

Fletcher v Pantazis

2013 NY Slip Op 31467(U)

July 8, 2013

Supreme Court, Queens County

Docket Number: 13364/2011

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

LADAWN M. FLETCHER, Index No.: 13364/2011
Plaintiff, Motion Date: 05/02/13
- against - Motion No.: 50
Motion Seq.: 1

NIKOLAOS C. PANTAZIS,
Defendant.

- - - - - x

The following papers numbered 1 to 22 were read on this motion by plaintiff, LADAWN M. FLETCHER, for an order pursuant to CPLR 3212(b) granting plaintiff partial summary judgment on the issue of liability and setting the matter down for trial on damages only; and the cross-motion by the defendant, NIKOLAOS C. PANTAZIS, for an order pursuant to CPLR 3212, granting the defendant summary judgment and dismissing the plaintiff's complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 6
Cross-Motion-Affidavits-Exhibits.....7 - 12
Affirmation in Opposition to Cross-Motion.....13 - 20
Reply Affirmation.....20 - 22

This is a personal injury action in which plaintiff, Ladawn Fletcher, seeks to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred on June 11, 2010, on Main Street at the intersection of Peck Avenue, Queens County, New York.

Plaintiff claims that at the time of the accident, she was proceeding northbound on Main Street when the defendant, who was

pulling out of a parking spot to her right and in front of her vehicle, pulled out from the parking spot and attempted to make a U-turn in front of the plaintiff's vehicle causing a collision. Plaintiff contends that as a result of the accident she sustained physical injuries including multiple herniated discs of the cervical and lumbosacral spine.

Plaintiff commenced an action for damages by filing a summons and complaint on June 3, 2011. Issue was joined by service of the defendant's answer on August 16, 2011. Plaintiff filed a note of issue on December 3, 2012 and the matter is presently on the calendar of the Trial Scheduling Part on July 10, 2013.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

Jay Flatow, Esq., counsel for plaintiff, moves for an order pursuant to CPLR 3212(b), granting partial summary judgment in favor of plaintiff on the issue of liability and setting the matter down for a trial on damages. In support of the motion, the plaintiff submits an affirmation from counsel; a copy of the pleadings; a copy of the police accident report (MV-104AN); and transcripts of the examinations before trial of plaintiff and defendant.

In the accident description section of the police report, the police officer, who did not witness the accident, describes the accident, based upon the statements of the two drivers as follows:

At t/p/o operator of vehicle 1 (defendant), states that he was exiting a parked position facing northbound on Main Street when operator of vehicle 2 (plaintiff) was proceeding northbound on Main Street and struck defendant's vehicle. Operator of vehicle 1 (defendant), states he was trying to make a u-turn. Operator of vehicle 2 (plaintiff), states she was traveling northbound on Main Street at Peck Avenue intersection when operator of vehicle 1 (defendant) attempted to make a u-turn striking her vehicle."

Plaintiff, age 40, testified at an examination before trial on April 26, 2012. She stated that at the time of the accident she was employed as a dental assistant/office manager at Cosgrove Dental. On the day of the accident she was coming from her home and traveling with her daughter and niece to go shopping. She stated that she was proceeding in the left lane of Main Street traveling at a rate of speed of 30 mph. She first observed the defendant's vehicle parked ahead of her on the right side in the

same direction that she was traveling. When she first observed the vehicle, she was two or three car lengths from it. She stated from the time she first saw the defendant's vehicle until the time the accident she kept the defendant's car under her constant observation. She observed the defendant's vehicle maneuvering back and forth as it was exiting the parking spot. She did not move from the left lane as she observed the vehicle. As defendant's vehicle exited the parking spot it began to make a U-turn right in front of her vehicle. She stated that the front of her vehicle struck the front drivers side door of the defendant's vehicle. She stated that from the time she first observed the vehicle to the time of impact was a period of about two or three seconds. She testified that the impact was moderate in strength. She stated that she was moving at 30 mph at the time of the accident and she does not remember if her foot was on the gas or the brake at the time of impact.

The plaintiff testified that as a result of the impact, her shoulders and chest hit the steering wheel and she felt pain to her neck, left arm, and lower back. She left the scene in an ambulance and was transported to the emergency room at New York Hospital, Queens. She was given pain medication and was discharged the same day. About one week later, she sought medical treatment with Dr. Tolat for pain in her neck, back, and left hand. She stated that she treated with Dr. Tolat for about a year. She also received epidural injections on occasion for pain. She testified that she stopped treating with Dr. Tolat because he told her that she had reached a point of maximum improvement although she would probably continue to have back pain. Plaintiff stated that she still experiences pain in her back, neck and left shoulder but she has not sought any other medical treatment as a result of the subject accident.

Plaintiff testified that she was not confined to her bed or home as a result of the accident and she missed one day of work immediately following the accident on June 11, 2011. She testified that she left her position in the dental office in October 2011 because she could no longer sit or stand for long periods of time. Since that time she has been employed as a temporary dental fill-in.

Defendant, Nikolaos C. Pantazis, age 80, testified at an examination before trial on April 26, 2012. He stated that right before the accident his vehicle was parked on Main street. He was coming from New York Hospital and intended to return to his home. He entered his car and maneuvered it out of the parking space. He stated that he engaged the turn signal and intended to make a U-turn. He stated that the front of the plaintiff's vehicle struck his vehicle on the left driver's side. When the police came to

the hospital to speak with him he told the officer that he tried to make a U-turn and his car was struck by plaintiff's vehicle. He stated that before pulling out he looked behind him down Main Street as well as in front of him but he did not see the plaintiff's vehicle. He stated that from the time he pulled out of the parking space to the time of the impact was approximately 10 seconds.

Counsel claims that the defendant was negligent as a matter of law in violating VTL § 1162 which states that "no person shall move a vehicle which is stopped, standing or parked unless and until such movement can be made with reasonable safety." Citing Socci v Levy, 90 AD3d 1020 [2d Dept. 2011], counsel states that defendant was negligent in pulling out of a parking space without signaling when it was not reasonably safe to do so, making a sudden and unexpected U-turn in front of the plaintiff's vehicle, failing to yield the right of way and causing the subject accident. Counsel asserts that the defendant admitted to the police officer at the scene that he was making a U-turn at the time the accident occurred and thus defendant's actions were the sole proximate cause of the accident.

Further, citing Yelder v Walters, 64 AD3d 762 [2d Dept. 2009], counsel asserts that as plaintiff had the right of way and had only seconds to react to the defendant's U-turn, that plaintiff could not have avoided the accident and cannot be held to be comparatively negligent for failing to avoid the collision.

In opposition to the motion, defendant's counsel, Marcella Gerbasi Crewe, Esq., argues that plaintiff admitted in her deposition testimony that she observed the defendant's vehicle maneuvering out of the parking space in front of her and she did not slow down, continuing to drive at 30 miles per hour, resulting in the front of her vehicle striking the driver's side of the defendant's vehicle. Counsel contends that there is a question of fact as to whether plaintiff caused or contributed to the accident as defendant testified that he had his turn signal on when he pulled out and was traveling 5 miles per hour. Defendant contends that 10 seconds went by from the time he started pulling out of the space, during which time the plaintiff, who admitted that she saw his vehicle in the parking space could have attempted to take some action such as slowing down or moving her vehicle to the left to try to avoid the accident.

Secondly, counsel contends that the plaintiff's statement that the defendant made a sudden U-turn and struck her vehicle is insufficient, per se, to prove the defendant's negligence as it

is insufficient to establish that the plaintiff took action to avoid the collision. Counsel contends that the plaintiff's testimony although stating that her car was struck by defendant's vehicle, failed to demonstrate that she exercised due care, failed to establish that her actions did not contribute to the accident and failed to establish that she was free from comparative fault.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see Mastrangelo v Manning, 17 AD3d 326 [2nd Dept 2005]). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

Based upon a review of the respective testimony of the parties, this Court finds that there are material issues of fact which preclude the granting of summary judgment to the plaintiff on the issue of liability. Although the plaintiff states that the defendant made a sudden U-turn into her lane of traffic striking her vehicle in violation of Vehicle and Traffic Law § 1162, the plaintiff failed to provide any statement regarding her own actions at the time the defendant made the U-turn. In that regard, the Appellate Division has stated that "there can be more than one proximate cause of an accident and, thus, the proponent of a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law" (Winner v Star Cruiser Transp., Inc., 95 AD3d 1109 [2d Dept. 2012] citing Pollack v Margolin, 84 AD3d 1341 [2d Dept. 2011]; Villa v Leandrou, 94 AD3d 980 [2d Dept 2012]; Calcano v Rodriguez, 91 AD3d 468 [1st Dept. 2012]). Although the plaintiff driver had the right-of-way, was proceeding lawfully on Main Street and was entitled to anticipate that the plaintiff would obey the traffic laws (see Martin v Ali, 78 AD3d 1135, 1136 [2010]; Yelder v Walters, 64 AD3d 762 [2009]), the plaintiff driver also has a duty to exercise reasonable care to avoid a collision with another vehicle that allegedly failed to yield the right-of-way. Here, the plaintiff's testimony was that she saw the defendant's vehicle maneuvering out of the parking in spot to her right for several seconds prior to the impact and continued to travel at the same speed. She did not remember if she had or foot on the brake or the gas when the accident occurred. Further, plaintiff did not testify to what actions, if any, such as slowing down or trying to change lanes in order to avoid the collision. Thus,

the plaintiff's evidentiary submissions did not prove her freedom from negligence as a matter of law, and as such, were insufficient to establish, prima facie, that the defendant's actions were the sole proximate cause of the accident or to eliminate all issues regarding the facts surrounding the accident and whether either or both parties were negligent (see Allen v Echols, 88 AD3d 926 [2d Dept. 2011]; Pollack v Margolin, 84 AD3d 1341 [2d Dept. 2011]; Myles v Blain, 81 AD3d 798 [2d Dept. 2011]; Sayed v Aviles, 72 AD3d 1061 [2d Dept. 2010]).

Therefore, viewing the evidence in the light most favorable to the non-moving party (Stukas v Streiter, 83 AD3d 18 [2d Dept. 2011]; Judice v DeAngelo, 272 AD2d 583, [2d Dept. 2000] this court finds that there are factual issues concerning whether the plaintiff and defendant each met their respective duty to observe what should have been observed and to exercise reasonable care under the circumstances (see Wilson v Rosedom, 82 AD3d 970 [2d Dept. 2011]; Cox v Weil, 66 AD3d 634 [2d Dept. 2009]; Borukhow v Cuff, 48 AD3d 726 [2d Dept. 2008]).

Accordingly, as triable questions exist as to whether both drivers exercised due care and, if not, whether such lack of care was a proximate cause of the accident (see Gorham v Methun, 57 AD3d 480 [2d Dept. 2008]), it is hereby

ORDERED, the motion by plaintiff for partial summary judgment on the issue liability is denied.

DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT
ON THE ISSUE OF THRESHOLD

Defendant cross-moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Marcella Gerbasi Crewe, Esq., a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the plaintiff's records from the emergency room at New York Hospital Queens; a copy of the examination before trial of the plaintiff; the affirmed medical report of orthopedist, Dr. Michael J. Katz; and the affirmed report of radiologist, Dr. Alan B. Greenfield.

In her verified bill of particulars, plaintiff states that as a result of the accident she sustained, inter alia, disc herniations at C2-C3, C4-C5, C5-C6 and L4-L5, and a disc bulge at

C6-C7. Plaintiff states that she was confined to her bed and home for one day immediately after the accident and returned to work one day after the accident and continued to work until October 2011. Plaintiff contends that she sustained a serious injury as defined in Insurance Law § 5102(d) in that she sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

Dr. Michael J. Katz, a board certified orthopedist retained by the defendant, examined the plaintiff on July 23, 2012. Plaintiff told Dr. Katz that she is employed full time as a dental assistant. She presented with pain to her back, and stated that she had tingling in her left shoulder to her left hand. Dr. Katz conducted objective and comparative range of motion testing and found that plaintiff had normal range of motion of the cervical spine; thoracolumbosacral spine; right shoulder and arm; left shoulder and arm; left hand and fingers; and left knee and leg. He diagnosed plaintiff's injuries as cervical strain with radiculopathy, thoracolumbraosacral strain with radiculopathy and bilateral shoulder contusion, all resolved. He states that plaintiff showed no signs or symptoms of permanence. She had full range of motion with no objective positive findings. The MRI report of the cervical spine shows degenerative changes only. He states that plaintiff is not disabled and is capable of her full time duties as a dental assistant and capable of her activities of daily living without restrictions.

Dr. Greenfield reviewed the MRI of the plaintiff's left shoulder, cervical spine and lumbar spine. As to the left shoulder he states that the rotator cuff tendons showed no signs of tearing and he observed no labral tear. He stated that there are no findings on the study which can be attributed to an accident occurring on June 11, 2010. With respect to the cervical spine he states that there is degenerative disc disease and bulging at C5-6 and C6-7. There are no herniations. Dr. Greenfield states that all of the plaintiff's findings are longstanding and degenerative in origin and entirely unrelated to the accident in question. There are no disc herniations at any level and no findings on the study which can be attributed to the subject accident. With respect to the lumbar spine, Dr. Greenfield states that there are no disc bulges or herniations at any level and no findings which can be attributed to the accident in question.

Defendant's counsel contends that the medical reports of Drs. Greenfield and Katz, as well as the plaintiff's deposition testimony in which she stated that she returned to work one day after the accident, are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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 opposition, plaintiff's attorney, Jay Flatow, Esq., submits his own affirmation as well as a copy of plaintiff's verified bill of particulars, an affidavit from plaintiff Ladawn Fletcher, dated April 5, 2013; a copy of the plaintiff's examination before trial, affirmed medical reports from Dr. Tolat; records from Premier Physical Medicine and Rehabilitation PC; the affidavit of radiologist Mark Shapiro; the unaffirmed medical report of Dr. Millman; and the unaffirmed medical report of Dr. Katzman.

In her affidavit, plaintiff states that while being treated by Dr. Tolat she was referred to Dr. Millman, a pain management specialist at Pro-health Associates from whom she received epidural steroid injections. She states that she was then referred to orthopedist, Dr. Barry Katzman due to the injury to the left shoulder. He recommended surgery for impingement to the left shoulder. She states that she continues to suffer from neck pain radiating to her left arm, low back pain and bilateral shoulder pain. She discontinued physical therapy when she was told by Dr. Tolat that she had reached maximum medical improvement. She states that she is now limited and restricted in the performance of many household chores and is limited in her ability to bend, lift or carry anything 10 pounds or more or stand or sit for any period of time without pain.

Dr. Tolat first examined the plaintiff on June 18 2010, one week after her accident. She presented with neck pain, mid back pain, low back pain and bilateral shoulder pain. Range of motion testing showed significant limitations of the cervical spine, lumbar spine, and bilateral shoulders. He diagnosed plaintiff after the initial evaluation as suffering from cervical spine strain/sprain, thoracic spine, strain/sprain, lumbar spine strain/sprain and bilateral

shoulders strain /sprain all causally related to the automobile accident of June 11, 2010. He stated that the plaintiff could continue to work as tolerated and recommended that she begin a course of physical therapy.

Dr. Tolat re-examined the plaintiff March 20, 2013. At that time the plaintiff continued to have neck pain radiating to the left upper extremity with numbness, tingling and weakness of the left arm. She also continued to have mid and low back pain and bilateral shoulder pain with activity. Her recent range of motion testing showed significant limitation of the cervical spine and lumbar spine. He states that the objective findings indicate a significant limitation of use of the cervical and lumbar spine. He states that because plaintiff's restrictions continue to occur three years past the accident they constitute a permanent loss which is causally related to the subject accident.

Plaintiff's board certified radiologist, Dr. Shapiro submits his interpretation of the plaintiff's MRI studies of her cervical and lumbar spine which indicate herniations at L4-5, C2-3, C4-5 and C5-6 as well as a bulging disc at C6-7.

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557[1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the competent proof submitted by the defendant, including the affirmed medical reports of Drs. Greenfield and Katz, as well as the plaintiff's deposition testimony in which she stated that she only missed one day of work following the accident, are sufficient to meet defendants' prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance

Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Drs. Shapiro and Tolat attesting to the fact that the plaintiff sustained bulging and herniated discs in the cervical and lumbar spine as a result of the accident and finding that the plaintiff had significant limitations in range of motion of her cervical spine and lumbar spine both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Perl v. Meher, 18 NY3d 208 [2011]; David v Caceres, 2012 NY Slip Op 5132 [2d Dept. 2012]; Martin v Portexit Corp., 2012 NY Slip Op 5088 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether she sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, Dr. Tolat adequately explained the gap in plaintiff's treatment stating that plaintiff had reached the point of maximum medical improvement (see Ayala v Cruz, 95 AD3d 699 [1st Dept. 2012]; Jean-Baptiste v Tobias, 88 AD3d 962 [2d Dept. 2011]; Park v He Jung Lee, 84 AD3d 904 [2d Dept. 2011]; Eusebio v Yannetti, 68 AD3d 919 [2d Dept. 2009]; Black v Robinson, 305 AD2d 438 [2d Dept.2003]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the cross-motion by defendant for an order granting summary judgment dismissing the plaintiff's complaint pursuant to Insurance Law §§ 5102 and 5104 is denied.

Dated: July 8, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.