

Howard v Salinas
2016 NY Slip Op 31060(U)
June 9, 2016
Supreme Court, New York County
Docket Number: 155238/14
Judge: Leticia M. Ramirez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

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SUZY HOWARD,

Plaintiff(s),

-against-

Index #: 155238/14
Mot. Seq: 01

DECISION/ORDER

HON. LETICIA M. RAMIREZ

HAYDEE SALINAS, DIAKAIA BAH and CLYDE
CAB CORP.,

Defendant(s).

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Defendants Diakaia Bah and Clyde Cab Corp.s' motion, pursuant to CPLR §3212, for summary judgment on the basis that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) and for summary judgment on the issue of liability; and defendant Haydee Salinas' cross-motion, pursuant to CPLR §3212, for summary judgment on the basis that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) are decided as follows:

It is well settled that summary judgment is a drastic remedy and cannot be granted where there is any doubt as to the existence of triable issues of fact or if there is even arguably such an issue. *Hourigan v McGarry*, 106 A.D.2d 845, appeal dismissed 65 N.Y.2d 637 (1985); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The function of a court in deciding a summary judgment motion is to determine whether any issues of fact exist which preclude summary resolution of the dispute between the parties on the merits. *Consolidated Edison Co. v Zebler*, 40 Misc3d 1230A (Sup. Ct. N.Y. 2013); *Menzel v Plotnick*, 202 A.D.2d 558 (2nd Dept. 1994). Furthermore, in deciding motions for summary judgment, the Court must accept, as true, the non-moving party's recounting of the facts and must draw all reasonable inferences in favor of the non-moving party. *Warney v Haddad*, 237 A.D.2d 123 (1st Dept. 1997); *Assaf v Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dept. 1989); *Menzel v Plotnick*, *supra*.

According to plaintiff's Bill of Particulars, plaintiff alleges, inter alia, the following injuries as a result of the subject accident of June 2, 2013: disc herniations at C5-6, L4-5 and L5-S1; disc bulging at C3-4, C4-5, C6-7, L2-3 and L3-4; and a lumbar annular tear.

In support of their motions, defendants submitted, inter alia, the affirmed reports of radiologist, Dr. Steven Peyser, who reviewed the films of plaintiff's cervical and lumbar spine MRIs conducted on June 5, 2013. Dr. Peyser opined that plaintiff's cervical spine MRI revealed spondylitic changes with mild bulging at C4-5 and C5-6 consistent with longstanding degenerative disc disease. He found no evidence of a post traumatic injury and stated that the subligamentous disc herniation at C5-6 and bulging at C6-7 described by Dr. Winter, the radiologist who interpreted the films, "cannot be appreciated on this

review.” Dr. Peyser also did not find any disc bulging at C3-4, as claimed by plaintiff.

With regard to plaintiff’s lumbar spine MRI, Dr. Peyser opined that MRI films demonstrated spondylitic changes with bulging, an associated posterior central disc herniation at L4-5 and a spondylitic change with a posterior central disc herniation at L5-S1 “most likely related to longstanding degenerative disc disease.” He found no evidence of a post traumatic injury. Dr. Peyser also did not find any disc bulging at L2-3 and L3-4 or a lumbar annular tear, as claimed by plaintiff.

Given the foregoing, even if it was believed that plaintiff’s claim of disc bulging at C4-5, C5-6, L2-3 and L3-4 were pre-existing injuries and/or conditions, Dr. Peyser’s affirmed reports still raise triable issues of fact as to whether the plaintiff sustained a disc herniation at C5-6 and disc bulging at C3-4, C6-7, L2-3 and L3-4 or a lumbar annular tear as a result of the subject accident.

Defendants also submitted the affirmed report of Dr. Igor Rubinshteyn, who examined plaintiff on August 24, 2015. Dr. Rubinshteyn noted that plaintiff reported being involved in a prior motor vehicle accident in November 2004, in which she injured her lower back. Upon his examination, he found that plaintiff had normal ranges of motion of her cervical, thoracic and lumbar spine. He diagnosed plaintiff with resolved cervical, thoracic and lumbar spine sprains without orthopedic disability and noted that plaintiff had pre-existing degenerative joint disease of the spine.

In opposition, plaintiff submitted, inter alia, the affirmation of radiologist, Dr. Steven Winter, who interpreted the films of plaintiff’s cervical and lumbar MRIs conducted on June 5, 2013. Dr. Winter opined that the cervical spine MRI revealed, inter alia, C5-6 left peripheral subligamentous disc herniation encroaching into the left neural foramen with some impression on the left anterolateral thecal sac and left anterior recess; posterior disc bulging with thecal sac impression at C3-4; C4-5 left peripheral disc bulging encroaching toward the left neural foramen; subligamentous disc bulging at C6-7.

According to Dr. Winter, plaintiff’s lumbar spine MRI revealed, inter alia, L4-5 posterior disc herniation with extrusion in the midline that impresses on the thecal sac; radial annular tear and segment of the disc herniation that migrates inferiorly from the level of L4-5 and resides posterior to the superior end plate at L5; T12-L1 Schmorl’s node invagination with posterior disc bulging; posterior disc bulging at L2-3 impressing on the thecal sac with Schmorl’s node invagination; subligamentous posterior disc bulging at L3-4; and a L5-S1 posterior disc herniation with a 1mm retrolisthesis that impresses on the ventral thecal sac.

Plaintiff also submitted the affirmed report of Dr. David Delman of DHD Medical, P.C., who first treated plaintiff on June 4, 2013. During his most recent examination of plaintiff on January 11, 2016, Dr. Delman noted that plaintiff’s cervical spine demonstrated limitations in motion ranging from

19% to 25% and her lumbar spine demonstrated limitations in motion ranging from 17% to 39%. He further noted tenderness and spasm on palpation of the cervical and lumbar spine. In addition, he noted his review of plaintiff's cervical and lumbar spine MRI reports. Dr. Delman diagnosed plaintiff with, inter alia, cervical spine myofascial derangement with multiple cervical spine disc bulges and a cervical spine disc herniation with worsening pain, spasm and range of motion loss; significant exacerbation of previous lumbar spine myofascial derangement with multiple new disc bulges, a new disc herniation, a new annular tear and a new disc extrusion with worsening pain, spasm and range of motion loss. He causally related his diagnoses to the subject accident and opined that plaintiff sustained a permanent disability as a result of the subject accident.

In viewing the evidence in the light most favorable to the plaintiff, as the non-moving party, this Court finds that plaintiff sufficiently raised triable issues of fact as to whether she sustained disc herniations at C5-6, L4-5 and L5-S1; disc bulging at C3-4, C4-5, C6-7, L2-3 and L3-4; and/or a lumbar annular tear as a result of the subject accident and whether she sustained a "significant" or "permanent consequential" limitation of her cervical spine and/or lumbar spine as a result of the subject accident and/or whether the subject accident aggravated, exacerbated and/or activated any pre-existing injury/condition so severely as to cause a "serious injury" above and beyond the pre-existing injury/condition.

It is well settled that the finder of fact must resolve conflicts in expert medical opinions.

Ugarriza v. Schmider, 46 N.Y.2d 471 (1979); *Andre v. Pomeroy*, *supra*.

Accordingly, defendants' summary judgment motions based upon the "serious injury" threshold are denied.

Next, that portion of defendants Diakaia Bah and Clyde Cab Corp.s' motion seeking summary judgment on the issue of liability is granted.

A rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the rear vehicle and imposes a duty on the driver of the rear vehicle to come forward with an adequate non-negligent explanation for the accident. *Cruz v Lise*, 123 A.D.3d 514 (1st Dept. 2014).

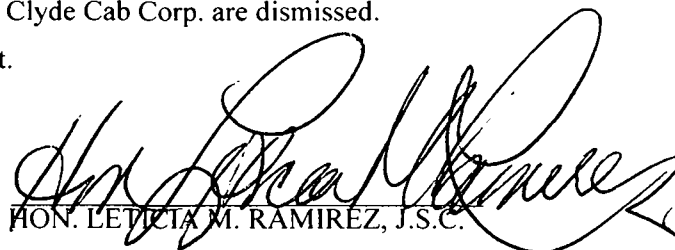
Here, defendants Diakaia Bah and Clyde Cab Corp. made a *prima facie* case of negligence by demonstrating that their vehicle (operated by defendant Bah and owned by Clyde Cab Corp.) was rear-ended by defendant Salinas' vehicle, while stopped for a red traffic signal. During her deposition, defendant Salinas testified that she rear-ended said defendants' stopped vehicle after her foot slipped off the brake pedal. The burden then shifted to defendant Salinas to come forth with an adequate non-negligent explanation for the accident.

Defendant Salinas failed to meet this burden. Pursuant to N.Y. Veh. & Traf. Law §1129(a), the driver of the rear vehicle has the burden to maintain a safe distance between his vehicle and the front vehicle. *N.Y. Veh. & Traf. Law §1129(a)*. See also, *Corrigan v Porter Cab Corp.*, 101 A.D.3d 471 (1st Dept. 2012). In opposing a summary judgment motion, a party must "lay bear his proofs," with admissible evidence, to sufficiently demonstrate that a triable issue of fact exists to warrant denial of the motion. *Lo Breglio v Marks*, 105 A.D.2d 621 (1st Dept. 1984). "Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact." *Cabrera v Rodriguez*, 72 A.D.3d 553, 554 (1st Dept. 2010). Furthermore, an attorney's affirmation, alone, is insufficient to defeat a summary judgment motion. *Zuckerman v City of New York*, 49 N.Y.2d 557 (1980).

As defendant Salinas failed to submit admissible evidence demonstrating an adequate non-negligent explanation for rear-ending defendants Diakaia Bah and Clyde Cab Corp.'s stopped vehicle, defendants Diakaia Bah and Clyde Cab Corp.'s motion for summary judgment on the issue of liability is granted and plaintiff's Complaint as against defendants Diakaia Bah and Clyde Cab Corp. and all Cross-Claims as against defendants Diakaia Bah and Clyde Cab Corp. are dismissed.

This constitutes the Decision/Order of the Court.

Dated: June 9, 2016
New York, New York



HON. LETICIA M. RAMIREZ, J.S.C.