Schulz v Mondesir
2018 NY Slip Op 30766(U)
March 21, 2018
Supreme Court, Bronx County
Docket Number: 302245/2013
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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JEANNE M. SCHULZ and MARK A. SCHULZ,

Plaintiffs,

-against-

KIRK H. MONDESIR, FAVEUR MONDESIR, MANUEL A. CESPEDES and CARLY AUTO GROUP.,

Defendants.

---x

DECISION AND ORDER
Present: HON. HOWARD H. SHERMAN, J.S.C.
Index No. 302245/2013

Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Notice of Motion and Affidavits Annexed	2
Opposition	3
Opposition	4
Reply	5

The motion by defendants Manuel Cespedes and Carly Auto, Corp. for summary judgment dismissing the complaint and all cross claims against them on the issue of liability and the motion by the same defendants for summary judgment dismissing the complaint against them on the issue of serious injury are consolidated for purposes of this determination.

Defendants Manuel Cespedes and Carly Auto, Corp. ("Carly Auto") move for summary judgment dismissing the complaint and all cross claims against them on the ground that defendant Cespedes was not liable for the accident, and that the subject accident was solely the result of plaintiff Jeanne Schulz' failure to control her vehicle. Plaintiffs submit opposition to the motion. This motion is denied.

In support of the motion, moving defendants submit, among other things, the pleadings, the uncertified copy of the police accident report, and the deposition testimony of the parties. In opposition, plaintiffs submit the affidavit of Jeanne Schulz and a copy of the Court's decision, dated October 30, 2014.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Jeanne Schulz when her vehicle collided with defendants' vehicles, while having traveled southbound on the FDR Drive on November 6, 2011. By the bill of particulars, the injured plaintiff alleges that, as a result of the subject accident, she sustained serious injuries and conditions, including herniated discs in the cervical region, left arm spasm, and numbness and tingling in her shoulders and fingers.

A driver is negligent where he has failed to see that which through proper use of his senses he should have seen (*see Abboud v Pawelec*, 141 AD3d 438 [1st Dept 2016]; *Griffin v Pennoyer*, 49 AD3d 341 [1st Dept 2008]; *Berner v Koegel*, 31 AD3d 591 [1st Dept 2006]). At the same time, a driver traveling with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident (*see Espinal v Volunteers of America-Greater N.Y., Inc.*, 121 AD3d 558 [1st Dept 2014]; *Rodriguez v CMB Collision Inc.*, 112 AD3d 473 [1st Dept 2013]; *Raposo v. Robinson*, 106 AD3d 593 [1st Dept 2013]). An accident may have more than one proximate cause (*see Bell v Angah*, 146 AD3d 734 [1st Dept 2017]; *Gutierrez Bautista v Grand Ambulette Serv., Inc.*, 140 AD3d 639 [1st Dept 2016]), and the issue of comparative fault is generally a question for the jury to decide (*see Rodriguez v City of New York*, 142 AD3d 778 [1st Dept 2016]; *Jones v Pinto*, 133 AD3d 634 [2d Dept 2015]). Thus, a movant seeking summary judgment is required to make a prima facie showing that he or she is free from comparative fault (*see Rodriguez v City of New York, supra*; *Adams v Bruno*, 124 AD3d 566 [2d Dept 2015]).

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At her deposition, Jeanne Schulz testified that prior to the accident, she had been traveling in the middle lane of the southbound FDR Drive. When she first observed the Mondesir vehicle, which broke down in the middle lane, she was approximately 250 feet away from the vehicle. She reduced her speed from 50 miles per hour to 35 miles per hour. She looked in the rear-view mirror and observed the left lane was open. She testified that although she saw the Cespedes vehicle in the left lane in the distance, she thought she was able to change lanes. When her vehicle entered three quarters into the left lane, she saw the Cespedes vehicle speeding up and starting to honk to pass her on the left side. She testified that she was struck from behind by the Cespedes vehicle and then was pushed into the disabled Mondesir vehicle.

At his deposition, Kirk Mondesir testified that while traveling in the middle lane of the southbound FDR Drive, his vehicle lost power. When his vehicle came to a complete stop on the roadway, he activated its emergency lights. About a minute later, his vehicle was struck from behind by the plaintiffs' vehicle. Prior to the accident, he looked in his rearview mirror and observed that while the plaintiffs' vehicle was trying to move over to the left lane, the Cespedes vehicle, which was already in the left lane, was traveling at the same speed. He opined that there was no room for the plaintiffs' vehicle to move into the left lane, and that the Cespedes vehicle neither sped up or slowed down. However, he had no recollection as to whether the impact between his vehicle and the plaintiffs' vehicle or the impact between the plaintiffs' vehicle and the Cespedes vehicle occurred first.

At his deposition, Cespedes testified that prior to the accident, he had been traveling in the left lane of the southbound FDR Drive. He testified that after the plaintiffs' vehicle struck the Mondesir vehicle in the rear, it spun and then hit his vehicle. Although he slowed his vehicle immediately prior to the accident, Cespedes was unable to avoid contact with the plaintiffs' vehicle.

Here, the testimony of the parties conflict as to the happening of the accident (*see Barba v Stewart*, 137 AD3d 704 [1st Dept 2016]; *Pyke v Bachan*, 123 AD3d 994 [2d Dept 2014]). While plaintiff Schulz testified that she was first struck from behind by the Cespedes vehicle, and that her vehicle was propelled into the rear of the Mondesir vehicle, Cespedes testified that there was an impact between the plaintiffs' vehicle and the Mondesir vehicle, and, as a result of the impact, the plaintiffs' vehicle spun and struck his vehicle. Under these circumstances, there are questions of fact as to how the accident happened, which impact came first, between the Mondesir vehicle and the plaintiffs' vehicle or between the plaintiffs' vehicle and the Cespedes vehicle, and whether comparative negligence on Cespedes's part contributed to the subject accident. Thus, Cespedes and Carly Auto have failed to sustain the initial burden of establishing prima facie entitlement to judgment as a matter of law. Therefore, the motion for summary judgment by defendants Cespedes and Carly Auto in their favor on the issue of liability is denied.

Cespedes and Carly Auto also move for summary judgment dismissing the complaint against them on the ground that plaintiff Jeanne Schulz did not sustain a "serious injury" as defined in Insurance Law §5102 (d). Plaintiffs submit opposition to the motion. The motion is granted in part and denied in part.

In support of the motion, moving defendants submit, among other things, the pleadings, the bills of particulars, the deposition testimony of the injured plaintiff, and affirmed reports of Dr. John Buckner and Dr. Timonthy Haydock. In opposition, plaintiffs submit, among other things, the affidavit of Jeanne Schulz, an affirmed report of Dr. John Robbins, various medical reports and an MRI report of Dr. Joseph Santoro.

Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use

of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, 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 (*see Perl v Meher*, 18 NY3d 208 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230 [1982]).

Under the No Fault Law to maintain an action for personal injury, plaintiff must establish that a "serious injury" has been sustained (*id.*). The proponent of a motion for summary judgment must tender sufficient evidence to the absence of any material issue of fact and the right to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). In the present action, the burden rests on defendant to establish, by submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury" (*see Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see Gaddy v Eyler*, 79 NY2d 955 [1992]; *see generally Zuckerman v City of New York*, 49 NY2d 557 [1980]).

