McGuckin v Giambrone
2014 NY Slip Op 32723(U)
September 30, 2014
Supreme Court, Suffolk County
Docket Number: 12-15454
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX No. 12-15454
CAL No. 13-02299MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 5-22-14
ADJ. DATE 6-19-14
Mot. Seq. # 002 - MG

---X

MATTHEW MCGUCKIN,

Plaintiff,

- against -

DOUGLAS GIAMBRONE and CAROL GIAMBRONE,

Defendants.

---X

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Upon the following papers numbered 1 to 23 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 18 -21 ; Replying Affidavits and supporting papers 22 - 23 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Matthew McGuckin seeking summary judgment in his favor on the issue of liability and on the issue of whether he sustained a "serious injury" within the meaning of Insurance Law § 5102 (d) is granted.

Plaintiff Matthew McGuckin commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Woodbury Road and Carnegie Court in the Town of Oyster Bay on December 21, 2011. The accident allegedly occurred when the vehicle operated by defendant Douglas Giambrone and owned by defendant Carol Giambrone struck the rear of the vehicle operated by Raquel Lomonico. As a result of the impact between the Giambrone and Lomonico vehicles, the Giambrone vehicle crossed over the double yellow lines into the oncoming traffic, striking the front of the vehicle operated by Samuel Nathan, causing that vehicle to spin several times and strike the passenger side of the vehicle operated by Joyce Berg. At the time of the accident, plaintiff was riding as a front seat passenger in the Giambrone vehicle. By his bill of

particulars, plaintiff alleges, among other things, that he sustained various personal injuries as a result of the subject collision, including a burst fracture at level L3; a comminuted nasal bone fracture; cerebral hemorrhage; fractured lumbar vertebrae; orbital edema; and lung and periocular contusions. Plaintiff further alleges that as a result of the injuries he sustained in the accident he was confined to his bed for approximately three months and to his home for approximately eight months.

Plaintiff now moves for summary judgment in his favor on the complaint on the bases that he is not a proximate cause of the subject accident's occurrence and that he sustained "serious injuries" within the meaning of Section 5102 (d) of the Insurance Law. In support of the motion, plaintiff submits copies of the pleadings, the parties' deposition transcripts, a certified copy of the police accident report, and the sworn medical report of Dr. P. Arjen Keuskamp. Dr. Keuskamp, at defendants' request, conducted an independent neurological examination of plaintiff on September 6, 2013. Defendants do not oppose the branch of plaintiff's motion for summary judgment in his favor on the issue of whether he sustained a serious injury within the meaning of the Insurance Law. However, defendants oppose the branch of plaintiff's motion for summary on the issue of liability, arguing that plaintiff's recitation of the background description of the accident is inaccurate and that there are triable issues of fact as to whether plaintiff was contributorily negligent. In opposition to the motion, defendants submit the parties' deposition transcripts.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]).

It has long-been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "serious injury" as "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 90 days during the 180 days immediately following the occurrence of the injury or impairment."

A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

Based upon the adduced evidence, plaintiff established, *prima facie*, that the injuries he sustained as a result of the subject accident come within the meaning of the serious injury threshold requirement of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; *see also* ***Linton v Nawaz***, 14 NY3d 821, 822, 900 NYS2d 239 [2010]; *cf.* ***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]). The affirmed medical report of Dr. Keuskamp, defendants' examining neurologist, states that plaintiff's significant restriction in the range of motion of his lumbar spine and the tenderness at the lumbosacral junction of plaintiff's spine are causally related to the subject accident. Dr. Keuskamp states that plaintiff also sustained "a burst fracture of L3 [that] required surgical intervention and open reduction/internal fixation; comminuted nasal bone fracture; fractured lumbar vertebrae; periocular contusion; orbital edema; and contusion [of the] face, scalp and neck; left neuralgia paresthetica; abrasion [of the] hip; and [a] possible lung contusion" as a result of the subject accident. Dr. Keuskamp further states that plaintiff's injuries restrict his ability to lift more than 50 pounds and that he is unable to play any contact sports, but that he should be able to pursue his normal activities of daily living. Additionally, Dr. Keuskamp states that plaintiff's status is post decompression and instrumented fusion L1 through L5, but that he suffers from residual post lumbar spinal surgery syndrome despite having made a good general recovery from the L3 fracture. Therefore, plaintiff has shifted the burden to defendants to come forward with evidence in admissible form to raise a material triable issue of fact demonstrating that he did not sustain an injury within the meaning of the

Insurance Law (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

As previously stated, defendants do not oppose the branch of plaintiff's motion for summary judgment in his favor on the issue of whether he sustained a serious injury within the meaning of the Insurance Law. In fact, defendants have conceded that the injuries plaintiff sustained as a result of the subject accident meet the serious injury threshold requirement of Insurance Law § 5102 (d) (*see generally* ***Linton v Nawaz***, 14 NY3d 821, 900 NYS2d 239 [2010]). Accordingly, the branch of plaintiff's motion for summary judgment in his favor on the issue of whether he sustained a serious injury under the Insurance Law is granted.

In addition, the branch of plaintiff's motion for summary judgment in his favor on the issue of liability is granted. It is well-settled that a driver approaching a vehicle from the rear is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see* Vehicle and Traffic Law § 1129 [a]; *see also* ***Moore v Singh***, 108 AD3d 602, 969 NYS2d 146 [2d Dept 2013]; ***Nsiah-Ababio v Hunter***, 73 AD3d 672, 913 NYS2d 659 [2d Dept 2010]). As a result, a rear-end accident establishes a *prima facie* case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see* ***Fajardo v City of New York***, 95 AD3d 820, 943 NYS2d 587 [2d Dept 2012]; ***Orbitz v Hub Truck Rental Corp***, 82 AD3d 725, 918 NYS2d 156 [2d Dept 2011]).

Plaintiff established his entitlement to judgment as a matter of law by tendering the parties' deposition transcripts, which showed that plaintiff was riding as a front seat passenger in the Giambrone vehicle when it struck the rear of the vehicle operated by Raquel Lomonico, resulting in the subject four-car accident (*see* ***Rodriguez v Farrell***, 115 AD3d 929, 983 NYS2d 68 [2d Dept 104]; ***Medina v Rodriguez***, 92 AD3d 850, 939 NYS2d 514 [2d Dept 2012]; ***Conigliaro v Premier Poultry, Inc.***, 67 AD3d 954, 888 NYS2d 779 [2d Dept 2009]). The parties' deposition testimony also demonstrated that prior to the accident's occurrence, plaintiff was not engaged in any culpable conduct that contributed to the happening of the subject accident (*see* ***Andre v Pomeroy***, 35 NY2d 361; 362 NYS2d 131 [1974]; ***Matos v Salem Truck Leasing***, 105 AD3d 916, 963 NYS2d 366 [2d Dept 2013]; ***Shu-Feng Lin v Dial Container Serv., Inc.***, 90 AD3d 740, 935 NYS2d 48 [2d Dept 2011]). In fact, plaintiff testified that he informed Douglas Giambrone to slow down because he was driving very fast. In opposition to plaintiff's *prima facie* showing, defendants failed to raise a triable issue of fact that would absolve them of liability or to demonstrate any culpable conduct on behalf of plaintiff in causing the subject accident (*see* ***Sale v Lee***, 49 AD3d 854, 853 NYS2d 888 [2d Dept 2008]; ***Martinez v Novin***, 303 AD2d 653, 757 NYS2d 317 [2d Dept 2003]; ***Johnson v Phillips***, 261 AD2d 269, 690 NYS2d 545 [1st Dept 1999]). Although there may be questions of fact as to whether Douglas Giambrone was speeding in violation of Vehicle and Traffic Law § 1180 or whether he was following another vehicle too closely in violation of Vehicle and Traffic Law §1129 (a) when the accident occurred, an innocent passenger's right to summary judgment is not barred or in any way restricted by potential issues of comparative negligence (*see* CPLR 3212 [g]; ***Brabham v City of New York***, 105 AD3d 881, 963 NYS2d 332 [2d Dept 2013]; ***Garcia v Tri-County Ambulette Serv.***, 282 AD2d 206, 723 NYS2d 163 [2d Dept 2001). In the absence

of competent evidence that plaintiff's failure to exercise reasonable care for his or her own safety was a substantial factor in bringing about the injury, the issue should not be submitted to the jury (*see e.g.* ***Strychalski v Dailey***, 65 AD3d 546, 883 NYS2d 586 [2d Dept 2009]; ***Beck v Northside Med.***, 46 AD3d 499, 846 NYS2d 662 [2d Dept 2007]; ***Regan v Ancoma, Inc.***, 11 AD3d 1016, 782 NYS2d 480 [4 Dept 2004]; *see also* CPLR 1411).

Accordingly, plaintiff's motion for summary judgment in his favor on the issue of liability and on the issue of whether he sustained a serious injury under the Insurance Law is granted.

Dated: September 30, 2014

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

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