

Horn v D & A Sand & Gravel Inc.

2018 NY Slip Op 33563(U)

June 22, 2018

Supreme Court, Nassau County

Docket Number: 010205/2015

Judge: Leonard D. Steinman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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DIANE HORN and BRIAN HORN,

Plaintiffs,

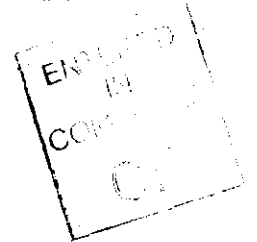
IAS Part 17
Index No. 010205/2015
Mot. Seq. Nos. 002/003

- against -

D & A SAND & GRAVEL INC. d/b/a D&A SAND
AND GRAVEL and FRANK R. VELEZ,

Defendants.

DECISION AND ORDER



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LEONARD D. STEINMAN, J.

The following papers, in addition to any memoranda of law, were reviewed in preparing this Decision and Order:

Motion Seq. No. 002

Plaintiffs' Notice of Motion, Affirmation & Exhibits.....	1
Defendants' Affirmation in Opposition.....	2
Plaintiffs' Reply Affirmation.....	3

Motion Seq. No. 003

Defendants' Notice of Motion, Affirmation & Exhibits.....	1
Plaintiffs' Affirmation in Opposition & Exhibits.....	2
Defendants' Reply Affirmation & Exhibits	3

In this action, plaintiffs seek to recover for injuries allegedly sustained as a result of a car accident that took place on July 27, 2015 on Jerusalem Avenue near Merrick Avenue in North Merrick, New York.

Before the court are two motions for summary judgment -- one brought by defendants seeking dismissal of the complaint on the basis that plaintiff Diane Horn has

failed to sustain injuries sufficient to satisfy the no-fault threshold set forth in Insurance Law Article 51 and the second motion for summary judgment brought by plaintiffs seeking summary judgment on the issue of liability. Both applications are opposed.

Defendants' Motion for Summary Judgment

In her Bill of Particulars, Ms. Horn alleges injuries to her back. She further alleges that she sustained "significant disfigurement, loss of use of a body organ, member function or system, fractures, permanent consequential limitation of use of a body, organ or member; significant limitation of use of a body function or system and/or a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all the material acts which constitute such plaintiff's usual and customary daily activities for not less than ninety (90) days during the first 18 days following the occurrence of such injury or impairment."

Ms. Horn testified at her deposition that she missed one week of work following the accident. Following the accident her head hurt and, as a result, the next day she sought treatment from Dr. Jeffrey Elfenbein, her family doctor. She testified that she "couldn't turn my neck; I had pain in my shoulder; I had headaches; I was dizzy; I had wrist pain." Dr. Elfenbein sent her for an x-ray. Ms. Horn testified that Dr. Elfenbein referred her to an orthopedist for follow-up and, as a result, she sought treatment from Island Orthopedics. After being unhappy with that facility, she testified that she went to Orlin and Cohen. She testified that she treated with this provider approximately ten times for her neck, left shoulder and left wrist. She further testified that within a month of the accident she underwent physical therapy at Advanced Physical Therapy, which included massage, laser heat, ice and exercises for her neck and shoulders. She treated there twice a week until August 31, 2016. Ms. Horn testified that she continued to be treated at Orlin and Cohen during the period of time she underwent physical therapy. Ms. Horn testified that she also received acupuncture treatments once each week between March 2016 and the time of her deposition (September 2016) and that she also underwent an MRI of her neck and left shoulder.

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Ms. Horn testified that as a result of her injuries she is no longer able to “golf; or bowl; or dance; or garden; or its just anything to do with exercise that I did. Fishing. Housework is difficult, cooking is difficult. Laundry, my husband has to do all the laundry now.” With regard to housework she testified that she has difficulty “changing the sheets; washing the bathtub; cleaning the windows; vacuuming; mopping; dusting; sweeping; emptying the dash (*sic.*) washer because my dishwasher location is impossible now” and most of these tasks are done by her husband and daughter. She can no longer ride a bicycle.

Ms. Horn testified that she continues to experience neck and constant left shoulder pain. On a motion for summary judgment, the proponent must tender sufficient evidence to demonstrate the absence of any material issues of fact in order to set forth a *prima facie* showing that he/she is entitled to judgment as a matter of law. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). To obtain summary judgment, the moving party must establish his/her claim or defense by tendering proof, in admissible form, sufficient to warrant the court to direct judgment in the movant’s favor. *Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 (1979). Such evidence may include deposition transcripts as well as other proof annexed to an attorney’s affirmation. CPLR § 3212(b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092 (1985). Where the movant fails to meet its initial burden, the motion for summary judgment should be denied. *U.S. Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears the specific burden of establishing that the plaintiff did not sustain a “serious injury” as enumerated in Insurance Law § 5102(d). To

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satisfy the burden, a defendant's medical expert(s) must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part under evaluation. *Black v. Robinson*, 305 A.D.2d 438 (2d Dept. 2003); *Minlionica v. Shahabi*, 296 A.D.2d 569 (2d Dept. 2002). The burden then shifts to a plaintiff to set forth sufficient evidence demonstrating that he/she sustained a serious injury within the meaning of the statute. *Gaddy v. Eyler*, 79 N.Y.2d 955, 956 (1992).

Serious injury is defined as:

[P]ersonal 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. Insurance Law §5102(d).

In support of the application, defendants rely on the affirmed medical report of Dr. Jay Eneman, an orthopedic surgeon, who examined Ms. Horn on March 23, 2017. The report reflects that an examination of Ms. Horn's cervical spine revealed flexion 40° (normal 50°), extension 25° (normal 60°), right rotation 50° (normal 80°), left rotation 50° (normal 80°), right lateral flexion 0° (normal 45°) and left lateral flexion 0° (normal 45°). The report reflects that "[t]here was suboptimal effort due to pain during the examination."

The examination of the thoracic spine revealed flexion 35° (normal 45°), extension 0° (normal 0°), right rotation 25° (normal 30°), left rotation 25° (normal 30°), right lateral

bending 20° (normal 45°) and left lateral bending 20° (normal 45°). The examination of the lumbar spine revealed flexion 60° (normal 60°), extension 20° (normal 25°), right lateral bending 20° (normal 25°) and left lateral bending 20° (normal 25°). The examination of the right shoulder revealed abduction 170° (normal 180°), adduction 25° (normal 30°), forward flexion 170° (normal 180°), extension 35° (normal 40°), internal rotation 70° (normal 80°) and external rotation 80° (normal 90°). The examination of the left shoulder revealed abduction 150° (normal 180°), adduction 20° (normal 30°), forward flexion 150° (normal 180°), extension 25° (normal 40°), internal rotation 50° (normal 80°) and external rotation 70° (normal 90°).

Dr. Eneman noted that there “was evidence of a mild magnification of symptoms during the examination today. There were findings of decreased range of motion in the physical examination; however, there were no positive objective findings from an orthopedic standpoint.”

Defendants have also provided the affirmed reports of Dr. Jonathan Lerner, Board Certified Radiologist. In his report dated July 11, 2017, Dr. Lerner states that the MRI of the left shoulder performed on February 24, 2016 reveals “1. Supraspinatus tendinosis with a partial thickness articular surface insertional tear. 2. Curved (type II) acromion, moderate acromioclavicular joint arthrosis with capsular hypertrophy and subchondral irregularity with a marked decrease in the acromiohumeral interval.” Dr. Lerner notes “[m]agnetic resonance imaging of the left shoulder demonstrates a partial thickness articular surface insertional tear of the supraspinatus tendon. This is seen in the setting of diffuse supraspinatus tendinosis as well as a narrowed acriohumeral interval due to osteoarthritis at the acromioclavicular joint with capsular hypertrophy and subchondral irregularity. The findings are consistent with rotator cuff impingement.”

Dr. Lerner also noted in the report that the “abnormalities from impingement that affect the supraspinatus tendon and surrounding structures range from the myotendinous tears to full thickness tendon tears. These abnormalities can be associated with symptoms of pain and collectively are referred to impingement syndrome.... It can occur

in young athletes involved in repetitive movements, muscle overdevelopment, as well as degenerative changes of the acromioclavicular joint space.” Dr. Lerner concluded that the MRI revealed no causal relationship between the accident and the findings of the MRI.

Dr. Lerner also concluded that the MRI’s of the cervical spine taken on July 30, 2015, October 8, 2015, and November 5, 2016 revealed no causal relationship between the accident and the findings contained in the results. He contends that the findings are consistent with chronic degenerative process and not “an acute traumatic event.”

With the exception of the 90/180 category, defendants have failed to meet their *prima facie* burden. The medical report of Dr. Eneman contained numerous and some significant range of motion limitations in plaintiff’s left shoulder and cervical spine. While he states in this report the “magnification of symptoms” by Ms. Horn, he does not explain or substantiate those conclusions with any objective medical evidence. *See Tavaras v. Herkimer Taxi Corp.*, 78 A.D.3d 1162 (2d Dept. 2010), *see also Reitz v. Seagate Trucking, Inc.*, 71 A.D.3d 975 (2d Dept. 2010); *Mercado v. Mendoca*, 133 A.D.3d 833 (2d Dept. 2015). Further troubling is the finding by Dr. Eneman that “the diagnosed neck, middle back, lower back and left shoulder injuries are causally related to the accident on July 27, 2015.”

With regard to the 90/180 category, defendant has established that Ms. Horn did not suffer an injury that prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for greater than 90 days during the first 180 days immediately following the accident at issue. Given the testimony provided by Ms. Horn that following the accident she missed one week of work and returned without restriction, as well as the testimony that she was only limited in certain housework, defendant has provided sufficient evidence with regard to this category.

Plaintiff failed to present competent medical evidence to support her claim that she was unable to perform substantially all of her daily activities for not less than 90 of the

first 180 days following the subject accident. *Jackson v. Colvert*, 24 A.D.3d 420 (2d Dept. 2005). While she attempts to rely on the affirmation of Dr. Craig Levitz, he fails to point to a specific basis for his conclusion that she was unable to perform substantially all of her customary daily activities. In fact, he specifically states that she was limited in performing housework, not that she was unable to complete all of her daily activities. A plaintiff must sufficiently demonstrate that her usual activities were limited to a "great extent rather than some slight curtailment." *Licari v. Elliot*, 57 N.Y.2d 230, 236 (1982). Plaintiff's deposition testimony establishes that she did not suffer an injury that prevented her from performing substantially all of her customary daily activities for at least 90 of the 180 days immediately after the accident.

As discussed above, except for the 90/180 category, defendants have failed to submit sufficient competent medical evidence establishing its entitlement to summary judgment as it relates to Ms. Horn's allegations of serious injuries. Therefore, the court need to determine the sufficiency of the opposition papers. *See Kang v. Guillen*, 151 A.D.3d 827 (2d Dept. 2017), *see also Che Hong Kim v. Kossoff*, 90 A.D.3d 969 (2d Dept. 2011).

Accordingly, defendants' motion seeking an order granting summary judgment dismissing the complaint is denied except as to any claim of plaintiff that she was prevented from performing substantially all of her customary daily activities for at least 90 of the 180 days immediately after the accident pursuant to Insurance Law § 5102(d).

Plaintiffs' Application for Summary Judgment

Plaintiffs seek summary judgment pursuant to CPLR § 3212 concerning liability. Defendants oppose the application.

As discussed above, Ms. Horn alleges that on July 27, 2015 her motor vehicle was struck in the rear by a vehicle driven by defendant Frank R. Velez and owned by defendant D & A Sand and Gravel Inc. Ms. Horn asserts that while she was stopped at a red light on Jerusalem Avenue near Merrick Avenue in North Merrick, New York, the front of the vehicle operated by Velez struck the rear of her vehicle. Velez contends that

Ms. Horn was traveling through the intersection and stopped short when the collision occurred.

The court has previously detailed the standard for summary judgment above. Neither party denies or disputes that the front of the vehicle driven by Velez struck the rear of the vehicle driven by Ms. Horn. "A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle." *Scheker v. Brown*, 85 A.D.3d 1007 (2d Dept. 2011). "Accordingly, a rear-end collision establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision." *Gleason v. Villegas*, 81 A.D.3d 889 (2d Dept. 2011).

Ms. Horn testified at her deposition that she was stopped at a red light when the collision occurred. Velez testified that Ms. Horn was traveling through the green light but suddenly stopped short in front of him at the intersection. But under either scenario, a rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the driver of the moving vehicle and imposes a duty upon him to explain how the accident occurred. *Leal v. Wolff*, 224 A.D.2d 392 (2d Dept. 1996). Thus, Velez is required to rebut the inference of negligence created by his rear-end collision. *Id.* See also *Cortes v. Whelan*, 83 A.D.3d 763 (2d Dept. 2011); *Mallen v. Su*, 67 A.D.3d 974 (2d Dept. 2009).

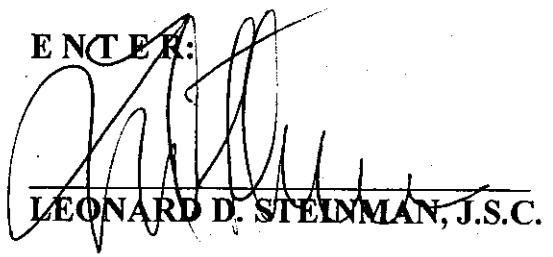
Velez fails to provide facts that establish a non-negligent explanation for the collision. Velez asserts there were eight to ten feet between the motor vehicles preceding the collision and that he had been traveling one mile per hour when he struck Ms. Horn's vehicle. Velez concedes that the roads were dry at the time of the collision. A claim that the driver of the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence. *Mallen v. Su*, 67 A.D.3d at 974.

For the foregoing reasons, plaintiff's application for summary judgment, pursuant to CPLR § 3212, on the issue of liability is granted. The issue of damages is reserved for trial.

Any relief requested not specifically addressed herein is denied.

The above constitutes the **Decision and Order** of this court.

Dated: June 22, 2018
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.

ENTERED
JUN 25 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE