

Lopez v Puccio

2013 NY Slip Op 31522(U)

June 24, 2013

Sup Ct, Queens County

Docket Number: 11718/2010

Judge: David Elliot

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This is an action to recover damages for personal injuries alleged to have been sustained as a result of a motor vehicle accident which occurred on October 11, 2008, at or near the intersection of Edsall Avenue and 73rd Street, in the County of Queens, City and State of New York. Plaintiff has alleged that she was a passenger in King's vehicle when King's vehicle and Puccio's vehicle came into contact with each other.

Puccio has moved, and King has cross-moved, for summary judgment dismissing the complaint and any cross-claims on the ground that plaintiff did not sustain a serious injury. They have the initial burden of demonstrating that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352 [2002]; *Gaddy v Eycler*, 79 NY2d 955, 956-957 [1992]). In support of their motion and cross motion, Puccio and King have relied upon, among other things, plaintiff's deposition testimony, their own testimony, and the affirmed medical report of Michael Katz, M.D.

After objective testing, Dr. Katz concluded that plaintiff had normal range of motion in her cervical spine and lumbar spine. Dr. Katz concluded that plaintiff had resolved cervical and lumbosacral strains, and that she exhibited no signs of permanence as a result of the subject accident. Dr. Katz further noted, after review of plaintiff's MRI reports, that the changes seen are degenerative in nature.

Moreover, in light of plaintiff's testimony that she missed only a month to six weeks from work as a result of the subject accident, Puccio and King have demonstrated that plaintiff did not sustain a serious injury that prevented her from performing substantially all of her usual and customary activities for 90 of the 180 days following the accident (*see Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664, 665 [2008]; *Hasner v Budnik*, 35 AD3d 366, 368 [2006]). Thus, Puccio and King have satisfied their initial burden.

In opposition, plaintiff has relied upon, among other things, the affirmation of Cheri Durden, M.D. Dr. Durden initially examined plaintiff on October 20, 2008, soon after the subject accident, and at that time, after objective testing, she concluded that plaintiff had limited range of motion in her cervical spine and lumbar spine. Dr. Durden also detailed a course of treatment for a period of time after the accident. Following a recent examination of plaintiff on March 28, 2012, Dr. Durden again concluded, after objective testing, that plaintiff continued to suffer from a limited range of motion in her lumbar spine as a result of the subject accident. Dr. Durden also stated in her affirmation that plaintiff's treatment was discontinued because she determined that plaintiff had reached a maximum medical benefit from therapy and that further treatment would be palliative only and would not substantially improve her physical condition (*see Pommells v Perez*, 4 NY3d 566, 577

[2005]; *Mercado-Arif v Garcia*, 74 AD3d 446, 447 [2010]). In any event, based upon plaintiff's testimony, it appears that her no-fault benefits ceased. Finally, Dr. Durden specifically rebutted the claim that the findings in the MRI reports were as a result of degeneration. Therefore, plaintiff has raised a triable issue of fact in opposition to this branch of Puccio's motion and King's cross motion and they are not entitled to the relief sought.

In light of the above determination, the court will next turn to the branch of Puccio's motion for summary judgment on the issue of liability. Puccio has argued that King failed to yield the right-of-way to his vehicle at the intersection of Edsall Avenue and 73rd Street and that he is not liable in causing or contributing to the subject accident. Puccio has the initial burden of demonstrating that King, "who was faced with a stop sign at an intersection, negligently entered the intersection without yielding the right-of-way, and that this was the sole proximate cause of the accident" (*Klein v Crespo*, 50 AD3d 745, 746 [2008]; see *Gergis v Miccio*, 39 AD3d 468 [2007]; *Laino v Lucchese*, 35 AD3d 672 [2006]). "[U]nder the doctrine of comparative negligence, 'a driver who lawfully enters an intersection ... may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection' " (*Romano v 202 Corp.*, 305 AD2d 576, 577 [2003], quoting *Siegel v Sweeney*, 266 AD2d 200, 202 [1999]).

King testified that he was operating his vehicle, in which plaintiff was a passenger, on 73rd Street, that his vehicle was controlled by a stop sign, and that he came to a stop at the stop sign before proceeding into the intersection in order to make a right turn onto Edsall Avenue. King further testified that, at the subject intersection, it was difficult to see if any vehicles were traveling on Edsall Avenue in either direction due to the presence of trees, bushes and parked vehicles. King testified that the subject accident occurred when he slowly proceeded into the intersection in order to see if there were any vehicles approaching on Edsall Avenue, and that he only observed Puccio's vehicle at the time of impact, when he had reached the point where he was first able to see onto Edsall Avenue.

Puccio testified that at the time of the accident, he was proceeding through the intersection of Edsall Avenue and 73rd Street, that his vehicle was traveling on Edsall Avenue and was not controlled by a traffic signal, that he was looking straight ahead at the time of the accident and that he did not see King's vehicle until the time of impact.

In light of this evidence, the record has demonstrated that there are questions of fact as to whether Puccio was comparatively at fault in the accident. Although a driver may have the right-of-way, he or she may not blindly and wantonly enter an intersection (see *Nuziale v Paper Transport of Green Bay Inc.*, 39 AD3d 833, 835 [2007]; *Strasburg v Campbell*, 28 AD3d 1131, 1132 [2006]). Moreover, there is an issue of fact as to whether, by the use of

his senses, he could have avoided the collision (*see e.g. Simmons v Canady*, 95 AD3d 1201 [2012]; *Steiner v Dincesen*, 95 AD3d 877 [2012]). Therefore, Puccio is not entitled to the relief sought.

Plaintiff has cross-moved for summary judgment against King and has adopted the arguments and evidence in Puccio's motion. However, in light of the above determination that issues of fact remain as to the comparative fault of the parties in the instant matter, plaintiff is not entitled to the relief sought.

Accordingly, Puccio's motion for summary judgment is denied in its entirety. King's cross motion for summary judgment is denied and plaintiff's cross motion for summary judgment against King is denied.

Dated: November 15, 2012

J.S.C.