Surbrug v Sorgie
2014 NY Slip Op 30503(U)
February 21, 2014
Supreme Court, Suffolk County
Docket Number: 11-10325
Judge: Peter M. Mayer
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SHORT FORM ORDER

INDEX No. 11-10325
CAL No. 13-00888MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER M. MAYER
Justice of the Supreme Court

MOTION DATE 9-3-13
ADJ. DATE 12-6-13
Mot. Seq. # 001 - MD
002 - MD

THOMAS SURBRUG,

Plaintiff,

- against -

LAURA A. SORGIE, JOSEPH SORGIE and ABDOU A. CISSE,

Defendants.

O'BRIEN & O'BRIEN, LLP
Attorney for Plaintiff
168 Smithtown Boulevard
Nesconset, New York 11767

DESENA & SWEENEY, ESQS.
Attorney for Defendants Sorgie
1500 Lakeland Avenue
Bohemia, New York 11716

MCCABE, COLLINS, MCGEOUGH, & FOWLER, LLP
Attorney for Defendant Cisse
346 Westbury Avenue, P.O. Box 9000
Carle Place, New York 11514

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the Sorgie defendants, dated July 30, 2013, and supporting papers; (2) Notice of Motion by October 28, 2013, and supporting papers; (3) Affirmation in Opposition by the plaintiff, dated October 28, 2013, and supporting papers; (4) Reply Affirmation by the Sorgie defendant, dated June 17, 2013, and supporting papers; (5) Reply Affirmation by the Cisse defendant dated December 24, 2013, and supporting papers; (6) Further Reply Affirmation by Sorgie defendants, dated January 3, 2014, and supporting papers; (7) Other memorandum of law (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that motion (001) by defendants Laura A. Sorgie and Joseph Sorgie, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the bases that they bear no liability for the occurrence of the accident, and that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied; and it is further

ORDERED that motion (002) by the defendant, Abdou A. Cisse, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied.

In this negligence action, the plaintiff, Thomas Surbrug, seeks damages for personal injuries alleged to have been sustained on September 11, 2009, on northbound County Road at its intersection with Northern Boulevard, in the Town of Brookhaven, New York, in a three car collision. The plaintiff's vehicle was the front vehicle, the Sorgie defendants' vehicle was in the middle, and the Cisse vehicle was the rear vehicle.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of motion (001), the Sorgie defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants' answers with cross claims and demands, and plaintiff's verified bill of particulars; the transcripts of plaintiff's examination before trial dated February 6, 2012, Laura Sorgie's transcript dated March 26, 2012, and Abdou Cisse's transcript dated March 26, 2012; uncertified witness statements of Thomas Surbrug, Laura Sorgie and Abdou Cisse; the expert witness reports of Mark J. Zuckerman, M.D. dated April 17, 2012 concerning his independent neurology examination of the plaintiff, Michael Katz, M.D. dated June 5, 2012 concerning his independent orthopedic examination of the plaintiff, and David A. Fisher, M.D. dated February 25, 2012 concerning his independent radiologic review of the MRI of plaintiff's cervical spine of January 8, 2010.

In support of motion (002), the defendant has submitted, inter alia, an attorney's affirmation; copy of plaintiff's verified bill of particulars; and refers to co-defendants' evidentiary submissions.

LIABILITY

Thomas Surbrug testified to the extent that he was involved in an automobile accident on the morning of September 11, 2009. He stated it was an overcast day; the ground was wet. He thought it

could have been raining, but visibility was good. He had been traveling on William Floyd Parkway, in Shirley, in a northbound direction in the far right lane of three northbound lanes for about five minutes in his white Chevy Astro van, when he approached the railroad tracks at about 25 miles per hour. The gates were coming down at the railroad crossing with the alternating red lights flashing, so he brought his vehicle to a stop with minimal pressure on his brake pedal. He remained stopped for about five seconds when his vehicle was struck in the rear. He was aware of traffic around him, but did not take notice of any vehicles behind him prior to the incident. He heard no horns or the screeching of brakes prior to the accident. He did not recall if he looked into his rear view mirror after stopping his vehicle. He felt two medium impacts to the rear of his vehicle, spaced "split seconds" apart. In the statement he prepared following the accident, he wrote that he was stopped at the railroad tracks on William Floyd Parkway when he was hit from behind by a black Chevrolet Suburban.

Laura Sorgie testified to the extent that she was driving a Chevy Tahoe when she was involved in the accident on William Floyd Parkway in the right northbound travel lane. She testified that she brought her car to a complete stop when her vehicle was hit from behind and pushed into the plaintiff's vehicle. She stated that the plaintiff's car and her car were stopped waiting for the train for about one minute, with less than one car length separating their vehicles. The gates went up, and she and the plaintiff both started to move their vehicles forward when the plaintiff slammed on his brakes and came to a sudden stop. She thought she was several cars back from the gate but did not observe a vehicle in front of the plaintiff's vehicle. She did not know how much time passed from when the vehicles began to move and the impact between her vehicle and the plaintiff's vehicle occurred. She continued that she had only one medium impact which was when her vehicle was struck from behind while she was stopped. She was then pushed into the plaintiff's vehicle, causing a second medium impact to her vehicle. She testified that when she applied her brakes, she swerved to the right to try to avoid hitting the plaintiff's stopped vehicle, and believed she came to a complete stop for about five seconds, or long enough to say, "Oh my God, thank you, I stopped." She continued that she then felt the impact to the rear of her vehicle and was pushed forward into the plaintiff's car. She stated that prior to the impact to the rear of her vehicle, she heard her own brakes screeching. She testified that the only damage to her vehicle was to her rear bumper, although the driver's side front bumper of her vehicle struck the rear bumper on the passenger side of plaintiff's vehicle. She did not see any damage to the plaintiff's vehicle. She did not notice the Cisse vehicle behind her prior to the accident, but after the accident, noticed that the entire hood of his vehicle was folded up. When questioned about the statement she prepared at the time of the accident, she stated that it accurately reflected what happened, but it did not indicate her "recollection of coming to a complete stop...."

Abdou Cisse testified to the extent that he was involved in the accident while traveling northbound on William Floyd Parkway in the right travel lane, in his Kia Sorento. There was light rain. His windshield wipers were on but his headlights were off. He stated that traffic was heavy. He was driving about 10 to 15 miles per hour. All of a sudden, the vehicle in front of him began stopping. He hit his brakes and could not stop in time. He stated that it all happened in the matter of one second. Prior to striking the vehicle in front of him, traffic was bumper to bumper and stop and go. He then stated that his vehicle had been stopped for less than a second about 20 feet behind the Sorgie vehicle before he began to proceed forward just before the accident occurred. He continued that the Sorgie vehicle, the Chevy Tahoe, was stopped, then began moving for about one second, when he noticed

sudden braking lights. He hit his brakes hard, but his vehicle began to slide. The entire front end of his vehicle made medium impact with the Chevy Tahoe. He then heard the noise of the impact between the Chevy Tahoe and the vehicle in front of it after he struck the Chevy Tahoe and it moved forward about four feet. He testified that prior to the impact, the Chevy Tahoe was pointing straight in the lane ahead of him, and it was not pointed in any other direction. He noticed no damage to the rear of the plaintiff's van after the impact. He filled out a statement following the accident wherein he wrote to the effect that the black Tahoe just stopped right in front of him, and he hit the brakes hard, but couldn't stop and hit the Tahoe.

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation (*see* ***Rainford v Han***, 18 AD3d 638 [2d Dept 2005]; ***Thoman v Rivera***, 16 AD3d 667 [2d Dept 2005]; ***Power v Hupart***, *supra*). Whether a vehicle stops abruptly or quickly is not a sufficient defense to rebut the presumption of negligence (***Danza v Longieliere***, 256 Ad2d 434 [2d Dept 1998]; ***Mitchell v Gonzales***, 269 AD2d 250 [1st Dept 2000]). The "driver of a motor vehicle has a duty to keep proper control of that vehicle, and to not stop suddenly or slow down without proper signaling so as to avoid a collision" (***Maschka v Newman***, 262 AD2d 615 [2d Dept 1999]). When the only explanation provided for the accident is that the vehicle in front had stopped suddenly and without warning, as such, the driver's failure to maintain a safe distance between the two vehicles, in the absence of an adequate, nonnegligent explanation, constitutes negligence as a matter of law (***Silberman v Surry Cadillac Limousine Service, Inc.***, 109 AD2d 833 [2d Dept 1985]; ***Barile v Lazzarini***, 222 AD2d 635 [2d Dept 1995]; ***Brando-Twomey v Richheimer***, 229 AD2d 554 [2d Dept 1996]).

Here, all doubt is not eliminated by the record submitted by the Sorgie defendants, and plaintiff's evidentiary proof shall be considered at trial due to the factual issues presented in the moving papers and in plaintiff's opposition (***Ugarriza v Schmieder***, 46 NY2d 471, 414 NYS2d 304 [1979]; ***Sillman v 20th Century Fox Film Corp***., 3 NY2d 395, 165 NYS2d 498 [1957]). When a driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate of speed and to maintain control of his vehicle and use reasonable care to avoid colliding with the other vehicle (***Chepel v Meyers,*** 306 AD2d 235, 762 NYS2d 95 [2003]; ***Power v Hupart,*** 260 AD2d 458, 688 NYS2d 194 [1999]; *see also* Vehicle and Traffic Law § 1129[a]). Vehicle & Traffic Law § 1129 (a) provides that the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

There are factual issues which preclude summary judgment as the plaintiff testified that there were two impacts to the rear of his vehicle, and the defendants contend that the Cisse vehicle struck the Sorgie vehicle in the rear, which then struck the plaintiff's vehicle. There are factual issues concerning whether defendant Sorgie maintained an unsafe distance between her vehicle and the plaintiff's vehicle, causing her to stop abruptly, contributing to the cause of the accident as well. Based upon the foregoing, it is determined that the Sorgie defendants have not demonstrated prima facie entitlement to summary judgment dismissing the complaint and any cross claims asserted against them on the basis that they bear no liability for the occurrence of the accident.

It is noted that the plaintiff has submitted opposing papers in response to both motions (001) and (002), and has labeled the attorney's affirmation as a notice of cross motion, however, no notice of motion has been served by plaintiff, precluding this court from considering the plaintiff's submissions as a motion.

Accordingly, that part of motion (001) for summary judgment on the issue that the Sorgie defendants bear no liability for the occurrence of the accident is denied.

SERIOUS INJURY

The defendants each seek summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d)

Pursuant to Insurance Law § 5102 (d), "'[s]erious injury' means 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 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 "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 (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

By way of the verified bill of particulars, Thomas Surbrug alleges to have sustained the following injuries in the subject accident: mild median neuropathy at the wrists bilaterally; cervical pain syndrome; cervical derangement; cervical radicular syndrome; left L 5 radiculopathy; left C5-6 and C4-5 radiculopathy; small central disc herniation at C5-6 with slight impingement upon the ventral subarachnoid space with right foramina narrowing; C6-7 diffuse disc bulging with superimposed moderate-sized central disc herniation which causes mild flattening of the cervical cord and bilateral foramina narrowing; slight disc bulging at C2-3 without significant impingement upon the ventral subarachnoid space; C3-4 slight disc bulging without cord impingement with narrow neural foramina; C4-5 slight disc bulging without cord impingement with narrow neural foramina especially on the right; neck pain radiating into the arms; numbness of the arms; small left parasagittal disc herniation at C7-T1 with mild impingement upon the ventral saubarachnoid space; carpal tunnel syndrome; moderate L5 radiculopathy; lumbosacral pain syndrome; lumbosacral derangement; lumbosacral radiculopathy; spinal nerve root encroachment/stenosis; peripheral neuropathy; peripheral nerve entrapment; post traumatic nerve injury; contusions to face, scalp and neck; headaches; difficulty sleeping; temporal mandibular joint dysfunction; and diminished quality of life.

Upon careful review and consideration of the moving parties' evidentiary submissions, it is determined that they have not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Thomas Surbrug did not sustain a serious injury in either category as defined by Insurance Law § 5102 (d).

Dr. Zuckerman and Dr. Katz set forth the materials, records, and reports they each reviewed, including EMG/NCV studies, and cervical spine CT scan and MRI reports, however, none of the records reviewed by the defendants' experts have been submitted. It is also noted that Dr. Fisher has not provided a copy of the report concerning the examining physician's findings for the cervical MRI films which he reviewed. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that expert testimony is limited to facts in evidence (*see* ***Allen v Uh***, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom***, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]). Here, the aforementioned records and reports are not in evidence, leaving this court speculate as to the contents of those reports.