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Here, moving defendants failed to make a prima facie showing that plaintiff Jeanne Schulz (hereinafter plaintiff) did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) with regard to her claim of the limitation of use of her cervical spine and shoulders (*see Susino v Panzer*, 127 AD3d 523 [1st Dept 2015]). On September 14, 2015, approximately four years after the subject accident, moving defendants' examining orthopedist, Dr. John Buckner, examined plaintiff and performed certain orthopedic and neurological tests, including Spurling's test, Lhermitte's test, Tinel's test, Phalen's test, Finkelstein's test, the straight leg raising test, and FABER's maneuver. Dr. Buckner found that all the test results were negative or normal. Dr. Buckner also performed range of motion testing on plaintiff's cervical and lumbar regions, shoulders and wrists. Dr. Buckner found that she exhibited normal range of motion in her cervical spine: 40 degrees of flexion, 30 degrees of extension, 30 degrees of lateral flexion, and 45 degrees of rotation. With regard to plaintiff's lumbar spine, Dr. Buckner found that the plaintiff exhibited normal range of motion in her shoulders: 165 degrees of flexion and abduction and 80 degrees of external rotation. He stated that the plaintiff's fingertips were able to reach T12, bilaterally, to demonstrate a normal internal rotation. However, Dr. Buckner failed to compare these findings to the normal range of motion (*see Rivera v Gonzalez*, 107 AD3d 500 [1st Dept 2013]; *Lopez v Felton*, 60 AD3d 822 [2d Dept 2009]; *Bray v Rosas*, 29 AD3d 422 [1st Dept 2006]). Moreover, Dr. Buckner failed to provide any specific range of motion testing results for plaintiff's shoulder extension, adduction and internal rotation (*see Sentino v Valerio*, 72 AD3d 1063 [2d Dept 2010]; *Bray v Rosas, supra*). Dr. Buckner's report, therefore, is insufficient to establish a prima facie case that plaintiff did not sustain a serious injury within the "significant limitation of use" category of Insurance Law § 5102 (d).

The affirmation of Dr. Haydock does not constitute competent evidence. Dr. Haydock reviewed the uncertified New York Presbyterian Hospital records in November 2011.

Although Dr. Haydock's affirmation attempted to substantiate the injured plaintiff's claim medically, he had no personal knowledge of the plaintiff's medical condition on the day of the subject accident. Inasmuch as he relied on unsworn medical reports from such period, they were hearsay and thus not probative of the issue (*see Uddin v Cooper*, 32 AD3d 270 [1st Dept 2006]).

As to the 90/180-day category, plaintiff's deposition testimony established a prima facie case that she does not have a 90/180 claim (*see Rose v Tall*, 149 AD3d 554 [1st Dept 2017]; *Haniff v Khan*, 101 AD3d 643 [1st Dept 2012]; *Valdez v Benjamin*, 101 AD3d 622 [1st Dept 2012]). Here, plaintiff, who worked as a full-time nurse, testified that she missed only one day of work following the subject accident until February 14, 2014 when she underwent surgery for a C5-C6 anterior discectomy and fusion. In opposition, plaintiffs failed to offer any evidence, or make any argument, in support of the 90/180-day claim. Plaintiffs failed to raise a triable issue of fact regarding whether during the first 180 days following the accident plaintiff was "curtailed from performing [her] usual activities to a great extent rather than some slight curtailment" (*Gaddy v Eyler, supra*; *see Morris v Cisse*, 58 AD3d 455 [1st Dept 2009]). Accordingly, it is

ORDERED that the motion by defendants Cespedes and Carly Auto for summary judgment dismissing the complaint and all cross claims against them on the issue of liability is denied; and it is further

ORDERED that the branch of the motion by defendants Cespedes and Carly Auto for summary judgment dismissing the limitation of use claims against them is denied; and it is further

ORDERED that the branch of the motion by defendants Cespedes and Carly Auto for summary judgment dismissing the 90/180-day claims against them is granted; and it is further

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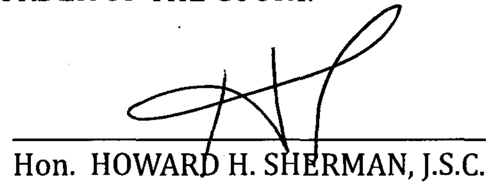
ORDERED that defendants Cespedes and Carly Auto shall serve a copy of this Order with Notice of Entry on all parties.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.



Dated: March 21, 2018

Hon. HOWARD H. SHERMAN, J.S.C.