Tyson v Nikolis
2015 NY Slip Op 32003(U)
October 23, 2015
Supreme Court, Suffolk County
Docket Number: 13-17718
Judge: John H. Rouse

SHORT FORM ORDER

INDEX No. 13-17718
CAL. No. 14-02155MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN H. ROUSE
Acting Justice of the Supreme Court

MOTION DATE 2-25-15 (#002)
MOTION DATE 4-15-15 (#003)
ADJ. DATE 4-15-15
Mot. Seq. # 002 - MD
003 - MG

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JESSE L. TYSON and DIANE M. TYSON,

Plaintiff,

- against -

ANASTASIA S. NIKOLIS and PHILLIP P. NIKOLIS,

Defendants.

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Upon the following papers numbered 1 to 40 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; 27 - 37; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 11 - 24; 38 - 39; Replying Affidavits and supporting papers 25 - 26; 40; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#002) by defendants Anastasia Nikolis and Phillip Nikolis and the motion (#003) by plaintiffs Jesse Tyson and Diane Tyson hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendants Anastasia Nikolis and Phillip Nikolis seeking summary judgment dismissing the complaint is denied; and it is further

ORDERED that the motion by plaintiffs Jesse Tyson and Diane Tyson seeking summary judgment in their favor on the issue of negligence is granted.

Plaintiffs Jesse Tyson and Diane Tyson commenced this action to recover damages for the injuries they allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Broadhollow Road and Express Drive North in the Town of Huntington on December 26, 2011. It is alleged

that the accident occurred when the vehicle operated by plaintiff Jesse Tyson and owned by plaintiff Diane Tyson was struck in the rear while it was stopped at a red traffic light by the vehicle operated by defendant Anastasia Nikolis and owned by defendant Phillip Nikolis. At the time of the accident, Diane Tyson was riding as a front seat passenger in the vehicle operated by her husband, Jesse Tyson. By their bill of particulars, plaintiffs allege that they each sustained numerous personal injuries as a result of the subject accident. It is alleged in the bill of particulars that plaintiff Jesse Tyson sustained the following injuries due to the subject collision: disc herniations at levels C3 through C5 and level L4-L5; disc bulges at level C6-C7 and levels L4 through S1; cervical and lumbar radiculopathy; adhesive capsulitis; interstitial tearing of the supraspinatus tendon; and an annular tear at level C2-C3. Diane Tyson alleges in the bill of particulars that she sustained the following injuries due to the subject accident: herniated discs at level C3-C4; disc bulges at levels C3 through C7; labral tear of the left shoulder; tendinopathy; and lumbar radiculopathy.

Defendants now move for summary judgment on the basis that the injuries alleged to have been sustained by Diane Tyson do not meet the serious injury threshold requirement of Insurance § 5102(d). In support of the motion, defendants submit copies of the pleadings, Diane Tyson's deposition transcript, and the sworn medical reports of Dr. Joseph Margulies. At defendants' request, Dr. Margulies conducted an independent orthopedic examination of Diane Tyson on September 8, 2014. Plaintiffs oppose the motion on the grounds that defendants failed to meet their prima facie burden that Diane Tyson did not sustain a serious injury as a result of the subject accident, 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. In opposition to the motion, Diane Tyson submits her own affidavit and the sworn medical reports of Dr. Harley Cohen, David Weissberg, Dr. Glenn Gray, Dr. Pradeep Albert and Dr. Sanjay Gupta. In addition, she submits the sworn medical reports of Dr. James Avellini. Lastly, plaintiffs submit the affidavits of Physician Assistant Donna Romano and Physical Therapist Michael Rosati.

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 Eyler***, 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, defendants, by submitting Diane Tyson's deposition transcript and competent medical evidence, have made a prima facie case demonstrating that Diane Tyson did not sustain an injury within the meaning of the serious injury threshold requirement of § 5102(d) of the Insurance Law (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Jackson v Aghwana***, 114 AD3d 728, 980 NYS2d 145 [2d Dept 2014]; ***West v Martinez***, 78 AD3d 934, 910 NYS2d 661 [2d Dept 2010]). Defendants' examining orthopedist, Dr. Margulies, during his examination of Diane Tyson found that she had full range of motion in her spine and shoulders, that there was no tenderness or spasm upon palpation of her paraspinal muscles or over the anterior, lateral or posterior aspects of her shoulders or acromioclavicular ("AC") joints, that the straight leg raising test was normal, and that there was no sensory loss to light touch or pinprick. Dr. Margulies opined that the sprains Diane Tyson sustained to her spine and left shoulder have resolved, that there was no evidence of an orthopedic disability, and that she was capable of performing her usual activities of daily living and employment.

Defendants, having made a prima facie showing that Diane Tyson did not sustain a serious injury within the meaning of the statute, shifted the burden to plaintiffs to come forward with evidence to overcome the defendants' submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained by Diane Tyson (*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). 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]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*). 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, plaintiffs have submitted numerous sworn medical reports to establish that Diane Tyson sustained a serious injury as a result of the subject accident. Although the sworn affidavit of Michael Rosati, Diane Tyson's physical therapist, purports to demonstrate that she exhibited significant range of motion limitations in the cervical and lumbar regions of her spine and in her left shoulder contemporaneous with the subject accident, a physical therapist "cannot by definition diagnose or make prognoses and is incompetent to determine the permanency or duration of a physical limitation" (***Delaney v Lewis***, 256 AD2d 895, 897, 682 NYS2d 270 [3d Dept 1998]; *see* ***Howard v Espinosa***, 70 AD3d 1091, 898 NYS2d 267 [3d Dept 2010]; ***Brandt-Miller v McArdle***, 21 AD3d 1152, 801 NYS2d 834 [3d Dept 2005]; ***Tornatore v Haggerty***, 307 AD2d 522, 763 NYS2d 344 [3d Dept 2003]). Thus, Mr. Rosati's report fails to raise a triable issue of fact as to whether Diane Tyson sustained a serious injury under the Insurance Law (*see* ***Brush v Levy***, 303 AD2d 536, 756 NYS2d 456 [2d Dept 2003]).

In any event, plaintiffs have raised a triable issue of fact as to whether Diane Tyson sustained a serious injury within the meaning of the Insurance Law as a result of the subject collision (*see* ***Greenberg v Macagnone***, 126 AD3d 937, 7 NYS3d 185 [2d Dept 2015]; ***Fraser-Baptiste v New York City Tr. Auth.*** 81 AD3d 878, 917 NYS2d 670 [2d Dept 2011]). Plaintiffs have submitted the sworn medical reports of Dr. David Weissberg, Diane Tyson's treating orthopedist, and Dr. Harley Cohen, her treating rheumatologist, each of whom has provided a qualitative assessment of Diane Tyson's condition as it relates to the subject accident. "An expert's qualitative assessment of a plaintiff's condition also may suffice, provided the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (***Toure v Avis Rent A Car Sys.***, *supra* at 353; ***Perl v Meher***, *supra* at 216). In his report, Dr. Cohen explains that Diane Tyson initially came under his care following a positive antinuclear antibody ("ANA") test on November 28, 2011, and that an examination of her revealed that she had full range of motion in her spine and shoulders, and that following her initial consultation and follow-up visit on December 12, 2011, there were no objective findings and that she did not meet the clinical criteria for rheumatoid arthritis. However, Dr. Cohen states that when Diane Tyson presented on January 16, 2012, she complained of continued discomfit in her shoulders, neck, arms, and elbows, and she reported that she had been in a motor vehicle accident on December 26, 2011, and that after reviewing the results of an magnetic resonance imaging ("MRI") study of her cervical spine, which revealed bulging and herniated discs, he recommended physical therapy, which he had not done prior to this presentation.

In addition to his qualitative assessment, Dr. Weissberg also provided a quantitative assessment of Diane Tyson. Dr. Weissberg in his medical report states that Diane Tyson, who he initially began treating on January 17, 2012 and re-examined on February 24, 2015, had significant range of motion limitations in her spine and left shoulder, a positive Speed's test for her left shoulder, which was indicative of a labral tear or bicipital tendonitis, and a positive impingement test for the left shoulder. Dr. Weissberg states that he reviewed the MRI films of Diane Tyson's cervical spine and left shoulder performed on January 2, 2012 and

January 26, 2012, respectively, which revealed that she had bulging and herniated discs in her cervical spine and a partially torn anterior inferior labrum, as well as impingement syndrome, in her left shoulder. Although disc bulges and herniations, standing alone are not evidence of a serious injury under Insurance Law § 5102 (d), evidence of range of motion limitations, when coupled with positive MRI findings and objective test results, are sufficient to defeat summary judgment (*see* ***Wadford v Gruz***, 35 AD3d 258, 826 NYS2d 57 [1st Dept 2006]; ***Meely v 4 G's Truck Renting Co., Inc.***, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). Dr. Weissberg opines, based upon his contemporaneous and recent examinations of Diane Tyson, that she remains symptomatic and her activities continue to be restricted, that her symptoms are chronic and painful, and that her limitations in motion are causally related to the subject accident. Dr. Weissberg further states that Diane Tyson underwent continuous conservative treatment and physical therapy prior to being released from his care, and that any additional treatment, while providing relief temporarily, would have been palliative in nature.

Moreover, Diane Tyson's examining radiologists, Dr. Glenn Gray, Dr. Pradeep Albert, and Dr. Sanjay Gupta, who each reviewed the MRI films of Diane Tyson's cervical spine and left shoulder taken on January 2, 2012, January 26, 2012 and March 19, 2015, and compared such exams with prior studies performed on December 1, 2011, December 1, 2011, and January 26, 2012, opined that the disc bulges and herniations in her cervical spine, and that the tear to her anterior inferior labrum in her left shoulder, as well as the impingement syndrome, were findings consistent with trauma that occurred subsequent to her previous studies on December 1, 2011, and were consistent with her complaints of pain since the subject accident.

Thus, plaintiffs have presented medical evidence that conflicts with that of defendants' expert, who found that the injuries Diane Tyson sustained to her left shoulder and cervical spine as a result of the subject accident were resolved. "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (***Noble v Ackerman***, 252 AD2d 392, 395, 675 NYS2d 86 [1st Dept 1998]; *see* ***Johnson v Garcia***, 82 AD3d 561, 919 NYS2d 13 [1st Dept 2011]; ***LaMasa v Bachman***, 56 AD3d 340, 869 NYS17 [1st Dept 2008]; ***Ocasio v Zorbas***, 14 AD3d 499, 789 NYS2d 166 [2d Dept 2005]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]). Moreover, "where [a] plaintiff establishes that at least some of [her] injuries meet the 'no-fault' threshold, it is unnecessary to address whether [her] proof with respect to other injuries [s]he allegedly sustained would have been sufficient to withstand [defendants'] motion for summary judgment" (***Linton v Nawaz***, 14 NY3d 821, 822, 900 NYS2d 239 [2010]; *see* ***Rubin v SMS Taxi Corp.***, 71 AD3d 548, 898 NYS2d 110 [1st Dept 2010]). Accordingly, defendants' motion for summary judgment dismissing Diane Tyson's cause of action is denied.

Plaintiffs move for summary judgment on the issue of negligence, arguing that Anastasia Nikolis' negligent operation of the Nikolis' vehicle was the sole proximate cause of the subject accident. In support of the motion, plaintiffs submit copies of the pleadings, the parties' deposition transcripts, photographs of their motor vehicle following the subject collision, and a certified copy of the police accident report. Defendants oppose the motion on the grounds that there are triable issues of fact as to the subject accident's occurrence.

A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle and requires that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (*see* ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 AD3d 489, 904 NYS2d 761 [2d Dept 2010]; ***Smith v Seskin***, 49 AD3d 628, 854 NYS2d 420 [2d Dept 2008]; ***Klopchin v Masri***, 45 AD3d 737, 846 NYS2d 311 [2d Dept 2007]; ***Niyazov v Bradford***, 13 AD3d 501, 786 NYS2d 582 [2d Dept 2004]). A non-negligent explanation for the collision, such as mechanical failure or the sudden and abrupt stop of the vehicle ahead, is sufficient to overcome the inference of negligence and preclude an award of summary judgment (***Danner v Campbell***, 302 AD2d 859, 859, 754 NYS2d 484 [4th Dept 2003]; *see* ***Davidoff v Mullokandov***, 74 AD3d 862, 903 NYS2d 107 [2d Dept 2010]; ***Rodriguez-Johnson v Hunt***, 279 AD2d 781, 718 NYS2d 501 [3rd Dept 2001]). If the operator of the moving vehicle cannot come forward with any evidence to rebut the inference of negligence, the plaintiff is entitled to judgment as a matter of law (*see* ***Lundy v Llatin***, 51 AD3d 877, 858 NYS2d 341 [2d Dept 2008]; ***Leal v Wolff***, 224 AD2d 392, 638 NYS2d 110 [2d Dept 1996]).

Plaintiffs' submissions established prima facie their entitlement to judgment as a matter of law that Anastasia Nikolis' negligent operation of the Nikolis vehicle was the sole proximate cause of the subject accident (*see* ***Kastritsios v Marcello***, 84 AD3d 1174, 923 NYS2d 863 [2d Dept 2011]; ***Staton v Ilic***, 69 AD3d 606, 892 NYS2d 486 [2d Dept 2010]; ***Jumandeo v Franks***, 56 AD3d 614, 867 NYS2d 541 [2d Dept 2008]). The record demonstrates that the Tyson vehicle was stopped at a red traffic light when it was struck in the rear by the vehicle operated by Anastasia Nikolis. It is well settled that a driver approaching a vehicle from the rear 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 (*see* Vehicle and Traffic Law § 1129[a]; ***Brooks v High St. Professional Bldg., Inc.***, 34 AD3d 1265, 825 NYS2d 330 [4th Dept 2006]). Moreover, Anastasia Nikolis testified at an examination before trial that she stopped behind the Tyson vehicle at a red light on Broadhollow Road and that she observed the vehicle in front of the Tyson vehicle move, but did not see the Tyson vehicle move prior to taking her foot off the brake and impacting the vehicle. She further testified that at the time of the accident she was "messing with" her vehicle's radio and does not recall if she applied the accelerator after taking her foot off the brake once the light turned green prior to striking the rear of the Tyson vehicle. In addition, the certified police accident report, which was recorded immediately after the accident and submitted in support of plaintiffs' motion, attributes a statement by Anastasia Nikolis wherein she states " that she was distracted by [the] radio, saw other vehicles starting in traffic when rear ended [Tyson] vehicle" that is against her interest in the instant matter (*see e.g.* ***Jackson v Trust***, 103 AD3d 851, 962 NYS2d 267 [2d Dept 2013]; ***Valden v Rose***, 4 AD3d 468, 771 NYS2d 670 [2d Dept 2004]; ***Kemenyash v McGoey***, 306 AD2d 516, 762 NYS2d 629 [2d Dept 2003]; ***Aloi v Firebird Freight Serv. Corp.***, 251 AD2d 608, 675 NYS2d 107 [2d Dept 1998]). The police officer who prepared the report was acting within the scope of his duty in recording Anastasia Nikolis' statement, and the statement is admissible as an admission of a party (*see* ***Sydnor v Home Depot U.S.A., Inc.***, 74 AD3d 1185, 906 NYS2d 279 [2d Dept 2010]; ***Scott v Kass***, 48 AD3d 785, 851 NYS2d 649 [2d Dept 2008]; ***Guevara v Zaharakis***, 303 AD2d 555, 756 NYS2d 465 [2d Dept 2003]; *cf.* ***Bailey v Reid***, 82 AD3d 809, 918 NYS2d 364 [2d Dept 2011]). Thus, the evidence submitted by plaintiffs established that Anastasia Nikolis violated the rules of the Vehicle and Traffic Law when she struck the rear of the Tyson vehicle, and that plaintiffs were not comparatively negligent in the happening of the subject accident (*see* ***France Herly Bien-Aime v Clare***, 124 AD3d 814, 2 NYS3d 557 [2d Dept 2015]; ***Moreira v M.K. Travel & Transp., Inc.***, 106 AD3d 965, 966 NYS2d 150 [2d Dept 2013]; ***Lariviere v New York City Tr. Auth.***, 82 AD3d 1165, 920 NYS2d 231 [2d Dept 2011]).

In opposition to plaintiffs' prima facie showing, defendants failed to raise a triable issue of fact as to whether plaintiffs were contributorily negligent in the subject accident's occurrence (*see* ***Ramos v Bartis***, 112 AD3d 804, 977 NYS2d 315 [2d Dept 2013]; ***Cuevas v Qamar v Kanarek***, 82 AD3d 860, 918 NYS2d 360 [2d Dept 2011]). Accordingly, plaintiffs' motion for summary judgment in their favor on the issue of negligence is granted.

Dated: 10/23/15

A.J.S.C. JOHN H. ROUSE

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION