

**Houng v Beers**

2015 NY Slip Op 31801(U)

September 24, 2015

Supreme Court, Queens County

Docket Number: 12130/2013

Judge: Robert J. McDonald

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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

SOOK HOUNG, Index No.: 12130/2013  
Plaintiff, Motion Date: 9/10/15  
- against - Motion No.: 75  
KENNETH E BEERS, III and RYDER TRUCK Motion Seq.: 3  
RENTAL INC.,

Defendants.

- - - - - x

The following papers numbered 1 to 10 read on this motion by defendants, KENNETH E BEERS, III and RYDER TRUCK RENTAL INC., for an order pursuant to CPLR 3211(a)(7) and 3212(b) granting summary judgment and dismissing plaintiff's complaint as against defendant RYDER TRUCK RENTAL INC. pursuant to the Graves Amendment; for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability; and/or for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing plaintiff's complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102 and 5104:

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Notice of Motion-Affidavits-Exhibits.....	1 - 6
Affirmation in Opposition-Exhibits.....	7 - 8
Reply Affirmation-Exhibits.....	9 - 10

In this negligence action, plaintiff seeks to recover damages for personal injuries she sustained as a result of a motor vehicle accident that occurred on June 4, 2013, at approximately 1:49 p.m., on the corner of 48<sup>th</sup> Street and Northern Boulevard, in Queens County, New York. Plaintiff contends that as a result of the accident she sustained serious physical injuries to her right knee, lumbar spine, right ankle, and cervical spine.

Plaintiff commenced this action by filing a supplemental summons and amended verified complaint dated July 8, 2013. Issue was joined by service of defendants' verified answer dated September 10, 2013.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF  
LIABILITY OF RYDER TRUCK RENTAL INC.: GRAVES AMENDMENT

Defendant Ryder Truck Rental Inc. (Ryder) moves for an order dismissing the complaint against it alleging that under the Federal Transportation Equity Act of 2005, 49 U.S.C. § 30106, commonly known as the "Graves Amendment," a leasing/rental company vehicle owner cannot be held to be vicariously liable for the alleged negligent acts of the renter, its employees or agents.

In support of its motion, Ryder submits an affidavit dated March 27, 2015 from Norm Miller, the Claims Examiner for Ryder. He states that Ryder entered into a long-term lease agreement with Tree of Life, Inc. Pursuant to the agreement, which was annexed to the moving papers, Ryder leased the subject vehicle to Tree of Life, Inc. for a term of seven years. The agreement was in full force and effect on the date of the subject accident. Mr. Miller further states that the vehicle was in good working order and condition on the date of the subject accident, and Ryder never received any complaints regarding any mechanical issues.

Defendants' counsel contends that pursuant to the Graves Amendment, as Ryder is a rental company, it is not vicariously liable under VTL § 388, and therefore, the complaint fails to state a cause of action. Plaintiff does not oppose this branch of defendants' motion.

Here, there is no dispute that Ryder is a leasing company, and therefore, cannot be held vicariously liable for leasing the vehicle in question. Ryder has provided sufficient evidence to demonstrate that the Graves Amendment is applicable herein in that Ryder is an owner engaged in the trade or business of renting or leasing motor vehicles (see Bravo v Vargas, 978 NYS2d 307 [2d Dept. 2014]; Khan v MMCA Lease, Ltd., 100 AD3d 833 [2d Dept. 2012]; Ballatore v HUB Truck Rental Corp., 83 AD3d 978 [2d Dept. 2011]).

Therefore, the motion by Ryder to dismiss plaintiff's complaint against it based solely on vicarious liability against Ryder Truck Rental Inc. is granted pursuant to CPLR 3211 (a) (7) as that claim fails to state a cause of action (see Burrell v Barreiro, 83 AD3d 984 [2d Dept. 2011]; Byrne v Collins, 77 AD3d 782 [2d Dept. 2010]; Gluck v Nebgen, 72 AD3d 1023 [2d Dept. 2010]).

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT  
ON THE ISSUE OF LIABILITY

In his examination before trial, taken on March 12, 2015, defendant Kenneth E Beers, III, stated that on the date of the accident he was employed as a driver/laborer by KeHE Distributors. At the time of the accident, he was driving a thirty-two foot long tractor trailer in furtherance of his employment. Just before the accident, he was stopped at the red traffic light at the subject intersection at 48<sup>th</sup> Street and Northern Boulevard. When the light turned green, he proceeded to make a right turn onto Northern Boulevard. Prior to making the turn, his right turn signal was on. He testified that initially he was unable to complete the right turn because there were pedestrians walking in the cross walk, but once the traffic light turned from green to yellow the pedestrians stopped, and he continued with his turn. Immediately thereafter, he heard the honking of a horn and brought the truck to an immediate stop. When the contact occurred, he had already started his right turn.

Plaintiff testified on November 4, 2014. At the time of the accident, she was employed as a tailor at Quality Cleaners. She testified that she was traveling along 48<sup>th</sup> Street in the right lane and was stopped at a red traffic light at the intersection of 48<sup>th</sup> Street and Northern Boulevard. While stopped, she noticed defendants' truck in the left lane. She states that the lane she was stopped in was a right turn lane only, but that vehicles traveling in the left lane of traffic at the intersection could also make a right turn. She did not remember if the truck's right turn signal was on. She testified that once the light turned green, she moved her vehicle forward and that is when the accident occurred.

Defendants also submit the affidavit of Liliana Pan who witnessed the subject accident. Ms. Pan states that she observed defendants' truck in the single lane of traffic on 48<sup>th</sup> Street stopped at a red traffic light at the intersection with its right turn signal on. She affirms that she also saw plaintiff's vehicle stopped directly behind the truck. She observed the truck start to move forward and commence a right turn onto Northern Boulevard when plaintiff moved her vehicle into the parking lane and attempted to pass the truck.

Pursuant to VTL § 1122(a), "[t]he 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." Pursuant to VTL 1123(b), "[t]he driver of a vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety."

Defendants' counsel contends that plaintiff was under the mistaken belief that the parking lane was a lane of travel and attempted to pass defendants' truck on the right while defendant was attempting to make a right turn at the intersection.

In opposition, counsel for plaintiff contends that defendant was negligent in making a narrow right turn causing the accident and that defendant Beers' testimony does not establish his freedom from culpable conduct.

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 or her position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

Viewing the evidence submitted in the light most favorable to the nonmoving party, there are issues of credibility which must be determined by the trier of fact rather than on a motion for summary judgment. "A court may not weigh the credibility of witnesses on a motion for summary judgment, unless it clearly appears that the issues are not genuine, but feigned" (Conciatori v. Port Auth. of N. Y. & N. J., 46 AD3d 501 [2d Dept. 2007]). Thus, this Court finds that as the parties have presented different versions as to how the accident occurred, there are triable issues of fact as to whether plaintiff was in a right turning lane; whether plaintiff safely attempted to overtake the truck; and whether any negligence on defendant's part contributed to the accident. Therefore, defendants failed to make a prima facie showing of entitlement to judgment as a matter of law as there are questions of fact as to each party's negligence (see Roman v. Al Limousine, Inc., 76 AD3d 552 [2d Dept. 2010]; Lum v Wallace, 70 AD3d 1013 [2d Dept. 2010]; Lopez v Reyes-Flores, 52 ASD3d 785 [2d Dept. 2008]; Scibelli v Hopchick, 27 AD3d 720 [2d Dept. 2006]).

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT  
ON THE ISSUE OF THRESHOLD

Defendants also moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendants submit the affirmed orthopedic medical report of Alan J. Zimmerman, M.D. and the affirmed neurologic medical report of Monette G. Basson, M.D.

In her verified bill of particulars, plaintiff contends that she sustained a serious injury as defined in Insurance Law § 5102(d) in that she sustained a fracture; a permanent loss of use of a body organ, member function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

Dr. Zimmerman examined plaintiff on December 3, 2014. She presented with neck, waist, left shoulder, right knee, and right ankle complaints. She reported that she had no prior accidents or injuries. Dr. Zimmerman conducted objective and comparative range of motion testing using a goniometer and found that plaintiff had normal range of motion of her cervical spine, lumbar spine, knees, and ankles. He did find a 10 degree limitation of range of motion of plaintiff's cervical spine extension, and a 10 degree limitation of range of motion of plaintiff's lumbar spine flexion. He states that plaintiff's cervical sprain; lumbar sprain; right knee contusion, post surgery; and right ankle sprain are all resolved. Dr. Zimmerman states which records he reviewed including plaintiff's MRIs. He opined that all of the findings regarding plaintiff's lumbar spine and cervical spine are degenerative, preexisting, and not causally related to the subject accident. He did find a herniation at L4-L5, but states that it was a degenerative herniation and that there is no evidence of nerve root compression or radiculopathy. Regarding the right ankle MRI, Dr. Zimmerman found a sprain of the ankle with no permanency. Regarding the right knee, he states that the mechanism of injury of plaintiff being seated in a vehicle precludes a meniscal tear from being causally related. He states that to tear a meniscus or the ACL, plaintiff must sustain a twisting injury to a weight bearing extremity which did not occur in this subject accident.

Plaintiff was examined on January 29, 2015 by Dr. Basson. Dr. Basson conducted range of motion testing using a baseline bubble inclinometer and found normal ranges of motion of plaintiff's cervical spine and lumbar spine. Dr. Basson concludes that plaintiff is neurologically completely normal and has recovered from any sprains that were sustained. Dr. Basson states that there is no need for any neurological testing or treatment and there is no neurological disability.

At her examination before trial, plaintiff testified that she did not receive any medical treatment until four or five days after the accident. She first started treatment at New York Pain Clinic where she complained of pain to her right knee, lower back, and neck. She received chiropractic care, acupuncture treatment, and physical therapy. Plaintiff also treated with Dr. Song who performed surgery to her right knee on her third visit. Plaintiff testified that she missed approximately five months from work, but none of her doctors advised her that she could not work.

Defendants' counsel contends that the medical reports are sufficient to establish, prima facie, that plaintiff has not sustained a fracture; a permanent loss of use of a body organ, member function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constitute her 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 opposition, plaintiff submits an affirmation from counsel; the affirmed medical report of Yan Q. Sun, M.D.; and the affirmed medical report of Ayooob Khodadadi, M.D.

Dr. Sun states that he initially examined plaintiff on August 17, 2013 and recently examined her on June 3, 2015. He states that although plaintiff's condition was and remained poor, her no-fault coverage had been denied, and therefore, she was unable to continue treatment even though treatment was necessary to relieve pain. He affirms that plaintiff's conditions are permanent and any medical treatment is palliative in nature only. He opines that plaintiff's injuries are causally related to the accident, not from any preexisting degenerative condition, and that she will have difficulty performing daily activities due to the pain and stiffness.

Dr. Khodadadi affirms that the MRI findings regarding plaintiff's right knee, cervical spine, and right ankle are not attributable to degenerative disease.

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 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 plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to 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 competent proof submitted by defendants, including the medical reports and plaintiff's testimony, is sufficient to meet defendants' prima facie burden by demonstrating that 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]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

In opposition, plaintiff failed to raise a question of fact. First and foremost, there is no evidence that plaintiff sustained a fracture as a result of the subject accident. Turning to the permanent loss, permanent consequential limitation of use, and significant limitation of use categories, while a quantitative assessment or numerical assessment of range of motion of injury is not required on an initial or contemporaneous examination, the courts still require a contemporaneous qualitative assessment of injuries from an examination close to the time of the accident. "[A] contemporaneous doctor's report is important to proof of causation" (Perl v Meher, 18 NY3d 208 [2011]). The absence of a contemporaneous medical report invites speculation as to causation (see Griffiths v Munoz, 98 AD3d 997 [2d Dept. 2012]). As stated by the Appellate Division, First Judicial Department, "while the Court of Appeals in Perl rejected a rule that would make contemporaneous quantitative assessments

a prerequisite to recovery...Perl did not abrogate the need for at least a qualitative assessment of injuries soon after the accident (see Rosa v Mejia, 95 AD3d 402 (1st Dept. 2012)). Thus, Perl "confirmed the necessity of some type of contemporaneous treatment to establish that a plaintiff's injuries were causally related to the incident in question" [Rosa v Mejia, 95 AD3d 402 (1st Dept. 2012)].

Here, although Dr. Sun states that he performed range of motion testing with the use of a goniometer, he merely states that he "found positive results." Dr. Sun fails to provide any qualitative assessment of the injuries upon his initial examination of plaintiff, and fails to compare any findings to what is normal. As such, Dr. Sun's opinion that plaintiff's injuries were sustained in the subject accident is speculative (see Perl v. Meher, 18 N.Y.3d 308 [2011]; Griffiths v. Munoz, 98 A.D.3d 997 [2d Dept. 2012]; Singh v. City of New York, 71 A.D.3d 1121 [2d Dept. 2010]).

Moreover, Dr. Khodadadi's affirmation, with the MRI report of plaintiff's cervical spine attached, is insufficient as proof of a herniated disc, without objective medical evidence establishing that the subject accident resulted in significant physical limitations, is insufficient to establish a serious injury (see Pommels v Perez, 4 NY3d 566 [2005]; Kearse v New York City Transit Authority, 16 AD3d 45 [2d Dept. 2005]). Dr. Khodadadi's affirmations with the MRI reports of plaintiff's right knee and right ankle fail to causally relate plaintiff's injuries to the subject accident, and as such, are insufficient to raise a triable issue of fact.

Regarding the 90/180 day category, plaintiff failed to submit competent medical evidence that the injuries allegedly sustained in the subject accident rendered her unable to perform substantially all of her usual and customary daily activities for not less than 90 days of the first 180 days following the subject accident (see Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Sainte-Aime v Ho, 274 AD2d 569 [2d Dept. 2000]). In this regard, plaintiff admitted at her deposition that none of her doctors advised her that she could not work (see Bleszcz v Hiscock, 69 AD3d 890 [2d Dept. 2010]).

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

ORDERED, that the Clerk of Court is directed to enter judgment in favor of defendant, Ryder Truck Rental Inc., dismissing the complaint as to defendant Ryder Truck Rental Inc. on the issue of liability; and it is further

ORDERED, that the motion by defendant, Kenneth E Beers, III, for an order dismissing plaintiff's complaint against him on the issue of liability is denied; and it is further

ORDERED, that defendants' motion for an order granting summary judgment dismissing plaintiff's complaint pursuant to Insurance Law §§ 5102 and 5104 is granted and the complaint of plaintiff, Sook Huang, is dismissed.

Dated: September 24, 2015  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**