Roskosky v Muncan
2015 NY Slip Op 30108(U)
January 15, 2015
Supreme Court, Queens County
Docket Number: 5386/2013
Judge: Robert J. McDonald

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

JACQUELINE ROSKOSKY and CHARLES ROSKOSKY,

Plaintiffs,

- against -

JONEL MUNCAN,

Defendant.

- x

Index No.: 5386/2013

Motion Date: 11/13/14

Motion No.: 134

Motion Seq.: 1

The following papers numbered 1 to 23 were read on this motion by the plaintiffs, Jacqueline Roskosky and Charles Roskosky, for an order pursuant to CPLR 3212(b) granting plaintiff partial summary judgment on the issue of liability and setting the matter down for a trial on serious injury and damages; and the cross-motion of the defendant Jonel Muncan for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing the complaint of the plaintiffs on the ground that plaintiff Jacqueline Roskosky did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	Papers Numbered
Notice of Motion-Affirmations-Exhibits	1 - 4
Notice of Cross-Motion-Affirmation-Exhibits	5 - 9
Affirmation in Opposition to Defendant's Cross-Motion	10 - 14
Affirmation in Opposition to Plaintiff's Motion	15 - 18
Reply Affirmations(2)	19 - 23

In this action for negligence, the plaintiffs, Jacqueline Roskosky and Charles Roskosky seek to recover damages for personal injuries allegedly sustained by Jacqueline Roskosky as a result of a multi-vehicle accident that occurred on April 8, 2012, on 80th Street at the intersection with Cooper Avenue,

Queens County, New York. Plaintiff alleges that she sustained injuries when the vehicle in which she was a passenger, was struck in the rear while stopped at a red traffic signal by a vehicle operated by non-party, Shavone Boston, that was pushed into hers. The third vehicle, owned and operated by defendant, Jonel Muncan, allegedly struck the second vehicle in the rear pushing it into plaintiff's vehicle. As a result of the accident the plaintiff allegedly sustained physical injuries including a herniated disc and bulging discs of the cervical spine.

This action was commenced by the plaintiff by the filing of a summons and complaint on March 21, 2013. Issue was joined by service of defendant's verified answer dated April 19, 2013. Plaintiff now moves, for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability and setting the matter down for a trial on damages only.

In support of the motion, the plaintiff submits an affirmation from counsel, Jhosandys Sears, Esq; a copy of the pleadings; a copy of the plaintiff's verified bill of particulars; copies of the deposition testimony of the plaintiffs Jacqueline Roskosky and Charles Roskosky and the defendant, Jonel Muncan; a copy of the police accident report (MV-104); and an affidavit from each plaintiff.

The description portion of the police accident report prepared by the responding officer states, "driver of vehicles #1(Roskosky) and #2 (nonparty Boston) stopped at traffic signal when Veh #3(Muncan), heading southbound on 80th, rear-ended Vehicle #2 pushing her into vehicle #1 (Roskosky) causing damage to all three vehicles."

In her examination before trial, taken on October 8, 2013, the plaintiff, Jacqueline Roskosky, age 55, a school aide at Our Lady of Hope School, testified that she was involved in a motor vehicle accident on Easter Sunday in April 2012. She was a front seat passenger in the vehicle being operated by her husband Charles. They were coming from their home and proceeding on 80th Avenue in Middle Village towards her sister-in-law's house in Glendale. Her two sons were rear seat passengers. When they reached the intersection with Cooper Avenue they stopped at a red traffic signal. There was a vehicle in front of theirs and a vehicle behind theirs. After being stopped for two minutes she felt two impacts from the rear of her vehicle. She immediately felt pain to her neck. When she exited her vehicle she observed a small vehicle behind hers and a truck behind the small vehicle. She declined medical assistance at the scene but sought medical treatment for neck pain two days after the accident. She was

initially examined and treated by chiropractor Dr. Keith who then referred her to Dr. Liguori, a neurologist and also referred her for MRI studies of the cervical spine. She stated that she missed about a week from school as a result of the accident and then went back to performing the same duties that she had prior to the accident. She stated that after her no fault payments were terminated she continued her treatments using private medical insurance. Her neck pain has not gotten better since she started her treatments.

Her husband, Charles Roskosky, age 55, testified at an examination before trial on March 7, 2014. He states that he is employed as building superintendent in Manhattan. He testified that his vehicle was struck in the rear while he was stopped at a red traffic signal on 80th Avenue at the intersection with Cooper Avenue. He intended on making a right turn on Cooper when the light changed. His vehicle had been struck by a small Toyota operated by non-party Ms. Boston. She stated that her vehicle had also been stopped at the light when the defendant's truck came plowing into her. He stated there was on heavy impact to his vehicle. When he looked in his rear view mirror he observed the truck pushing the small vehicle behind him into his car. He said that his vehicle lightly tapped the car in front of his but the first driver left the scene as there was no damage to her vehicle. He stated that he was not sure if there was one or two impacts to the rear of his vehicle. He stated that he was not injured as a result of the impact.

