Velez v Hayes
2016 NY Slip Op 32594(U)
March 16, 2016
Supreme Court, Nassau County
Docket Number: 601300/2014
Judge: Arthur M. Diamond

SUPREME COURT - STATE OF NEW YORK

Present:
HON. ARTHUR M. DIAMOND
Justice Supreme Court

----------x **TRIAL PART: 7**

ASHLEY VELEZ,

Plaintiff,

-against- **NASSAU COUNTY**

RALPH HAYES and CHRISTINA PRADEL **INDEX NO: 601300/2014**

MOTION SEQ #: 1-5

SUBMIT DATE:2/22/16

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The following papers having been read on this motion:

Notice of Motion....(Seq#1).....1
Opposition.....2
Memorandum in Law & Opposition...3
Reply.....4
Notice of Motion....(Seq#2).....5
Cross-Motion.....(Seq#3).....6
Opposition.....7
Reply.....8
Notice Of Motion...(Seq#4,5).....9
Opposition.....10
Reply.....11

Motion by plaintiff pursuant to CPLR 3212 for summary judgment against defendants on the issue of liability is granted.

Motion by defendant Ralph Haynes (Haynes) pursuant to CPLR 8501(a) to direct plaintiff to post security for costs is granted.

Cross motion by defendant Christina Pradel (Pradel) pursuant to CPLR 3212 for summary judgment dismissing the complaint, and all cross claims asserted against her, on the liability issue is denied.

Motion by defendant Haynes pursuant to CPLR 3212 for summary dismissing the complaint on the grounds that plaintiff's alleged injuries do not come within the ambit of Insurance Law § 5102(d) is denied.

Cross motion by defendant Pradel pursuant to CPLR 3212 for summary judgment dismissing the complaint, and all cross claims asserted against her, on the ground that plaintiff's alleged injuries do not come within the ambit of Insurance Law § 5102(d) is denied.

BACKGROUND

This action arises from a motor vehicle accident which occurred January 17, 2013, when the vehicle driven by her grandmother, defendant Pradel, was involved in a collision with a vehicle owned and operated by defendant Haynes. The accident occurred on Jericho Turnpike, at or near its intersection with Fifth Avenue, Garden City Park, New York, when the Pradel vehicle was allegedly stopped in the left turning lane of the westbound lane of Jericho Turnpike, at its intersection with Fifth Avenue. Upon impact, the driver's side of the Pradel vehicle came in contact with the front bumper of defendant Haynes' vehicle which was allegedly traveling at a speed of approximately 15-20 mph.

Plaintiff alleges that, as a result of the subject accident, she sustained both permanent consequential and significant limitation in the use of her shoulder, lumbar, thoracic and cervical spines. In her bill of particulars (Exhibit "3": Motion by Defendant Haynes for Summary Judgment), plaintiff alleges the following injuries, including, *inter alia*:

- C4-C5 and C5-C6 disc herniation impressing the ventral cord;
- C3-C4 disc bulge impressing the thecal sac and abutting the dorsal cord;
- C6-C7 disc bulge indenting the thecal sac;
- Dorsal ligmentous impression on the thecal sac at C6-C7 and dorsal CSF space effaced at the C2-C3 and C3-C4 levels abutting the dorsal cord;
- Reversal of the cervical lordosis;
- T3-T4 disc bulge;
- Bilateral shoulder sprain/strain; and
- Bilateral shoulder impingement syndrome.

SERIOUS INJURY

The issue of whether a claimed injury falls within the statutory definition of serious injury, is a question of law for the court which may be decided on a summary judgment motion (*Licari v Elliott*, 57 NY2d 230, 237 [1982]; *Carter v Adams* 123 AD3d 967 [2d Dept 2014]). A defendant seeking summary judgment based on a lack of serious injury bears the initial burden

of establishing that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102(d) (*Gaddy v Eyler*, 79 NY2d 955, 956-57 [1997]; *Datikashvilli v Vijungco*, 121 AD3d 637 [2d Dept 2014]).

Defendant can satisfy the initial burden by relying on either the sworn statements of defendant's examining physician, or plaintiff's sworn testimony or the unsworn reports of plaintiff's own examining physicians (*Pagano v Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992]), or can demonstrate that plaintiff's own medical evidence does not indicate that plaintiff suffered a serious injury and that the alleged injuries were not, in any event, causally related to the accident (*Franchini v Palmieri*,1 NY3d 536, 537 [2003]; *Fragale v Geiger*, 288 AD2d 431 [2d Dept 2001]).

Defendant's medical expert must specify the objective tests upon which his medical opinion is based and, with respect to an opinion *vis-a-vis* plaintiff's range of motion, the expert must quantify/qualify his findings and compare those findings to the ranges of motion considered normal for the particular body part tested (*Gastaldi v Chen*, 56 AD3d 420, 421 [2d Dept 2008]).

Whether a limitation of use or function is significant or consequential relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on normal function, purpose and use of the body part (*Dufel v Green*, 84 NY 795, 798 [1995]). To prove the extent or degree of physical limitation with respect to the limitation 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, 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 or system *(Perl v Meher, supra* at p. 218; *Estrella v Geico Ins. Co.*, 102 AD3d 730, 731 [2d Dept 2013]). A mild, minor or slight limitation of use is considered insignificant within the meaning of Insurance Law § 5102(d) (*Il Chung Lim v Chrabaszcz*, 95 AD3d 950, 951 [2d Dept 2012]). The mere existence of a bulging disc, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from that injury and their duration, is not evidence of serious injury (*Bleszca v Hiscock*, 69 AD3d 890, 891 [2d Dept 2010]; *Sutton v Yener*, 65 AD3d 625, 627 [2d Dept 2009; *Roman v Fast Lane Car Serv. Inc.*, 46 AD3d 535 536 [2d Dept 2007]).

Once a plaintiff establishes proof that some of her injuries meet at least one category of the no-fault threshold, it is unnecessary to address whether her proof with respect to other alleged injuries is sufficient to defeat defendant's *prima facie* showing (*Linton v Nawaz*, 14 NY3d 821, 822 [2010]).

In support of their respective threshold summary judgment motions, defendants Haynes and Pradel[1] have submitted the narrative treatment reports of David D. Manevitz, D.O., who treated plaintiff between February 4, 2013, February 10, 2014 and January 15, 2015; the affirmation of radiologist David A. Fisher, M.D., who performed an independent review of the MRI of plaintiff's cervical spine (April 26, 2013); and the affirmation of orthopedic surgeon Eric L. Freeman, M.D., who performed an orthopedic evaluation of plaintiff on April 15, 2015 on defendant's behalf.

In his affirmation, Dr. Fisher opines that the MRI study of plaintiff's cervical spine

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[1]Defendant Pradel's attorney affirms that he adopts and incorporates by reference all arguments set forth in the papers submitted by defendant Haynes in support of his motion for summary judgment.

> "demonstrates congenital fusion of the C7, T1 and T2 vertebral bodies and degenerative changes, most pronounced at the C4/5 and C5/6 levels."

He notes that

> "[t]here are no disc herniations or fractures [and] no radiographic evidence of traumatic or causally related injury."

While Dr. Freeman documents quantified restricted ranges of motion of plaintiff's shoulders, lower back, cervical and lumbar spines, as compared to normal values, he opines that the examination was "discordant when she was distracted versus when she was being examined and she had a brisk walk . . . [S]he had full active range of motion of her shoulders when distracted and utilizing them."

Dr. Freeman further opines that plaintiff was neurologically "intact in the upper and lower extremities" and "independent review of the cervical spine MRI failed to demonstrate any evidence of herniated disc or acute component injury." He notes that the disease found was degenerative and pre-existent.

Defendants Haynes and Pradel, who relied on the same submissions in support of their motions, have failed to meet their *prima facie* burdens of showing that plaintiff did not sustain serious injury within the meaning of Insurance Law § 5102(d). While Dr. Freeman opines that the restricted range of motion he documents "was discordant when [plaintiff] was distracted," he fails to explain or substantiate, with objective medical evidence, the basis of his conclusion that the restrictions noted were purely voluntary, beyond noting that he observed that plaintiff had full mobility of her shoulders, and could walk at a brisk pace, when distracted (*Williams v Fava Cab Corp.*, 90 AD3d 912, 913 [2d Dept 2011]; *Artis v Lucas*, 84 AD3d 845 [2d Dept 2011]; Iannello v Vazquez, 78 AD3d 1121 [2d Dept

2010]). Moreover, Dr. Freeman fails to document any findings *vis-a-vis* plaintiff's upper spine or comment on her continued complaints of headache[2].

Since the defendants failed to meet their respective *prima facie* burdens of demonstrating that plaintiff did not sustain serious injury as a result of the subject accident, it is unnecessary to determine whether plaintiff's opposition papers are sufficient to raise a triable issue of fact on the issue (*Solomatin v Fisher,* [2d Dept 2015; *Gega v Lubin*, 132 AD3d 723, 724 [2d Dept 2015]; *Uvaydov v Peart*, 99 AD3d 891 [2d Dept 2012]).

LIABILITY

In support of her motion for summary judgment to dismiss the complaint, on the liability issue, defendant Pradel contends that she bears no responsibility for the accident which she alleges is solely the fault of defendant Haynes. As defendant Pradel describes it, the accident occurred when she was in the process of making a left hand turn from Jericho Turnpike, where her vehicle had the right of way, onto Fifth Avenue, when defendant Haynes' vehicle drove straight in front of her vehicle, as he attempted to make a left hand turn from Fifth Avenue, a subordinate road, onto Jericho Turnpike without stopping.

Defendant Pradel contends that the Haynes vehicle proceeded into the intersection, controlled by a stop sign, and failed to yield the right of way in violation of Vehicle and Traffic Law §§1142(a) and 1172(a) which provide as follows:

> Section 1142(a): . . . every driver of a vehicle approaching a stop sign shall stop . . . and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is

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[2]Dr. Freeman does not address plaintiff's claim, set forth in her bill of particulars, that she sustained an injury or impairment that prevented her from performing substantially all of the material acts that constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident.

> approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.
>
> Section 1172(a): . . . Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection, or in the event there is no crosswalk, at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection and the right to proceed shall be subject to the provisions of section eleven hundred forth-two.

According to his deposition testimony, prior to the collision, defendant Haynes stopped his vehicle at the stop sign two times and inched his way into the intersection. At the time of the collision, his vehicle had already reached the middle of the eastbound travel lane of Jericho Turnpike as he executed a left hand turn from Fifth Avenue.

In determining a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences must be resolved in his favor (*Escobar v Velez*, 116 AD3d 735 [2d Dept 2014]). A party moving for summary judgment on the issue of liability in an action alleging negligence must establish, *prima facie*, not only that defendant was negligent but that the movant was free from comparative fault (*Derieux v Apollo New York City Ambulette, Inc.*, 131 AD3d 504 [2d Dept 2015]; *Valentin v Parisio*, 119 AD3d 854, 855 [2d Dept 2014]).

As defendant Pradel correctly asserts, the driver traveling with the right of way is entitled to anticipate that the other motorist will obey traffic laws which require him to yield (*Wanderman v Schwartz*, 127 AD3d 1074, 1075 [2d Dept 2015]; *McPherson v Chanzeb*, 123 AD3d 1098, 1099 [2d Dept 2014]; *Francavilla v Doyno*, 96 AD3d 714, 715 [2d Dept 2012]). Moreover, a driver who fails to yield the right of way, after stopping at a stop sign, is in violation

of Vehicle and Traffic Law §1142(a) and is negligent as a matter of law (*Luke v McFadden*, 119 AD3d 533 [2d Dept 2014]; *Thompson v Schmitt*, 74 AD3d 789 [2d Dept 2010]). Furthermore, a driver is negligent when an accident occurs because the driver fails to see that which proper use of his senses, he should have seen (*Klein v Crespo*, 50 AD3d 745, 745-746 [2d Dept 2008]).

A driver with a right of way, however, has a duty to exercise reasonable care to avoid a collision with a vehicle already in the intersection, including keeping a proper lookout and observing that which can be seen through the proper use of her senses (*Bennett v Granata*, 118 AD3d 652, 653 [2d Dept 2014]). There can be more than one proximate cause of an accident and the issue of comparative negligence is generally a question for the jury (*Bonilla v Calabria*, 80 AD3d 720 [2d Dept 2011]).

Given the conflicting testimony of co-defendants Pradel and Haynes as to the facts surrounding the happening of the accident, defendant Pradel has failed to establish that defendant Haynes' alleged failure to yield the right of way to defendant Pradel's vehicle was the sole proximate cause of the accident (*Gause v Martinez*, 91 AD3d 595,597 [2d Dept 2012]), and requires denial of her motion for summary judgment on the liability issue. The court notes that plaintiff testified at her deposition both that her grandmother's vehicle had a green light, and green turning arrow, and that cars were traveling in the eastbound lane (opposite direction) prior to the collision.

INNOCENT PASSENGER

Plaintiff's motion is not premature. Defendant Haynes has failed to offer an evidentiary basis to show that discovery might lead to relevant evidence and/or that facts essential to justify opposition to the motion are exclusively within the knowledge and control of plaintiff (*Garcia v Lenox Hill Florist III, Inc.*, 120 AD3d 1296, 1297 [2d Dept 2014] [citations and quotation marks

omitted]). Where, as here, plaintiff was a mere passenger in her grandmother's vehicle, without any control over the operation of the vehicle, her freedom from fault in the happening of the subject accident is apparent.

The right of an innocent passenger for summary judgment on the issue of whether she was at fault in the happening of the accident is not barred, or restricted by, potential issues of comparative fault as between two defendant drivers (*Rodriguez v Farrell*, 115 AD3d 929 [2d Dept 2014]).

Defendant Haynes has failed to demonstrate that discovery, including the deposition of plaintiff Pradel, would lead to the relevant evidence sufficient to defeat the motion. Defendant Haynes has failed to raise a triable question of fact on the issue of whether plaintiff engaged in any culpable conduct that contributed to the accident (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

SECURITY FOR COSTS

Pursuant to CPLR 8501(a) an out-of-state resident must furnish security for costs (*Verdino v Alexandrou*, 253 AD2d 553, 554 [2d Dept 1998]). Since plaintiff no longer resides in New York, but now resides in Florida, plaintiff is hereby directed to post an undertaking in the amount of $250 (CPLR 8503) within 30 days of the order hereon (*Halloway v KRNH, Inc.*, 64 AD3d 751, 752 [2d Dept 2009]).

ENTER

DATED: March 16, 2016

HON. ARTHUR M. DIAMOND

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