Ormsby v Alvarado-Martinez
2014 NY Slip Op 30970(U)
March 28, 2014
Sup Ct, Suffolk County
Docket Number: 12-6152
Judge: Peter H. Mayer

[* 1]

SHORT FORM ORDER

INDEX No. 12-6152
CAL No. 13-01399MV

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

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 11-12-13 (#001)
MOTION DATE 12-13-13 (#002)
ADJ. DATE 1-27-14
Mot. Seq. # 001 - MG
002 - MD

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STEPHEN ORMSBY,

Plaintiff,

- against -

J. ALVARADO-MARTINEZ and VICTOR CANALES,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated October 2, 2013, and supporting papers 1-8; (2) Notice of Cross Motion by the defendant , dated November 7, 2013, supporting papers 15-23; (3) Affirmation in Opposition by the defendant, dated November 4, 2013, and supporting papers 9-12 ; (4) Affirmation in Opposition by the plaintiff, dated January 14, 2014, and supporting papers 13-14; (5) Reply Affirmation by the plaintiff dated November 11, 2013, and supporting papers 13-14; (6) Reply Affirmation by the defendant dated January 24, 2014, and supporting papers 29-32; 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 the plaintiff, Stephen Ormsby, pursuant to CPLR 3212 for summary judgment in his favor on the issue of liability is granted; and it is further

ORDERED that motion (002) by the defendants, J. Alvarado-Martinez and Victor Canales, pursuant to CPLR 3212 for summary judgment on the issue that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the plaintiff is directed to serve and file a copy of this order with notice of entry upon the defendants and the Clerk of the Calendar Department, Supreme Court, Riverhead within thirty

days of entry of the order with the Clerk of the County of Suffolk, and the Clerk of the Calendar Department is directed to schedule this matter for a trial on damages forthwith.

In this negligence action, the plaintiff, Stephen Ormsby, alleges that he sustained serious injury as defined by Insurance Law § 5102 (d), on November 17, 2010, on Route 25 at or near its intersection with Lake Avenue, in the Hamlet of Smithtown, New York, when his vehicle was struck in the rear by the vehicle owned by defendant J. Alvarado-Martinez and operated by Victor Canales. The plaintiff now seeks summary judgment on the issue of liability in his favor, and the defendants seek dismissal of the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d).

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]).

MOTION (001)

In support of motion (001), the plaintiff has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint and defendants' answer; the transcripts of the examinations before trial of Stephen Ormsby and Victor Canales. Although the plaintiff has not submitted a copy of his bill of particulars, in searching the record, this court refers to the copy provided by the defendants in motion (002).

Stephen Ormsby testified to the extent that he was involved in a three-car accident on November 1, 2010, on Middle Country Road, Smithtown, between 8 a.m. and 9 a.m. He was operating his black 2010 Infinity in a westbound direction on Middle Country Road, and brought his car to a stop for a red light behind two or three cars in the lane ahead of him. His vehicle was stopped for three to five seconds when he felt a medium to heavy impact to the rear of his vehicle from the truck behind him, causing his vehicle to move forward two to three feet into the rear of the vehicle in front of his. The rear of his vehicle was crushed in, the rear fender was hanging off, the rear daytime running lights were cracked, and the whole front panel was cracked. He stated that the driver of the vehicle in front of his car left before the police arrived.

Victor Canales testimony was translated by a Spanish interpreter. He testified that he was involved in the subject accident. He was operating the vehicle insured by his brother-in-law, Jose Alvarado. He later testified that Samuel Alvarado was the owner of the vehicle, which he described as a Chevy truck, not too big. He testified that he did not have a driver's license at the time of the accident. He had previously driven in El

Salvador. He stated the roads were dry on Middle Country Road. When he was about 600 feet from the intersection of Middle Country Road and Lake Avenue, he was traveling about 40 miles per hour behind two cars, and noticed the traffic light was green for his travel direction. He was about one car length behind the car in front of him, when the car in front of the plaintiff's car began braking, but he did not know why. The plaintiff's car applied its brakes and hit the car in front of it very lightly. He then struck the rear of the plaintiff's vehicle in front of him. He testified that about five seconds, maybe more, passed from when he saw the plaintiff's brake lights go on until he hit the rear of the plaintiff's car. He thought about ten seconds passed from when the plaintiff's vehicle hit the car in front of it until he struck the plaintiff's vehicle. The plaintiff's vehicle came to a complete stop for about five seconds before he hit the plaintiff's vehicle. He turned his car to the left and applied his brakes heavy. He described the impact between his vehicle and the plaintiff's as very light. After the accident, he noticed damage to the rear bumper of the plaintiff's car, and less damage to the plaintiff's front bumper. He testified that the driver of the first vehicle left the scene of the accident.

The defendant then read the statement which he wrote in Spanish at the scene of the accident: "(T)he accident happened this way. The light was green. And the person that was in front of me made a sudden stop. And I didn't realize that this person had stopped. It was like an instant. And that's when I hit the other car." The defendant then testified that when he wrote that statement, he believed the statement to be true and accurate, and still did at the time of his deposition testimony. He stated that he was nervous and that was why he did not tell the police about the plaintiff striking the other car.

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]). 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. A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that the defendant rebut the inference of negligence by providing a nonnegligent explanation that he applied his brakes but his vehicle was unable to stop (***Grimm v Bailey***, 105 AD3d 703, 963 NYS2d 277 [2d Dept 2013]). Under the circumstances of this case, such explanation by the defendant is insufficient to rebut the inference of negligence caused by the rear-end collision, as a claim of a sudden stop by the leading vehicle, standing alone, is insufficient to rebut the presumption of negligence (*see* ***Hearn v Manzolillo***, 103 AD3d 689, 959 NYS2d 531 [2d Dept 2013]; ***Williamson v Coleman***, 114 AD3d 768, 979 NYS2d 849 [2d Dept 2014]; ***Byrne v Smith***, 96 AD3d 704, 945 NYS2d 737 [2d Dept 2012]; ***Franco v Bauguste***, 70 AD3d 767, 895 NYS2d 152 [2d Dept 2010]). Moreover, the defendant has further failed to rebut the inference that he did not maintain a safe distance between his vehicle and the plaintiff's vehicle, thus proximately causing the subject accident.

A driver, as a matter of law, is charged with seeing what there is to be seen on the road, that is, what should have been seen, or what is capable of being seen at the time (***People of the State of New York v Anderson***, 7 Misc3d 1022A, 801 NYS2d 238 [City Ct, Ithaca 2005]). Here, the defendant testified that he was traveling about 40 miles per hour behind two cars, and was about one car length behind the plaintiff's vehicle when he noticed the traffic light was green for his travel direction. He was about one car length behind the car in front of him, when the car in front of the plaintiff's car began braking, but he did not know why, indicating that he failed to observe what was there on the roadway, namely the stopping vehicles ahead

of him. He did not testify as to the color of the traffic light at the time of the accident, only that it was green when he was 600 feet back from it. He did not testify that the light continued to remain green. Consequently, the defendant failed to meet the burden of establishing through admissible evidentiary proof the existence of a triable issue of fact sufficient to defeat the summary judgment motion. He has failed to come forward with a non-negligent explanation for the occurrence of the accident and the failure to safely stop and not strike the plaintiffs' vehicle, or to rebut the inference that he was traveling too closely behind the plaintiff's vehicle. While the defendant testified that the plaintiff struck the rear of the vehicle in front of it before he made contact with the rear of the plaintiff's vehicle, he has not supported this conclusory statement with evidentiary proof, namely, the testimony of the passengers in his vehicle at the time of the accident, or a statement made by him or the plaintiff at the scene indicating that was so.

It is determined that factual issues were raised by the defendant himself through the submission of his deposition testimony that the plaintiff's vehicle struck the vehicle in front prior to the defendant's impact with the plaintiff's vehicle. Such testimony was inconsistent with the statement he gave at the time of the accident. However, such feigned factual issue proffered at defendant's deposition several years after his statement at the scene of the accident does not preclude the granting of summary judgment to the plaintiff (*see* ***Standford v Hua Da, Inc.***, 2013 NY Slip Op 31738(U) [Sup Ct, New York County]). Rather, it is determined that the defendant failed to raise a factual issue concerning his striking the plaintiff's stopped vehicle in the rear; in failing to observe what was on the roadway, namely the two stopped vehicles ahead of him at the red light; and in failing to maintain a safe distance between his vehicle and the rear of the plaintiff's vehicle.

Accordingly, motion (001) is granted in favor of the plaintiff Ormsby on the issue of liability.

MOTION (002)

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]).

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 his verified bill of particulars, the plaintiff alleges that as a result of this accident he sustained injuries consisting of, inter alia, disc herniation at C4-5 impressing the ventral CSF with central canal stenosis; disc herniation at C5-6 with central canal stenosis; posterior disc bulge at C3-4 impressing the ventral CSF; C6-7 posterior disc bulge impressing the ventral CSF with central canal stenosis; L1-2 posterior disc bulge; L3-4 posterior disc bulge; L4-5 posterior disc bulge; L5-S1 posterior subligamentous disc bulge; cervical sprain/strain; thoracic sprain/strain; left pinky sprain/strain; cervical reactive arcual kyphosus; cephalgia; myospasm; myofascitis; myofascial pain syndrome; subluxation complex syndrome of the cervical thoracic and lumbar spine; and severe anxiety and depression.

In support of motion (003), the defendant has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendant's answer, and plaintiff's verified bill of particulars; transcript of the examination before trial of the plaintiff; and the report of Michael J. Katz, M.D. dated April 9, 2013 concerning his independent orthopedic evaluation of the plaintiff, with attendant curriculum vitae.

Upon review of the defendants' evidentiary submissions, it is determined as a matter of law that the defendants have not established prima facie entitlement to summary judgment pursuant to either category of injury defined by Insurance Law § 5102 (d).

The defendants failed to support this motion with copies of the medical records and initial test results for the MRI studies of the plaintiffs' cervical spine, and lumbar spine, and the EMG nerve conduction studies reviewed by Dr. Katz. 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 the 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]). Such records are not in evidence, precluding summary judgment.

Additionally, Dr. Katz reviewed the cervical and lumbar MRI reports of the testing undergone by the plaintiff and indicated that the reports indicate some changes which are degenerative in nature and pre-existing. However, Dr. Katz does not support his conclusory opinion and does not rule out that such injuries claimed by the plaintiff are causally related to the subject accident. He does not set forth what he determines to be degenerative changes, the cause of those changes, or the duration of those changes, and thus has not established that the purported degenerative changes were not causally related to the subject accident duration of his findings (***Estella v Geico Insurance Company***, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]; ***Partlow v Meehan***, 155 AD2d 647, 548 NYS2d 239 [2d Dept 1989]), precluding summary judgment.

Dr. Katz stated that the plaintiff has bilateral 5 degrees of flexion contracture at the PIP joint which leads him to believe that the appearance of both little fingers is congenital in nature, however, he does not

indicate in his report that he examined plaintiff's right hand or fingers, and only reported on plaintiff's left hand and fingers, raising further factual issues and further precluding summary judgment.

Dr. Katz has not opined with regard to the findings of the EMG report and nerve conducting studies, thus, leaving this court to speculate as to any opinion with regard to the same, and also whether or not an independent neurological examination was performed, and the results thereof. It is noted in plaintiff's opposition that the records of South Shore Chiropractic indicate that NCV and needle EMG testing of the upper extremities was limited due to patient intolerance, but that there was clinical evidence of left upper extremity radiculopathy. This leaves further factual issues unresolved and requires this court to speculate.

It is further noted that the defendants' examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendants' physician's affidavit 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]). Additionally, the expert offers 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]), precluding summary judgment.

It is noted that Dr. Katz reported that the plaintiff came under the outpatient care of South Shore Chiropractic and had physical therapy and/or chiropractic treatment two to three times per week until the present. He complains of headaches, pain in the neck and back, difficulty sleeping, and cannot sit for long periods or do household chores.

The plaintiff testified that he was self-employed as an insurance agent/broker in insurance sales full time at the time of the accident. After the accident, he took off the week, then worked on a part-time basis from home for about six months. When he is at home, it is less hours that he is physically sitting which is uncomfortable for a period of time, and he can take breaks. He had also been a part-time DJ (disc jockey) but is no longer since the accident. Immediately following the accident, he was experiencing the effects of adrenaline, he had pain in his neck and back, and had a headache. He went to South Shore Chiropractic for nausea, pain in his lower and mid-back, and neck and was treated three times a week with adjustments, massage, heat pads, and stim treatments, took lots of Advil, and used chiropractic pillows to sleep with. He went for MRIs. He has continued with weekly chiropractic treatment on a regular basis since 2010. His left hand and pinky got jammed in the accident, and he still experiences tingling and numbness in his left pinky finger. He was told he has herniations in his neck and back. He never had pain or discomfort in his neck or back prior to this accident, or to his finger. He has experienced no subsequent injury to those parts of his body. He still takes Advil for pain as needed, depending on the day. He still experiences periodic headaches. Prior to the accident, he worked out at a gym for two hours, running and lifting weights. He now exercises for one hour with 20 minutes of cardio and light lifting, with a lot of stretching exercises. He mountain biked prior to the accident and cannot ride anymore. He cannot roughhouse with his children, or go on the trampoline with them. He now has a landscaper for home. He is not "Mr. Muscle Man" carrying five grocery bags for his wife, and will now carry one at a time. He previously ran 25 miles per week, now does light jogging once a week. He experiences headaches and neck and back pain on a daily to weekly

basis

Based upon the foregoing, the defendants failed to demonstrate entitlement to summary judgment on either category of injury defined in 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 party has failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), 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]), as the burden has not shifted to the plaintiff.

Accordingly, motion (002) by the defendants for summary judgment dismissing the complaint on the basis that the plaintiff did not suffer serious injury as defined by Insurance Law §5102 (d) is denied.

Dated: 3/28/14

Peter H. Mayer

PETER H. MAYER, J.S.C.