant has failed to proffer any evidence to rebut the plaintiff's prima facie showing of entitlement to judgment as a matter of law and the cross motion for partial summary judgment as to the issue of liability only is granted.

This shall constitute the decision and order of the Court.

So ordered.

**Dated: Riverhead, New York
April 26, 2012**



J.S.C.

CHECK ONE: FINAL DISPOSITION NON-FINAL DISPOSITION