

Mekulju v Katiraeifar

2013 NY Slip Op 33949(U)

August 19, 2013

Supreme Court, Bronx County

Docket Number: 307873/09

Judge: Edgar G. Walker

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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Ruke Mekulju,

Plaintiff,

-against-

Susan J. Katiraeifar and Daimler Trust,

Defendants.
-----X

Hon. Edgar Walker
PART: IA 26

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Defendant Susan J. Katiraeifar’s motion for summary judgment, pursuant to CPLR §3212, as to liability, is denied. Defendant Katiraeifar’s motion for summary judgment, dismissing the complaint on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law §5102(d), is also denied. Defendant Daimler Trust’s cross-motion for summary judgment, pursuant to CPLR §3212 and 49 U.S.C. §30106 (Graves Amendment), dismissing the complaint and any and all cross-claims against it, is granted.

In her deposition, Ms. Katiraeifar testified that after making a left turn onto Broadway at 76th street, and while traveling in the right lane about three car-lengths north of the crosswalk, plaintiff suddenly emerged from between two parked vehicles, held out her left hand and walked directly into the passenger side of Ms. Katiraeifar’s vehicle. Ms. Katiraeifar also testified that the light ahead was red, that she saw plaintiff a “split second” before impact, that she was “easing up on the brake” at the moment of impact and that she brought her vehicle to a complete stop after impact. In her deposition, plaintiff testified that while on the sidewalk at the intersection of 76th street and Broadway, she observed that the light was in her favor, stepped into the crosswalk to cross Broadway, walked a few steps and was struck by defendant’s vehicle. Plaintiff also testified that she had not looked to her left or right before entering the crosswalk and did not see defendant’s vehicle before the accident. Based on the deposition testimony of plaintiff and defendant Katiraeifar, issues of fact exist as to defendant’s negligence and plaintiff’s comparative

negligence.

On the threshold issue, defendant shifted the burden to plaintiff to establish a triable issue of fact by submitting plaintiff's medical records which indicate: (1) the results of her initial chiropractic examination, two and one-half months after the accident, revealed "mildly" decreased range of motion of her cervical spine and "moderately" decreased range of motion of her lumbar spine and (2) the results of her chiropractic examination eight months later revealed full range of motion of her cervical and lumbar spine. In addition, defendant submitted the reports of MRIs taken of plaintiff's cervical spine and lumbar spine two months after the accident which reveal degenerative changes of plaintiff's lumbar spine and degenerative changes and muscle strain or spasm of plaintiff's cervical spine. Further, defendant's neurologist examined plaintiff on December 30, 2010, twenty-two months after the accident, and reported a normal neurological examination with no neurological disability. Defendant's radiologist reviewed an MRI of plaintiff's left knee taken eight weeks after the accident and reported degenerative joint disease with no evidence of traumatic injury.

In opposition to the motion, plaintiff raised an issue of fact by submitting, *inter alia*, the affirmation and medical records of Randall V. Ehrlich, M.D. Dr. Ehrlich examined plaintiff on August 17, 2009, six months after the accident, and reviewed the MRI of plaintiff's left knee, taken eight weeks after the accident. Dr. Ehrlich reported quantified, significant limitations in range of motion of plaintiff's left knee and opined that the results of the MRI and physical examination were consistent with traumatic intra-articular injury. On September 3, 2009, Dr. Ehrlich performed arthroscopic surgery on plaintiff's left knee which he indicated was to address mechanical and not arthritic conditions. On September 9, 2009 and October 7, 2009, Dr. Ehrlich re-examined plaintiff and, while noting some improvement in range of motion of plaintiff's left knee, he continued to report quantified, significant limitations as compared to normal. On January 16, 2013, Dr. Ehrlich re-examined plaintiff and reported a 14 percent loss of active range of motion of plaintiff's left knee. Dr. Ehrlich opined that plaintiff sustained significant injuries to her left knee as a result of the accident resulting in the need for surgery. Dr. Ehrlich also

opined that, due to the presence of an arthroscopically confirmed condral injury, plaintiff's condition will most likely worsen in the future, necessitating further treatment including operative intervention.

In support of its cross-motion for summary judgment, pursuant to CPLR §3212 and 49 U.S.C. §30106 (Graves Amendment), defendant Daimler Trust submitted the affidavit of Steven C. Poling, its assistant general counsel. In his affidavit, Mr. Poling states that Daimler Trust is currently engaged exclusively in the trade or business of leasing motor vehicles and that Daimler Trust is the assignee of a lease agreement between co-defendant Katiraiefar and Benzl-Busch Motor Car Corporation. Mr. Poling also states that there is no relationship between Daimler Trust and Ms. Katiraiefar other than the lease agreement and that Daimler Trust has no knowledge as to the circumstances surrounding the alleged incident. Under the terms of the lease, a copy of which is attached to Mr. Poling's affidavit, Ms. Katiraiefar is solely responsible for the maintenance of the vehicle. Also, in her deposition, Ms. Katiraiefar testified that she saw to it to have the vehicle maintained, inspected and repaired and that she went to Benzl-Busch to do so.


In opposition to the cross-motion, plaintiff argues that Daimler Trust has not met its *prima facie* burden because it has not submitted any evidence in admissible form to establish that the subject vehicle was properly maintained or that Daimler Trust did not negligently entrust the vehicle to Ms. Katiraiefar. Plaintiff contends that the affidavit of Mr. Poling and the documents attached thereto are inadmissible because the affidavit was notarized in Michigan and a certificate of conformity was not submitted. However, this is not a fatal defect and, in any event, was corrected by the submission of a certificate of conformity in defendants' reply papers to which plaintiff submitted a sur-reply. *See Smith v. Allstate Ins. Co.*, A.D.3d 522; *Sparaco v. Sparaco*, 309 A.D.2d 1029. Plaintiff's contention that the certificate of conformity of Michelle D. Spreitzer is insufficient because it is not notarized lacks merit. A certificate of conformity is not required to be notarized. The signature to a certificate of conformity is presumptively genuine, and the qualification of the person whose name is so signed as a person authorized to

make such certificate is presumptively established by the recital thereof in the certificate. *See* CPLR §2309(c); RPL §299-a. In the certificate, Ms. Spreitzer states that she is an attorney admitted to practice in the State of Michigan. This qualifies her to make the certificate. *See* RPL §299-a (1)(b). The court notes that plaintiff has not disputed the authority of the notary or the veracity of the statements in Mr. Poling's affidavit nor has she demonstrated any prejudice resulting from the belated submission of the certificate. As such, the court will consider the affidavit of Mr. Poling and documents attached thereto.

To establish a cause of action under a theory of negligent entrustment, the defendant must either have some special knowledge concerning a characteristic or condition peculiar to the person to whom a particular chattel is given which renders that person's use of the chattel unreasonably dangerous or some special knowledge as to a characteristic or defect peculiar to the chattel which renders it unreasonably dangerous. *See Cook v. Shapiro*, 58 A.D.3d 664; *Zara v. Perzan*, 185 A.D.2d 236. Given Mr. Poling's uncontroverted allegations that Daimler Trust was not involved in leasing the vehicle to Ms. Katiraiefar and had no relationship with her other than as assignee of the lease she entered into with Benzl-Busch, and the lack of any evidence that Daimler Trust had knowledge of any characteristic or defect peculiar to the vehicle which would render it unreasonably dangerous, plaintiff's negligent entrustment theory fails.

Nor is there any evidence that Daimler Trust had any responsibility for maintaining the subject vehicle. Indeed, the evidence indicates that Ms. Katiraiefar was solely responsible for maintaining the vehicle. Accordingly, Daimler Trust's motion for summary judgment, pursuant to CPLR §3212 and 49 U.S.C. §30106 (Graves Amendment), dismissing the complaint and any and all cross-claims against it, is granted.

Dated : 9/19/13



Hon. Edgar G. Walker, J.S.C.