Dr. Fisher has not provided a copy of his curriculum vitae to qualify as an expert in the field of radiology and to render an opinion with regard to his interpretation of the cervical MRI films which he reviewed.

It is noted that Dr. Zuckerman set forth some of the normal range of motion values in a range or spectrum of normal values rather than one specific value. When the normal range of motion is set forth

within a range or spectrum, it leaves it to this court to speculate as to the actual normal ranges of motions without variations, and under which conditions such variations would be applicable (*see* ***Hypolite v International Logistics Mgt., Inc.***, 43 AD3d 461, 842 NYS2d 453 [2d Dept 2007]; ***Somers v Macpherson***, 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Manceri v Bowe***, 19 AD3d 462, 798 NYS2d 441 [2d Dept 2005]; *see also* ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). Moreover, Dr. Zuckerman and Dr. Katz have set forth different normal range of motion values in comparing some of their range of motion findings with regard to plaintiff's cervical spine, raising further factual issues. It is further noted that Dr. Zuckerman has set forth "usual"values in some instances to which he compares his findings, creating additional factual issues.

Dr. Zuckerman relates that there are mild median neuropathies at the wrist and carpal tunnel, an unrelated condition likely related to a history of diabetes and the use of tools, however, his opinion is conclusory and unsupported by any basis or history relating thereto. He then continued that the plaintiff has pre-existing cervical degenerative disc disease and a history of a lumbar condition that has reportedly placed him on disability status, however, he does not address plaintiff's claims of cervical disc bulging and herniation, and does not rule out that such conditions are causally related to the subject accident, precluding summary judgment. He fails to report lumbar left and right lateral rotation, leaving this court to speculate as to whether or not he obtained range of motion values for the same, and what the findings are. He does not address the findings of Dr. Tipirneni concerning plaintiff's EMG and NCV test results.

While Dr. Katz stated that plaintiff's cervical MRI study reveals changes which are degenerative in nature, he does not indicate the cause or duration of such changes precluding summary judgment (***Dufel v Green***, 84 NY2d 795, 622 NYS2d 9000; ***Carmona v Youssef***, 27 Misc3d 1238(a) 910 NYS2d 761 [Sup Ct, Queens County 2010]).

The movants' examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering their physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the experts offer no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). Thus, summary judgment is precluded to the moving parties with regard to this category of injury as well.

It is noted that the plaintiff had been receiving disability benefits since 1995 for an injury relating to his back, and that he also receives Medicaid, Medicare, and food stamp benefits. Since the accident, he suffers from severe headaches. He experiences pain in his neck radiating into his shoulders and both arms, accompanied by numbness in his hands and arms. He was confined to bed and to home following the accident for six to eight weeks or longer. Since the accident, he cannot walk for long distances, and walking across the mall is sometimes too much for him. He has had injections into his lower back since the accident to help with the pain. He has difficulty bending over, with pain worse than he had prior to

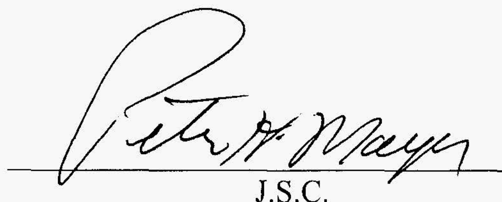
the subject accident. When he wakes up, his hands are numb and curled in. He feels depressed, and has anxiety attacks and panic attacks, for which he takes Xanax. He was placed on Prozac for a period of time.

Based upon the foregoing, the defendants have not demonstrated prima facie entitlement to summary judgment on the issue that plaintiff Thomas Surbrug did not sustain a serious injury as defined by Insurance Law § 5102 (d).

The factual issues raised in the moving papers preclude summary judgment and the moving parties have failed to satisfy the burden of establishing, prima facie, that plaintiff Julie McCarthy did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving parties have failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury", it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, motions (001) and (002) are denied.

Dated: 2/21/14



J.S.C.

___ **FINAL DISPOSITION** _X_ **NON-FINAL DISPOSITION**