

Dale v Grand Prix Suzuki

2013 NY Slip Op 31070(U)

May 10, 2013

Supreme Court, Suffolk County

Docket Number: 094-7838

Judge: Hector D. LaSalle

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This opinion is uncorrected and not selected for official publication.

ORDERED that the unopposed motion (# 001) by defendants Sandra Dunn and James Dunn for summary judgment dismissing the complaint against them is denied; and it is further

ORDERED that the cross motion (# 002) by defendants Grand Prix Suzuki and Kenneth Hartung for summary judgment dismissing the complaint against them on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the unopposed cross motion (# 003) by defendants Ted Rabinowitz and Judith Mella for summary judgment dismissing the complaint against them on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is denied.

Plaintiff, Donna Dale, commenced this action to recover damages for injuries arising out of a three-car accident which occurred at the intersection of the Little Neck Parkway and the eastbound lanes of the Horace Harding Expressway in the County of Queens, New York, on January 17, 2008. It is undisputed that the Little Neck Parkway, which is a two-way road, runs north and south, and that the Horace Harding Expressway runs parallel to and underneath the Long Island Expressway which divides the westbound lanes from the eastbound lanes of the Horace Harding Expressway. The intersection of the Little Neck Parkway and the eastbound lanes of the Horace Harding Expressway is controlled by a traffic device. It is alleged that a vehicle owned by defendant Rabinowitz and operated by defendant Mella, who was traveling southbound on the Little Neck Parkway, collided with a vehicle owned by defendant Grand Prix Suzuki and operated by defendant Kenneth Hartung, who was traveling eastbound on the Horace Harding Expressway. As a result of the collision between the Mella vehicle and the Hartung vehicle, either the Mella vehicle or the Hartung vehicle struck a vehicle owned by defendant Sandra Dunn and operated by defendant James Dunn, in which plaintiff was a passenger. At the time of the accident, the Dunn vehicle was stopped at a red light at the subject intersection.

Defendants Sandra Dunn and James Dunn move for summary judgment dismissing the complaint against them, asserting that they bear no liability for the plaintiff’s accident.

At his examination before trial, defendant James Dunn testified to the effect that he had been traveling northbound on the Little Neck Parkway, and that he came to a complete stop at a red traffic light at the intersection with the eastbound lanes of the Horace Harding Expressway. Plaintiff was a front-seat passenger in the vehicle. Approximately one minute thereafter, while he was talking with plaintiff, he heard plaintiff gasp. When he turned his head to the left, he observed the headlights coming into his door, and felt an impact. Immediately prior to the impact, he neither heard the sound of any horn blowing nor saw any vehicle coming from his left, right or front. He also did not “hear [any] prior impact.” As a result of the impact, his vehicle was pushed to his right into a traffic light pole. He then lost consciousness. He testified that “there were two impacts, but ... [he] can’t be sure on that.”

At her deposition, plaintiff testified to the effect that, on the day of the accident, she was involved in the subject accident at the intersection of the Little Neck Parkway and the eastbound lanes of the Horace Harding Expressway. She stated that, at the time of the accident, she was a front-seat passenger of the vehicle operated by defendant James Dunn, and prior to the accident, the vehicle had been stopped at a red light at the intersection in the northbound right turning lane of the Little Neck Parkway for approximately two minutes. About a minute after she heard a “bang,” a brown vehicle, which had been traveling southbound on the Little Neck Parkway, “slammed into” her vehicle.

At his deposition, defendant Kenneth Hartung testified to the effect that he had been traveling eastbound on the Horace Harding Expressway, and that prior to the accident, his vehicle was in the middle lane of the Horace Harding Expressway where it intersected with the Little Neck Parkway. There are three lanes in the eastbound lanes of the Horace Harding Expressway at the intersection. Approximately 100 feet away from the intersection, he first observed the green light, and it did not change. He was driving at a rate of speed between 25 and 28 miles per hour. Right before entering the intersection, he noticed a vehicle to his left traveling southbound on the Little Neck Parkway, he applied his brakes “aggressively” and decreased his speed to five miles per hour, but was unable to avoid the collision with the vehicle which came in contact with the left front bumper of his vehicle. As a result of the impact, his vehicle spun around and ended up to the south side of the Little Neck Parkway, and the vehicle which collided with his vehicle “hit the car that was sitting at the light on the south side of the Little Neck Parkway.”

At her deposition, defendant Judith Mella testified to the effect that she had been traveling southbound on the Little Neck Parkway, and that prior to the accident, her vehicle was in the right thru lane of the Little Neck Parkway where it intersected with the Horace Harding Expressway. There are two lanes in the southbound lanes of the Little Neck Parkway at the intersection; a left turning lane and a thru lane. Before she went underneath the overpass of the Long Island Expressway, she first observed the green light at the intersection, and it did not change, as she entered the intersection. Then, she felt an impact of the collision with the Hartung vehicle. Prior to the impact, she never observed the Hartung vehicle approaching the intersection. As a result of the impact, her vehicle “got dragged,” and the air bag deployed. Since the air bag was “over [her] head,” she could not see anything. Defendant Mella testified that she knew that, after the first impact between her vehicle and the Hartung vehicle, the Hartung vehicle struck the Dunn vehicle, while her vehicle did not come in contact with the Dunn vehicle. She had no recollection of her speed when she began to cross underneath the overpass.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Schaffe v SimmsParris*, 82 AD3d 867, 918 NYS2d 531 [2d Dept 2011]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

Here, defendants Sandra Dunn and James Dunn failed to establish their entitlement to judgment as a matter of law. The deposition testimony of plaintiff, James Dunn, Kenneth Hartung, and Judith Mella conflict as to the happening of the accident (*see Viggiano v Camara*, 250 AD2d 836, 673 NYS2d 714 [2d Dept 1998]). Several factual issues exist as to how the accident happened and as to whether the Hartung vehicle or the Mella vehicle came into contact with the Dunn vehicle (*see Exantus v Town of Ossining*, 266 AD2d 502, 699 NYS2d 94 [2d Dept 1999]). In view of the foregoing, the motion by defendants Sandra Dunn and James Dunn for summary judgment is denied.

Defendants Grand Prix Suzuki and Kenneth Hartung cross-move (# 002) for summary judgment dismissing the complaint against them on the ground that plaintiff has not sustained a “serious injury” as defined in Insurance Law § 5102 (d). In support, defendants Grand Prix Suzuki and Hartung submit only an affirmation of one of their attorneys which attempts to adopt the record submitted in the cross motion (# 003) by defendants Rabinowitz and Mella. Here, said cross motion is denied for the reasons stated below.

Defendants Ted Rabinowitz and Judith Mella cross-move (# 003) for summary judgment dismissing the complaint against them on the ground that plaintiff has not sustained a “serious injury” as defined in Insurance Law § 5102 (d).

By her bill of particulars, plaintiff alleges that she sustained serious injuries as a result of the subject accident, including right shoulder rotator cuff tendinosis; acromioclavicular joint arthrosis of the right shoulder; straightening of the cervical lordosis; cervical and lumbar strain/sprain; a bulging disc at L4-L5; dizziness; low back pain with numbness into the right foot; right eye lid ecchymosis; and blurred right eye.

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.”

In order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 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 a “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 (*see Perl v Meher*, 2011 NY Slip Op 8452, 2011 NY Lexis 3320 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) (*see Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos* 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff’s own deposition testimony and the affirmed medical report of the defendant’s own examining physician (*see Moore v Edison*, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; *Faroze v Kamran* 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Boone v New York City Tr. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

On April 10, 2008, approximately three months after the subject accident, an independent examining neurologist, Dr. Ravi Tikoo, examined plaintiff, using certain orthopedic and neurological tests including

straight leg raising test. Dr. Tikoo found that all the test results were negative and that there was mild tenderness in the cervical and lumbar spine. Dr. Tikoo concluded that, although plaintiff's injuries were casually related to the subject accident, there is no neurological disability due to the accident.

On April 2, 2008, an independent examining orthopedist, Dr. Bruce Meinhard, examined plaintiff, using certain orthopedic and neurological tests, including Trendelenburg test, straight leg raising test, Lachman test, drawer test, AC joint compression test, Tinel test, Phalen test, and impingement test. Dr. Meinhard found that all the test results were negative, and that there was mild tenderness to the thoracic and lumbar musculature. Dr. Meinhard performed range of motion testing on plaintiff's cervical and lumbar spine, right hip, right knee, and right shoulder, and found that her ranges of motion were all within normal ranges, except the lumbar flexion which was 80 degrees (normal 90 degrees). Dr. Meinhard opined that "[plaintiff] is to continue physical therapy for the right shoulder three times weekly for eight weeks," and that "there is no need for further evaluation or treatment ... for the spine, right knee or right hip."

On July 9, 2008, approximately three months after the first examination on the plaintiff, Dr. Bruce Meinhard re-examined plaintiff, using certain orthopedic and neurological tests, and performed range of motion testing on plaintiff's cervical and lumbar spine, right hip, right knee, and right shoulder. Dr. Meinhard found that all the test results were negative, and that plaintiff's ranges of motion were all within normal ranges, including the lumbar flexion which was 90 degrees (normal 90 degrees).

On June 8, 2011, approximately three years and five months after the subject accident, the moving defendants' examining physician in physical medicine and rehabilitation, Dr. Jeffrey Perry, examined plaintiff using certain orthopedic and neurological tests, including straight leg raising test. All the test results were negative or normal. Dr. Perry performed range of motion testing on plaintiff's cervical and lumbar spine. With respect to the plaintiff's cervical spine, Dr. Perry indicated that flexion was 60 degrees (normal 50 to 60 degrees); extension was 75 degrees (normal 70 to 75 degrees); right and left lateral bending were 45 degrees (normal 40 to 45 degrees); and right and left rotation were 80 degrees (normal 70 to 80 degrees). Regarding plaintiff's lumbar spine, Dr. Perry indicated that flexion was 80 degrees (normal 70 to 80 degrees); extension was 30 degrees (normal 25 to 30 degrees); right and left lateral flexion were 30 degrees (normal 25 to 30 degrees); and right and left rotation were 40 degrees (normal 40 to 45 degrees).

Here, defendants Rabinowitz and Mella failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see Reitz v Seagate Trucking, Inc.*, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). Dr. Tikoo's report is insufficient to sustain the moving defendants' prima facie burden since he failed to report any range of motion findings with the plaintiff's cervical and lumbar spine (*see Barrera v MTA Long Island Bus*, 52 AD3d 446, 859 NYS2d 483 [2d Dept 2008]). Moreover, Dr. Tikoo failed to set forth the objective medical tests he performed in reaching the conclusion that plaintiff did not sustain any limitations in range of motion in her cervical spine as a result of the subject accident (*see Nirenberg v Public Admin'r of Westchester County*, 62 AD3d 844, 879 NYS2d 547 [2009]; *Larriuet v Gutterman*, 37 AD3d 424, 832 NYS2d 44 [2007]). Dr. Meinhard's April 2, 2008 report is insufficient to sustain the moving defendants' prima facie burden. Dr. Meinhard failed to specify the degree of range of motion in right and left rotation of the plaintiff's lumbar spine (*see Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]). Moreover, Dr. Meinhard failed to set forth the objective medical tests he performed in reaching the conclusion that plaintiff did not sustain any limitations in range of motion in her cervical spine as a result of the subject accident (*see Nirenberg v Public Admin'r of Westchester County, supra; Larriuet v Gutterman, supra*). Dr. Meinhard's July 9, 2008 report is also insufficient to sustain the

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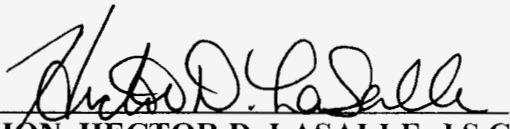
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moving defendants' prima facie burden. Dr. Meinhard failed to specify the degree of range of motion in right and left rotation of the plaintiff's lumbar spine (*see Browdame v Candura, supra*). Dr. Meinhard also failed to set forth the objective medical tests he performed in reaching the conclusion that plaintiff did not sustain any limitations in range of motion in her cervical spine as a result of the subject accident (*see Nirenberg v Public Admin'r of Westchester County, supra; Larriuet v Gutterman, supra*). Moreover, although Dr. Meinhard opined in his April 2, 2008 report that there is no need for further evaluation, he re-examined the plaintiff only three months thereafter, and has provided no explanation for why he re-examined the plaintiff and how plaintiff's lumbar flexion was improved from 80 degrees to 90 degrees within the three-month period. Dr. Perry's report is insufficient to sustain the moving defendants' prima facie burden. Dr. Perry failed to specify the degree of range of motion of plaintiff's left shoulder (*see Browdame v Candura, supra*). Moreover, although Dr. Perry reported range of motion testing results for plaintiff's cervical and lumbar spine that were expressed in certain or definitive numerical degrees, he provided ranges or spectrums of degrees up to 10 degrees for the normal standards of comparison, i.e. normal cervical flexion 50 to 60 degrees (*compare Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 920 NYS2d 24 [1st Dept 2011]; *see Lee v M & M Auto Coach, Ltd.*, 2011 NY Slip Op 30667U, 2011 NY Misc Lexis 1131 [Sup Ct, Nassau County 2011]). When a normal reading for range of motion testing is provided in terms of a spectrum or range of numbers rather than one definitive number, the actual extent of the limitation is unknown, and the Court is left to speculate (*see Sainnoval v Sallick*, 78 AD3d 922, 923, 911 NYS2d 429 [2d Dept 2010]; *see also Lee v M & M Auto Coach, Ltd., supra*).

Inasmuch as defendants Rabinowitz and Mella failed to meet their prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiffs in opposition to the moving defendants' motion for summary judgment were sufficient to raise a triable issue of fact (*see McMillian v Naparano*, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; *Yong Deok Lee v Singh*, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]). Thus, the cross motion (# 003) by defendants Rabinowitz and Mella for summary judgment is denied.

The foregoing constitutes the Order of this Court.

Dated: May 10, 2013
Riverhead, NY


HON. HECTOR D. LASALLE, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION