

Hennington v Neider
2018 NY Slip Op 32762(U)
October 30, 2018
Supreme Court, Suffolk County
Docket Number: 13-26242
Judge: Joseph Farneti
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ORIGINAL

SHORT FORM ORDER

INDEX No. 13-26242
CAL. No. 17-01932MV

SUPREME COURT - STATE OF NEW YORK I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 3-5-18 (007 & 008)
MOTION DATE 3-8-18 (009)
ADJ. DATE 5-17-18
Mot. Seq. # 007 - MG
 # 008 - MD
 # 009 - XMD

-----X
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Plaintiffs,

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- against -

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RORY NEIDER, DANIEL VOGT and ISLAND
MEDICAL TRANSPORTATION INC., and
ISLAND MEDICAL TRANSPORTATION,

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Defendants.
-----X

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Upon the following papers numbered 1 to 67 read on these motions, for summary judgment and cross motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-14; 15-26 ; Notice of Cross Motion and supporting papers 27-41 ; Answering Affidavits and supporting papers 42-45; 50-52; 53-54; 55-57 ; Replying Affidavits and supporting papers 46-49; 58-59; 60-67 ; Other ; it is,

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ORDERED that the motion (#007) by defendant Daniel Vogt seeking summary judgment, the motion (#008) by defendant Rory Neider seeking summary judgment, and the cross motion (#009) by defendant Daniel Vogt seeking summary judgment hereby are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendant Daniel Vogt seeking summary judgment dismissing the complaint against him is granted; and it is further

ORDERED that the motion by defendant Rory Neider seeking summary judgment dismissing the claim of Frances Hennington on the ground that she failed to sustain a serious injury as defined by Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the cross motion by defendant Daniel Vogt seeking summary judgment dismissing the claim of Frances Hennington on the ground that she has not sustained an injury within the meaning of Insurance Law § 5102 (d) is denied, as moot.

Plaintiffs Frances Hennington commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Old Country Road and Roanoke Avenue in the Town of Riverhead on May 10, 2013. It is alleged that the accident occurred when the vehicle owned and operated by defendant Rory Neider struck the rear passenger side of the vehicle owned by defendant Island Medical Transportation Inc., and operated by defendant Daniel Vogt when it made a right turn from Old Country Road and entered the rotary traffic circle as defendant Vogt's vehicle traveled southbound on Roanoke Avenue. At the time of the accident, plaintiff Hennington was riding as a backseat passenger in the vehicle operated by defendant Vogt. By her bill of particulars, plaintiff Hennington alleges that she sustained various personal injuries as a result of the subject accident, including a compression fracture at level L1, and an exacerbation of right hip and knee injuries. Plaintiff Hennington further asserts that due to the injuries she sustained in the subject accident she was confined to her bed for approximately three months and to her home since August 19, 2013, following her release from Oak Hollow Nursing Center.

Subsequently, on October 3, 2014, a separate action was commenced by Tatiana McKenzie, assigned Index Number 26242/2013 to recover damages for injuries she allegedly sustained in the same accident. At the time of the accident, plaintiff McKenzie, who was plaintiff Hennington's home health aide, was riding as a backseat passenger in the Vogt vehicle. Thereafter, this Court, by Order dated September 16, 2014, granted defendant Neider's motion for consolidation, and ordered that the two actions be consolidated under index number 26243/13, and that the caption be amended to read *Frances Hennington and Tatiana McKenzie, plaintiffs, against Rory Neider, Daniel Vogt and Island Medical Transportation Inc, and Island Medical Transportation, defendants.*

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Defendant Rory Neider now moves for summary judgment in his favor on the basis that plaintiff Hennington's alleged injuries do not meet the serious injuries threshold requirement of Section 5102 (d) of the Insurance Law. In support of the motion, defendant Neider submits copies of the pleadings, plaintiff Hennington's deposition transcript, uncertified copies of plaintiff Hennington's medical records concerning the injuries at issue, and the sworn medical report of Dr. David Weissberg. At defendant Neider's request, Dr. Weissberg conducted an independent orthopedic examination of plaintiff Hennington on August 15, 2017. Defendant Daniel Vogt cross-moves for summary judgment on the grounds that plaintiff Hennington did not sustain a serious injury within the meaning of Section 5102 (d) of the Insurance Law as a result of the subject collision. In support of the cross motion, defendant Vogt relies upon the same evidence as defendant Neider along with the uncertified medical report of plaintiff's treating orthopedist, Dr. Michael Ciminiello.

Plaintiff Hennington opposes the motion and cross motion on the grounds that defendants failed to make a *prima facie* case that she did not sustain a serious injury as a result of the subject accident, and that the evidence submitted in opposition demonstrates that she sustained injuries in the "limitations of use" and the "90/180" categories of the Insurance Law. In opposition, plaintiff submits the sworn medical report of Dr. Muneer Imam and uncertified copies of her medical records regarding the injuries at issue.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (*Dufel v Green*, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see also Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Porcano v Lehman*, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; *Nolan v Ford*, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [2d Dept 1984]).

Insurance Law § 5102 (d) defines a "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 "limitations of use" categories, a plaintiff must present objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (*see Magid v Lincoln Servs. Corp.*, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; *Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815

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NYS2d 140 [2d Dept 2006]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). 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 may also suffice (see *Toure v Avis Rent A Car Systems, Inc.*, *supra*; *Dufel v Green*, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]). Further, evidence of pain and discomfort alone, unsupported by credible medical evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (see *Scheer v Koubek*, 70 NY2d 678, 518 NYS2d 788 [1987]). Unsworn medical reports of a plaintiff’s examining physician or chiropractor are insufficient to defeat a motion for summary judgment (see *Grasso v Anegarmi*, 79 NY2d 813, 580 NYS2d 178 [1991]). However, a plaintiff may rely upon unsworn MRI reports if they have been referred to by a defendant’s examining expert (see *Caulkins v Vicinanza*, 71 AD3d 1224, 895 NYS2d 600 [3d Dept 2010]; *Ayzen v Melendez*, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]).

A defendant seeking summary judgment on the ground that a plaintiff’s negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a *prima facie* case that the plaintiff did not sustain a “serious injury” (see *Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant’s own witnesses, “those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports” to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff’s deposition testimony and medical reports and records prepared by the plaintiff’s own physicians (see *Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for “serious injury” under New York’s No-Fault Insurance Law (see *Dufel v Green*, *supra*; *Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; *Pagano v Kingsbury*, *supra*). However, if a defendant does not establish a *prima facie* case that the plaintiff’s injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff’s opposition papers (see *Burns v Stranger*, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; *Rich-Wing v Baboolal*, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; see generally, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Based upon the adduced evidence, defendant Neider failed to make a *prima facie* showing that plaintiff Hennington did not sustain a serious injury within the meaning of the Insurance Law as a result of the subject collision (see *Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, *supra*; *India v O’Connor*, 97 AD3d 796, 948 NYS2d 678 [2d Dept 2012]; *Kearney v Garrett*, 92 AD3d 725, 938 NYS2d 349 [2d Dept 2012]). Defendant Neider’s motion papers failed to adequately address plaintiff

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Hennington's claim, clearly set forth in her bill of particulars, that she sustained a compression fracture to her lumbar spine at level L1 as a result of the subject accident (*see Uribe v Jimenez*, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; *Barkley v Thomas*, 128 AD3d 873, 9 NYS3d 381 [2d Dept 2015]; *Luna v Romanowski*, 123 AD3d 985, 997 NYS2d 323 [2d Dept 2014]; *Silan v Sylvester*, 122 AD3d 713, 996 NYS2d 170 [2d Dept 2014]), and that she sustain a medically determined injury or impairment of a non-permanent nature which prevented plaintiff Hennington from performing substantially all of the material acts which constitute her usual and customary daily activities for not less that 90 days during the 180 days immediately following the subject accident (*see Elshaarawy v U-Haul Co. of Miss.*, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]).

Moreover, defendant Nieder's examining orthopedist, Dr. Weissberg, did not provide complete range of motion testing for plaintiff Hennington's lumbar spine, he only provided one range of motion measurement, namely flexion, and such measurement showed a significant limitation compared to the normal range of motion for that area (*see Katanov v County of Nassau*, 91 AD3d 723, 936 NYS2d 285 [2d Dept 2012]; *Edouazin v Champlain*, 89 AD3d 892, 933 NYS2d 85 [2d Dept 2011]; *Torres v Torrano*, 79 AD3d 1124, 912 NYS2d 912 [2d Dept 2010]). Additionally, Dr. Weissberg's report shows that plaintiff Hennington has significant range of motion limitations in her right hip and right knee (*see Kahvejian v Pardo*, 125 AD3d 936, 4 NYS3d 133 [2d Dept 2015]; *Calcagno v New York City Transit Auth.*, 273 AD2d 334, 710 NYS2d 824 [2d Dept 2000]). While Dr. Weissberg opines that the observed limitations in plaintiff Hennington's knee, hip, and lumber region are due to her longstanding history of pre-existing lumbar radiculitis, neuropathy, and right hip and knee pathologies, which predate the subject accident, he also states that plaintiff Hennington sustained an aggravation of her lower back, right knee and hip osteoarthritic and radicular symptomatology following the subject collision. Thus, based upon Dr. Weissberg's findings, it cannot be said as a matter of law that plaintiff Hennington's aggravation of pre-existing right hip and knee conditions do not constitute a serious injury within the meaning of the Insurance Law or that her alleged injuries were not as a result of the subject accident (*see Werthner v Lewis*, 120 AD3d 490, 990 NYS2d 267 [2d Dept 2014]; *Sanclemente v MTA Bus Co.*, 116 AD3d 688, 983 NYS2d 280 [2d Dept 2014]; *Rodgers v Duffy*, 95 AD3d 864, 944 NYS2d 175 [2d Dept 2012]). Furthermore, Dr. Weissberg's conclusion that "it is abundantly clear that plaintiff Hennington exhibited multiple signs of symptom magnification at the time of the examination" is speculative and without probative value, since he failed to explain or substantiate with any objective medical evidence the basis for this conclusion that the noted limitations were self-restricted (*see Morafates v Macchia*, 127 AD3d 1150, 7 NYS3d 546 [2d Dept 2015]; *Raguso v Ubriaco*, 97 AD3d 560, 947 NYS2d 343 [2d Dept 2012]; *Artis v Lucas*, 84 AD3d 845, 921 NYS2d 910 [2d Dept 2011]).

Inasmuch as defendant Neider failed to meet his *prima facie* burden, the Court need not address the sufficiency of whether plaintiff Hennington's papers submitted in opposition raised a triable issue of fact as to whether she sustained a serious injury within the meaning of the Insurance Law (*see Smith v Hartman*, 73 AD3d 736, 899 NYS2d 648 [2d Dept 2010]; *Quiceno v Mendoza*, 72 AD3d 669, 897

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NYS2d 643 [2d Dept 2010]). Accordingly, defendant Neider's motion for summary judgment dismissing the complaint of plaintiff Hennington is denied.

Having determined that defendant Neider failed to establish that plaintiff Hennington did not sustain a serious injury within the meaning of the Insurance Law as a result of the subject accident, defendant Vogt's cross motion for summary judgment dismissing the complaint on the ground that plaintiff Hennington's alleged injuries do not come within the meaning of the serious injury threshold requirement of Insurance Law § 5102 (d) is denied, as moot.

Defendant Vogt additionally moves for summary judgment dismissing the complaint against him on the grounds that defendant Neider's operation of his vehicle in violation of Vehicle and Traffic Law § 1145 was the sole proximate cause of the subject collision. In support of the motion, defendant Vogt submits, among other things, copies of the pleadings, the parties' deposition transcripts, and a certified copy of the police accident report. Plaintiff McKenzie opposes the motion on the grounds that there are triable issues of fact as to how the subject accident occurred, and as to whether defendant Vogt took reasonable precautions to avoid the subject collision. In opposition to the motion, plaintiff McKenzie submits the deposition transcript of defendant Neider. Defendant Neider and plaintiff Hennington also oppose the motion on the same grounds as plaintiff McKenzie and rely on the same evidence submitted by plaintiff McKenzie in their opposition.

The proponent of a summary judgment motion must establish his or her cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his or her favor (*see* CPLR 3212; *Friends of Animals, Inc. v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Outar v Sumner*, 164 AD3d 1356, 81 NYS3d 751 [2d Dept 2018]). Vehicle and Traffic Law § 1145 states that "except where a traffic control device directs otherwise, the driver of a vehicle approaching or about to enter a rotary traffic circle or island shall yield the right of way to any vehicle traveling on such circle or around such island. A violation of this statute constitutes negligence *per se* (*see Katikireddy v Espinal*, 137 AD3d 866, 867, 26 NYS3d 775 [2d Dept]). While the operator of a motor vehicle traveling with the right of way is entitled to assume that the opposing driver will obey the traffic law requiring him or her to yield the right of way (*see LeBron v Mensah*, 161 AD3d 972, 76 NYS3d 219 [2d Dept 2018]; *Ahern v Lanaia*, 85 AD3d 696, 924 NYS2d 802 [2d Dept 2011]), the operator traveling with the right of way still has an obligation to keep a proper lookout and see that which can be seen through the reasonable use of his or her senses to avoid colliding with other vehicles (*see Arias v Tiao*, 123 AD3d 857, 1 NYS3d 133 [2d Dept 2014]; *Regans v Baratta*, 106 AD3d 893, 965 NYS2d 171 [2d Dept 2013]; *Todd v Godek*, 71 AD3d 872, 895 NYS2d 861 [2d Dept 2010]).

Defendant Vogt testified at an examination before trial that prior to the accident he was traveling southbound on Roanoke Avenue, that plaintiffs Hennington and McKenzie were backseat passengers in the vehicle he was operating, and that the vehicle was owned by defendant Island Medical Transportation. He testified that after stopping and waiting for traffic to clear he entered the rotary

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traffic circle, that he first observed defendant Neider's vehicle when it was stopped on Old Country Road, that as he was passing defendant Neider's vehicle on the right hand side of the road he observed the stopped vehicle from his periphery, and that his vehicle was struck in the right rear passenger side by defendant Neider's vehicle after his front bumper, up to the front tire, had passed the entrance for eastbound Old Country Road to the traffic roundabout. Defendant Vogt further testified the impact to his vehicle occurred while the vehicle still was within the rotary traffic circle and that prior to the impact he did not hear any horns blowing or tires screeching.

Plaintiff McKenzie testified at an examination before trial that on the day of the accident she was employed as the home health aide for plaintiff Hennington, that she was riding as a back seat passenger in the vehicle operated by defendant Vogt, and that plaintiff Hennington was sitting to her right on the back seat of the Vogt vehicle as headed back to plaintiff Hennington's house. She testified that the accident occurred within the confines of the traffic circle as defendant Vogt's vehicle was exiting the traffic circle, that she did not see defendant Neider's vehicle prior to the impact with defendant Vogt's vehicle, and that defendant Vogt's vehicle was moving at the moment of impact. Plaintiff McKenzie further testified that she did not hear any horns blowing or tires screeching prior to impact, and that defendant Vogt's vehicle was struck on the right passenger side where plaintiff Hennington was seated in the vehicle.

Defendant Neider testified at an examination before trial the he was the operator of a vehicle involved in an accident with the Vogt vehicle, that he brought his vehicle to a stop at the Old Country Road entrance to the rotary traffic circle, and that after waiting for the traffic to clear, and checking left and right, he entered the traffic circle. He testified that he did not see defendant Vogt's vehicle prior to the impact between the two vehicles, that when he entered the traffic roundabout he believed it was clear, and that the accident occurred within the traffic circle. Defendant Neider testified that the front quarter panel of his vehicle and the rear right passenger side of defendant Vogt's vehicle were involved in the accident, that the first time he observed defendant Vogt's vehicle was when the impact occurred, that his foot was on the gas or about to press the gas when the collision occurred, and that he did not hear any horns blowing or tire screeching prior to the impact.

Plaintiff Hennington testified at an examination before trial that she was riding as a back seat passenger with her aide, plaintiff McKenzie, in the vehicle operated by defendant Vogt when the time of the accident occurred, that defendant Vogt's vehicle was within the rotary traffic circle at the moment of impact, that she did not see defendant Neider's vehicle prior to the collision, and that the impact occurred to the right rear passenger side door where she was seated in the vehicle. Plaintiff further testified that prior to the impact she did not hear any horns blowing, skidding tires or screeching brake.

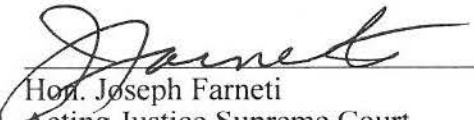
Here, in support of the motion, defendant Vogt relied upon, *inter alia*, the deposition transcripts of the parties. The evidence submitted by defendant Vogt established his *prima facie* entitlement to judgment as a matter of law by demonstrating that the sole proximate cause of the subject accident was

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defendant Neider's violation of the Vehicle and Traffic Law in entering the rotary traffic circle when it was not reasonably safe to do so, directly into the path of his oncoming vehicle (*see Folevy v Santucci*, 135 AD3d 813, 23 NYS3d 338 [2d Dept 2016]; *Krajniak v Jin Y Trading, Inc.*, 114 AD3d 910, 980 NYS2d 812 [2d Dept 2014]; *Ducie v Ippolito*, 95 AD3d 1067, 944 NYS2d 275 [2d Dept 2012]).

In opposition to the motion, neither plaintiffs nor defendant Neider raised a triable issue of fact. In fact, plaintiff McKenzie in her deposition testimony stated that "[defendant Vogt's vehicle] was coming out of the circle and out of nowhere a car came and hit us." In addition, defendant Neider stated to the police that "he entered the traffic circle, not being familiar with traffic roundabouts, got confused and was in [*sic*] collision with vehicle #2." Thus, defendant Neider's deposition testimony and the contention by plaintiffs that defendant Vogt failed to keep a proper lookout for defendant Neider's vehicle are inconsistent and contradict defendant Neider's earlier admission, contained in a police report, and plaintiffs' deposition testimony. As a result, it appears that these inconsistencies were designed to avoid the consequences of defendant Neider's earlier admission as well as plaintiffs' deposition testimony, by raising feigned issues of fact which are insufficient to defeat defendant Vogt's motion (*see Odetella v Rodriguez*, _ AD3d _, 2018 NY Slip Op 06756, 2018 WL 4905378 [2d Dept 2018]; *Buchinger v Jazz Leasing Corp.*, 95 AD3d 1053, 944 NYS2d 316 [2d Dept 2012]; *Ricci v Lo*, 95 AD3d 859, 942 NYS2d 644 [2d Dept 2012]). Accordingly, defendant Vogt's motion for summary judgment dismissing the complaint against him is granted. The action is severed and continued only as against the remaining defendants.

Dated: October 30, 2018


 Hon. Joseph Farneti
 Acting Justice Supreme Court

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION