

Taylor v Cameli
2017 NY Slip Op 32472(U)
October 27, 2017
Supreme Court, Suffolk County
Docket Number: 13489-14
Judge: Denise F. Molia
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Index No.: 13489-14

**SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:

Hon. DENISE F. MOLIA,
Justice

ANGELA TAYLOR,

Plaintiff,

- against -

ANNA M. CAMELI, SUFFOLK COACH INC., and
FOUR ONES ENTERPRISES LLC,Defendants.

CASE DISPOSED: NO
MOTION R/D: 4/8/16
SUBMISSION DATE: 5/12/17
MOTION SEQUENCE NO.: 001 MD

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Upon the following papers filed and considered relative to this matter:

Notice of Motion dated March 8, 2016; Affirmation in Support dated March 8, 2016; Exhibits A through L annexed thereto; Affirmation in Opposition dated May 24, 2016; Exhibits A through I annexed thereto; Reply Affirmation dated June 10, 2016; Exhibit A annexed thereto; and upon due deliberation; it is

ORDERED, that the motion by defendants, pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of defendants and dismissing the Complaint, is denied.

The underlying action was brought for personal injuries allegedly sustained by the plaintiff in a one car accident on October 16, 2012. At the time of the accident, the plaintiff was a backseat passenger in a taxi cab owned by defendants, Suffolk Coach Inc., and Four Ones Enterprises LLC, and operated by defendant Anna Cameli. As the taxi proceeded southbound on County Road 51, a deer entered the roadway and was struck by the taxi. As a result of the accident, the plaintiff has alleged that she sustained personal injuries.

At her deposition, the plaintiff, Angela Taylor, testified that while traveling in the

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defendants' taxi, in the southbound left lane of County Road 51 a deer entered the roadway from the left and was struck by the front end of the taxi. Plaintiff described the area as being dark enough that she could not see the lanes of travel on the northbound side across the median that separated the northbound and southbound lanes of County Road 51. Taylor was unaware of the taxi's speed at the time of the accident and stated that she did not see the deer prior to the impact. The plaintiff did not seek immediate medical attention after the accident and was driven to her home by another taxi.

Taylor also testified that on October 10, 2012, less than one week prior to the subject accident, she had been involved in a similar motor vehicle accident on the same roadway, also in which a taxi owned by the defendants had struck a deer. The prior accident was also the result of the taxi hitting a deer that had run into the road from the left side of County Road 51. Taylor estimated that the taxi in the earlier accident was proceeding at 55 miles per hour at the time it struck the deer. Plaintiff stated that she was not injured and did not seek medical treatment as a result of the October 10, 2012 accident. However, as a result of her experience from the first deer-taxi collision, Taylor testified that she asked Cameli to slow the speed of the taxi just prior to the subject accident, and had warned Cameli to "watch out for the deer" immediately prior to the taxi's striking of the deer.

Defendant Anna Cameli testified that County Road 51 does not provide street lighting and that at the time of the accident, the area was very dark and there was no other traffic on the road. She estimated that she was traveling at between 40 and 45 mph on the 55 mph roadway, and was in the process of coasting to a stop at a red lighted intersection at the time of impact with the deer. She testified that she did not see the deer prior to impact. Cameli was very familiar with the subject area and was aware that there were deer in the area. She noted that there were woods on both sides of the road, that hunting season was in progress, and that there were signs indicating the presence of deer all along the highway. She stated that she was unaware of plaintiff's prior accident.

The defendants contend that the circumstances warrant the application of the emergency doctrine in favor of the defendants and have moved for summary judgment to dismiss the Complaint. Defendants maintain the Cameli was traveling at a safe rate of speed below the speed limit, with her high beams illuminated, when a deer unexpectedly ran into the road and impacted with her vehicle, giving her less than one second to react to the situation.

Defendants' contentions to the contrary, questions of fact exist which would preclude automatic application of the emergency doctrine in favor of defendants and a dismissal of the Complaint. The defendant driver testified that she was familiar with travel on County Road 51, was aware of the deer population in the area, and was aware of the possibility of a deer entering into the roadway. While Cameli stated that she was traveling at or below the posted speed limit and was driving with her high beams on, it cannot be definitively determined at this juncture whether her driving efforts were sufficiently reasonable and prudent considering her general and actual knowledge of the subject roadway, the presence of deer in the area, the chance that a deer would enter into the roadway, and the plaintiff's testimony that she asked the defendant to slow the speed of the vehicle just prior to the collision. Even if a qualifying emergency were

determined to exist herein, decisions as to whether the defendant's actions are reasonable in light of that emergency are best reserved for determination by the jury.

After the subject accident, the plaintiff initially treated at Peconic Bay Medical Center on October 19, 2012, complaining of neck and back pain. She informed the attending physicians that she had been involved in two motor vehicle accidents a few days prior, although she did not differentiate with regard to which accident caused her injuries. Taylor also treated at Island Musculoskeletal Care, M.D., P.C., for shoulder and neck complaints. With regard to plaintiff's cervical spine, Brett Silverman, D.O., at Island Musculoskeletal Care found that she had "mild restricted range of motion" and that with regard to her left shoulder, Taylor had "mild restricted internal rotation. Mild restricted abduction."

Plaintiff submitted to an independent medical exam conducted by Orthopedist John F. Waller, M.D., on October 8, 2015. Dr. Waller found mild loss of range of motion in Taylor's cervical spine, and full range of motion in her left shoulder. Waller found "no evidence of an orthopedic disability" and opined that Taylor was "capable of performing her activities of daily living without limitation."

On October 8, 2015, the plaintiff also submitted to a neurological exam conducted by Richard Lechtenberg, M.D., who stated "this woman had no objective, clinical, neurological deficits on my examination. From a neurological standpoint she is not disabled and can work at any job for which she is qualified." In reviewing the plaintiff's Bill of Particulars alleging injuries to her left shoulder, cervical spine, and lumbar spine, Lechtenberg opined that there was "no objective, clinical, neurological deficits on my examination substantiating these claims."

Orthopedist Bruce P. Meinhard, M.D., examined Taylor on October 13, 2015, finding her to have essentially full range of motion in her cervical spine and mild restriction of range of motion in her left shoulder. He diagnosed her with a cervical spine sprain, exacerbation of a preexisting lumbar spine injury, exacerbation of preexisting left shoulder rotator cuff pathology, and found her to have "nonorganic findings on examination, indicating that her symptoms did not comport with Meinhard's objective clinical findings."

Based on the foregoing medical reports, the defendants contend that the plaintiff has primarily suffered "soft tissue" injuries and failed to demonstrate that she sustained a "serious injury" as defined by Insurance Law §5102(d), thereby entitling them to summary judgment and a dismissal of the Complaint.

In opposition to the motion, the plaintiff has submitted copies of her Verified Bill of Particulars, deposition testimony, and the records of her treating physicians. While the defendants contend that the plaintiff's injuries may have emanated from the October 12, 2012 accident, the plaintiff has consistently testified that she did not suffer any injuries in her first accident and that her complaints only began after the October 16, 2012 accident that is the subject of the instant litigation.

The plaintiff testified that she began to suffer nervousness and confusion on the evening

of the accident, developing pain in her neck and left arm/hand over the next two days. After consulting with her primary care physician two days after the subject accident, the plaintiff was directed to the emergency room at Peconic Bay Medical Center where she complained of neck and left shoulder pain. Following the taking of x-rays, the plaintiff was prescribed Toradol, Robaxin and Naprosyn. MRIs revealed a partial thickness tear of the rotator cuff, as well as herniated disc with foraminal encroachment at C6-7 and a bulge at C4-5. Taylor was also diagnosed with a disc bulge at L4-5 with extruded material and L5-S1 by way of MRI on January 8, 2013. Plaintiff attended physical therapy at North Fork PT from December 31, 2012 until June 24, 2013. She received a steroid injection to her shoulder on January 2, 2013. Taylor continued to follow-up with her physicians, presenting consistent complaints and being treated primarily with medications. More recent EMG testing resulted in findings of C7 and C5-6 radiculopathies, and the plaintiff underwent surgery to repair her left rotator cuff on February 17, 2016.

The plaintiff notes that the Waller orthopedic report fails to address the findings of the plaintiff's cervical and shoulder MRI's, and further notes that Waller found cervical limitations of motion of "flexion 40 degrees (50 degrees normal)"; "extension to 45 degrees (60 degrees normal)"; "right lateral flexion to 30 degrees (45 degrees normal)"; and "right rotation to 50 degrees (80 degrees normal) and left rotation to 50 degrees (80 degrees normal)". In addition, the plaintiff notes that Waller referred plaintiff to a pain management specialist and affirmatively found that "[b]ased upon the history provided by Ms. Taylor and review of submitted medical records, there is a causal relationship between the accident of record and her reported cervical spine and left shoulder injuries."

The Lechtenberg neurological report found "20 degrees extension (60 normal)" for a 66% limitation of plaintiff's cervical spine as well as "110 degrees flexion (180 normal)" and "110 degrees abduction (180 normal)", constituting a 39% limitation of Taylor's shoulders. Similarly, the Meinhard examination and report opined up to a 50% limitation of the left shoulder and 10% limitation of the cervical spine, while opining that "[i]f the history, as it was described is correct, the above diagnoses are causally related to the event alleged on October 16, 2012."

Although the plaintiff testified that she had been involved in a prior accident, she has testified that she did not suffer any injuries in the first accident and that her complaints only began after the second accident. Even if the defendants' contention that the initial accident precluded the instant action, there is no evidence that the plaintiff presented for any treatment or diagnosis prior to the second accident. Where two torts exist and the injuries are incapable of practicable allocation, joint and several liability may be implicated. Reilley v. Fulmer, 9 A.D.3d 818, 819, 780 N.Y.S.2d 830, 831; Ravo v. Rogatnick, 70 N.Y.2d 305, 310, 520 N.Y.S.2d 533. Accordingly, even if there was evidence of injury prior to the second accident, the defendants still would not have demonstrated sufficient grounds for dismissal.

With respect to the issue of damages, the defendants have failed to make out a prima facie case of entitlement to judgment as a matter of law. The plaintiff has submitted the medical reports of her treating physicians who have opined that the plaintiff has sustained significant and permanent injuries that are causally related to the subject accident. Defendants' own examining physician found causally related range of motion restrictions in the cervical and lumbar spine.

while failing to address aspects of the plaintiff's MRI reports.

Assuming *arguendo* that defendants' submissions are sufficient, the medical testimony and the affidavits of plaintiff's treating physicians raise issues of fact as to whether the plaintiff's injuries were significant and permanent, and causally related to the subject accident, or a prior accident, as suggested by the defendants. Accordingly, the plaintiff has met her burden of demonstrating the existence of a triable issue of fact as to whether she suffered a serious injury within the meaning of Insurance Law section 5102(d) (see, Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345)

The foregoing constitutes the Order of this Court.

Dated: October 27, 2017

Hon. Denise F. Molia

HON. DENISE F. MOLIA A.J.S.C.