Brown v City of White Plains
2014 NY Slip Op 32822(U)
September 29, 2014
Supreme Court, Westchester County
Docket Number: 67962/2012
Judge: Francesca E. Connolly
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To commence the statutory time for appeals as of right
(CPLR 5513[a]), you are advised to serve a copy
of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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ROBIN BROWN,

Plaintiff,

-against-

CITY OF WHITE PLAINS, CITY OF WHITE PLAINS POLICE DEPARTMENT, and MARK BURNETT.

Defendants.

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DECISION and ORDER
Sequence Nos. 3, 4, and 5

Action No. 1
Index No. 70368/2012

---x

ULAN BAKER,

Plaintiff,

-against-

CITY OF WHITE PLAINS, CITY OF WHITE PLAINS POLICE DEPARTMENT, MARK BURNETT, and ROBIN BROWN,

Defendants.

---x

Action No. 2
Index No. 67962/2012

CONNOLLY, J.

The following documents were read in connection with (1) the motion of the defendants City of White Plains and Mark Burnett for summary judgment, (2) the cross motion of the defendant Robin Brown for summary judgment, and (3) the cross motion of the plaintiff Ulan Baker for summary judgment on the issue of liability:

White Plains/Burnett's notice of motion, affirmation, affidavit, exhibits, memorandum of law	1-12
Brown's notice of cross motion, affirmation, exhibits	13-18
Baker's notice of cross motion, affirmation, exhibits	19-35

The plaintiffs in these consolidated actions,[1] Robin Brown and Ulan Baker, seek to recover damages for personal injuries they allegedly sustained in a December 3, 2011 motor vehicle accident involving a police vehicle driven by the defendant Officer Mark Burnett (hereinafter Burnett). The accident allegedly occurred when Burnett, who was in pursuit of a vehicle driven by a non-party, rear-ended a vehicle driven by Brown, in which Baker was a passenger. The defendants City of White Plains Police Department and The City of White Plains are sued as the owners of Burnett's vehicle and his employer. Brown was also named as a defendant in Action No. 2, however, the action has since been dismissed insofar as asserted against her.

Three motions are presently pending before the Court: (1) Burnett and the City defendants (hereinafter collectively the defendants) move for summary judgment dismissing Action No. 2 insofar as asserted against them;[2] (2) Brown cross-moves for summary judgment dismissing the complaint in Action No. 2 insofar as asserted against her on the ground that Baker did not suffer a serious injury;[3] and (3) Baker cross-moves for summary judgment on the issue of liability.

The defendants' motion for summary judgment

In support of their motion, the defendants submit, among other things, the depositions of Burnett and Baker, Baker's verified bill of particulars, a certified police report, hospital records, and the expert reports of Dr. Edward Mills and Dr. Ronald Mann. As relevant to the issues raised on the instant motions, in Baker's bill of particulars he alleges that he sustained the following serious injuries: permanent loss of a body organ, member, function or system; permanent consequential limitation of use of a body function or system; and/or medically determined injury or impairment which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for at least ninety days during the hundred and eighty days immediately following the date of the occurrence. The bill of particulars further alleges that Baker missed three weeks from work as a result of the accident.

According to Burnett's deposition and affidavit, just before the accident, he was traveling 30 to 35 miles per hour on North Broadway in White Plains, in pursuit of a black BMW driven by a non-party. The speed limit at this location is 30 miles per hour. Burnett turned on his lights and

[1] The actions were consolidated for joint trial by so-ordered stipulation (Lefkowitz, J.), dated January 22, 2014, denominating *Brown v City of White Plains* (70368/2012) as Action No. 1 and *Baker v City of White Plains* (67962/2012) as Action No. 2.

[2] In an order dated July 21, 2014 (Lefkowitz, J.), the defendants obtained an extension of time to file a motion for summary judgment dismissing the complaint in Action No. 1 until August 15, 2014. However, based upon this Court's review of the NYSCEF filings in Action No. 1, the defendants have not moved for summary judgment within that time frame.

[3] In a decision and order dated June 18, 2014, this Court granted Brown's separate motion (sequence No. 2) for summary judgment dismissing the complaint and all cross claims in Action No. 2 insofar as asserted against her, on the ground that she was not negligent as a matter of law. Accordingly, her presently pending cross motion (sequence No. 4) is denied as academic.

sirens in order to pull over the non-party's vehicle, but the vehicle's operator refused and began traveling at a high rate of speed. Burnett pursued the non-party's vehicle until it made an abrupt lane change to the right. Burnett looked to his right, but he could not change into the right lane because he was blocked by another vehicle in that lane. When he realized he could not safely change lanes, Burnett attempted to brake, but he was unable to stop before he struck the vehicle driven by Brown (in which Baker was a passenger). Burnett testified that there was only a "split second" between the time that he saw Brown's vehicle and when he struck it.

Baker testified at his deposition that the car that he and Brown were traveling in was either at a full stop or was moving forward slightly when they were struck from behind. According to Baker, there was traffic directly in front of their car when the accident occurred. With respect to his injuries, Baker has general complaints of pain, has difficulty walking as he did before the accident, and has pain while climbing stairs. Although Baker returned to work full-time two to three weeks after the accident, he has difficulty lifting heavy objects (*see* Baker deposition at 72-75). Baker has since joined a Planet Fitness gym to stay in shape, and goes once or twice per week.

The certified police accident report states that "[Brown's vehicle] stopped suddenly causing [Burnett's vehicle] to collide into the rear of [Brown's vehicle]."

Dr. Edward Mills, an orthopedic surgeon, examined Baker on January 15, 2014, and opines that Baker sustained cervical and lumbar sprains as a result of the accident, both of which have resolved. Although Baker exhibited decreased range of motion, Dr. Mills notes that range of motion tests are subjective and there were no objective clinical findings noted such as muscle spasm, sensation, or atrophy to substantiate the subjective loss of motion (Exhibit I at 3-4).

Dr. Edward Mann, an orthopedist, examined Baker on February 21, 2014, and notes that he is able to work full-time as a building maintenance supervisor and can care for himself. During the examination, Dr. Mann observed Baker walking with a "slow exaggerated gait pattern" but, contrastingly, Baker "was observed in the parking lot after the examination walking with a normal gait pattern" (Exhibit J at 2). In Dr. Mann's opinion, Baker did not give full effort during his examination. Dr. Mann was unable to elicit spasm in Baker's cervical or lumbar spine. Dr. Mann opined that Baker has no disability related to the motor vehicle accident, and he is able to perform all of the activities of daily living without restriction.

The defendants argue that their actions are immune from liability pursuant to Vehicle and Traffic Law § 1104, under which the driver of a qualified emergency vehicle cannot be held liable without a showing of reckless disregard for the safety of others. They further argue that they are entitled to summary judgment dismissing the complaint because the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5104 (a).

<u>Baker's opposition and cross motion</u>

Baker opposes the motion and cross moves for summary judgment on the issue of liability,

submitting, among other things, medical records, the affidavit of James McGee, D.C., the affirmation of Dr. David Payne, and his own affidavit.

James McGee, D.C., who was Baker's treating chiropractor after the accident, avers that on December 5, 2011, Baker presented to his office with complaints of neck pain, pain radiating across the trapezius muscles, pain radiating to the left arm, headaches, low back pain, lumbar muscle spasms, pain radiating into the left leg, paresthesia into the left lower extremity, and increased low back pain when sitting and bending. Dr. McGee took measurements of Baker's range of motion and found deficits in his cervical range of motion as follows: 43% reduced right rotation, 50% reduced left rotation, 66% reduced right lateral flexion, and 66% reduced left lateral flexion. In his lumbar spine he found: 50% reduced flexion and 75% reduced extension. In Dr. McGee's opinion, these injuries were caused by the December 3, 2001 accident. Separate MRIs taken of Baker's cervical and lumber spine on January 31, 2012 demonstrated various bulging discs and a herniated disc at L4-5. Baker continued to receive treatment from Dr. McGee for over a year, and received treatment from other providers, which included a nerve block injection. On April 15, 2014, Dr. McGee measured Baker's cervical range of motion as follows: 25% reduced right rotation, 31% reduced left rotation, 33% reduced right lateral flexion, and 44% reduced left lateral flexion. Baker's lumbar range of motion at that time was: 16% reduced flexion and 25% reduced extension. Dr. McGee opines that, as a result of the accident, Baker suffers from cervical, thoracic, and lumbar myofascial derangement, and that, with a reasonable degree of medical certainty, Baker's injuries are permanent and consequential and have resulted in the loss of partial use of his neck and lower back.

Dr. Payne, a radiologist, affirms that Baker's MRIs demonstrated bulging discs at C4-5, C5-6, and C6-7, as well as a herniation at L4-5 impinging on the L4 root, and bulging disc at L5-S1.

In his affidavit, Baker avers that the car he was traveling in was in heavy traffic, and was hit from the rear suddenly and without warning by Burnett. He avers that, as a result of injuries sustained in the accident, he can no longer move his neck and back in the same way as before the accident. As a result, he has pain in his neck and back when he walks, sleeps, and stands too long, and when he goes up stairs or has to lift anything. He also has pain in his shoulders and shooting pain in his right leg. Although he still goes to the gym, he no longer does heavy lifting, and is only able to do exercises similar to his physical therapy. Prior to the accident, he had no injuries or pain in his neck, back, shoulders, or right leg.

Baker argues that the defendants failed to establish, as a matter of law, that he did not sustain a serious injury, noting that the defendants' own experts found that he exhibited loss of range of motion. Alternatively, Baker contends that his experts raised a triable issue of fact as to whether he sustained serious injuries. Baker also argues that Vehicle and Traffic Law § 1104 is inapplicable in that Burnett was not engaged in any enumerated conduct under that section entitling him to rely on the recklessness standard and, in any event, there is an issue of fact as to whether Burnett was acting with reckless disregard to the safety of others. Finally, Baker argues that Burnett's rear-end collision with his vehicle, which was stopped or nearly stopped, creates a presumption of negligence, entitling Baker to summary judgment.

[* 5]

DISCUSSION

I. The defendants' motion for summary judgment

A. Vehicle and Traffic Law § 1104

The defendants failed to meet their prima facie burden for summary judgment dismissing the complaint on the issue of whether they were engaged in specific conduct enumerated by Vehicle and Traffic Law § 1104 relieving them of liability (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Vehicle and Traffic Law § 1104 provides, in pertinent part:

> (a) The driver of an authorized emergency vehicle, when involved in an emergency operation, may exercise the privileges set forth in this section, but subject to the conditions herein stated.
>
> (b) The driver of an authorized emergency vehicle may:
>
> 1. Stop, stand or park irrespective of the provisions of this title;
>
> 2. Proceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation;
>
> 3. Exceed the maximum speed limits so long as he does not endanger life or property;
>
> 4. Disregard regulations governing directions of movement or turning in specified directions.
>
> * * *
>
> (e) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

(Vehicle and Traffic Law § 1104 [a], [b], and [e]). However, the reckless disregard standard of care provided for in this statute only applies where, among other things, the driver of the vehicle is engaging in the specific conduct enumerated by the statute:

> [T]he reckless disregard standard of care in Vehicle and Traffic Law § 1104 (e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the *specific conduct* exempted from the rules of the road by

Vehicle and Traffic Law § 1104 (b). Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence."

(*Kabir v County of Monroe*, 16 NY3d 217, 220 [2011] [emphasis added]).[4]

Here, the defendants have failed to establish, prima facie, that Burnett was engaging in covered conduct at the time of the accident. Specifically, the accident was not caused by Burnett: stopping, standing, or parking contrary to law; proceeding past a steady red signal; exceeding maximum speed limits without endangering life or property; or disregarding regulations governing directions or movement or turning in specified directions (*see* Vehicle and Traffic Law § 1104 [b] [1]-[4]). Viewing the evidence in the light most favorable to Baker (*see Pearson v Dix McBride*, 63 AD3d 895 [2d Dept 2009] ["in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant"]), Burnett was traveling in heavy traffic at approximately 30 to 35 miles per hour in a 30 mile per hour zone and failed to stop or change lanes in time to avoid the plaintiffs' stationary vehicle. It cannot be said, under these circumstances, that Burnett was in fact speeding. Moreover, even if Burnett was speeding, he has not established that his conduct falls within the ambit of subdivision (b) (3) of the statute, as he has not shown, as a matter of law, that by exceeding the maximum speed limit he did so in a manner that did "not endanger life or property."

Accordingly, since the defendants have not eliminated triable issues of fact as to whether Burnett's conduct was covered by Vehicle and Traffic Law § 1104 entitling him to rely upon the reckless disregard standard of care, the branch of their motion which is for summary judgment on the issue of liability is denied (*see Benn v New York Presbyt. Hosp.*, __ AD3d __ [2d Dept 2014] ["As the injury-producing conduct was not specifically exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b), the principles of ordinary negligence apply"]), without regard to the sufficiency of the opposition papers (*see Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

B. Serious injury

The defendants met their prima facie burden for summary judgment dismissing the complaint on the ground that Baker did not sustain a "serious injury" within the ambit of Insurance Law § 5104 (a). Specifically, the defendants' experts opined that Baker's upper and lower back sprains had completely resolved, and Baker's deposition testimony establishes that he was able to return to work within three weeks of the accident and has resumed most of his daily activities (*see Lim v Flores,*

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[4] The Court notes that in *Saarinen v Kerr* the Court of Appeals held: "[A] police officer's conduct in pursuing a suspected lawbreaker may not form the basis of civil liability to an injured bystander unless the officer acted in reckless disregard for the safety of others" (84 NY2d 494 [1994]). However, in *Kabir*, the Court of Appeals limited the holding of *Saarinen* by clarifying that the officer's conduct must fall within the conduct specified by Vehicle and Traffic Law § 1104 (b) in order to rely upon the reckless standard of care (*see Kabir v County of Monroe*, 16 NY3d 217, 228 [2011] ["Whether the police officer in *Saarinen* was entitled to have his actions judged by the standard of care in section 1104 (e) was not at issue"]).

[* 7]

96 AD3d 723 [2d Dept 2012] ["The defendants submitted, inter alia, the affirmed report of their examining orthopedist, who found no limitation in motion upon objective and quantitative range-of-motion testing of the plaintiff's left shoulder and cervical and lumbar regions of her spine"]; *Ranford v Tim's Tree and Lawn Serv., Inc.*, 71 AD3d 973, 974 [2d Dept 2010] ["[T]he medical evidence relied on by the defendants established that he did not sustain a serious injury to his cervical or lumbar spine under the permanent consequential limitation of use and/or significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident. The defendants submitted the affirmed report of their examining orthopedist, who concluded, based on objective range of motion tests, that the plaintiff had full range of motion in his cervical and lumbar spines"]; *George v Suarez,* 71 AD3d 727, 728 [2d Dept 2010] ["The affirmed medical reports of the examining neurologist and orthopedist concluded, based upon objective range-of-motion tests, that the plaintiff had full range of motion in the cervical and lumbar areas of his spine"]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 49-50 [2d Dept 2005] ["A defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities causally related to the motor vehicle accident, has established a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), despite the existence of an MRI which shows herniated or bulging discs"]).

However, in opposition, the plaintiff raised triable issues of fact through his expert's affidavit who, based upon contemporaneous medical records generated shortly after the accident and continuing for a period of time thereafter, opined that the plaintiff had sustained permanent and significant loss of range of motion in his cervical and lumbar spine as a result of the accident (*see Chryssty v Koskovolis,* 99 AD3d 655, 656 [2d Dept 2012] ["in opposition, the plaintiff submitted competent medical evidence raising a triable issue of fact as to whether the alleged injuries to the cervical and lumbar regions of her spine constituted serious injuries under the permanent consequential limitations of use and significant limitation of use categories of Insurance Law § 5102 [d]"]; *Evans v Pitt*, 77 AD3d 611 [2d Dept 2010]).

Although the defendants' experts have opined that Baker did not give a full effort during their examinations of him so as to exaggerate his range of motion deficits, such matters involve credibility determinations that must, under the circumstances, be resolved by a fact-finder at the time of trial, and not on a motion for summary judgment (*see Ferrante v American Lung Ass'n*, 90 NY2d 623, 631 [1997] ["It is not the court's function on a motion for summary judgment to assess credibility"]).

II. <u>Baker's cross motion for summary judgment</u>

Baker failed to meet his prima facie burden for summary judgment on the issue of liability. Although "[a] rear-end collision with a stopped vehicle creates 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" (*Raimondo v Plunkitt*, 102 AD3d 851 [2d Dept 2013]), here, there is an issue of fact as to whether the reckless disregard standard of care should be applied to Burnett's conduct. Burnett testified that he was traveling at 30 to 35 miles per hour in a 30 mile per hour zone. Moreover, assuming that a reckless disregard

standard of care applies, it cannot be said, on this record, that Burnett acted with reckless disregard to the safety of others as a matter of law such that Baker would be entitled to summary judgment on this issue of liability (*see Ferrara v Village of Chester*, 57 AD3d 719, 720 [2d Dept 2008] ["The 'reckless disregard' standard requires proof that the officer intentionally committed an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow"]). Accordingly, Baker's cross motion for summary judgment on the issue of liability is denied (*see Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

Accordingly, it is hereby,

ORDERED that the motion of the defendants City of White Plains, City of White Plains Police Department, and Mark Burnett for summary judgment dismissing the complaint and all cross claims insofar as asserted against them is denied; and it is further

ORDERED that the cross motion of the defendant Robin Brown for summary judgment dismissing the complaint and all cross claims insofar as asserted against her is denied as academic; and it is further

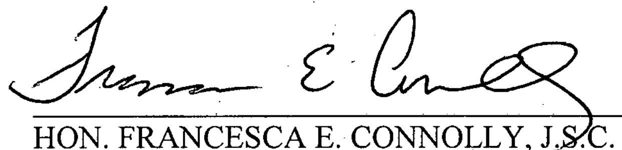
ORDERED that the plaintiff Ulan Baker's cross motion for summary judgment on the issue of liability is denied; and it is further

ORDERED that all parties are directed to appear in the Settlement Conference Part on October 28, 2014 at 9:15 a.m., in room 1600 of the Westchester County Courthouse located at 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York, 10601; and it is further

ORDERED that all other relief requested and not decided herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
September 29, 2014



HON. FRANCESCA E. CONNOLLY, J.S.C.

TO: Spar & Bernstein, PC
Attorneys for the plaintiff
225 Broadway, Suite 512
New York, NY 10007
By NYSCEF