

Hunte v Vujtech

2013 NY Slip Op 31222(U)

June 6, 2013

Sup Ct, Suffolk County

Docket Number: 11-24036

Judge: Daniel Martin

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 12-18-12
MOTION DATE 2-19-13
ADJ. DATE 2-19-13
Mot. Seq. # 001 - MD
 # 002 - XMG

-----X		
CHERYL HUNTE,		KEEGAN & KEEGAN, ROSS & ROSNER, LLP
	Plaintiff,	Attorney for Plaintiff
		147 N. Ocean Avenue, P.O. Box 918
		Patchogue, New York 11772
- against -		
CHRISTOPHER VUJTECH and BRANDY		DEIRDRE TOBIN & ASSOCIATES
VUJTECH,		Attorney for Defendants
	Defendants.	901 Franklin Avenue, P.O. Box 9301
		Garden City, New York 11530
-----X		

Upon the following papers numbered 1 to 25, read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers 9 - 14; Answering Affidavits and supporting papers 15 - 25; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Christopher Vujtech and Brandy Vujtech seeking summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that the cross motion by plaintiff Cheryl Hunte seeking summary judgment in her favor on the issue of liability is granted.

Plaintiff Cheryl Hunte commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred at the exit to the parking lot of the Ronkonkoma train station, near Railroad Avenue, in the Town of Islip on September 17, 2010. It is alleged that the accident occurred when the vehicle operated by plaintiff was struck in the rear by the vehicle operated by defendant Christopher Vujtech and owned by defendant Brandy Vujtech while it was

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stopped at a stop sign waiting to make a right turn onto Railroad Avenue. At the time of the accident, defendant Christopher Vujtech was traveling westbound on Railroad Avenue. By her bill of particulars, plaintiff alleges that she sustained numerous injuries as a result of the subject collision, including disc protusions at levels C3 through C5 and levels L3 through S1, bilateral shoulder injury, and exacerbation/aggravation of asymptomatic pre-existing conditions in her spine. Plaintiff alleges as a result of the injuries she sustained in the subject accident she was confined to her bed and home for approximately two days.

Defendants now move for summary judgment on the basis that the injuries alleged to have been sustained by plaintiff as a result of the subject accident fail to meet the “serious injury” threshold requirement of § 5102 (d) of the Insurance Law. In support of the motion, defendants submit copies of the pleadings and the sworn medical report of Dr. Mark Zuckerman. Dr. Zuckerman, at defendants’ request, performed an independent neurological examination of plaintiff on August 6, 2012. Plaintiff opposes the motion on the grounds that defendants failed to make a prima facie showing that she did not sustain a serious injury within the meaning of the Insurance Law, and that the evidence submitted in opposition demonstrates that she sustained an injury within the “limitations of use” categories of the Insurance Law. Plaintiff further asserts that defendants failed to disclose their expert and failed to provide her counsel with a copy of Dr. Zuckerman’s report in accordance with the preliminary conference order dated October 18, 2011. In opposition to the motion, plaintiff submits her own affidavit, the affidavit of Dr. Brett Desing, the unsworn reports of Dr. Dawn Behr-Ventura and Dr. Mindy Pfeffer, and uncertified copies of her medical records.

It has long been established that the “legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries” (*Dufel v Green*, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a “serious injury” is to be made by the court in the first instance (see *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Porcano v Lehman*, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; *Nolan v Ford*, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *aff’d* 64 NY2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a “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.*, *supra*; *Gaddy v Eyer*, 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, [such as], 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 may also 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]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for “serious injury” under New York’s No-Fault Insurance Law (see *Dufel v Green*, *supra*; *Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; *Pagano v Kingsbury*, *supra*).

Initially, the Court notes that a party’s failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of the note of issue and certificate of readiness does not divest the court of the discretion to consider an affirmation or affidavit submitted by that party’s expert in the context of a timely motion for summary judgment (*Jacobs v Nussbaum*, 100 AD3d 702, 703, 953 NYS2d 875 [2d Dept 2012], quoting *Rivers v Birnbaum*, 102 AD3d 26, 39, 953 NYS2d 232 [2d Dept 2012]). Under the circumstances of this case, there has been no showing that the failure by defendants to disclose their expert witness pursuant to CPLR 3101(d)(1)(i) was intentional or willful, and there has been no demonstration of prejudice to plaintiff by such failure to disclose (see e.g. *SCG Architects v Smith, Buss & Jacobs*, 100 AD3d 619, 952 NYS2d 896 [2d Dept 2012]; *Hayden v Gordon*, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; *Hernandez-Vega v Zwanger-Pesiri Radiology Group*, 39 AD3d 710, 833 NYS2d 627 [2d Dept 2007]; see also *LeMaire v Kuncham*, 102 AD2d 659, 957 NYS2d 732 [2d Dept 2013]).

However, based upon the adduced evidence, defendants failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of the Insurance Law as a result of the subject collision (see *Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyer*, *supra*; *India v O’Connor*, 97 AD3d 796, 948 NYS2d 678 [2d Dept 2012]; *Kearney v Garrett*, 92 AD3d 725, 938 NYS2d 349 [2d Dept 2012]). Defendants’ examining neurologist, Dr. Zuckerman, during his examination of plaintiff appears to have found significant range of motion limitations in her cervical and lumbar regions (see *Katanov v County of Nassau*, 91 AD3d 723, 936 NYS2d 285 [2d Dept 2012]; *Edouazin v Champlain*, 89 AD3d 892, 933 NYS2d 85 [2d Dept 2011]; *Torres v Torrano*, 79 AD3d 1124, 912 NYS2d 912 [2d Dept 2010]). Dr. Zuckerman expressed the ranges of motion for plaintiff’s lumbar flexion, cervical extension, and cervical flexion in either certain or definitive numerical degrees, but he failed to provide corresponding certain or definitive normal values (compare *Brand v Evangelista*, 103 AD3d 539, ___ AD3d ___ [1st Dept 2013]; *Spencer v Golden Eagle, Inc.*, 82 AD2d 589, 920 NYS2d 24 [1st Dept 2011]). When a normal reading for range of motion testing is provided in terms of a range of numbers rather than one definitive number, the actual extent of the limitation is unknown, leaving the Court to speculate as to whether the plaintiff has sustained a serious injury within the meaning of the Insurance Law (cf. *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Williams v Fava Cab Corp.*, 90 AD3d 912, 935 NYS2d 90 [2d Dept 2011]; *Sainnoval v Sallick*, 78 AD3d 922, 911 NYS2d 429 [2d Dept 2010]). Moreover, while Dr. Zuckerman opines that the limitations he observed in plaintiff’s spine are degenerative in nature, as noted on her magnetic resonance images (“MRI”) films, and, therefore, are

unrelated to the subject accident, his findings failed to demonstrate that the subject accident did not exacerbate or aggravate previously asymptomatic pre-existing conditions in plaintiff's spine (*see Little v Ajah*, 97 AD3d 801, 949 NYS2d 109 [2d Dept 2012]; *Pero v Transervice Logisitic, Inc.*, 83 AD3d 681, 920 NYS2d 364 [2d Dept 2011]; *Keenum v Atkins*, 82 AD3d 843, 918 NYS2d 547 [2d Dept 2011]). Finally, neither Dr. Zuckerman's report nor any of the other evidence submitted by defendants in support of their motion for summary judgment addressed the injuries to plaintiff's shoulders alleged in her bill of particulars (*see Martinez v Yi Zhong Chen*, 91 AD3d 834, 937 NYS2d 274 [2d Dept 2012]; *Bitterman v Dennis*, 78 AD3d 627, 909 NYS2d 672 [2d Dept 2010]). In fact, Dr. Zuckerman notes in his report that the bill of particulars alleges bilateral shoulder injuries, low back pain and neck pain, and that such allegations should be addressed by an orthopedic consultant.

Since defendants failed to sustain their prima facie burden, it is unnecessary to address the sufficiency of the evidence submitted in opposition by plaintiff to the instant motion (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Kharzis v PV Holding Corp.*, 78 AD3d 1122, 912 NYS2d 14 [2d Dept 2010]; *Kelly v County of Suffolk*, 62 AD3d 837, 878 NYS2d 636 [2d Dept 2009]). Accordingly, defendants' motion for summary judgment dismissing plaintiff's complaint is denied.

Plaintiff cross-moves for summary judgment in her favor on the issue of liability, arguing that Christopher Vujtech's negligent operation of the Vujtech vehicle was the sole proximate cause of the subject accident, and that defendants cannot offer a non-negligent explanation for the happening of the collision. In support of the motion, plaintiff submits copies of the pleadings, her own affidavit, the parties' deposition transcripts, and an uncertified copy of the police accident report. Defendants have not submitted any evidence in opposition to plaintiff's motion for partial summary judgment.

It is well settled that a driver approaching a vehicle from the rear is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see Vehicle and Traffic Law* § 1129[a]; *see also Nsiah-Ababio v Hunter*, 73 AD3d 672, 913 NYS2d 659 [2d Dept 2010]). A rear-end collision with a stopped vehicle creates a prima facie case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see Tutrani v County of Suffolk*, 10 NY3d 906, 861 NYS2d 610 [2008]; *Pollard v Independent Beauty & Barber Supply Co.*, 94 AD3d 845, 942 NYS2d 360 [2d Dept 2012]; *Cortes v Whelan*, 83 AD3d 763, 922 NYS2d 410 [2d Dept 2011]; *Ramirez v Konstanzer*, 61 AD3d 837, 837 NYS2d 381 [2d Dept 2009]). A non-negligent explanation for the collision, such as mechanical failure, a sudden stop of the vehicle ahead, or an unavoidable skidding on wet pavement is sufficient to overcome the inference of negligence and preclude an award of summary judgment (*see Ramos v TC Paratransit*, 96 AD3d 924, 946 NYS2d 644 [2d Dept 2012]; *Fajardo v City of New York*, 95 AD3d 820, 943 NYS2d 587 [2d Dept 2012]; *Davidoff v Mullokandov*, 74 AD3d 862, 903 NYS2d 107 [2d Dept 2010]).

Here, plaintiff has established her prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating that her vehicle was stopped at a stop sign when it was struck in the rear on the driver's side by the Vujtech vehicle (*see Gifford v Consolidated Edison Co. of N.Y.*, 103 AD3d 779, 959 NYS2d 728 [2d Dept 2013]; *Hearn v Manzollilo*, 103 AD3d 689, 959 NYS2d 531 [2d

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Dept 2013]; *Martin v Cartledge*, 102 AD3d 841, 958 NYS2d 452 [2d Dept 2013]; *Kastritsios v Marcello*, 84 AD3d 1174, 923 NYS2d 863 [2d Dept 2011]). In opposition, defendants have failed to raise a triable issue of fact as to whether plaintiff contributed to the subject accident's occurrence or provide a non-negligent explanation for the collision (see *Sehgal v www.nyairportsbus.com, Inc.*, 100 AD3d 860, 955 NYS2d 604 [2d Dept 2012]; *Romero v Greve*, 100 AD3d 617, 953 NYS2d 296 [2d Dept 2012]; *Murphy v Epstein*, 72 AD3d 767, 899 NYS2d 319 [2d Dept 2010]). In fact, defendants failed to submit any evidence in opposition to plaintiff's motion. Accordingly, plaintiff's motion for summary judgment in her favor on the issue of liability is granted.

Dated: JUNE 6, 2013.



J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION