Gasparro v Henriquez
2016 NY Slip Op 31985(U)
July 12, 2016
Supreme Court, Suffolk County
Docket Number: 10973/2013
Judge: William B. Rebolini

Short Form Order

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SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Lisa Gasparro,

Plaintiff,

-against-

Juan G. Henriquez,

Defendant.

Index No.: 10973/2013

Motion Sequence No.: 001; MG
Motion Date: 8/7/15
Submitted: 10/7/15

Motion Sequence No.: 002; MD
Motion Date: 9/2/15
Submitted: 10/7/15

Attorney for Plaintiff:

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Clerk of the Court

Upon the following papers numbered 1 to 64 read upon these motions for summary judgment: Notice of Motion and supporting papers, 1 - 17; 22 - 45; Answering Affidavits and supporting papers, 18 - 19; 46 - 64; Replying Affidavits and supporting papers, 20 - 21; it is

ORDERED that the motion by plaintiff Lisa Gasparro for an order granting partial summary judgment in her favor on the issue of liability is granted; it is further

ORDERED that the motion by defendant Juan G. Hernandez for an order granting summary judgment in his favor dismissing the complaint is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Lisa Gasparro as a result of a motor vehicle accident which occurred at around midnight on October 1, 2011 on the Long Island Expressway Service Road, in the Town of Brookhaven. The accident allegedly happened when a vehicle owned and operated by defendant Juan G. Hernandez failed to stop and side-swiped plaintiff's stopped vehicle along its driver's side. During the same collision, a second vehicle, whose driver is not a party to this action, was side-swiped along its passenger side. By her verified complaint, as amplified by her verified bill of particulars, plaintiff alleges that, as a result of the accident, she suffered serious injuries, including a concussion, strains/sprains and herniated and bulging discs of the cervical, thoracic, and lumbar spine.

Plaintiff now moves for partial summary judgment on the issue of liability, arguing that defendant's negligence was the sole legal and proximate cause of the collision. In support of her motion, plaintiff submits several documents, including transcripts of the parties' deposition testimony. In opposition, defendant submits an affirmation of his attorney.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial for resolution (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The Vehicle and Traffic Law establishes standards of care for motorists and an unexcused violation of such standards of care constitutes negligence per se (*see* ***Estate of Cook v Gomez***, 138 AD3d 675, 30 NYS3d 148 [2d Dept 2016]; ***Adobea v Junel***, 114 AD3d 818, 980 NYS2d 564 [2d Dept 2014]; ***Marcel v Sanders***, 123 AD3d 1097, 1 NYS3d 230 [2d Dept 2014]). The Vehicle and Traffic Law §1128(a) provides that "a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety" (*see* ***Rivera v Fritts***, 136 AD3d 1249, 25 NYS3d 741 [2d Dept 2016]; ***Qureshi v Brinks, Inc.***, 133 AD3d 737, 19 NYS3d 181 [2d Dept 2015]; ***Farrugio v Lavender***, *supra*). Further, pursuant to Vehicle and Traffic Law §1110(a), all drivers must obey the instructions of any official traffic-control device applicable to him, such as stopping at a red traffic signal (*see* ***Chuachingco v Christ***, 132 AD3d 798; 18 NYS3d 425 [2d Dept 2015]; ***Joaquin v Franco***, 116 AD3d 1009, 985 NYS2d 131 [2d Dept 2014]; ***Simmons v Canady***, 95 AD3d 1201; 945 NYS2d 138 [2d Dept 2012]).

As there can be more than one proximate cause of an accident, a plaintiff in a personal injury action who moves for summary judgment on the issue of liability must establish, prima facie, both that the defendant was negligent and that he or she was free from comparative fault (*see* ***McLaughlin v Lunn***, 137 AD3d 757, 26 NYS3d 338 [2d Dept 2016]; ***Farrugio v Lavender***, 123 AD3d 875, 999 NYS2d 452 [2d Dept 2014]; ***Ramos v Bartis***, 112 AD3d 804; 977 NYS2d 315 [2d Dept 2013]). Once this prima facie showing has been made, the burden shifts to the defendant driver to submit proof, in admissible form, providing a non-negligent explanation for the collision or that raises a

triable issue of fact as to whether the plaintiff was also negligent (*see* ***Zuckerman v City of New York***, *supra*; ***Orellana v Maggies Paratransit Corp.***, 138 AD3d 941, 30 NYS3d 224 [2d Dept 2016]; ***Drakh v Levin***, 123 AD3d 1084, 1 NYS3d 202 [2d Dept 2014]).

Here, plaintiff's submissions in support of her motion establish, prima facie, that the defendant driver was negligent and that she was free from comparative fault in the happening of the accident (*see* ***McLaughlin v Lunn***, *supra*; ***Farrugio v Lavender***, *supra*; ***Ramos v Bartis***, *supra*). The parties' deposition testimony demonstrates that, by failing to maintain his lane of travel and failing to stop at the red traffic signal, defendant violated the Vehicle and Traffic Law and was negligent as a matter of law (*see* Vehicle and Traffic Law §§1110(a), 1128(a); ***Estate of Cook v Gomez***, *supra*; ***Chuachingco v Christ***, *supra*; ***Joaquin v Franco***, *supra*). At her deposition, plaintiff testified that, while her vehicle was lawfully stopped at a red traffic light for approximately 30 to 45 seconds, defendant's vehicle departed his lane of travel and drove between the driver's side of her vehicle and the passenger side of another vehicle, striking both. Defendant did not contradict this testimony at his deposition, testifying that his vehicle collided with the two vehicles while they were stopped at a red traffic light.

Plaintiff having met her initial burden on the motion, the burden shifted to the defendant driver to submit evidentiary proof in admissible form to raise a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). In opposition, defendant submits an affirmation of his attorney alleging that his failure to stop at the red traffic light is excused by the emergency doctrine. However, this does not fulfill defendant's duty to provide a non-negligent explanation for the collision or to raise a triable issue of fact as to whether the plaintiff was also at fault for its occurrence (*see* ***Zuckerman v City of New York***, *supra*; ***Orellana v Maggies Paratransit Corp.***, *supra*; ***Drakh v Levin***, *supra*). The affirmation from an attorney having no personal knowledge of the facts is without evidentiary value and, thus, is insufficient to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, *supra*). As defendant fails to rebut plaintiff's prima facie showing that defendant's negligence was the sole proximate cause of the accident, plaintiff's motion for summary judgment is granted (*see* ***Zuckerman v City of New York***, *supra*; ***McLaughlin v Lunn***, *supra*; ***Drakh v Levin***, *supra*).

Defendant separately moves for summary judgment dismissing the complaint, alleging that Insurance Law §5104 precludes plaintiff from pursuing a personal injury claim because she did not suffer a "serious injury" within the meaning of Insurance Law §5102(d). In support of his motion, defendant submits, among other things, transcripts of plaintiff's deposition testimony and the sworn medical reports of neurologist Dr. Richard Lechtenberg, orthopedic surgeon Dr. Richard A. Weiss, and radiologist Dr. Jessica Berkowitz. At defendants' request, Dr. Lechtenberg and Dr. Weiss conducted examinations of plaintiff and reviewed medical records related to the injuries alleged in this action and Dr. Berkowitz conducted an independent review of plaintiff's magnetic resonance imaging films (MRIs) and reports taken shortly after the accident.

Plaintiff opposes defendant's motion, arguing that, as a result of the accident, she sustained a "serious injury" as defined by the statute because she suffers from, among other things, tinnitus,

memory loss, and bulging and herniated discs in her cervical, thoracic, and lumbar spine. In support of her opposition, plaintiff submits several documents, including her own affidavit, an affidavit of Dr. Michael Campo, plaintiff's treating chiropractor, and plaintiff's medical records relating to the subject accident. As plaintiff's medical records from Dr. Campo are certified by his affidavit as being a true and accurate report (*see* CPLR 4518[c]; ***Berkovits v Chaaya***, 138 AD3d 1050, 31 NYS3d 531 [2d Dept 2016]), Dr. Campo's reliance upon these records in rendering his sworn opinion to the Court is admissible (*see* ***Kreimerman v Stunis***, 74 AD3d 753; 902 NYS2d 180 [2d Dept 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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by 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.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). When such a defendant's motion relies upon 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 (*see* ***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing* ***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692, 694 [2d Dept 1992]). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which creates a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*).

A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination or 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*; ***McEachin v City of New York***, 137 AD3d 753, 756, 25 NYS3d 672, 675 [2d Dept 2016]). Proof of a herniated disc, without additional objective medical

evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a "serious injury" within the meaning of the statute (*see* ***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380, 384 [2005]; ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]).

Defendant's submissions establish a prima facie case that the alleged injuries to plaintiff's head and spinal regions do not constitute "serious injuries" within the meaning of Insurance Law §5102(d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*). Defendant has presented competent medical evidence that none of plaintiff's alleged injuries fall under the "permanent consequential limitation" or "significant limitation" of use categories of the statute (*see* ***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*; ***Rovelo v Volcy***, *supra*). The affirmed medical report of neurologist Dr. Lechetenberg states, in relevant part, that during his examination, plaintiff's sensation, strength, and reflexes were intact and normal, although she displayed decreased hearing acuity in her left ear. Dr. Lechtenberg diagnoses plaintiff as having suffered a concussion and sprains of the cervical, thoracic, and lumbar spine, and he concludes that these conditions have resolved. Dr. Lechtenberg also diagnoses plaintiff with tinnitus, although he notes that this and plaintiff's complaints of memory loss are subjective in nature. In addition, the affirmed medical report of orthopedist Dr. Weiss states, in relevant part, that during his examination, plaintiff exhibited normal joint function during range of motion testing of her cervical, thoracic, and lumbar regions, that no spasm or atrophy of the spine was detected on palpation of the spine, and that the reflexes and sensation in her upper and lower extremities were normal and intact (*see* ***Brite v Miller***, *supra*; ***Damas v Valdes***, *supra*; ***Pagano v Kingsbury***, *supra*). Dr. Weiss diagnoses plaintiff as having suffered sprains of the cervical, thoracic, and lumbar spine, and concludes that all such conditions have resolved. Further, the affirmed medical report of radiologist Dr. Berkowitz states, in relevant part, that plaintiff's MRIs of the brain and lumbar spine, taken one and two months after the subject accident, do not show evidence of acute traumatic injury. Dr. Berkowitz concludes that the slight disc bulge and posterior right central annular tear at the L5 to S1 vertebrae shown on the MRI of plaintiff's lumbar spine are evidence of chronic, degenerative disc disease, which is not causally related to the subject accident (*see* ***Perl v Meher***, *supra*, at 218-219; ***Schilling v Labrador***, *supra*; ***Gouvea v Lesende***, 127 AD3d 811, 6 NYS3d 607 [2d Dept 2015]).

Defendant having met his initial burden on the motion, the burden shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*). Plaintiff's submissions in opposition are sufficient to raise a triable issue of fact as to whether she sustained a serious injury to her cervical, thoracic, and lumbar regions of her spine as a result of the subject accident, resulting in a permanent consequential or significant limitation of its use (*see* ***Schilling v Labrador***, *supra*; ***Rovelo v Volcy***, *supra*; ***McLoud v Reyes***, *supra*). While the disc bulges and herniations plaintiff alleges to have suffered as a result of the subject accident are alone insufficient to establish a serious injury within the meaning of the statute, plaintiff's submissions demonstrate that these injuries caused significant limitations of use of her spine (*see* ***Perl v Meher***, *supra*; ***Pommells v Perez***, *supra*; ***Hayes v Vasilios***, *supra*). By his affidavit, Dr. Campo, plaintiff's treating chiropractor, opines that, based on both his contemporaneous and most recent examinations of plaintiff, that there were limitations in plaintiff's

range of motion in the cervical, thoracic, and lumbar spine, and that these limitations and injuries were significant, permanent, and causally related to the subject accident (*see* ***Chul Koo Jeong v Denike***, 137 AD3d 1189, 28 NYS3d 393 [2d Dept 2016]; ***Park v He Jung Lee***, 84 AD3d 904, 922 NYS2d 564 [2d Dept 2011]). Further, as a result of his initial examinations of plaintiff shortly after the accident and his most recent examination on July 25, 2015, in his affidavit, Dr. Campo refutes Dr. Weiss's conclusion that plaintiff has full range of motion of her spine and he designates numeric percentages of plaintiff's range of motion loss in the cervical, thoracic, and lumbar spine, presenting objective quantitative evidence of same (*see* ***Perl v Meher***, *supra*; ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***McEachin v City of New York***, *supra*). In addition, Dr. Campo contradicts Dr. Berkowitz's conclusions regarding the chronic, degenerative disc disease found in plaintiff's lumbar spine, opining that plaintiff was asymptomatic for this condition until after the subject accident (*see* ***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*; ***Gouvea v Lesende***, *supra*). As plaintiff submits admissible evidence of her significant limitations of use of her spine, she has rebutted defendant's prima facie showing that she did not suffer a serious injury as a result of the subject accident (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*).

In light of the foregoing, plaintiff's motion for summary judgment on the issue of liability is granted and defendant's motion for summary judgment dismissing the complaint is denied.

Dated: July 12, 2016

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**