Sigcha v Russel
2015 NY Slip Op 30420(U)
March 19, 2015
Supreme Court, Suffolk County
Docket Number: 12-37142
Judge: Jr., Andrew G. Tarantino
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

COPY

SHORT FORM ORDER

INDEX No. 12-37142

ORIGINAL WHEN BLUE

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 7-10-14 (#001)
MOTION DATE 9-2-14 (#002)
ADJ. DATE 10-28-14
Mot. Seq. # 001 - MG
002 - MD

BOLIVAR SIGCHA and IRALDA D. BARAVO ROSALES,

Plaintiffs,

- against -

KELLY E. RUSSEL,

Defendant.

DAVID J. RAIMONDO & ASSOCIATES
Attorney for Plaintiffs
2780 Middle Country Road
Lake Grove, New York 11755

MARKS, O'NEILL, O'BRIEN DOHERTY & KELLY, P.C.
Attorney for Defendant
530 Saw Mill River Road
Elmsford, New York 10523

Upon the following papers numbered 1 to 55 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; 16 - 36 ; Notice of Cross Motion and supporting papers__; Answering Affidavits and supporting papers 37 - 38; 39 - 51 ; Replying Affidavits and supporting papers 52 - 55 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions by the plaintiffs (# 001) and by the defendant (# 002) for summary judgment are consolidated for purposes of this determination; and it is further

ORDERED that the motion (# 001) by the plaintiffs for an order granting them partial summary judgment on the issue of liability is granted; and it is further

ORDERED that the plaintiffs are directed to serve a copy of this order with notice of entry upon the Calendar Clerk of this Court. Upon such service, the Calendar Clerk is directed to place this matter on the Calendar Control Part Calendar for a trial on damages on the next available date; and it is further

ORDERED that the motion (# 002) by the defendant for summary judgment dismissing the complaint against her on the ground that plaintiff Bolivar Sigcha did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

3/19

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Bolivar Sigcha when his vehicle was rear-ended by a vehicle owned and operated by the defendant. The accident allegedly occurred in the northbound lane of Route 110 in the Town of Babylon, New York, on June 7, 2012.

The plaintiffs now move for summary judgment in their favor on the issue of liability. In support, the plaintiffs submit, *inter alia*, the pleadings, the affidavit of plaintiff Bolivar Sigcha and the transcripts of the deposition testimony of plaintiff Sigcha and the defendant. Initially, the Court notes that the uncertified police report submitted with the moving papers is not in admissible form and, therefore, is not considered in the determination of the motion (*see* ***Coleman v Maclas***, 61 AD3d 569, 877 NYS2d 297 [1st Dept 2009]; ***Cheul Soo Kang v Violante***, 60 AD3d 991, 877 NYS2d 354 [2d Dept 2009]).

In his affidavit, plaintiff Sigcha avers that he had been traveling northbound on Route 110, that he came to a complete stop at the intersection with Parthey Lane to yield to a pedestrian crossing the street. While stopped for approximately six to eight seconds, he was hit in the rear by the defendant's vehicle.

At his deposition, plaintiff Sigcha testified to the effect that he had been traveling northbound in the left lane of Route 110. When he observed a pedestrian crossing the street, he came to a complete stop. While stopped for about six to eight seconds, he was hit in the rear by the defendant's vehicle. Immediately before the accident, he heard screeching of brakes.

At her deposition, the defendant testified to the effect that she had been traveling northbound in the left lane of Route 110. She was following GPS directions. Prior to the accident, plaintiff Sigcha's vehicle had traveled in front of her for a couple of blocks, and her highest rate of speed was forty miles per hour. When she observed the brake lights on the Sigcha vehicle, she was approximately two car lengths behind him. She immediately applied her brakes but was unable to avoid the collision. She was not sure whether her vehicle skidded before hitting the Sigcha vehicle. She testified that she presumed that plaintiff Sigcha was going to make a left turn because he was stopped in the left lane.

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed, to keep 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]; ***Gibson v Levine***, 95 AD3d 1071, 944 NYS2d 610 [2d Dept 2012]; ***Zweeres v Materi***, 94 AD3d 1111, 942 NYS2d 625 [2d Dept 2012]; ***Nsiah-Ababio v Hunter***, 78 AD3d 672, 913 NYS2d 659 [2d Dept 2010]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on wet pavement or some other reasonable excuse (*see* ***Fajardo v City of New York***, 95 AD3d 820, 943 NYS2d 587 [2d Dept 2012]; ***Giangrasso v Callahan***, 87 AD3d 521, 928 NYS2d 68 [2d Dept 2011]; ***Ortiz v Hub Truck Rental Corp.***, 82 AD3d 725, 918 NYS2d 156 [2d Dept 2011]).

Here, the plaintiffs established their prima facie entitlement to summary judgment as they demonstrated that plaintiff Sigcha's vehicle came to a complete stop when it was struck in the rear by the defendant's vehicle. The burden then shifted to the defendant to come forward with a non-negligent explanation for the accident. In opposition, the defendant contends that plaintiff Sigcha stopped his vehicle abruptly, and that his actions caused the subject accident. However, the defendant's claim that the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the following vehicle (*see* ***Gutierrez v Trillium USA, LLC***, 111 AD3d 669, 974 NYS2d 563 [2d Dept 2013]; ***Hackny v Monge***, 103 AD3d 844, 960 NYS2d 176 [2d Dept 2013]; ***Kastritsios v Marcello***, 84 AD3d 1174, 923 NYS2d 863 [2d Dept 2011]). The defendant failed to raise an issue of fact by providing a reasonable, non-negligent explanation for the subject accident. Thus, the plaintiffs' motion for summary judgment in their favor on the issue of liability is granted.

The defendant moves (# 003) for summary judgment dismissing the complaint on the ground that plaintiff Sigcha did not sustain a "serious injury" as defined in Insurance Law § 5102 (d).

By his bill of particulars, Sigcha alleges that as a result of the subject accident, he sustained serious injuries including extensive tear of anterior labrum of right shoulder; axonal degeneration of the right ulnar nerve; bulging discs at C3-C4, C4-C5 and C5-C6; cervical radiculopathy; lumbar radiculopathy at L4-5 and L5-S1; annular tear at L4-L5; bulging discs at L3-L4 and L5-S1; and hearing loss in the left ear at 4000 hertz.

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 a specific percentage of the loss of range of motion must be ascribed, 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]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

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 defendant may satisfy this burden by submitting the plaintiff's own deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran*** 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). 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]).

Here, the defendant failed to make a prima facie showing that plaintiff Sigcha did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). The medical report dated September 6, 2012 of the examining neurologist, Dr. Jonathan Winick, was without any probative value since it was unaffirmed (*see* ***Quintana v Arena Transp., Inc.***, 89 AD3d 1002, 933 NYS2d 379 [2d Dept 2011]; ***D'Orsa v Bryan***, 83 AD3d 646, 919 NYS2d 881 [2d Dept 2011]; ***Lozusko v Miller***, 72 AD3d 908, 899 NYS2d 358 [2d Dept 2010]). In any event, Dr. Winick failed to provide any specific range of motion testing results for plaintiff Sigcha's cervical and lumbar spine, right shoulder and right wrist (*see* ***Barrera v MTA Long Island Bus***, 52 AD3d 446, 859 NYS2d 483 [2d Dept 2008]).

On September 20, 2012, approximately three months after the subject accident, an independent examining orthopedist, Dr. John Waller, examined plaintiff Sigcha using certain orthopedic and neurological tests, including a straight leg raising test, impingement test, and cuff tear test. Dr. Waller performed range of motion testing on plaintiff Sigcha's cervical and lumbar spine and shoulders, and found that he had range of motion restrictions: 45 degrees flexion (50 degrees normal), 50 degrees extension (60 degrees normal), 40 degrees right and left lateral flexion (45 degrees normal), and 45 degrees right and left rotation (80 degrees normal) in the cervical spine and 90 degrees flexion (180 degrees normal), 90 degrees abduction (170 degrees normal), and 60 degrees internal and external rotation (80 degrees normal) in the right shoulder (*see* ***Jean v New York City Tr. Auth.***, 85 AD3d 972, 925 NYS2d 657 [2d Dept 2011]; ***Reitz v Seagate Trucking, Inc.***, *supra*). Dr. Waller opined that plaintiff Sigcha had "voluntary restriction of motion" with regard to his cervical spine. Dr. Waller failed to set forth what objective testing he performed in order to arrive at this conclusion (*c.f.* ***Chiara v Dernago***, 70 AD3d 746, 894 NYS2d 129 [2d Dept 2010]; ***Mannix v Lisi's Towing Serv.***, 67 AD3d 977, 888 NYS2d 773 [2d Dept 2009]). Moreover, the range of motion restrictions for plaintiff Sigcha's right shoulder have raised an issue of fact as to whether Sigcha sustained a significant limitation (*see* ***Mazo v Wolofsky***, 9 AD3d 452, 779 NYS2d 921 [2d Dept 2004]; ***Negrete v Hernandez***, 2 AD3d 511, 768 NYS2d 231 [2d Dept 2003]).

On September 20, 2012, an independent examining chiropractor, Dr. Robert Marks, examined plaintiff Sigcha using certain orthopedic and neurological tests, including cervical distraction test, Jackson's test, a straight leg raising test, Minor's test, and Kemp's test. Dr. Marks performed range of

motion testing on plaintiff Sigcha's cervical and lumbar spine, and found that he had range of motion restrictions: 40 degrees flexion (50 degrees normal), 40 degrees extension (60 degrees normal), and 60 degrees right and left rotation (80 degrees normal) in the cervical spine (*see* ***Jean v New York City Tr. Auth.***, *supra*; ***Reitz v Seagate Trucking, Inc.***, *supra*). On March 7, 2013, approximately nine months after the subject accident, an independent examining acupuncturist, John Yang examined plaintiff Sigcha using certain orthopedic and neurological tests, including a straight leg raising test and Kemp's test. Yang performed range of motion testing on plaintiff Sigcha's lumbar spine and right shoulder and found that he had range of motion restrictions: 160 degrees flexion (180 degrees normal), 160 degrees abduction (180 degrees normal), and 70 degrees external rotation (90 degrees normal) in the right shoulder. Yang failed to provide any specific range of motion testing results for plaintiff Sigcha's cervical spine and right wrist (*see* ***Barrera v MTA Long Island Bus***, *supra*). The range of motion restrictions for plaintiff Sigcha's cervical spine and right shoulder have raised an issue of fact as to whether Sigcha sustained a significant limitation within the meaning of Insurance Law § 5102 (d) (*see* ***Mazo v Wolofsky***, *supra*; ***Negrete v Hernandez***, *supra*).

On May 15, 2014, approximately one year and eleven months after the subject accident, the defendant's examining orthopedist, Dr. William Healy, III, examined plaintiff Sigcha using certain orthopedic and neurological tests, including O'Brien's test, Speed's test, Yergason's test, a cross arm test, Hawkin's sign, Neer sign, and a straight leg raising test. Dr. Healy found that all the test results were negative or normal except Hawkin's sign. Dr. Healy performed range of motion testing on plaintiff Sigcha's cervical and lumbar spine, shoulders, elbows, wrists, fingers, hips, knees, ankles, and feet and found that his ranges of motion were all within normal ranges. With respect to the cervical spine, Dr. Healy indicated that flexion and extension were 45 degrees (45 degrees normal), right and left lateral flexion were 30-45 degrees (30-45 degrees normal), and right and left rotation were 80 degrees (80 degrees normal). Dr. Healy's report is insufficient to sustain the defendant's prima facie burden. Dr. Healy reported range of motion testing results for the plaintiff's cervical lateral flexion that were expressed in ranges of degrees and also provided ranges or spectrums of degrees up to 15 degrees for the normal standards of comparison (*compare* ***Spencer v Golden Eagle, Inc.***, 82 AD3d 589, 920 NYS2d 24 [1st Dept 2011]; *see* ***Lee v M & M Auto Coach, Ltd.***, 2011 NY Slip Op 30667U, 2011 NY Misc Lexis 1131 [Sup Ct, Nassau County 2011]). When a normal reading for range of motion testing is provided in terms of a spectrum or range of numbers rather than one definitive number, the actual extent of the limitation is unknown, and the Court is left to speculate (*see* ***Sainnoval v Sallick***, 78 AD3d 922, 923, 911 NYS2d 429 [2d Dept 2010]; *see also* ***Lee v M & M Auto Coach, Ltd.***, *supra*). Moreover, Dr. Healy failed to set forth the objective tests that were performed to support his conclusion that plaintiff did not suffer from any limitation of the range of motion in his cervical spine. On May 13, 2014, the defendant's examining neurologist, Dr. Max Rudansky, examined plaintiff Sigcha using certain neurological tests, including Romberg test. Dr. Rudansky found that all the test results were negative or normal and there was paracervical trigger point tenderness with limitation on lateral cervical rotation. However, as Dr. Rudansky failed to provide any specific range of motion testing results for plaintiff Sigcha's cervical and lumbar spine, right shoulder and right wrist, his report is insufficient to sustain the defendant's prima facie burden (*see* ***Barrera v MTA Long Island Bus***, *supra*).

Inasmuch as the defendant failed to meet her prima facie burden, it is unnecessary to consider whether the papers submitted by the plaintiffs in opposition to the motion were sufficient to raise a triable issue of fact (*see* ***McMillian v Naparano***, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]). Accordingly, the defendant's motion on the issue of serious injury is denied.

Dated: MARCH 19 2015

A.J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**