Al-Masri v Hochheim
2015 NY Slip Op 30050(U)
January 14, 2015
Supreme Court, Suffolk County
Docket Number: 12-30734
Judge: W. Gerard Asher
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SHORT FORM ORDER

INDEX No. 12-30734
CAL. No. 14-00299MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 1-14-14 (001)
MOTION DATE 6-3-14 (002)
ADJ. DATE 7-1-14
Mot. Seq. # 001 - MD
002 - XMG

JAMAL AL-MASRI,

Plaintiff,

- against -

ERIKA HOCHHEIM,

Defendant.

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Upon the following papers numbered 1 to 73 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17 ; Notice of Cross Motion and supporting papers 18 - 62 ; Answering Affidavits and supporting papers 65 - 71 ; Replying Affidavits and supporting papers 63 - 64; 72 - 73 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in her favor dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) as a result of the subject accident is denied; and it is further

ORDERED that this cross motion by plaintiff for an order pursuant to CPLR 3212 (e) granting partial summary judgment in his favor on the issue of liability is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff on December 23, 2011 in a motor vehicle accident that occurred on northbound CR 97 (Nicolls Road) at its intersection with Pond Path in Setauket, New York. By his bill of particulars, plaintiff alleges that as a result of the subject accident he sustained serious injuries including: 2 mm of retrolisthesis at L5-S1 with a central disc herniation which is more prominent on the right and exerts mild mass effect on the right S1 nerve root; headaches, brachial neuritis, cervical and lumbar subluxations, myospasm, trigger points, and

significant decrease of normal range of motion in the cervical and lumbar spine; acute, severe sprain/strain of the cervical spine with severe pain and stiffness in the neck and upper back regions, aggravated by all motions of the head or neck with radiation of pain down the cervical, thoracic and lumbar regions of the spine; and acute, severe sprain/strain of the lumbar spine with radiculitis and nerve root irritation right and left lower extremity, accompanied by severe pain, tenderness and stiffness in the middle and lower back regions. In addition, plaintiff alleges that following the accident he was confined to home for approximately one week and unable to work that week and intermittently thereafter.

Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) as a result of the subject accident. Her submissions in support of her motion include the pleadings, plaintiff's bill of particulars, plaintiff's deposition transcript, and the affirmed reports of her examining physicians.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

Insurance Law § 5102 (d) defines "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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 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 a "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of plaintiff's limitation or loss of range of motion 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.***, 98 NY2d 345, 746 NYS2d 865 [2000]). In order to qualify under the 90/180-days category, an injury must be "medically determined" meaning that the condition must be substantiated by a physician, and the condition must be

causally related to the accident (*see* ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

By his affirmed report dated October 1, 2013, defendant's examining orthopedic surgeon, Matthew Skolnick, M.D., indicated that he examined plaintiff on said date and used a goniometer for range of motion testing of plaintiff's cervical spine, thoracic spine and lumbar spine. He reported range of motion findings, which when compared to normal results based on AMA guidelines, showed that plaintiff's results were all normal. In addition, Dr. Skolnick indicated that plaintiff had no spasms in his cervical spine nor did he have any paraspinal tenderness of the thoracic spine or the lumbar spine. He also performed a neurological examination and found that muscle testing of the upper extremities and of the lower extremities was 5+/5 with no giveaway weakness and that sensory responses were intact. Dr. Skolnick noted that deep tendon reflexes of the biceps, triceps and brachioradialis were 2+ and equal bilaterally; patellar and Achilles reflexes were +2 and equal bilaterally; there was no atrophy of the intrinsic muscles; and the straight leg raising test was negative. He diagnosed cervical spine strain, thoracic spine strain and lumbar spine strain all resolved and opined that there was no orthopedic disability as a result of the alleged injuries from the subject accident.

Defendant's examining radiologist, Steven M. Peyser, indicated in his affirmed report dated August 6, 2013 that he reviewed plaintiff's MRI of the lumbar spine performed on January 9, 2012 and found a small right paracentral disc herniation L5-S1 with mild impingement of the ventral thecal sac. He opined that such small disc herniations are frequently found in the normal asymptomatic population and that no direct evidence of a post-traumatic etiology could be determined with said evaluation.

Here, defendant met her prima facie burden of showing that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see* ***Griffiths v Munoz***, 98 AD3d 997, 950 NYS2d 787 [2d Dept 2012]; ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). She submitted competent medical evidence establishing, prima facie, that the alleged injuries to the lumbar, cervical, and thoracic regions of plaintiff's spine did not constitute serious injuries under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102 (d) (*see* ***Liriano v Ruperto***, 113 AD3d 599, 977 NYS2d 901 [2d Dept 2014]). Moreover, while plaintiff also alleged that he sustained a serious injury under the 90/180-day category of Insurance Law § 5102 (d), defendant submitted evidence establishing, prima facie, that during the 180-day period immediately following the subject accident, plaintiff did not have an injury or impairment which, for more than 90 days, prevented him from performing substantially all of the acts that constituted his usual and customary daily activities (*see* ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]). Plaintiff's deposition testimony reveals that following said accident he was on restricted duty at work as

a porter at a nursing home for "at least a month, two months" and "slowly" resumed his normal duties and that the only activity that he could no longer do was exercise at the gym. The burden then shifted to plaintiff to show, by admissible evidentiary proof, the existence of a triable issue of fact (*see* ***Marietta v Scelzo***, 29 AD3d 539, 815 NYS2d 137 [2d Dept 2006]).

In opposition to defendant's motion, plaintiff contends that he did sustain a "serious injury" as defined in Insurance Law § 5102 (d) as a result of the subject accident. His submissions include the pleadings, the affidavit of his treating chiropractor David Beneliyahu, D.C. and the affirmations of David Panasci, M.D. and Gabriel J. Gelves, D.O.

Plaintiff's treating chiropractor Dr. Beneliyahu indicated by affidavit that he first saw plaintiff on December 27. 2011 at which time he noted cervical and lumbar paraspinal myospasm with myofascial trigger points and positive cervical orthopedic tests including Foramen Compression, Soto Hall and Cervical Compression as well as positive Kemps, straight leg raise and Elys tests. He stated that on January 4, 2012 he performed range of motion testing of plaintiff's cervical spine and lumbar spine using J-Tech computerized digital inclinometry. Dr. Beneliyahu reported decreased cervical range of motion testing results of: extension 3 degrees (normal 60 degrees), a 95 percent deficit; left rotation 24 degrees (normal 80 degrees), a 70 percent deficit; and left lateral flexion 5 degrees (normal 45 degrees), an 88.8 percent deficit. With respect to plaintiff's lumbar spine, he reported decreased range of motion testing results including right lateral flexion 15 degrees (normal 25 degrees), a 40 percent deficit. Dr. Beneliyahu explained that plaintiff was treated at his office 96 times between December 23, 2011 and August 27, 2013 and that treatment included specific spinal manipulation, applied physiotherapy, cryotherapy and heat packs, and neck and back rehabilitation exercises. He further explained that five months after treatment began, plaintiff's symptoms began to taper, that by early July 2012 treatment was palliative in nature, and that any gap in treatment following August 27, 2013 is attributable to the palliative nature of plaintiff's treatment. Upon re-examination on January 9, 2014, Dr. Beneliyahu noted cervical paraspinal myospasm with myofascial trigger points of the upper trapezius, rhomboids and deep paracervical musculature and positive cervical orthopedic test results for Jackson Compression, Shoulder Depression, Cervical Distraction and Spurlings. As for plaintiff's lumbar spine, he reported that range of motion testing by J-Tech computerized digital inclinometer on said date showed the following significant range of motion restrictions: flexion 8 degrees (normal 60 degrees), 86 percent deficit; extension 6 degrees (normal 25 degrees), 76 percent deficit; right lateral flexion 14 degrees (normal 25 degrees), 44 percent deficit; and left lateral flexion 5 degrees (normal 25 degrees), 80 percent deficit. He also noted lumbar paraspinal myospasm with myofascial trigger points of the lumbar and thoracic erector spine muscles. Dr. Beneliyahu opined that plaintiff suffered injuries as a result of the subject accident including hyperextension/hyperflexion injury to the cervical spine, lumbar disc herniation at L5/S1 with radiculopathy, brachial neuritis and radiculopathy, post traumatic cephalgia, chronic myofascial pain syndrome, and chronic subluxation syndrome of the cervical, thoracic and lumbar spines. In addition, he opined within a reasonable degree of chiropractic certainty that plaintiff sustained a permanent consequential limitation of his musculoskeletal system and a significant limitation of use of a body function or system as a result of said accident.

Dr. Gelves avers in his affirmation that on or about February 4, 2014 he reviewed plaintiff's lumbar spine MRI and found "a compression of the descending right S1 nerve root at the L5-S1 level on

the basis of a focal central and slightly right of center disc herniation" and "a 3.0 mm retrolisthesis of L5 on S1 is present." He opines that "[g]iven the patient's young age and lack of degenerative changes, the findings appear to be acute and based on the trauma of the subject motor vehicle accident of December 23, 2011."

In opposition, plaintiff raised a triable issue of fact as to whether he sustained a serious injury to the lumbar region of his spine (*see* ***Ogle v Higgins***, 122 AD3d 696, 996 NYS2d 181 [2d Dept 2014]), and to his cervical spine which were caused by the subject accident (*see* ***Garafano v Alvarado***, 112 AD3d 783, 977 NYS2d 316 [2d Dept 2013]). Therefore, defendant's motion for summary judgment on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) as a result of the subject accident is denied.

Plaintiff cross-moves for partial summary judgment on the issue of liability. Plaintiff's submissions in support include his affidavit, the deposition transcript of defendant, and the certified police accident report.

"A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle" (***Nsiah–Ababio v Hunter***, 78 AD3d 672, 672, 913 NYS2d 659 [2d Dept 2010]; *see* Vehicle and Traffic Law § 1129 [a]). Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (*see* ***Maragos v Sakurai***, 92 AD3d 922, 923, 938 NYS2d 908 [2d Dept 2012]; ***Balducci v Velasquez***, 92 AD3d 626, 628, 938 NYS2d 178 [2d Dept 2012]). As a general rule, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rearmost vehicle, imposing a duty of explanation on that operator to excuse the collision either through a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or any other reasonable cause (*see* ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 AD3d 489, 904 NYS2d 761 [2d Dept 2010]; *see also* ***Ortiz v Hub Truck Rental Corp.***, 82 AD3d 725, 918 NYS2d 156 [2d Dept 2011]).

Defendant's deposition testimony reveals that she was traveling northbound on Nicolls Road at approximately 45 miles per hour, the road was dry, and as she approached the subject intersection she noticed that the traffic light was green but was unaware of the vehicles in front of her. According to defendant, she lifted her foot off of the gas pedal and took her eyes off the road because she was reaching to grab her travel bag on the front passenger seat floor to place it on the front passenger seat, and when she looked back there was a vehicle in front of her vehicle and her vehicle struck said vehicle in the rear on the passenger side. By his affidavit, plaintiff avers that he had been stopped at a red light for 30 seconds in the left through lane of Nicolls Road at its intersection with Pond Path when his vehicle was struck in the rear with a heavy impact causing his vehicle to be pushed forward into the vehicle in front of him.

Here, plaintiff established his prima facie entitlement to judgment as a matter of law (*see* ***Sehgal v www.nyairportsbus.com, Inc.***, 100 AD3d 860, 955 NYS2d 604 [2d Dept 2012]; *see also* ***Singh v Avis Rent A Car System, Inc.***, 119 AD3d 768, 989 NYS2d 302 [2d Dept 2014]). Plaintiff also made a prima facie showing that he was free of comparative fault (*see* ***Colandrea v Choku***, 94 AD3d

1034, 943 NYS2d 166 [2d Dept 2012]; ***Bonilla v Gutierrez***, 81 AD3d 581, 915 NYS2d 634 [2d Dept 2011]; ***Roman v A1 Limousine, Inc.***, 76 AD3d 552, 907 NYS2d 251 [2d Dept 2010]).

The burden then shifted to defendant to come forward with a non-negligent explanation for the accident (*see* ***Carman v Arthur J. Edwards Mason Contr. Co., Inc.***, 71 AD3d 813, 897 NYS2d 191 [2d Dept 2010]).

In opposition to the cross motion for partial summary judgment on the issue of liability, defendant argues, among other things, that the differing statements of the parties as to the color of the traffic light at the time of said accident raises issues of fact as to whether plaintiff failed to act reasonably under the circumstances by failing to take evasive action to avoid contact with defendant's vehicle and failed to see what he should have seen through the proper use of his senses. Defendant submits a copy of plaintiff's deposition transcript. In reply, plaintiff argues that the submissions raise no issue of fact inasmuch as defendant was unaware of the color of the traffic light just before the accident as she was not looking in front of her, she was not faced with an emergency situation, and plaintiff was not required to take any evasive action in a rear-end collision situation.

Defendant interposed only an affirmation of her attorney who lacked personal knowledge of the facts (*see* ***Lampkin v Chan***, 68 AD3d 727, 891 NYS2d 113 [2d Dept 2009]; ***Gomez v Sammy's Transp., Inc.***, 19 AD3d 544, 798 NYS2d 84 [2d Dept 2005]). Defendant failed to submit an affidavit from a person with personal knowledge of the facts either denying plaintiff's allegations or offering a non-negligent explanation for the collision (*see* ***Kimyagarov v Nixon Taxi Corp.***, 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007]; ***Piltser v Donna Lee Mgt. Corp.***, 29 AD3d 973, 816 NYS2d 543 [2d Dept 2006]). In any event, a stopped vehicle that is hit in the rear is not required to take evasive action to avoid the rear-end collision and the proffered proof fails to raise a triable issue of fact as to any comparative fault on the part of plaintiff or as to whether there was a non-negligent explanation for the accident (*see* ***Gutierrez v. Trillium USA, LLC***, 111 AD3d 669, 974 NYS2d 563 [2d Dept 2013]; *compare* ***Czarnecki v Corso***, 81 AD3d 774, 916 NYS2d 828 [2d Dept 2011]).

Therefore, plaintiff's cross motion for summary judgment in his favor on the issue of liability is granted.

Dated: Jan. 14, 2015

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**