Radoncic v Faulk
2017 NY Slip Op 32009(U)
September 19, 2017
Supreme Court, Suffolk County
Docket Number: 7731/15
Judge: Paul J. Baisley, Jr.
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Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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DZAVID RADONCIC,

Plaintiff,

-against-

WENDY FAULK, RICKY McTAGGART and V.E. PINNOCK McTAGGART,

Defendants.

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INDEX NO.: 7731/15
CALENDAR NO.: 201601373MV
MOTION DATE:3/16/17
MOTION SEQ. NO.: 003 MG; 004 CASEDISP

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Upon the following papers numbered 1 to 21 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-5; 10-14 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 6-7; 15-19 ; Replying Affidavits and supporting papers 8-9; 20-21 ; Other__; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the following motions are consolidated solely for purposes of this determination; and it is further

ORDERED that the motion (motion sequence no. 003) of defendant Wendy Faulk for summary judgment is granted and the complaint is hereby severed and dismissed as asserted against her; and it is further

ORDERED that the motion (motion sequence no. 004) of defendants Ricky McTaggart and V.E. Pinnock McTaggart for summary judgment dismissing the complaint on the ground that plaintiff Dzavid Radoncic did not sustain a serious injury as defined under Insurance Law §5102(d) is granted.

Plaintiff Dzavid Radoncic ("Radoncic") commenced this action to recover damages for personal injuries he allegedly sustained in a motor vehicle accident on February 1, 2015 while a rear seat passenger in the vehicle operated by defendant Wendy Faulk ("Faulk"). The accident occurred at approximately 6:00 p.m. near the intersection of Straight Path and Route 231 in Dix Hills, New York when the Faulk vehicle was rear-ended by the vehicle operated by defendant Ricky McTaggart and owned by defendant V.E. Pinnock McTaggart (hereinafter the "McTaggart defendants" when referred to collectively). In his complaint, Radondic alleges that Faulk and the McTaggart defendants were negligent in the operation and ownership of their respective vehicles and that such negligence caused him to sustain serious permanent injuries as defined in Insurance Law §5102(d).

Issue has been joined, discovery completed and the note of issue filed. Faulk now moves for summary judgment dismissing the complaint, arguing there is no dispute that her vehicle was hit in the rear by the McTaggart defendants' vehicle, and there is no evidence that she was negligent or any way contributed to the happening of the accident. Radoncic has not submitted any opposition to the motion. The McTaggert defendants oppose Faulk's motion and separately move for summary dismissal of the complaint arguing that Radoncic did not sustain a serious injury within the meaning of Insurance Law §5102(d). Counsel for Faulk adopts and incorporates by reference the facts, arguments and proffered exhibits set forth in the McTaggart defendants' motion; Radoncic has submitted papers in opposition.

In support of her motion, Faulk submits the transcript of her deposition testimony, as well as the deposition transcripts of Radoncic and Ricky McTaggart. There is no dispute that the McTaggart defendants' vehicle was stopped behind the Faulk vehicle and other cars as the traffic light at the subject intersection was red. Faulk testified she was stopped for thirty to sixty seconds and while the light was still red, she felt a heavy impact to the rear of her vehicle which caused it to move forward. Radoncic's testimony was consistent with that of Faulk's.

Ricky McTaggart testified that the light turned green, he started to move as the vehicles in front of him moved, but then the vehicles stopped. Ricky McTaggart further testified he attempted to stop his vehicle but his foot slipped off the brake and his car hit the rear of Faulk's stopped vehicle. He characterized the impact as light, testified that there was no damage to his vehicle and that, after giving a statement to the police, he drove from the scene.

A rear-end collision with a stopped vehicle creates a *prima facie* case of negligence on the part of the driver of the rearmost vehicle, and imposes a duty on that driver to proffer a non-negligent explanation for the collision (*Tutrani v County of Suffolk*,10 NY3d 906, 861 NYS2d 610 [2008]; *Nikolic v City-Wide Sewer & Drain Serv. Corp.*, 150AD3d 754, 53 NYS3d 684 [2d Dept 2017]; *Tumminello v City of New York*, 148 AD3d 1084, 49 NYS3d 739 [2d Dept 2017]; *Comas-Bourne v City of New York*, 146 AD3d 855, 45 NYS3d 182 [2d Dept 2017]; *Waide v ARI Fleet, LT*, 143 AD3d 975, 39 NYS3d 512 [2d Dept 2016]; *Bene v Dalessio*, 135 AD3d 679, 22 NYS3d 237 [2d Dep 2016]; *Ramirez v Konstanzer*, 61 AD3d 837, 878 NYS2d 281 [2d Dept 2009]; *Cajas-Romero v Ward*, 106 AD3d 850, 965 NYS2d 559 [2d Dept 2013]; *Hearn v Monzolillo*, 103 AD3d 689, 959 NYS2d 531 [2d Dept 2013]; *Cortes v Whelan*, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]). The presumption of negligence in rear-end cases arises from the duty of the driver of the vehicle behind to keep a safe distance and not collide with the vehicle ahead (*see* VTL § 1129 [a]; *Waide v ARI Fleet, LT, supra*; *Hearn v Monzolillo, supra*). Thus, if a vehicle is struck in the rear, absent some excuse, it is negligence as a matter of law, thereby entitling the driver of the lead vehicle to summary judgment on the issue of liability (*see Hearn v Monzolillo, supra*; *Cortes v Whelan, supra*). Nevertheless, as there can be more than one proximate cause of an accident, "[t]o prevail on a motion for summary judgment on the issue of liability, a plaintiff must establish, *prima facie*, not only that the opposing party was negligent, but also that the plaintiff was free from comparative fault" (*Phillip v D&D Carting Co., Inc.*, 136 AD3d 18, 22, 22 NYS3d 75 [2d Dept 2015]; *see Tumminello v City of New York, supra*; *Pollack v Margolin*, 84 AD3d 1341, 924 NYS2d 282 [2d Dept 2011]).

The proffered deposition testimony is sufficient to establish, *prima facie*, that Faulk was not negligent in the happening of the accident and that Ricky McTaggart's negligent operation of his vehicle was the sole proximate cause of the accident (*see Comas-Bourne v City of New York, supra*; *Waide v ARI Fleet, LT, supra*; *Hearn v Monzolillo, supra*; *Cajas-Romero v Ward, supra*). In opposition, the McTaggart defendants have failed to raise a triable issue of fact as to whether Faulk was comparatively at fault or whether McTaggart had a non-negligent explanation for the rear-end accident (*see Comas-Bourne v City of New York, supra*; *Nikolic v City-Wide Sewer & Drain Serv. Corp., supra*). Radoncic has not submitted any opposition to Faulk's motion.

The McTaggart defendants have not come forward with any evidence that Faulk negligently operated her vehicle. Rather, submitted in opposition is the affirmation of their counsel wherein it is asserted that Faulk's proof is deficient as the deposition transcripts are not signed or notarized and no proof has been proffered that they were sent to the parties as required by CPLR 3116. Faulk's transcript is certified by the reporter, and has been proffered to support her own motion, and therefore, adopted as accurate (*see Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011], *lv denied* 17 NY3d 703, 929 NYS2d 93 [2011]; *Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]). The transcripts of Radoncic and Ricky McTaggart are also certified by the reporter and are not challenged as inaccurate (*see Ciraldo v County of Westchester*, 147 AD3d 813, 47 NYS3d 95 [2d Dept 2017]; *Gezelter v Pecora*, 129 AD3d 1021, 13 NYS3d 141 [2d Dept 2015]; *Zalot v Zieba, supra*). Thus, contrary to counsel's arguments, the transcripts proffered by Faulk are admissible.

Furthermore, based on deposition testimony, the negligence of the McTaggart defendants has been conclusively established by Ricky McTaggart's admission that he rear-ended the Faulk vehicle (*see Hearn v Monzolillo, supra*; *Cortes v Whelan, supra*). Although the contention that Faulk proceeded once the traffic light turned green but then suddenly stopped differs from Faulk's and Radoncic's version, such contention is insufficient to rebut the presumption of negligence (*see Waide v ARI Fleet, LT, supra*; *Ramirez v Konstanzer, supra*; *see also Nikolic v City-Wide Sewer & Drain Serv. Corp.,supra*; *Bene v Dalessio, supra*). Even if Faulk suddenly stopped, that would not explain Ricky McTaggart's failure to maintain a safe distance from the vehicle in front of him (*see* VTL § 1129 [a]; *Waide v ARI Fleet, LT, supra*; *Cajas-Romero v Ward, supra*). Therefore, Faulk is entitled to summary judgment dismissing Radoncic's complaint, and all cross-claims, if any, as asserted against her.

Turning to the McTaggart defendants' motion, in support thereof, they rely on Radoncic's deposition testimony and the affirmed report of orthopedic surgeon Richard A. Weiss, M.D. Radoncic testified that as a result of the subject rear-end impact, he suffered injuries to his neck and back. Radoncic also testified that he began experiencing pain in his left shoulder and when he slept on it, his shoulder popped out of its socket. Radoncic's testimony further revealed that in 2004, at the age 12, he was hit by a pick-up truck while riding his bicycle, sustaining a broken left clavicle and wrist. Testimony also revealed that he sporadically missed days from work totaling approximately one month.

On April 19, 2016, Dr. Weiss performed an independent examination of Radoncic, at which time he complained of headaches, neck pain radiating to the upper extremities with tingling, mid back pain, lower back pain radiating to his lower extremities with tingling, and left shoulder

pain. Dr. Weiss reports that upon physical examination, using a goniometer and comparing the measurements to what is normal, he found no limitations in the range of motion of Radoncic's cervical and thoracic spine and no muscle spasms. Range of motion of the lumbar spine was also normal, except forward flexion was 50 degrees (60 degrees normal). Straight leg raise was normal as was the neurological examination of Radoncic's upper and lower extremities. Examination of his left shoulder revealed tenderness on palpation and no effusion. Range of motion on forward flexion and abduction was 170 degrees (180 degrees normal), external rotation to 80 degrees (90 normal) and internal rotation was 70 degrees (80 degrees normal). There was no crepitus noted in the joints and impingement sign was negative. Dr. Weiss characterizes the slightly decreased ranges of motion in the lumbar spine and left shoulder as subjective and reports that the ranges are compatible with normal function. Dr. Weiss diagnosed cervical, lumbar and left shoulder sprains, resolved and concludes that there is no evidence of an accident related orthopedic disability.

Radoncic's testimony is sufficient to establish the McTaggart defendants' *prima facie* showing of entitlement to judgment as a matter of law (*see Sky v Tabs*, 57 AD3d 235, 868 NYS2d 648 [1st Dept 2008]; *Ronda v Friendly Baptist Church*, 52 AD3d 440, 861 NYS2d 622 [1st Dept 2008]). Summary judgment may be appropriate "when additional contributory factors interrupt the chain of causation between the accident and claimed injury–such as a preexisting condition" (*Pommells v Perez*, 4 NY3d 566, 572, 797 NYS2d 380 [2005]). Once evidence of a pre-existing injury is presented, even in the form of an admission made at a deposition, it is incumbent upon the plaintiff to present proof of causation between the subject accident and the claimed injury (*see McNell v Dixon*, 9 AD3d 481, 780 NYS2d 635 [2d Dept 2004]; *see also Brewster v FTM Servo Corp.*, 44 AD3d 351, 844 NYS2d 5 [1st Dept 2007]; *Figueroa v Vcastillo*, 34 AD3d 353, 825 NYS2d 43 [1st Dept 2006]. His testimony also established he did not sustain a serious injury under the 90/180 category of Insurance Law §5102(d) (*see Pryce v Nelson*, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; *Cebron v Tuncoglu*, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

In addition, although Radoncic's medical records were not reviewed by Dr. Weiss, his affirmed report is sufficient make out a *prima facie* case for summary judgment as he performed objective tests showing full ranges of motion (*see Hayes v Vasilios*, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; *see also DeJesus v Paulino*, 61 AD3d 605, 878 NYS2d 29 [1st Dept2009]). The ten-degree limitation in Radoncic's lumbar spine is considered insignificant for purposes of Insurance Law §5102(d) (*see Cebron v Tuncoglu, supra*; *McLoud v Reyes*, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011] [12% decrease in range of motion withing the meaning of the no-fault statute]; *see also Pryce v Nelson, supra* [orthopedist concluded that slight limitations in the range of motion in plaintiff's left shoulder were insignificant]; *Irizarry v Lindor*, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]; *Osborne v Diaz*, 104 AD3d 486, 961 NYS2d 117 [1st Dept 2013] [minor limitation in a single plane of the cervical and lumbar spine not fatal to defendants' prima facie showing, where full range of motion measured in every other plane and opinion was that the strains/sprains were resolved]). It is indisputable that Radoncic's alleged injuries are not "total" and, thus, do not constitute a serious injury under the permanent loss of use category set forth in Insurance Law §5102(d) (*see Oberly v Bangs Ambulance, Inc.*, 96 NY2d 294, 727 NYS2d 378 [2001]). Furthermore, none of the injuries allegedly sustained constitute a serious injury under the

permanent consequential limitation of use or the significant limitation of use categories of Insurance Law §5102(d) (*see Gaddy v Eyler,* 79 NY2d 955, 582 NYS2d 990 [1992]; *Quintana v Arena Transport, Inc.*, 89 AD3d 1002, 933 NYS2d 379 [2d Dept 2011]).

Thus, the burden shifts to Radoncic to submit evidentiary proof in admissible form based upon objective medical findings and diagnostic tests to raise an issue of fact necessary to satisfy the threshold requirement that a serious injury was sustained, or demonstrate an acceptable excuse for failure to meet the requirement of tender in admissible form (*see, Gaddy v Eyler, supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). In opposition, Radoncic submits the initial consultation and follow-up reports and notes of his treating physician, Colin Clarke, M.D. However, these reports and notes are without probative value because none are affirmed to be true under the penalties for perjury and were not proffered by the McTaggart defendants in support of the motion (*see Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *Irizarry v Lindor*, *supra*; *Seck v Minigreen Hacking Corp.*, 53 AD3d 608, 863 NYS2d 218 [2d Dept 2008]). Radoncic has not provided any excuse for failing to meet the "strict requirement of tender in admissible form" (*Zuckerman v City of New York*, *supra*; *Irizarry v Lindor*, *supra* at 847).

The affirmed report of Dov J. Berkowitz, M.D. is in admissible form; however, it is insufficient to overcome the McTaggart defendants' *prima facie* showing. Dr. Berkowitz reports that upon physical examination of Radoncic's left shoulder, he could forward flex to 160 degrees and abduct to about 150 degrees as compared to the normal of 180 degrees. Significantly, however, Dr. Berkowitz reports that Radoncic appears to have shoulder instability which started after the 2004 accident. The history section of the report, in pertinent part, reads:

> Mr. Radoncic is a 23-year old male who sustained an injury on April 10, 2004 while riding a bicycle. He was hit by a truck and knocked to the ground. The patient was seen at Good Samaritan Hospital and apparently sustained fractures of his left clavicle and left wrist. The patient states he was placed in a sling for a number of weeks and when came [*sic*] out of the sling, he noticed his left shoulder was dislocating primarily at night. He began to put the shoulder back on his own....He did not complaint about this...[but] states he did advise the physical therapist that he was having problems with dislocation....The patient states over the last 10 years he has been having recurrent episodes of his left shoulder dislocating, in particular at night.

Glaringly absent from Dr. Berkowitz' report is any discussion as to how Radoncic's current complaints and medical condition regarding his shoulder are causally related to, or were exacerbated by the subject 2015 accident (*see Pommells v Perez, supra*; *Sternberg v Sipzner*, 74 AD3d 1054, 902 NYS2d 380 [2d Dept 2010]; *Seck v Minigreen Hacking Corp.*, *supra*; *Mirabelli v Voight*, 30 AD3d 486, 816 NYS2d 372 [2d Dept 2006]). Radoncic also failed to set forth any competent medical evidence to establish that he sustained a medically determined injury of a non-

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permanent nature which prevented him from performing his usual and customary activities for 90 of the 180 days following the subject accident (*Sternberg v Sipzner*, *supra*; *Seck v Minigreen Hacking Corp.*, *supra*). Therefore, the McTaggart defendants are entitled to summary judgment dismissing Radoncic's complaint.

Accordingly, both motions are granted and the complaint is dismissed.

Dated: September 19, 2017

HON. PAUL J. BAISLEY, JR.

J.S.C.