

Montefusco v Cornell
2012 NY Slip Op 32382(U)
September 11, 2012
Supreme Court, Suffolk County
Docket Number: 10-4105
Judge: Arthur G. Pitts
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 3-8-12 (#001)
MOTION DATE 4-2-12 (#002)
ADJ. DATE: 6-14-12
Mot. Seq. # 001 - MG
002 - MD

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MICHAEL MONTEFUSCO and LAURA
MONTEFUSCO,

Plaintiffs,

CANNON & ACOSTA, LLP
Attorney for Plaintiffs
1923 New York Avenue
Huntington Station, New York 11746

- against -

RICHARD T. LAU & ASSOCIATES
Attorney for Defendants
300 Jericho Quadrangle, P.O. Box 9040
Jericho, New York 11753

PETER J. CORNELL and INTEGRITY POOL
MANAGEMENT,

Defendants.

CASCONE & KLUEPFEL, LLP
Attorney for Plaintiff Michael Montefusco on
Counterclaim
1399 Franklin Avenue, Suite 302
Garden City, New York 11530

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Upon the following papers numbered 1 to 40 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; 14 -27; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 28 - 29; 30 -35; Replying Affidavits and supporting papers 36 -38; 39 - 40; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by plaintiff Michael Montefusco and the motion (#002) by defendants Peter Cornell and Integrity Pool Management are consolidated for the purposes of this determination; and it is

ORDERED that the motion by plaintiff Michael Montefusco for summary judgment on defendants' counterclaim is granted; and it is further

ORDERED that the motion by defendants for summary judgment dismissing the complaint as to plaintiff Michael Montefusco on the ground that he did not sustain "serious injury" within the meaning of Insurance Law § 5104(d) is denied.

This action was commenced by plaintiffs Michael Montefusco and Laura Montefusco to recover damages for injuries allegedly sustained in a motor vehicle accident that occurred on Route 25A near its intersection with Park Avenue in the Town of Huntington on May 16, 2009. At the time of the accident, plaintiff Laura Montefusco was a passenger in a vehicle operated by Michael Montefusco, which was traveling directly behind a vehicle operated by David Evans. The accident allegedly occurred when a vehicle operated by defendant Peter Cornell and owned by defendant Integrity Pool Management sideswiped the Evans' vehicle and then struck the Montefusco vehicle. The bill of particulars alleges that as a result of the subject accident plaintiff Michael Montefusco suffered various injuries, including disc herniation at level C5-6, disc bulge at level C6-7, cervical radiculopathy, and cervical sprain and strain. In addition to asserting affirmative defenses to the negligence claims against them, defendants interposed a counterclaim for contribution against plaintiff Michael Montefusco.

Plaintiff Michael Montefusco moves for summary judgment dismissing the counterclaim against him, on the ground that he did not operate his vehicle in a negligent manner. In support of his motion, he submits a copy of the pleadings, the police accident report, and transcripts of the parties' deposition testimony. Defendants oppose plaintiff's motion, arguing that the deposition transcripts submitted in plaintiff's motion are not in admissible form because they are not signed. Defendants further argue that Michael Montefusco's deposition testimony raises issues of fact as to his awareness of the road conditions.

Defendants move for summary judgment dismissing the complaint as to plaintiff Michael Montefusco on the ground that he did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of their motion, defendants submit a copy of the pleadings, a transcript of Michael Montefusco's deposition testimony, an affirmed medical report of Dr. Michael Katz, an affirmed magnetic resonance imaging (MRI) report of Dr. Alan Greenfield, and medical records regarding plaintiff's treatment at Huntington Hospital on the day of the accident. Plaintiffs oppose the motion, arguing that triable issues of fact exist as to whether Michael Montefusco sustained a serious injury. In opposition, plaintiffs submit a photograph of their vehicle, an affirmed MRI report of Dr. Harold Tice, and an affidavit of Mary Didio, D.C.

At his examination before trial, plaintiff Michael Montefusco testified that his vehicle was traveling westbound on Route 25A and that he had just begun moving his vehicle from a stop signal when the accident occurred. He testified that when he observed defendants vehicle, it was 8 to 10 car lengths away and that the entire vehicle, which was traveling eastbound, was on the westbound lane. He stated that the accident occurred within two seconds and that defendants' vehicle struck him head on towards the front passenger side of his vehicle.

At her examination before trial, plaintiff Laura Montefusco testified that defendants' vehicle struck the vehicle she was riding in head on. She stated that the accident occurred in a split second and that defendants' vehicle was moving fast. She further stated that the air bags deployed and that passenger side door was crushed.

At his examination before trial, defendant Peter Cornell testified that at the time of the accident he was employed by defendant Integrity Pool Management as a pool mechanic. He testified that the van he was operating, which was owned and maintained by his employer, had a problem with the alignment. This

caused the vehicle to pull slightly to the left. He testified that prior to the accident, he was traveling westbound on Route 25A at a speed of about 45 to 50 miles per hour and that there was a moderate amount of traffic. He stated that there was a curve along the road he was traveling on, and that the navigation device in his vehicle alerted him that he would have to make a right turn soon. He explained that he quickly glanced at the navigation device and at his side passenger mirror when the accident occurred. He testified that his vehicle clipped a vehicle that was traveling on the opposing lane of travel, causing him to lose control and strike plaintiffs' vehicle head on.

A driver is not required to anticipate that an automobile going in the opposite direction will cross over into oncoming traffic (*see Barbaruolo v. DiFede*, 73 AD3d 957, 900 NYS2d 671 [2d Dept 2010]). "Crossing a double yellow line into the opposing lane of traffic, in violation of Vehicle and Traffic Law § 1126 (a), constitutes negligence as a matter of law, unless justified by an emergency situation not of the driver's own making" (*Foster v. Sanchez*, 17 AD3d 312, 313, 792 NYS2d 579 [2d Dept 2005]; *see Sullivan v. Mandato*, 58 AD3d 714, 873 NYS2d 96 [2d Dept 2009]).

Here, contrary to defendants' contentions, the unsigned but certified deposition transcripts, which were submitted in support of plaintiff Michael Montefusco's motion for summary judgment, were admissible under CPLR 3116(a), since the transcripts were submitted by the party deponents themselves and, therefore, were adopted as accurate (*see Rodriguez v. Ryder Truck, Inc.*, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; *Ashif v. Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]). Plaintiff has established his prima facie entitlement to judgment as a matter of law on the issue of liability by submitting evidence demonstrating that defendants' vehicle violated Vehicle and Traffic Law § 1126 (a) by crossing over a double yellow line into an opposing lane of traffic and collided with his vehicle, thereby causing the collision (*see DiSiena v. Giammarino*, 72 AD3d 873, 898 NYS2d 664 [2d Dept 2010]; *Scott v. Kass*, 48 AD3d 785, 851 NYS2d 649 [2d Dept 2008]). Accordingly, plaintiff Michael Montefusco's motion for summary judgment dismissing the counterclaim against him is granted.

As to defendants' motion for summary judgment against Michael Montefusco, Insurance Law § 5102 (d) defines "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."

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.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v. Eyley*, 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 also may 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]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Pagano v Kingsbury*, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see Gaddy v Eyler*, *supra*; *Pagano v Kingsbury*, *supra*; *see generally Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

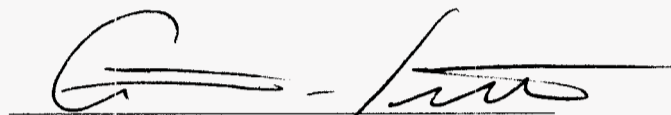
The evidence submitted by defendants establish prima facie that plaintiff Michael Montefusco did not sustain a serious injury as a result of the subject accident (*see Toure v Avis Rent A Car Sys.*, *supra*; *Singh v City of New York*, 71 AD3d 1121, 898 NYS2d 218 [2d Dept 2010]; *Burgos v Vargas*, 33 AD3d 579, 822 NYS2d 297 [2d Dept 2006]). The medical report of Dr. Katz states that an examination of Michael Montefusco's cervical spine revealed no tenderness and no paravertebral muscle spasm, and that range of motion testing showed flexion to 50 degrees (50 degrees normal), extension to 60 degrees (60 degrees normal), lateral flexion to 45 degrees (45 degrees normal), and rotation to 80 degrees (80 degrees normal). It states that an examination of his chest wall indicates no tenderness at the chest, sternum or ribs. It states that an examination of plaintiff's thoracolumbosacral spine revealed no paravertebral muscle spasm present and that straight leg raising test was negative. It states that range of motion testing region revealed forward flexion to 90 degrees (90 degrees normal), extension to 30 degrees (30 degrees normal), and lateral and side bending to 30 degrees (30 degrees normal). It states that an examination of plaintiff's upper extremities revealed no redness, swelling or tenderness, and that range of motion of the shoulders is 0 to 170 degrees (0 to 170 degrees normal), that range of motion of the elbows is 0 to 135 degrees (0 to 135 degrees normal) and dorsiflexion of the wrists is 70 degrees (70 degrees normal). Dr. Katz opines that plaintiff shows no signs or symptoms of permanence relative to the musculoskeletal system and relative to the subject accident. He also states that the MRI report of plaintiff's cervical spine indicates findings which are degenerative in nature. He concludes that plaintiff currently is capable of full time work without restrictions and performing his normal daily activities.

In addition, the report prepared by Dr. Greenfield regarding the June 2009 MRI examination of plaintiff's cervical spine states that such examination revealed diffuse degenerative disc disease present at all cervical disc levels, associated with diminished disc height, degenerative disc bulging, and degenerative bony osteophytic ridging. It states that these findings, along with the degenerative disc bulge at level C6-C7, are clearly longstanding and degenerative in origin, and unrelated to the subject accident. It further states that there is a coexistent central disc herniation at level C5-C6 indenting the dural sac, which can be explained on the basis of longstanding chronic degenerative discopathy. Dr. Greenfield concludes that the above findings cannot be attributed to the subject accident.

The burden, therefore, shifted to plaintiff Michael Montefusco to raise a triable issue of fact (*see Gaddy v Eyler*, *supra*). In opposition, plaintiff has raised a triable issue of fact as to whether he sustained a "serious injury" within the meaning of Insurance Law § 5102(d) as a result of the accident (*see Walker v Esses*, 72 AD3d 938, 899 NYS2d 321 [2d Dept 2010]; *Yeong Hee Kwak v Villamar*, 71 AD3d 762, 894 NYS2d 916 [2d Dept 2010]; *Parker v Singh*, 71 AD3d 750, 896 NYS2d 437 [2d Dept 2010]; *Sanevich v Lyubomir*, 66 AD3d 665, 885 NYS2d 635 [2d Dept 2009]). The medical report of Mary Didio reveals that

plaintiff had significant limitations in his cervical spine contemporaneous with the subject accident, and that significant limitations were still present when plaintiff was re-examined on May 4, 2012, over two years post accident. The medical report also states that the injuries suffered by Michael Montefusco are permanent and a direct result of the subject accident. It states that plaintiff was completely asymptomatic prior to the accident and that while there was some degenerative changes noted in his MRI, the symptomology displayed are consistent with the trauma-related injuries suffered in the subject accident. Thus, "where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (*Noble v Ackerman*, 252 AD2d 392, 395, 675 NYS2d 86 [1st Dept 1998]; see *LaMasa v Bachman*, 56 AD3d 340, 869 NYS17 [1st Dept 2008]; *Reynolds v Burgezi*, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]). Accordingly, defendants' summary judgment motion dismissing the complaint as to Michael Montefusco is denied.

Dated: September 11, 2012



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION