

Martin v Taxi La Paz Inc.
2015 NY Slip Op 32002(U)
September 24, 2015
Supreme Court, Suffolk County
Docket Number: 15685/2011
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY**PRESENT:**

WILLIAM B. REBOLINI
Justice

Debra A. Martin,

Index No.: 15685/2011

Plaintiff,

Motion Sequence No.: 002; MDMotion Date: 11/12/14

-against-

Submitted: 3/11/15Taxi La Paz Inc., Mauricio Avalos
and Douglas A. Morales,Motion Sequence No.: 003; MDMotion Date: 10/31/14Submitted: 3/11/15

Defendants.

Attorney for Plaintiff:Attorney for Defendant

Siben & Siben, LLP

Douglas A. Morales:

90 East Main Street

Bay Shore, NY 11706

Law Offices of Robert P. Tusa
898 Veterans Memorial Highway, Suite 320
Hauppauge, NY 11788Attorney for DefendantsTaxi La Paz Inc. and Mauricio Avalos:Clerk of the Court

Baker, McEvoy,

Morrissey & Moskovitz, P.C.

1 Metro Tech Center

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Upon the following papers numbered 1 to 41 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 15; 16 - 26; Answering Affidavits and supporting papers, 27 - 37; 38 - 39; Replying Affidavits and supporting papers, 40 - 41; it is

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion (# 001) by defendants Taxi La Paz Inc. and Mauricio Avalos for an order granting summary judgment dismissing the complaint against them on the ground that the

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plaintiff did sustain a “serious injury” as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the motion (# 002) by defendants Taxi La Paz Inc. and Mauricio Avalos for an order granting summary judgment in their favor on the issue of liability, dismissing the complaint and all cross claims against them, is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff as a result of a motor vehicle accident on February 6, 2010. At the time of the accident, the plaintiff was a passenger in a taxi operated by defendant Mauricio Avalos and owned by defendants Taxi La Paz Inc., when it collided with a vehicle owned and operated by defendant Douglas Morales. It is undisputed that the accident occurred on Brightside Avenue, a two-way roadway, in Central Islip, New York.

Defendants Taxi La Paz Inc. and Mauricio Avalos (“Taxi defendants”) move (# 001) for summary judgment dismissing the complaint against them on the ground that the plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d).

By her bill of particulars, the plaintiff alleges that as a result of the subject accident, she sustained serious injuries including a torn medial meniscus of the left knee; anterior cruciate ligament tear of the left knee; a lateral meniscus tear of the left knee requiring diagnostic arthroscopy; excision of medial and lateral meniscal tear of the left knee; post operative scarring and disfigurement of the left knee area; inferior labral tear of the right shoulder; supraspinatus impingement of the right shoulder; subcoracoid bursitis of the right shoulder; internal derangement of the right shoulder; herniated discs at C4-C5 and T3-T4; bulging discs at C5-C6 and C6-C7; cervical and lumbosacral spine sprain; cervical radiculitis; and aggravation and/or exacerbation of major depressive disorder, panic disorder with agoraphobia, anxiety, sleeplessness and isolation. The plaintiff claims that, following the subject accident on February 6, 2010, she underwent left knee surgery on June 11, 2010.

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

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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 Eycler*, 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]; *Faroze 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]).

On November 29, 2012, approximately two years and 10 months after the subject accident, the moving defendants’ examining neurologist, Dr. Edward Weiland, examined the plaintiff using certain orthopedic and neurological tests, including foraminal compression test, shoulder depression test, Soto-Hall test, Valsalva’s maneuver, a straight leg raising test, Romberg’s test, Babinski’s test, Clonus test, Waddell test, and Fabere-Patrick sign. Dr. Weiland found that all the test results were negative or normal, and that there was no tenderness or spasm in the plaintiff’s cervical and thoracic spine. Dr. Weiland performed range of motion testing on the plaintiff’s cervical, thoracic and lumbar spine using a goniometer, and found that she had normal range of motion. Dr. Weiland opined that the plaintiff’s cognitive functions were intact, without evidence of aphasia or apraxia, and that there was no sign of raised intracranial pressure.

On October 11, 2012, the moving defendants’ examining orthopedist, Dr. Jimmy Lim, examined the plaintiff using certain orthopedic and neurological tests including compression test, Spurling test, Soto-Hall test, Sulcus test, apprehension test, Hawkin’s test, Neer’s test, a straight leg raising test, Romberg’s test, Valsalva’s maneuver, Ely’s test, Nachla’s test, Minor’s test, Patrick’s test, McMurray’s test, drawer sign, and Lachman’s test. Dr. Lim found that all the test results were negative or normal and that there were no spasm, tenderness or trigger points in the plaintiff’s thoracolumbar spine and right shoulder. Dr. Lim performed range of motion testing on the plaintiff’s cervical and thoracolumbar spine, right shoulder, and left knee using a goniometer, and found that she had normal range of motion. Dr. Lim opined that the plaintiff had no orthopedic disability related to the subject accident and that she may perform normal daily activities without restriction.

Here, the Taxi defendants failed to make a prima facie showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see Reitz v Seagate*

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Trucking, Inc., 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). Both Dr. Weiland and Dr. Lim failed to provide any evidence demonstrating that the plaintiff's left knee injury requiring the surgery was not causally related to the subject accident (*see Chang v Cardone*, 113 AD3d 582, 977 NYS2d 911 [2d Dept 2014]; *Liautaud v Joseph*, 59 AD3d 394, 871 NYS2d 920 [2d Dept 2009]). Moreover, the reports of Dr. Weiland and Dr. Lim failed to adequately address the plaintiff's claim, clearly set forth in the bill of particulars, that she sustained an aggravation and/or exacerbation of major depressive disorder, panic disorder with agoraphobia, anxiety, sleeplessness and isolation as a result of the subject accident (*see Cohn v Khan*, 89 AD3d 1052, 933 NYS2d 403 [2d Dept 2011]; *Smith v Quicci*, 62 AD3d 858, 880 NYS2d 652 [2d Dept 2009]; *Volpetti v Kap*, 28 AD3d 750, 814 NYS2d 236 [2d Dept 2006]). A causally-related emotional injury, alone or in combination with a physical injury, can constitute a serious injury within the meaning of Insurance Law § 5102 (d) (*see Kranis v Biederbeck*, 83 AD3d 903, 920 NYS2d 725 [2d Dept 2011]; *Villeda v Cassas*, 56 AD3d 762, 871 NYS2d 167 [2d Dept 2008]). The reports of Dr. Weiland and Dr. Lim did not indicate that either Dr. Weiland or Dr. Lim performed any psychological tests with respect to the plaintiff's alleged emotional injury (*see Robinson v Lawrence*, 99 AD3d 980, 952 NYS2d 468 [2d Dept 2012]; *Rahman v Sarpaz*, 62 AD3d 979, 880 NYS2d 125 [2d Dept 2009]; *Joseph v Hampton*, 48 AD3d 638, 852 NYS2d 335 [2d Dept 2008]). Moreover, the moving defendants have not submitted any evidence to rule out the claimed emotional injury (*see McFadden v Barry*, 63 AD3d 1120, 883 NYS2d 83 [2d Dept 2009]; *Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; *Lawyer v Albany OK Cab Co.*, 142 AD2d 871, 530 NYS2d 904 [3d Dept 1988]), including a report from a psychologist who examined the plaintiff, her testimony, or the testimony of others who observed her (*see Hill v Cash*, 117 AD3d 1423, 985 NYS2d 345 [4th Dept 2014]; *Krivit v Pitula*, 79 AD3d 1432, 912 NYS2d 789 [3d Dept 2010]).

Inasmuch as the Taxi defendants failed to meet their prima facie burden, it is unnecessary to consider whether the papers submitted by the plaintiff 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 Taxi defendants' motion on the issue of serious injury is denied.

The Taxi defendants also move (# 002) for summary judgment on the issue of liability, dismissing the complaint and all cross claims against them, on the ground that the subject accident was solely the result of defendant Morales' failure to control his vehicle. In support, the Taxi defendants submit, *inter alia*, the pleadings and the transcripts of the deposition testimony of defendants Avalos and Morales.

At his deposition, defendant Avalos testified that while he had been traveling eastbound on Brightside Avenue, the Morales vehicle was behind him. When Avalos attempted to make a left turn with a turn signal at a T-intersection with either West End Avenue or Division Avenue, he was hit by the Morales vehicle. The front bumper of the Morales vehicle came into contact with the rear driver's side of his vehicle. Avalos testified that he never made a complete stop at any point prior to the accident.

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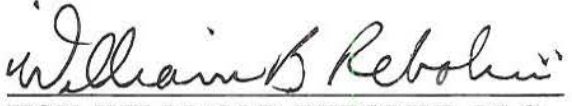
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At his deposition, defendant Morales testified that he had been traveling eastbound on Brightside Avenue for half a mile. The roadway was separated from houses by grass. When he first saw the subject taxi, it was parked to the right side of the road, half of the car on the road and the other half on the grass. At the time, he was driving 35 miles per hour. Then, the taxi moved into his lane and tried to make a u-turn in front of him. He immediately applied his brakes but was unable to avoid the collision. Morales testified that the accident happened in the middle of the roadway about five or ten feet before the next intersection.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*see Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party (*see Valentin v Parisio*, 119 AD3d 854, 989 NYS2d 621 [2d Dept 2014]). Moreover, the issue of comparative fault is generally a question for the jury to decide (*see Jahangir v Logan Bus Co., Inc.*, 89 AD3d 1064, 933 NYS2d 402 [2d Dept 2011]).

Here, the deposition testimony of defendants Avalos and Morales conflict as to the happening of the accident (*see Pyke v Bachan*, 123 AD3d 994, 999 NYS2d 508 [2d Dept 2014]; *Viggiano v Camara*, 250 AD2d 836, 673 NYS2d 714 [2d Dept 1998]). At his deposition, Avalos testified that as he attempted to make a left turn at a T-intersection, he was hit by the Morales vehicle, and that he never made a complete stop at any point prior to the accident. At his deposition, Morales testified that the accident happened when the Avalos vehicle moved into his lane and tried to make a u-turn, and that the impact occurred on Brightside Avenue five or ten feet before the next intersection. Under these circumstances, there are questions of fact as to how and where the accident happened, and as to whether comparative negligence on Avalos' part contributed to the subject accident (*see Ruthinoski v Brinkman*, 63 AD3d 900, 882 NYS2d 165 [2d Dept 2009]). Thus, the Taxi defendants have failed to sustain the initial burden of establishing prima facie entitlement to judgment as a matter of law. Thus, their motion on the issue of liability is denied.

Dated: September 24, 2015 
HON. WILLIAM B. REBOLINI, J.S.C.