The defendant, Jonel Muncan, testified at an examination before trial on October 8, 2013, that he was involved in an accident on April 8, 2012 at approximately 3:00 p.m. on southbound 80th Street at the intersection with Cooper Avenue. He stated that he was operating a GMC Yukon and was on his way to Glendale to pick up a relative. He testified that when he first observed the traffic signal at the intersection it was green. He described the traffic in front of him as stop and go. He stated that he believes he struck the vehicle in front of his because it had stopped short. He does not know if the vehicle in front of his struck another vehicle.

The plaintiff contends that the defendant was negligent in the operation of his vehicle in striking the vehicle in front of his vehicle in the rear causing it to be pushed into the plaintiff's vehicle. Plaintiff's counsel contends that the accident was caused solely by the negligence of the defendant driver in that his vehicle was traveling too closely in violation of VTL § 1129(a) and the driver failed to safely stop his vehicle prior to rear-ending the vehicle in front of his. Counsel

contends that the evidence indicates that the plaintiff's vehicle was lawfully stopped at a red traffic signal when it was struck from behind in a chain reaction accident initiated by the defendant driver. Counsel contends, therefore, that the plaintiff is entitled to partial summary judgment on the issue of liability because the defendant did not stop his vehicle in time. Plaintiff alleges that the defendant was solely responsible for causing the accident while the plaintiff, whose vehicle was lawfully stopped at a red traffic signal, was free from culpable conduct.

In opposition, defendant's counsel, George DeHaven, Esq. asserts that there are disputed issues of fact raised by the testimony of the parties. Firstly, counsel asserts that plaintiff Jacqueline Roskosky recalled two impacts to the rear of her vehicle spaced a couple of seconds apart. He also points out that Mr. Roskosky also stated there were two impacts but then corrected his testimony to state there was only one impact. Counsel claims that if there were two impacts then there is a question of fact as to whether the Boston vehicle behind the plaintiff's vehicle struck the plaintiff's vehicle before being struck by the Muncan vehicle. Counsel claims that in a multi-vehicle accident where there is a question as to the sequence of collisions, it cannot be said as a matter of law that the negligence of the operator of the last vehicle in the line of vehicles was the proximate cause of the injuries to the occupant of the lead vehicle (citing Valvoulis v Adler, 43 AD3d 1154 [2d Dept. 2007]). Counsel asserts that the conflicting testimony with regard to the number of times the lead vehicle was struck creates an issue of fact as to whether the actions of the driver of the second vehicle operated by Ms. Boston caused or contributed to the accident (citing Mullen v Street Cowboy Taxi, Inc., 118 AD3d 681 [2d Dept. 2014]).

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

"When the driver of an automobile approaches another automobile from the rear, he or she 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" (Macauley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision creates a prima facie case of negligence on the part of the

driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (see Hearn v Manzolillo, 103 AD3d 689[2d Dept 2013]; Taing v Drewery, 100 AD3d 740; Balducci v Velasquez, 92 A.D.D3d 626 [2d Dept. 2012]; Kastritsios v Marcello, 84 AD3d 1174[2d Dept. 2011]; Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 [2d Dept. 2007]; Velazquez v Denton Limo, Inc., 7 AD3d 787 [2d Dept. 2004]).

Here, plaintiffs testified that their vehicle was stopped at a red traffic signal when it was struck from behind by a vehicle pushed into it by the defendant's vehicle. However, plaintiff, Jacqueline Roskosky, testified that there were multiple impacts to her vehicle and her husband, Charles, testified that he was not sure how many impacts there were. The courts have consistently held that where there is conflicting evidence as to how a three-vehicle, rear-end, chain-reaction collision occurred, including evidence suggesting that there were multiple impacts, the plaintiff has not met her prima facie burden (see Polanco-Espinal v City of New York, 84 AD3d 914 [2d Dept. 2011]; Thoman v Rivera, 16 AD3d 667 [2d Dept. 2005]). Based on the plaintiff's testimony a question of fact exists as to whether the second vehicle struck the plaintiff's vehicle prior to the defendant's vehicle, and a question of fact as to whether the negligence of the defendant was a proximate cause of the plaintiff's injuries or whether there were concurrent causes (see Vavoulis v Adler, 43 AD3d 1154 [2d Dept. 2007][in a multiple-vehicle accident, where, as here, there is a question of fact as to the sequence of the collisions, it cannot be said as a matter of law that the negligence of the operator of the last vehicle in the line of vehicles was a proximate cause of the injuries to an occupant of the lead vehicle]).

Accordingly as the plaintiff failed to demonstrate, prima facie, that the defendant's negligence was the sole proximate cause of the subject accident, the plaintiffs' motion for partial summary judgment on the issue of liability is denied (see Malak v. Wynder, 56 AD3d 622 [2nd Dept. 2008]).

THRESHOLD - SERIOUS INJURY

Defendant cross-moves for an order pursuant to CPLR 3212 dismissing the plaintiffs' complaint on the ground that the injuries claimed by the plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law. In support of the motion, the defendant submits an affirmation from counsel, George K. DeHaven, Esq., a copy of the

pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial; and the affirmed medical report of board certified orthopedic surgeon, Dr. Edward A. Toriello he plaintiff contends that she sustained a serious injury as defined in Insurance law §5102(d).

On February 11, 2014, plaintiff underwent an independent orthopedic examination performed by Dr. Edward A. Toriello. At the time of the examination plaintiff explained to the examining physician that she injured her neck in the subject accident and she receives chiropractic care at the rate of once a week. She stated she lost one week from work as a result of the accident. She presented with neck tightness. Dr. Toriello conducted range of motion testing using a goniometer and found normal range of motion of the right shoulder, left shoulder, right elbow, right elbow, left elbow, right wrist and hand, and left wrist and hand. However, he found a 75% limitation of range of motion of the cervical spine.

Dr. Toriello states that the plaintiff revealed evidence of a resolved cervical strain, that the range of motion testing was subjective, and finds that the plaintiff has no disability.

Defendant’s counsel contends that the affirmed medical report of Dr. Toriello is sufficient to establish, prima facie, that the plaintiff has not sustained a fracture, a permanent loss of a body organ, member, function or system; that she has not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that the plaintiff, who returned to work one week after the accident, did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff, for not less than 90 days during the immediate one hundred days following the occurrence, from performing substantially all of her usual daily activities.

In opposition, plaintiff’s attorney submits a recent evaluation and certified medical records from her treating chiropractor, Dr. Keith and certified medical records from Dr. James M. Liguori plaintiff’s treating neurologist.

The plaintiff also submitted an affidavit of merit from the plaintiff dated October 23, 2014, stating that due to the heavy impact to her vehicle her head struck the headrest and she felt immediate pain to her neck. On April 10, 2012 two days after the accident she began treatments with Dr. Keith. She treated with Dr Keith on a sporadic basis from April 2012 through October 2014. She also treated with neurologist Dr. Liguori for pain in her neck and back as well as weakness in her right arm and right hand. She states that she treated with Dr. Liguori until April 5,

2013. She states that she still continues to experience pain and limitations of range of motion in her neck, back, right arm and right hand which has had a significant effect on her daily activities.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the defendants failed to meet their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car SYS., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Defendant failed to establish, prima facie, that plaintiff did not sustain a serious injury under the permanent loss of use, permanent consequential limitation of use or significant limitation of use categories as a result of the accident (see Insurance Law § 5102 [d]).

As stated above, in his affirmed medical report, Dr. Toriello stated that upon examination of the plaintiff's cervical spine, plaintiff exhibited significant range of motion limitations. Despite these objective findings, the defendant's physician concluded that the physical examination did not reveal objective evidence of a disability. In addition, despite his finding of a 75% limitation of range of motion of the plaintiff's cervical spine, Dr. Toriello failed to explain or substantiate,

with any objective medical evidence, the basis for his conclusions that the limitations exhibited by plaintiff were magnified or were self-controlled (see Iannello v Vazquez, 78 AD3d 1121 [2d Dept. 2010]; Granovskiy v Zarbaliyev, 78 AD3d 656 [2d Dept. 2010]; Quiceno v Mendoza, 72 AD3d 669 [2d Dept. 2010]; Bengaly v Singh, 68 AD3d 1030 [2d Dept. 2009]; Moriera v Durango, 65 AD3d 1024 [2d Dept. 2009]). Therefore, Dr. Toriello's report is insufficient to eliminate all triable issues of fact (see Raguso v Ubriaco, 97 AD3d 560 [2d Dept. 2012]; Katanov v County of Nassau, 91 AD3d 723 [2d Dept. 2012]; Artis v Lucas, 84 AD3d 845 [2d Dept. 2011]; Borras v Lewis, 79 AD3d 1084 [2d Dept. 2010]; Smith v Hartman, 73 AD3d 736 [2d Dept. 2010]; Leopold v New York City Tr. Auth., 72 AD3d 906 [2d Dept. 2020]). Dr. Toriello's findings alone raise an issue of fact as to whether the plaintiff suffered a significant limitation of use of a body function or system (see Williams v Fava Cab Corp., 90 AD3d 912 [2d Dept. 2011]; Iannello v Vazquez, 78 AD3d 1121 [2d Dept. 2010]; Granovskiy v Zarbaliyev, 78 AD3d 656 [2d Dept.2010]; Britt v Bustamante, 77 AD3d 781[2d Dept. 2010]).

As the defendant failed to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition are sufficient to raise a triable issue of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851[1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]; Held v Heideman, 63 AD3d 1105 [2d Dept. 2009]; Landman v Sarcona, 63 AD3d 690 [2d Dept. 2009]; Alam v Karim, 61 AD3d 904 [2d Dept. 2009]; Liautaud v Joseph, 59 AD3d 394 [2d Dept. 2009]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the defendant's cross-motion for an order dismissing the plaintiffs' complaint is denied.

Dated: January 15, 2015
Long Island City, N.Y

_____

ROBERT J. MCDONALD
J.S.C.