

DeAngelis v Guerico

2012 NY Slip Op 32432(U)

September 12, 2012

Supreme Court, Richmond County

Docket Number: 101423/10

Judge: Joseph J. Maltese

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.: 101423/10
Motion No.: 002, 003**

DOROTHEA DEANGELIS,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

DOMINICK K. GUERICO and DANIELLE LORIPPO,

Defendants

The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Reply Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants move for an order granting summary judgment due to plaintiff's alleged failure to sustain a "serious" injury as that term is defined by Insurance Law § 5102(d). The defendants' motion is denied.

Plaintiff seeks an order for partial summary judgment on liability and to allow the plaintiff to place this matter on the trial calendar for an inquest for damages. The plaintiff's motion is granted.

On June 21, 2009, a vehicle operated by the plaintiff, Dorothea DeAngelis, and a vehicle owned by the defendant, Dominick K. Guerico and operated by defendant, Danielle Lorippo, were involved in an accident at the intersection of Forest Hill Road and Travis Avenue in Staten Island, New York. Defendant Lorippo made a right turn from Travis Avenue onto Forest Hill

Road that resulted in defendant's vehicle making contact with the driver's side portion of the plaintiff's vehicle, who was stopped at a traffic light on Forest Hill Road. Plaintiff alleges she sustained injuries to her neck, back, right knee and hands as a result of the accident.

Plaintiff testified at an examination before trial taken June 28, 2011, that she was stopped at the red light at Forest Hill Road for approximately 1-1 ½ minute when she observed the vehicle driven by the defendant traveling at a high speed down Travis Avenue. She testified that the defendant did not reduce speed prior to making the right turn. The resulting impact caused plaintiff's head, chest and right knee to come in contact with the interior of her vehicle. Plaintiff further described the weather as misty rain at the time of the accident.

At a deposition held the same day, defendant Lorippo testified that as she approached a green light on Travis Avenue, she decreased her speed and turned on her right turn signal prior to making the right turn onto Forest Hill Road. She stated that she only saw the plaintiff's vehicle for about one second prior to the collision. Lorippo testified that her windshield wipers were on because there was moderate to heavy rainfall. Defendant stated at the deposition that she was unable to recall if any portion of her vehicle or that of the plaintiff's vehicle crossed the double yellow line separating Forest Hill Road.

The day after the accident, plaintiff went to Staten Island University Hospital North where she complained of pain to her head, neck, back, right leg and hands. Plaintiff then went to see her primary care physician who prescribed medication and ordered x-rays of plaintiff's back, neck and right knee. It was also recommended that plaintiff refrain from going to work and remain home. Three days after the accident, plaintiff then went to see Jason S. Brattner, D.C., a chiropractor, who provided treatment including electrodes, massage therapy and physical therapy. This treatment began as a four time a week visit over the course of approximately a year gradually decreasing to once a month at the time of the deposition. Plaintiff also underwent MRI examinations of her head, neck, back and leg. She also saw a neurologist who suggested she continue her physical therapy and provided plaintiff with medication. At the recommendation of Dr. Brattner, plaintiff began wearing braces on her hands to reduce numbness while she slept.

Plaintiff missed a total of two and a half months of work before returning to light duty doing administrative work at Staten Island University Hospital. She resumed her previous duties some four to six months after her return. Plaintiff testified to still be in pain and her ability to perform certain activities such as walking or grocery shopping remains limited.

The defendants in support of their motion for summary judgment on the threshold issue submitted counsel's affirmation, medical reports and deposition of plaintiff. Plaintiff was examined by Gregory Montalbano, M.D., a Diplomate of American Board of Orthopedic Surgeons, on November 6, 2011, at the request of the defendants. After examining the plaintiff, Dr. Montalbano concluded that she sustained a cervical and lumbar strain, which is a self-limiting diagnosis of soft tissue injury as a result of the accident. He asserted that the symptoms displayed by plaintiff together with the results from the imaging tests demonstrated multilevel disc changes, which are consistent with a long-standing degenerative process. In his report, he maintained that plaintiff's decreased range of motion in a single plane of the lumbar spine and loss of sensation in the right leg with normal reflexes and strength are consistent with long-standing nerve compression secondary to spinal stenosis secondary to spinal degeneration. Otherwise, Dr. Montalbano reported full range of motion in the plaintiff's lumbar and thoracic spine. In his opinion, plaintiff did not sustain any permanent structural injury to the cervical, thoracic and lumbar spine as a result of the accident.

Defendants also submitted a report completed by Stephen W. Lastig, M.D., a radiologist, who at the request of the defendants reviewed MRI films of the plaintiff's cervical and lumbar spine. After reviewing both MRI films, Dr. Lastig found evidence of multilevel degenerative disc disease and multilevel disc desiccation. Therefore, he concluded that the damage was unrelated to the accident but rather degenerative in origin.

In opposition to the motion, plaintiff submitted an affidavit of Dr. Brattner, who after reviewing MRI scans taken July 23, 2009 and July 24, 2009, observed disc herniation and disc bulges of the lumbar and thoracic spine through. An EMG/NCV of the upper extremities performed on August 6, 2009, which revealed nerve root irritation, neuropathy in the right wrist

and right carpal tunnel syndrome. A second EMG/NCV was taken of plaintiff's lower extremities on August 20, 2009. These results according to Dr. Brattner demonstrated bilateral lumbosacral radiculopathy. A follow-up NCV test of the upper extremities was conducted on June 18, 2010, which revealed left neuropathy while the follow-up NCV of the lower extremities dated September 24, 2010, revealed left neuropathy. Dr. Brattner also conducted diagnostic ultrasounds of the cervical, lumbar and thoracic regions which revealed vertebral subluxation complex. His diagnosis was that plaintiff suffered from cervicalgia, neuropathy, disc bulges, disc herniation, lumbar subluxation, bilateral lower lumbosacral radiculopathy, muscle spasms and bilateral knee pain. He believes these injuries were causally related to the accident.

On March 8, 2012, Dr. Brattner re-examined the plaintiff. His examination of plaintiff's cervical spine revealed positive bilateral foraminal compression test, positive bilateral shoulder depressor test and a positive Soto-Hall test. An examination of the thoracic spine also revealed a positive Soto-Hall test in addition to bilateral myospasm, bilateral edema and bilateral tenderness to the paraspinal region. A lumbar spine examination revealed positive straight leg-raising on the right as well as positive Kemps and Valsalva tests. Dr. Brattner also concluded that plaintiff displayed a decreased range of motion in her cervical, thoracic and lumbar vertebrae. The cervical range of motion examination revealed a reduction of 20% in the flexion, 50% in extension, 22% in the right lateral flexion, 54% in the left lateral flexion, 64% in the rotation and 50% in the left rotation. A test of the thoracic spine revealed a reduction of 83% in the flexion and 80% in the right lateral. He also found decreased range of motion in the lumbar spine. A test revealed a reduction of 23% in the flexion, 44% in the extension, 20% in the left lateral and 80% in the sacral flexion. He believes that a significant reduction in her range of motion coupled with her continued complaints of pain that plaintiff's recovery is poor and her injuries are permanent.

The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist.¹ Summary judgment is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues.² In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.³

The court will first address defendant's motion that plaintiff failed to meet the threshold requirement for a "serious" injury pursuant to Insurance Law §§5102 and 5104.

A defendant can establish that the 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. Once the defendant establishes that the plaintiff did not suffer a serious injury within the meaning of Insurance Law §5102(d), the burden then shifts to the plaintiff to produce evidentiary proof in admissible form demonstrating the existence of a triable issue of fact.⁴ The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient.⁵ Additionally, a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical which are based on a recent examination of the plaintiff.⁶ Conflicting medical evidence on the issue of whether a plaintiff has sustained a serious injury should be submitted to the jury.⁷

¹ *Stukas v. Streiter*, 83 A.D.3d 18 [2nd Dept. 2011], quoting *Kolivas v. Kirchoff*, 14 A.D.3d 493 [2nd Dept. 2005].

² *Id.*

³ *Glennon v. Mayo*, 148 A.D.2d 580 [2nd Dept. 1989].

⁴ *Fernandez v. Shields*, 223 A.D.2d 666 [2nd Dept. 1996].

⁵ *See, Gaddy v. Eyles*, 79 N.Y.2d 955 [1992]; *Grossman v. Wright*, 268 A.D.2d 79 [2nd Dept. 2000].

⁶ *Grossman v. Wright*, 268 A.D.2d 79 [2nd Dept. 2000].

⁷ *Ocasio v. Zorbas*, 14 A.D.3d 499 [2nd Dept. 2005].

Defendants met their initial burden of proof on the motion. They demonstrated that plaintiff's injuries were not, as a matter of law, serious through the medical reports of Dr. Montalbano and Dr. Lastig. In his report, Dr. Montalbano determined that the plaintiff sustained only a cervical and lumbar sprain as a result of the accident and that her current symptoms are a result of a multilevel degenerative process. He found that plaintiff exhibited a full range of motion except in a single plane of the lumbar spine. Defendants further met their burden through Dr. Lastig's report which corroborated Dr. Montalbano's theory of a multilevel degenerative process as the cause for her injuries and not as a result of the accident.

However, plaintiff raised an issue of material fact as to whether her injuries are serious as defined by law and were causally linked to the accident. Plaintiff's expert's findings were based on objective, quantitative tests that the plaintiff demonstrated significantly diminished range of motion in her cervical, lumbar and thoracic spine due to subluxations, disc bulges and herniations in her spine. It is his belief that these injuries were directly related to the accident and the fact that these symptoms continue to exist some three years after the accident lead him to further believe that the injuries are permanent.

Defendants in their reply, contend that plaintiff's response is insufficient to defeat the motion as Dr. Brattner's affidavit is in inadmissible form because neither a curriculum vitae nor a copy of the MRI reports were attached to their opposition papers. They also contend that plaintiff has failed to explain a gap in treatment of approximately three years and well as a gap between the onset of symptoms and the first recorded restrictions conducted by Dr. Brattner.

The defendant's contention that plaintiff's expert was unqualified to interpret an MRI film is without merit. If there are any purported shortcomings in the affidavit regarding the expert's training or ability to properly interpret MRI films, they would go to the weight of the opinion not to its admissibility.⁸

⁸ *Espinal v. Jamaica Hosp. Medical Center*, 71 A.D.3d 723 [2nd Dept. 2010].

Defendants incorrectly rely on the premise that the court should discount Dr. Brattner later findings of reduced range of motion since he did not conduct an initial contemporaneous range of motions tests. Dr. Brattner's conclusions are based upon verified objective medical findings during a recent visit of the plaintiff dated March 8, 2012.

Contrary to the defendant's final contention, there was no lengthy gap in treatment as plaintiff testified at her deposition that her physical therapy which began on June 26, 2009 was curtailed to one visit per month as of June 28, 2011, the date of her deposition.

Therefore, Dr. Brattner's affidavit was sufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury as a result of the accident to her cervical, lumbar and thoracic spine. The degree of seriousness concerning these documented limitations must be evaluated by a jury. Consequently, the defendants' motion is denied.

Next the court will take up plaintiff's motion seeking judgment as to liability. A violation of the Vehicle and Traffic Law, constitutes negligence as a matter of law.⁹ For the present case, the court is concerned with VTL §§1160(a) and 1163(a). VTL§1160(a) states in pertinent part that both the approach for a right turn and a right turn shall be made as close as practicable to the right hand curb or edge of the roadway. VTL §1163(a) directs that, no person shall turn a vehicle at an intersection...until such movement can be made with reasonable safety.

It is well settled that a driver must exercise reasonable care notwithstanding the invitation to proceed by the green light facing him.¹⁰ A plaintiff, who was stopped at a traffic control device on a two-way roadway could not be expected to anticipate that a driver executing a turn in order to proceed onto the plaintiff's roadway would turn directly into her lane and hit her vehicle.¹¹ Furthermore, a driver is negligent when an accident occurs because he or she failed to see that which through the proper use of his or her senses he or she should have seen.¹²

⁹ *Vainer v. DiSalvo*, 79 A.D.3d 1023 [2nd Dept. 2010].

¹⁰ *Siegel v. Sweeney*, 266 A.D.2d 200 [2nd Dept. 1999].

¹¹ *Murphy v. Epstein*, 72 A.D.3d 767 [2nd Dept. 2010].

¹² *Katanov v. County of Nassau*, 91 A.D.3d 723 [2nd Dept. 2012].

The plaintiff made a prima facie showing of her entitlement to judgment as a matter of law on the issue of liability as it was clearly demonstrated that defendant was the sole proximate cause of the collision. It is undisputed that defendant's vehicle struck the plaintiff while plaintiff was properly stopped at a traffic light. Defendant violated Vehicle and Traffic Law §§ 1160(a) and 1163(a), because she negligently proceeded to turn on Forest Hill Road and failed to make such turn in a reasonably safe manner.

The defendant has failed to raise a triable issue of material fact because the affirmation in opposition did not contradict the court's findings. Consequently, the plaintiff's motion is granted.

Accordingly, it is hereby:

ORDERED, that plaintiff's motion for summary judgment on liability is granted; and it is further,

ORDERED, that defendants' motion for summary judgment on threshold is denied; and it is further,

ORDERED, that the Clerk shall enter judgment accordingly, and it is further,

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3rd Floor, on Monday, September 24, 2012 at 9:30 a.m. for a Pre-Trial Conference.

ENTER,

DATED: September 12, 2012

Joseph J. Maltese
Justice of the Supreme Court