

**Johnson v Freund**

2013 NY Slip Op 30613(U)

March 14, 2013

Supreme Court, Suffolk County

Docket Number: 11-25338

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 37 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH FARNETI  
Acting Justice Supreme Court

MOTION DATE 11-2-12  
ADJ. DATE 3-7-13  
Mot. Seq. # 001 - MG  
# 002 - XMD

-----X		
BARBARA JOHNSON and GLENN LAWLOR,	:	SKENDERIS & CORNACCHIA P.C.
	:	Attorney for Plaintiffs
Plaintiffs,	:	45-07 Davis Street, 3 <sup>rd</sup> Floor
	:	Long Island City, New York 11101
- against -	:	
	:	RICHARD T. LAU & ASSOCIATES
ANNA LEE FREUND and TODD FREUND JR.,	:	Attorney for Defendants
	:	P.O. Box 9040
Defendants.	:	Jericho, New York 11753-9040
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Upon the following papers numbered 1 to 28 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-8; Notice of Cross Motion and supporting papers (002) 9-16; Answering Affidavits and supporting papers 17-18; 19-26; Replying Affidavits and supporting papers 27-28; Other   ; it is

**ORDERED** that this motion (seq. #001) by the plaintiffs, Barbara Johnson and Glenn Lawlor, pursuant to CPLR 3212, for an Order granting them summary judgment against the defendants on the issue of liability is granted; and it is further

**ORDERED** that the plaintiffs shall serve a copy of this Order with notice of entry upon the defendants and the Clerk of the Calendar Department, Supreme Court, Riverhead, and the Clerk is directed to calendar this matter for a trial on damages forthwith; and it is further

**ORDERED** that this motion (seq. #002) by defendants, Anna Lee Freund and Todd Freund, Jr., pursuant to CPLR 3212, dismissing the plaintiffs' complaint on the basis that the plaintiff, Barbara Johnson, has not sustained a serious injury as defined by Insurance Law § 5102 is denied.

In this action, the plaintiffs seek damages personally and derivatively for injuries alleged to have been sustained by Barbara Johnson when she was involved in a motor vehicle accident on December 18, 2010, when her vehicle and the vehicle operated by defendant Anna Lee Freund and owned by defendant Todd Freund, Jr., came into contact at the intersection of Blue Point Road and the Long Island Expressway Service Road, in the Town of Brookhaven, State of New York. It is alleged that Anna Lee Freund failed to stop at a red light at the intersection while heading west on the north service road of the Long Island Expressway and struck the plaintiff's vehicle which was heading south on Blue Point Road.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.

KAK

To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

The plaintiffs seek summary judgment on the issue of liability. In support of their motion, plaintiffs have submitted, *inter alia*, an attorney’s affirmation, a copy of the summons and complaint, defendants’ answer, and plaintiffs’ verified bill of particulars; a certified copy of both a redacted and unredacted copy of the report of the motor vehicle accident signed by the plaintiff, Barbara Johnson; a copy of a police accident report which is deemed hearsay and is not in admissible form (*see Lacagnino v Gonzalez*, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; *Hegy v Collier*, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]); a signed and certified copy of deposition transcript of Barbara Johnson dated June 20, 2012; and the unsigned but certified transcript of the examination before trial of Anna Lee Freund dated September 20, 2012, which is considered without objection by defendant Freund (*see, Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]).

Here, the adduced testimonies establish that the accident occurred on December 18, 2010 at about 8:45 a.m. Plaintiff, Barbara Johnson, was operating her vehicle southbound on Blue Point Avenue en route to Montauk Highway. Blue Point Road has two travel lanes, one north and one south. Anna Lee Freund was operating a vehicle owned by her father, T.J. Freund, with his permission, and was traveling westbound on the north service road of the Long Island Expressway, east of Blue Point Road. The service road has two westbound travel lanes. The accident occurred at the intersection of Blue Point Road and the north service road of the Long Island Expressway, which was controlled by a traffic signal light. The weather was clear and the roads were dry.

Barbara Johnson testified that she had traveled on Blue Point Road southbound for about a mile at 35 miles per hour prior to the accident. The roads were empty. When she was about ten car lengths from the traffic signal light, she observed that it was green for her travel direction. She kept the light under her constant observation. The color of the light for her travel direction did not change prior to the accident. She saw no other vehicles traveling east or west. As she traveled south, the westbound service road for the Long Island Expressway (“LIE”) was on her left. She was traveling about thirty miles per hour and saw the defendants’ vehicle for a split second prior to the accident just as she was entering into the intersection and about to go under the light. The defendant’s vehicle was in the left westbound lane of the service road, about a car and half length away, traveling at a speed of about 50 to 55 miles per hour. When she saw the defendant’s vehicle, she stepped on her brakes and turned to the right. The impact occurred to the front left of her vehicle from the front of defendant’s vehicle first. It was followed by a second impact about two seconds later, when the defendant’s vehicle struck the side rear of her car as well. Johnson continued that when she spoke to the defendant after the accident and asked her if she realized that she went through a red light, the defendant told her that she could not see because the sun was in her eyes.

Anna Lee Freund testified to the extent that she was involved in the motor vehicle accident at the intersection of Blue Point Road with the north service road of the LIE. At the time of the accident she was traveling westbound on the north service road for about five minutes in moderate traffic. She did not know in which lane of the service road she was traveling. She did not remember how far from the traffic signal light she was when she first observed the traffic signal light, but indicated that the light was yellow. She was traveling about fifty miles per hour. As she approached the intersection, she saw the plaintiff's vehicle on Blue Point Road about to make a right onto the westbound service road less than ten feet in front of her. She hit the brakes and jerked the wheel to the left. The right front of her vehicle made contact with the right quarter panel of the plaintiff's car. She later stated that it was the left front of the plaintiff's vehicle. She stated that she was committed and was through the intersection already, that she had completed crossing through it. She testified that when the police arrived at the scene, she told the officer that she could not see because the sun was in her eyes, and that when she crossed through the intersection, all of a sudden "she was there."

Based upon adduced testimonies and admissible evidence, it is determined that the plaintiff has established *prima facie* entitlement to summary judgment in her favor on the issue of liability and that the defendant has failed to raise a factual issue to preclude summary judgment. It is further determined that the defendant's negligence in the operation of her vehicle was the sole proximate cause of the accident.

Vehicle and Traffic Law § 1111 (a) (1) provides in pertinent part that traffic facing a steady circular green signal may proceed straight through or turn right or left unless a sign at such place prohibits either such turn. Such traffic shall yield the right of way to other traffic lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited. Section (b) (1) provides in pertinent part that traffic facing a steady yellow signal may enter the intersection; however, said traffic is thereby warned that the related green movement is being terminated, or that a red indication will be exhibited immediately thereafter (Vehicle and Traffic Law § 1111).

Here, the defendant did not establish that the light was still yellow for her travel direction prior to entering the intersection, and she did not know how far from the intersection she was when she first observed that the traffic light was yellow for her travel direction. The plaintiff affirmatively testified that she had a green light for her travel south on Blue Point Road. Despite the defendant testifying that she could not see due the sun as she entered into the intersection, the defendant testified that she did not apply her brakes to slow down or to ascertain that it was safe to enter into the intersection. Here, it is determined that the sun glare was not the proximate cause of the accident. It is well known, and therefore cannot be considered a sudden and unexpected circumstance, that the sun can interfere with one's vision as it nears the horizon at sunset, particularly when one is heading west, as was the defendant (see *Lipson v City of Syracuse*, 17 NY3d 492, 934 NYS2d 38 [2011]; *Sulaiman v Thomas*, 54 AD3d 751, 863 NYS2d 723 [2d Dept 2008]; *Arieta v MTA Bus Company*, 2011 NY Slip Op 30168U [Sup Ct, Nassau County]). However, the defendant herein was traveling westbound in the morning, not at sunset, and fails to establish how the glare from the sun was blinding her sight when she was traveling in a westerly direction, not facing the sun.

It is determined that the proximate cause of the subject accident was the failure of the defendant to use reasonable care when entering the intersection without making sure it was safe to do so, without braking despite the sun glare and allegedly not being able to see, and failing to continue to observe the yellow traffic signal light to ascertain it had not changed to red. The defendant did not testify that she still had a yellow light prior to entering the intersection. Thus, any factual issue raised by the defendant concerns her own testimony and her failure to establish that the traffic light was still in her favor when she entered into the intersection at about fifty

miles per hour. She continued to travel at the same speed approaching the intersection and crossed into the intersection, but could not see due to the sun. The defendant, by her own testimony, established that she failed to enter the intersection safely and in a reasonable manner, without applying her brakes when her vision was allegedly obstructed by the sun, and failed to exercise reasonable care in the operation her motor vehicle.

While the plaintiff has established *prima facie* entitlement to summary judgment on the issue of liability, the defendant has failed to raise a triable issue of fact to preclude summary judgment. The defendant has opposed this application with an attorney's affirmation. No affidavit by the defendant has been submitted to raise a factual issue as to whether the traffic signal light in her direction changed to red prior to her entering the intersection, or whether it was still yellow when she entered the intersection. She further testified that she could not see due to the sun, but did not establish that she stopped to ascertain whether it was safe to enter the intersection when she could not see. "While a driver has a duty to see that which through the proper use of his or her senses should have been seen (internal citations omitted), a driver who has the right-of-way is entitled to anticipate that the other motorist will obey the traffic law requiring him or her to yield (internal citations omitted)" (*Steiner v Dincesen*, 95 AD3d 877, 943 NYS2d 585 [2d Dept 2012]). Here, the defendant has not raised a factual issue concerning whether or not sun glare was the proximate cause of the accident. Instead, the defendant at some point saw the traffic light was yellow, and although she claimed that there was sun glare while traveling in a westerly direction in the morning, she did nothing to slow down prior to entering the intersection to ascertain that it was safe to enter, despite not being able to see.

"Although a driver with the right-of-way also has a duty to use reasonable care to avoid a collision . . . a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision" (*Vainer v Santiago*, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]). Here, the adduced testimonies establish that as the plaintiff was entering the intersection, she saw the defendant's vehicle, traveling about fifty miles an hour about two seconds prior to impact. Thus, the plaintiff established that she had insufficient time to avoid the collision despite her evasive attempt to steer to the right to avoid the collision. Accordingly, plaintiff is not comparatively negligent for failing to avoid the collision.

In view of the foregoing, this motion by the plaintiffs for summary judgment in their favor on the issue of liability is granted.

The defendants have crossed-moved for summary judgment on the basis that plaintiff Barbara Johnson has not sustained a serious injury as defined by Insurance Law § 5102 (d).

Pursuant to Insurance Law § 5102 (d), "[s]erious 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 eighty days immediately following the occurrence of the injury or impairment."

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 Elliot*, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a 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 plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 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 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving parties, here the plaintiffs (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the “permanent loss of use” category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott, supra*).

By way of her bill of particulars, Barbara Johnson has alleged that she sustained injuries consisting of C5-6 disc herniation deforming the thecal sac approaching the spinal cord with bilateral neural foraminal narrowing and inferior extension posterior to the C6 superior endplate; C5-6 herniated disc involving the C5-6 nerve roots; ruptured cervical disc at C5-6; cervical neuritis; bilateral cervical radiculopathy; thoracic sprain; lumbar sprain; myofascial pain and spasm; right maxillary sinus mucosal thickening; posttraumatic headaches; post concussion syndrome; cerebral concussion; and traumatic vestibulopathy.

Based upon a review of the evidentiary submissions, it is determined that the defendant has not demonstrated *prima facie* entitlement to summary judgment dismissing the complaint on either category of injury defined by Insurance Law § 5102 (d). The moving papers raise factual issues which preclude summary judgment. The defendant has not submitted copies of the medical records and reports, inclusive of the MRI and EMG studies, which the defendant’s expert, Dr. Nathanson reviewed in forming his opinion, as required pursuant to CPLR 3212. Expert testimony is limited to facts in evidence (*see Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *Marzuillo v Isom*, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; *O’Shea v Sarro*, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; *Hornbrook v Peak Resorts, Inc.* 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]), which evidence has not been provided in this case.

Notably, in his diagnosis after his examination of the plaintiff, Dr. Nathanson set forth that the plaintiff sustained a cervical sprain, resolved; thoracolumbar sprain, resolved; right shoulder sprain resolved; and left knee sprain, resolved. He continued that the etiology of the diagnosed conditions is a motor vehicle accident, however, he does not clarify whether the diagnosed conditions relate to his diagnoses or the diagnoses by the plaintiff’s treating physicians. He further stated that the diagnosed conditions can occur as a result of trauma. At no time has Dr. Nathanson addressed the plaintiff’s claims, or ruled out that she did not sustain the cervical

disc herniations as a result of the accident, nor does he address the claim of myofascial pain and spasm, posttraumatic headaches, post concussion syndrome, cerebral concussion, or traumatic vestibulopathy, thus raising factual issues.


Although the plaintiff has claimed that she suffered cervical radiculopathy, posttraumatic headaches, post concussion syndrome, cerebral concussion, and traumatic vestibulopathy, no report by defendant's examining neurologist or ophthalmologist has been submitted to rule out these neurological or ophthalmological injuries (*see Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), thus raising further factual issues and leaving this Court to speculate as to these injuries.

The defendants' expert has offered no opinion as to whether the plaintiff was incapacitated from substantially performing her activities of daily living for a period of ninety days in the 180 days following the accident, and he did not examine the plaintiff during that statutory period (*see Blanchard v Wilcox*, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see Uddin v Cooper*, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; *Toussaint v Claudio*, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]; *Delayhaye v Caledonia Limo & Car Service, Inc.*, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). The plaintiff testified that immediately following the accident, after she was assessed by the EMTs, she went home to get a heating pad and ice packs for her neck due to the pain in her neck and head. She also had pain in her right arm, and left knee. After being seen at the hospital, she followed up with Dr. Dark for treatment three times a week for seven weeks for muscle therapy and adjustments due to the pain, then two to three times a month, then twice a month. She followed with a neurologist at South Shore Neurology, and after having an MRI, was advised that she had two herniated discs in her neck. She also treated with that group for the constant headaches and concern for a concussion due to the blurred vision, dizziness and headaches. Although her symptoms improved, she is still experiencing them, albeit with some improvement. Since the accident, she cannot vacuum, or lift anything weighing over two or three pounds over her head. She gardens, works and cleans with difficulty since the accident. She stated that the accident has affected her relationship with her husband, both physically and emotionally, involving the frequency and quality of intimate relations. Thus, factual issues are raised concerning this second category of injury as well.

Inasmuch as the moving parties have failed to establish their *prima facie* entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see Yong Deok Lee v Singh*, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); *Krayn v Torella*, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; *Walker v Village of Ossining*, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Based upon the foregoing, the defendant has failed to establish that the plaintiff did not sustain a serious injury under either category set forth in Insurance Law § 5102 (d). Thus, the defendants' motion is denied.

Dated: March 14, 2013

  
 \_\_\_\_\_  
 Hon. Joseph Farneti  
 Acting Justice Supreme Court

\_\_\_\_\_ FINAL DISPOSITION        X   NON-FINAL DISPOSITION