

Skura v Wojtlowski

2017 NY Slip Op 32985(U)

September 5, 2017

Supreme Court, Suffolk County

Docket Number: 16-08552

Judge: David T. Reilly

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**SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY**

**PRESENT:
HON. DAVID T. REILLY, JSC**

INDEX NO.: 16-08552

PUBLISH

CINTHIA SKURA,

Plaintiff,

-against-

**RICHARD T. WOJTLOWSKI, RICHARD
WOJTLOWSKI, JEAN PIEDMONTE-LEHMAN and
THOMAS C. LEHMAN,**

Defendants.

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MOTION DATE: 03/03/17
SUBMITTED: 06/21/17
MOTION SEQ. NO.: 1, 2, 3 & 4
MOTION: MotD

The Court has considered the following in its deliberations:

1. Defendants Jean Piedmonte-Lehman and Thomas C. Lehman's (Lehman) Notice of Motion (Motion #1) dated February 8, 2017 and supporting papers;
2. Plaintiff's Notice of Motion (Motion #2) dated March 13, 2017 and supporting papers;
3. Defendant Richard T. Wojtowski's (Wojtowski) Notice of Cross-Motion (Motion #3) dated March 17, 2017 and supporting papers;
4. Plaintiff's Attorney's Reply Affirmation to Motion #2 dated March 27, 2017 and supporting papers;
5. Lehman's Affirmation in Opposition to Motion #2 dated April 28, 2017;
6. Lehman's Notice of Cross-Motion (Motion #4) dated April 28, 2017 and supporting papers;
7. Plaintiff's Attorney's Affirmation in Opposition to Motion #4 dated May 8, 2017;

8. Wojtowski's Affirmation in Opposition to Motion #4 dated May 31, 2017; and
9. Lehman's Reply Affirmation to Motion #4 dated June 20, 2017.

Pending before the Court are four separate motions. Initially, Lehman moves for an Order pursuant to CPLR §3126, dismissing the complaint based upon plaintiff's alleged failure to comply with the Preliminary Conference Order. Plaintiff then submitted Motion #2 seeking an Order striking the defendants' Answer and directing costs based upon defendants' failure to appear and submit to a deposition on February 27, 2017. Wojtowski then filed a cross-motion for an Order dismissing the Complaint pursuant to CPLR §3126 based upon an alleged failure by plaintiff to provide discovery in accordance with the Preliminary Conference Order. Finally, Lehman submitted a cross-motion seeking an Order granting him summary judgment and dismissing the complaint and the co-defendant's cross-claims.

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a four car motor vehicle accident that occurred on Ocean Avenue near the intersection of Johnson Avenue in Ronkonkoma, County of Suffolk on October 31, 2013. According to the certified police MV-104A report, Lehman was third in a line of vehicles lawfully stopped due to traffic on the northbound side of Ocean Avenue. Plaintiff was a passenger in Lehman's car when the Wojtowski vehicle came into contact with Lehman's car causing Lehman's car to come into contact with the vehicle in front of her. By the Bill of Particulars, plaintiff alleges that she suffered various injuries, including head pain with concussion, cervical strain, back pain, lower abdomen pain, acute UTI, right knee and leg pain necessitating immobilization and psychosis.

With respect to the motions pending, the Court will first address Lehman's Motion #4 wherein they seek an Order granting them summary judgment and dismissal of the plaintiff's complaint and co-defendant's cross-claims.

It is beyond cavil that the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material fact (see *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hosp.*, *supra.*, citing *Zuckerman v. City of New York*, *supra.*).

The law is also well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (see *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Benincasa v. Garrubo*, 141 AD2d 636 [1988]). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (*Pantote Big Alpha Foods, Inc. v. Schefman*, 121 AD2d 295 [1986]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v. Strong Memorial Hospital*, 98 AD2d 976 [1983]).

It is well settled in this State and in this Department that a rear-end collision with a stopped automobile establishes a *prima facie* case of negligence on the part of the operator of the moving vehicle and imposes a duty on the operator of the moving vehicle to explain how the accident occurred (see *Cortese v. Pobejmov*, 136 AD3d 635 [2016]). The operator of the moving vehicle is required to rebut the inference of negligence created by an unexplained rear-end collision (see *Moran v. Singh*, 10 AD3d 707 [2004], citing *Pfaffenbach v White Plains Express Corp.*, 17 NY2d 132 [1966]) because he or she is in the best position

to explain whether the collision was due to a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or some other reasonable cause (*see Pace v. State*, 271 AD2d 419 [2000]). If the operator of the moving vehicle cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law (*see Starace v Inner Circle Qonexions*, 198 AD2d 493 [1993]).

Here, according to the sworn statements of the plaintiff and Jean Piedmonte-Lehman, the Lehman vehicle was either stopped or slowly coming to a stop on Ocean Avenue due to traffic being stopped in front of them. As they were stopped or coming to a stop, Lehman glanced in her rear-view mirror and noticed the Wojtowski vehicle coming toward her car at a high rate of speed. Jean Piedmonte-Lehman had just enough time to warn the plaintiff about the impending collision before it occurred, or just a matter of seconds.

In opposition to the motion, Wojtowski maintains that the motion is premature inasmuch as the parties have not been deposed and other discovery has not been completed. He argues that Lehman's affidavit is deficient in that it fails to approximate the speed of the Wojtowski vehicle and fails to properly describe why she could do nothing to avoid the accident. Wojtowski does not speak as to a possible reasonable cause of the accident other than Lehman's failure to avoid the collision.

Plaintiff, for her part, states that Lehman's motion is untimely, fails to include a copy of plaintiff's amended and supplemental verified bill of particulars and is premature. In addition, plaintiff through her sworn affidavit, claims that Lehman was negligent in that her vehicle's seat belt was not in proper working order and Lehman had knowledge of that defect and that Lehman has sufficient time to and failed to avoid the collision by turning her vehicle to the right.

It has been held that speculation regarding evasive action that a driver should have taken to avoid a collision, especially when the driver had, at most, a few seconds to react, does not raise a triable issue of fact (*Cancellaro v. Shults*, 68 AD3d 1234 [2009], *leave denied* 14 NY2d 706 [2010]). In this case mere speculation on the part of the plaintiff and Wojtowski that Lehman failed to take some measures to avoid the accident, or that she in some way contributed to the occurrence of the accident, is insufficient to defeat this summary judgment motion (*see Conning v. Dietrich*, 105 AD3d 884 [2013]). Equally unavailing is plaintiff's assertions that the motion is untimely or that the depositions of the parties could result in an alternative determination.

Accordingly, Lehman's motion for summary judgment dismissing the plaintiff's complaint and co-defendant's cross-claims against her is granted. In light of this determination the Court need not address Lehman's motion for dismissal of the complaint pursuant to CPLR §3126 and that motion is denied as moot.

As to the remaining applications, it is noted that the Preliminary Conference Order in this case, dated December 20, 2016, calls for the depositions of all parties to occur on February 27, 2017. Plaintiff complains that the defendant Wojtowski failed to appear and submit to the deposition and, therefore, his Answer should be stricken. In response, Wojtowski states that plaintiff failed to timely comply with his Demand for Notice for Discovery and Inspection dated November 18, 2016 and further failed to provide him with duly executed HIPAA authorizations for Suffolk MRI and Dr. Barbara Arendash which were requested three additional times, most recently on March 1, 2017. Wojtowski further indicates that the scheduled depositions did not occur due to plaintiff's failure to comply with the Preliminary Conference Order.

In reply, plaintiff avers that she supplied Wojtowski with the documents sought in a Response to Preliminary Order dated February 6, 2015, some eighteen months prior to the commencement of this action (*see Plaintiff's Attorney's Reply Affirmation*, ¶2). That being said, plaintiff also maintains that she has timely provided Wojtowski with the required authorizations and 537 pages of medical records prior to the date scheduled for deposition, specifically on February 6, 2017. Finally, plaintiff indicates that Dr. Arendash

[* 4]
is a personal friend of the plaintiff's and did not have a physician/patient relationship with the plaintiff.

Striking a pleading for failure to provide discovery is a drastic remedy which will only be invoked where the respondent's conduct was willful, deliberate or contumacious (*Tinkleman v. Hudson Valley Winery*, 80 A.D.2d 844 [1981]). When a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the trial judge's discretion to dismiss the pleadings (*Kihl v. Pfeffer*, 94 N.Y.2d 118 [1999]). It is always preferable, however, to have actions decided on their merits (*Sieden v. Copen*, 170 A.D.2d 262 [1991]).

Here, the Court finds that neither the plaintiff nor Wojtowski have acted in a willful or contumacious manner and therefore, each of their applications are denied. However, in order to effectuate the timely progression of discovery in this matter the Court will provide a schedule which shall be strictly adhered to by the parties. That schedule will be outlined below.

Based upon the sum of the foregoing, it is hereby,

ORDERED that Lehman's motion (Motion #4) for summary judgment pursuant to CPLR §3212 is granted; and it is

ORDERED that Lehman's motion (Motion #1) for dismissal pursuant to CPLR §3126 is denied as moot; and it is

ORDERED that plaintiff's motion (Motion #2) for an Order striking Wojtowski's Answer is denied; and it is

ORDERED that Wojtowski's motion (Motion #3) for dismissal pursuant to CPLR §3126 is denied; and it is

ORDERED that all outstanding items discovery sought in the Preliminary Conference Order, other than plaintiff's medical examination, shall be supplied by the party from which the discovery is sought within thirty (30) days of this decision and Order; and it

ORDERED that the depositions of the remaining parties shall take place on or before September 20, 2017. No requests for adjournments past that date will be entertained by the Court.

The foregoing constitutes the decision and Order of the Court.

Dated: September 5, 2017
Riverhead, New York


DAVID T. REILLY, J.S.C.