

Mills v King
2017 NY Slip Op 31805(U)
July 12, 2017
Supreme Court, Queens County
Docket Number: 4637/2015
Judge: Marguerite A. Grays
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS**
Justice

IAS PART 4

-----X
RODNEY MILLS and SHARON BASS,

Index
No.: 4637/2015

Plaintiff(s),

-against-

DOMINIQUE KING, JANIS RODERICK and
SERGIO LAURENT.

FILED
JUL 24 2017
CLERK
QUEENS COUNTY

Motion
Date: April 3, 2017

Motion
Cal. No.: 122

Defendant(s).

Motion
Seq. No.: 12

-----X

The following papers numbered 1-6 read on this motion for an Order: (1) pursuant to CPLR §3212, granting summary judgment to defendant Sergio Laurent, dismissing the complaint and all cross-claims, on the basis that there is no material issue of fact regarding the liability of this defendant and (2) pursuant to CPLR §3212, granting summary judgment in favor of defendant, Sergio Laurent dismissing the complaint of the plaintiffs for personal injuries, on the ground that the injuries allegedly sustained by plaintiffs do not satisfy the "serious injury" threshold requirement of §5102(d) of the Insurance Law.

	PAPERS NUMBERED
Notice of Motion - Affid.-Exhibits.....	1- 4
Answering Affidavits - Exhibits	5
Reply Affidavits - Exhibits	6

Upon the foregoing papers it is ordered that this motion by defendant Sergio Laurent is determined as follows:

Plaintiff commenced the instant action for personal injuries allegedly sustained by plaintiff Rodney Mills ("Mills") as a result of a three-car automobile accident which occurred on May 2, 2015, at the intersection of Wood Street and Illion Avenue, in Queens, New York.

Defendant Laurent moves herein for summary judgment on the issue of liability and upon the ground that plaintiff Mills' alleged injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence sufficient to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Co.*, 25 NY3d 498 [2015]). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce admissible evidentiary proof sufficient to establish the existence of a material issue of fact which requires a trial of the action (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Alvarez v. Prospect Hosp.*, *supra*; *Leto v. Feld*, 131 AD3d 590 [2015]).

Upon review of the papers submitted, defendant Laurent has failed to meet his initial burden of demonstrating entitlement to judgment as a matter of law on the issue of liability. In support of his motion, defendant Laurent submitted the deposition transcripts of the parties herein. At his deposition, defendant Laurent testified, in relevant part, that he was traveling on Wood Street, which is a two-way street, heading in the direction of its intersection with Illion Avenue ("the intersection"); he did not reach the intersection of Wood Street and Illion Avenue before the accident occurred; Laurent was approximately four or five car lengths from the intersection when the accident occurred; there is no stop sign on Wood Street, but there is a stop sign on Illion Avenue; defendant King was traveling on Illion Avenue and did not stop at the stop sign facing her direction of travel ("...she went right through the stop sign."); plaintiff's vehicle was traveling on Wood Street in the opposite direction of Laurent's vehicle; the King vehicle hit the back of plaintiff Mills' vehicle on the driver's side in the intersection, causing plaintiff's vehicle to lose control, spin around and strike the driver's side door of Laurent's vehicle; and Laurent applied his brakes and stopped his vehicle when he saw plaintiff's car moving toward his car.

Defendant King testified, in relevant part, at her deposition that there was a stop sign on Illion Avenue for her direction of traffic, but no stop sign for either direction on Wood Street; as she approached Wood Street she could see to the left and right on Wood Street, and the view was not obstructed; as King approached the intersection, she saw plaintiff Mills' vehicle driving on Wood Street approximately one block away; King stopped at the stop sign at the intersection for ten to thirty seconds; when she drove past the stop sign she collided with the rear bumper on the driver's side of plaintiff Mills' vehicle; when King drove off from the stop sign, Mills' vehicle was already driving through the intersection, in front of King's car; when King's vehicle struck Mills' vehicle, the plaintiff's car "swerved to the right going almost at a complete circle"; and plaintiff's car spun around and entered the oncoming lane of traffic on Wood Street, and was struck by Laurent's car.

Plaintiff Mills testified, in relevant part, that there is a stop sign on Illion Avenue at its intersection with Wood Street; when the accident occurred with the King vehicle, the rear part of plaintiff's car was in the intersection, and plaintiff's vehicle had almost past the intersection; Mills did not see defendant King's vehicle on Illion Avenue before the accident happened; the first impact was to the rear driver quarter panel on plaintiff's car; the second impact to plaintiff's vehicle was in the middle of the passenger side; the first impact with the King vehicle sent plaintiff's car into a spin, and the front of plaintiff's car crossed over the double yellow lines on Wood Street; after the first impact but before the second impact, plaintiff did not do anything with the steering wheel, nor press the gas or brake pedals; the entire front end of plaintiff's car past the front doors was over the double yellow lines in the opposite directional lane on Wood Street at the moment the second impact occurred; plaintiff Mills could not recall if his vehicle and defendant Laurent's vehicles were stopped or moving at the second impact occurred; plaintiff Mills did not see the Laurent vehicle cross over the double yellow lines;

Defendant Laurent argues that the deposition testimonies of the parties demonstrate that he was faced with an emergency situation, not of his own making, when the Mills' vehicle lost control after having been hit by the King vehicle, and crossed over the double yellow lines coming into contact with Laurent's vehicle. Under the emergency doctrine, a person faced with a sudden and unexpected circumstance, not of their own making, that leaves them with little or no time for reflection or reasonably causes them to be so disturbed that they are compelled to make a quick decision without weighing alternative courses of conduct, may not be negligent if their actions are reasonable and prudent in the context of the emergency (*Pawlukiewicz v. Boisson*, 275 AD2d 446; *Bello v. Transit Authority of New York City*, 12 AD3d 58; *Rivera v. New York City Transit Authority*, 77 NY2d 322). However, defendant Laurent's Notice of Appearance and Answer with Counterclaim and Cross-Claim dated May 10, 2016 fails to assert the emergency doctrine as an affirmative defense¹.

Accordingly, based on the absence of an emergency doctrine affirmative defense in defendant Laurent's answer, and the conflicting deposition testimonies of the parties regarding whether or not defendant Laurent's vehicle struck plaintiff's vehicle or was stopped at the time of impact between the Laurent and Mills vehicles (*Barresi v. Chou*, 293 A.D.2d 637 [2002]; *Magnavita v. County of Nassau*, 282 A.D.2d 658 [2001]; *Alexandre v. Dweck*, 44 AD3d 597 [2007]; *Ricciuti v. Village of Tuckahoe*, 202 A.D.2d 488 [1994]), the branch of defendant Laurent's motion for summary judgment on the issue of liability is denied.

¹ Defendant Laurent's motion (sequence number "11") for leave to amend his answer to assert the emergency doctrine as an affirmative defense was denied by Order of this Court dated June 29, 2017.

The branch of defendant Laurent’s instant motion for summary judgment dismissing the complaint upon the ground that plaintiff failed to sustain a serious injury within the meaning of Insurance Law §5102(b), is denied. With regard to plaintiff Rodney Mills, the conflicting reports of the parties’ respective orthopedists regarding, inter alia, the range of motion of plaintiff Mills’ right and left shoulders, present issues of fact warranting denial of summary judgment and requiring a trial (*Kanic Realty Association, Inc. v. Suffolk County Water Authority*, 130 AD3d 876 [2015]; *Torres v. City of New York*, 127 AD3d 1163 [2015]; *Patel v. MBG Development, Inc.*, 7 AD3d 498 [2004]; *Halkias v. Otolaryngology-Facial Plastic Surgery Associates, P.C.*, 282 AD2d 650 [2001]). It is well settled that conflicting expert affirmations creates a credibility issue that is a matter particularly within the province of a jury (*People v. Gardella*, 5 AD3d 695; *Gleeson-Casey v. Otis Elevator Company*, 268 AD2d 406). With regard to plaintiff Sharon Bass, defendant Laurent failed to sustain his initial burden of demonstrating entitlement to judgment as a matter of law as to plaintiff Bass inasmuch as the report of Dr. Gregory Chiamonte, the orthopedic surgeon who conducted an independent medical examination of Bass on December 30, 2015, found limitations in the range of motion of Bass’ right shoulder and right hip (defendants Exhibit “J”). Furthermore, contrary to defendant’s claim that plaintiff Bass did not claim an injury to her right hip as a result of the subject accident, paragraph 9 of plaintiffs’ Verified Bill of Particulars dated July 15, 2016 does, in fact, state that Bass sustained “Trauma, injury and damage to the right hip...”.

Accordingly, defendant Laurent’s motion is denied in its entirety.

Dated:

JUL 12 2017.



 MARGUERITE A. GRAYS
 J.S.C.

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