

Metelenis v Bonomo

2015 NY Slip Op 30400(U)

March 5, 2015

Supreme Court, Suffolk County

Docket Number: 12-22815

Judge: Joseph Farneti

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

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 6-12-14 (#002)
MOTION DATE 9-11-14 (#003)
ADJ. DATE 10-9-14
Mot. Seq. # 002 - MD
003 - MG

-----X
VICTORIA METELENIS,
:
Plaintiff, :
:
- against - :
:
HEATHER BONOMO,
:
Defendant. :
-----X

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Upon the following papers numbered 1 to 50 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-12; 36-45; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 13-30; 46-48; Replying Affidavits and supporting papers 31-33; 49-50; Other supplemental affirmation in opposition 34-35; it is,

ORDERED that the motion (seq. #002) by defendant Heather Bonomo and the motion (seq. #003) by plaintiff Victoria Metelenis hereby are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendant Heather Bonomo seeking summary judgment dismissing the complaint is denied; and it is further

ORDERED that the motion by plaintiff Victoria Metelenis seeking summary judgment in her favor on the issue of liability is granted.

Plaintiff Victoria Metelenis commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Route 347 and Wireless Road in the Town of Brookhaven on March 30, 2011. It is alleged that the accident occurred when the vehicle owned and operated by defendant Heather Bonomo crossed over into plaintiff's vehicle's lane of travel, striking the rear left side of her vehicle. As a result of the impact between the Metelenis and Bonomo vehicles, the Metelenis vehicle spun around and struck a vehicle traveling in the left lane of Route 347. Prior the accident's occurrence, plaintiff was traveling westbound in the right lane of Route 347 and defendant was traveling in the westbound left lane of Route 347. By her bill of

particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject accident, including a concussion, sprain of the neck, and “injuries” to her hands and wrists.

Defendant now moves for summary judgment on the basis that the injuries alleged to have been sustained by plaintiff as a result of the subject collision do not meet the “serious injury” threshold requirement of § 5102 (d) of the Insurance Law. Defendant, in support of the motion, submits copies of the pleadings, plaintiff’s deposition transcript, and the sworn medical reports of Dr. Matthew Skolnick and Dr. Sheldon Feit. Dr. Skolnick, at defendant’s request, conducted an independent orthopedic examination on November 5, 2013. Dr. Feit, also at defendant’s request, conducted an independent radiological review of the magnetic resonance images (“MRI”) of plaintiff’s cervical and lumbar spines performed on April 29, 2011 and May 24, 2011, respectively. Plaintiff opposes the motion on the grounds that defendant failed to make a *prima facie* showing that she did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), and that the evidence submitted in opposition demonstrates that she sustained injuries within the “limitations of use” and the “90/180” categories of the Insurance Law as a result of the subject accident. Plaintiff, in opposition to the motion, submits an uncertified copy of the police accident report, the sworn medical report of Dr. Barry Katzman, and unsworn copies of her own medical records regarding the injuries she allegedly sustained in the subject collision.

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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

A defendant seeking summary judgment on the ground that a plaintiff’s negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a *prima facie* case that the plaintiff did not sustain a “serious injury” (see *Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant’s own witnesses, “those findings must be in admissible form, [such as], affidavits and affirmations, and not unsworn reports” to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff’s

deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see Dufel v Green*, *supra*; *Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; *Pagano v Kingsbury*, *supra*).

Here, defendant, through the submission of plaintiff's deposition transcript and competent medical evidence, established a *prima facie* case that plaintiff did not sustain an injury within the meaning of Section 5102 (d) of the Insurance Law (*see Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, *supra*; *Davis-Hassan v Siad*, 101 AD3d 932, 957 NYS2d 205 [2d Dept 2012]; *Torres v Ozel*, 92 AD3d 770, 938 NYS2d 469 [2d Dept 2012]). Dr. Skolnick, defendant's examining orthopedist, states in his medical report that an examination of plaintiff reveals she has full range of motion in her spine, shoulders, elbows and wrists; that there is no tenderness upon palpitation of the paraspinal muscles, wrists or shoulders; that the straight leg raising test was negative; and that the sprains sustained to her spine as a result of the accident have resolved. Dr. Skolnick further states that plaintiff does not have any causally related orthopedic disabilities due to the subject accident, and that plaintiff is capable of performing all of her usual daily living activities, including working at her usual occupation, which she is currently engaged in.

In addition, Dr. Feit, defendant's examining radiologist, states in his sworn medical reports that the MRI films of plaintiff's cervical and lumbar spines show that she has disc bulges at levels C4 through C6 and levels L4 through S1. Dr. Feit states that the disc bulges are the result of pre-existing degenerative changes in her spine, and that she also suffers from spondylosis in her lumbar region, but there is no evidence of focal herniation in her spine. Dr. Feit further states that these findings are unrelated to the accident in question and that disc bulges are not posttraumatic, but are "degenerative secondary to annular degeneration and/or chronic ligamentous laxity."

Defendant, having made a *prima facie* showing that the plaintiff did not sustain a serious injury within the meaning of the statute, shifted the burden to the plaintiff to come forward with evidence to overcome defendant's submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained (*see Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]). 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). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott*, *supra*). 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]). 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]).

In opposition to defendant’s *prima facie* showing, plaintiff has raised a triable issue of fact as to whether she sustained an injury within the limitations of use category of the Insurance Law as a result of the subject collision (see *Garafano v Alvarado*, 112 AD3d 783, 977 NYS2d 316 [2d Dept 2013]; *David v Caceres*, 96 AD3d 990, 947 NYS2d 990 [2d Dept 2012]; *Williams v Fava Cab Corp.*, 90 AD3d 912, 935 NYS2d 90 [2d Dept 2011]; *Compass v GAE Transp., Inc.*, 79 AD3d 1091, 914 NYS2d 255 [2d Dept 2010]). Plaintiff has submitted the affidavit of Dr. Barry Katzman, her treating orthopedist. Dr. Katzman, in his affidavit, concludes, based upon his contemporaneous and recent examinations of plaintiff that the injuries to her spine are permanent, and that the observed range of motion deficits were significant (see *Vaughan-Ware v Darcy*, 103 AD3d 621, 959 NYS2d 698 [2d Dept 2013]; *Bykova v Sisters Trans, Inc.*, 99 AD3d 654, 952 NYS2d 95 [2d Dept 2012]; *Kanard v Setter*, 87 AD3d 714, 928 NYS2d 782 [2d Dept 2011]; *Dixon v Fuller*, 79 AD3d 1094, 913 NYS2d 776 [2d Dept 2010]). Dr. Katzman further states that the injuries to the plaintiff’s spine and the range of motion limitations are causally related to the subject accident (see *Harris v Boudart*, 70 AD3d 643, 893 NYS2d 631 [2d Dept 2010]). Consequently, Dr. Katzman’s affidavit is sufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury to her spine within the limitations of use categories of the Insurance Law as a result of the subject accident (see *Young Chool Yoi v Rui Dong Wang*, 88 AD3d 991, 931 NYS2d 373 [2d Dept 2011]; *Gussack v McCoy*, 72 AD3d 644, 897 NYS2d 513 [2d Dept 2010]). Accordingly, defendant’s motion for summary judgment dismissing plaintiff’s complaint for failure to sustain a serious injury within the meaning of Insurance Law § 5102 (d) is denied.

Plaintiff moves for summary judgment in her favor on the issue of liability, arguing that defendant’s negligent operation of her vehicle was the sole proximate cause of the subject accident’s happening. Specifically, plaintiff alleges that defendant violated Vehicle and Traffic Law §§ 1122 (a) and 1128 (a) when she attempted to change lanes from the left lane to the right lane when it was unsafe to do so, causing defendant’s vehicle to strike the left rear side of her vehicle. Plaintiff, in support of the motion, submits copies of the pleadings, an uncertified copy of the police accident report, and the parties’ deposition transcripts. Defendant opposes the motion on the grounds that there are triable issues of fact as to the subject accident’s occurrence, and as to whether plaintiff’s operation of her vehicle was a proximate cause of the accident. Defendant, in opposition to the motion, submits plaintiff’s deposition transcript.

Vehicle and Traffic Law § 1122 (a) provides, in pertinent part, that “the driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken

vehicle.” In addition, Vehicle and Traffic Law § 1128 (a) states “a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.”

Based upon the adduced evidence, plaintiff established her *prima facie* entitlement to judgment as a matter of law by demonstrating that she was traveling lawfully in the westbound right lane of Route 347 when defendant’s vehicle entered into her lane of travel and collided with her vehicle (*see* Vehicle and Traffic Law §§ 1122 (a) and 1128 (a); *Reyes-Diaz v Quest Diagnostic Inc.*, 123 AD3d 790, 999 NYS2d 98 [2d 2014]; *Davidoff v Mullokandov*, 74 AD3d 862, 903 NYS2d 107 [2d Dept 2010]; *Rivera v Corbett*, 69 AD3d 916, 892 NYS2d 790 [2d Dept 2010]). Plaintiff also established that she was free from comparative negligence, and that defendant’s unsafe lane change was the sole proximate cause of the subject accident (*see DeBlasi v City of New York*, 306 AD2d 308, 760 NYS2d 667 [2d Dept 2003]). Defendant’s own deposition testimony establishes that, prior to the accident, she was traveling in the left lane of westbound Route 347; that she did not see plaintiff’s vehicle prior to changing lanes; that as she changed lanes she was looking straight ahead; that, immediately prior to impact, her vehicle was traveling parallel to plaintiff’s vehicle in the left lane; and that plaintiff’s vehicle, which was traveling in the right lane, did not change lanes at any point prior to the accident. Thus, plaintiff, as the driver with the right of way, was entitled to anticipate that defendant would obey the traffic laws and not change lanes when it was unsafe to do so (*see* Vehicle and Traffic Law §§ 1122 (a) and 1128 (a); *Walker v Patrix Trucking NY Corp.*, 115 AD3d 943, 982 NYS2d 552 [2d Dept 2014]). Moreover, a driver is negligent when an accident occurs because he or she failed to see that which through the proper use of his or her senses he or she should have seen (*see Laino v Lucchese*, 35 AD3d 672, 827 NYS2d 249 [2d Dept 2006]; *Bongiovi v Hoffman*, 18 AD3d 686, 795 NYS2d 354 [2d Dept 2005]; *Bolta v Lohan*, 242 AD2d 356, 661 NYS2d 286 [2d Dept 1997]). In opposition to plaintiff’s *prima facie* showing, defendant failed to raise a triable issue of fact as to the comparative negligence of plaintiff (*see Colandrea v Choku*, 94 AD3d 1034, 943 NYS2d 166 [2d 2012]). Accordingly, plaintiff’s motion for summary judgment in her favor on the issue of liability is granted.

Dated: March 5, 2015



 Hon. Joseph Farneti
 Acting Justice Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION