

Moskowitz v Katzgerish
2018 NY Slip Op 34380(U)
November 26, 2018
Supreme Court, Rockland County
Docket Number: Index No. 032012/2017
Judge: Thomas E. Walsh II
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
-----X
HARRIET MOSKOWITZ,

Plaintiff,

-against-

JORDAN S. KATZGERISH and JUKIE B. KATZ-GERISH
-----X
Defendants

Thomas E. Walsh II, J.S.C.

DECISION & ORDER

Index No.: 032012/2017

Motion # 1 - MG
Motion # 2 - MD
DC - N

Adj: 1/9/19 in TAP

The following papers, numbered 1- 6, were considered in connection with Plaintiff's Notice of Motion (Motion #1) for an order pursuant to Civil Practice Law and Rules § 3212 granting plaintiff summary judgment on the issue of Defendants' liability, together with such other and further relief this Court may find just and proper; and is also considered in connection with Defendant's Notice of Motion (Motion #2) for an order granting summary judgment in favor of the Defendant and dismissing Plaintiffs' Complaint pursuant to Civil Practice Law and Rules § 3212, together with such other and further relief as this Court deems just and proper:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion (Motion #1)/Affirmation of Craig A. Post, Esq./Exhibits (A-F)	1
Notice of Cross Motion (Motion #2)/Affirmation of Richard J. Porter, Esq./ Memorandum of Law/Exhibits (A-D)	2
Affirmation of Craig A. Post, Esq. In Opposition (Motion #2)/Exhibits (A-E)	3
Reply Affirmation of Richard J. Porter, Esq. (Motion #2)	4
Supplemental Affirmation in Opposition of Craig A. Post, Esq. (Motion #2)/ Exhibit A	5
Reply Affirmation of Sean M. Spencer, Esq. (Motion #2)	6

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

The instant action is seeking personal injuries sustained in a motor vehicle accident that occurred on August 12, 2014 on the northbound Palisades Interstate Parkway near the intersection with Exit 9E in Clarkstown. According to Plaintiff she was stopped in traffic when her vehicle was struck in the rear pushing the Plaintiff's vehicle forward into another vehicle.

This action was commenced by Plaintiff on May 3, 2017 with the filing of the Summons and Verified Complaint. Issue was joined with the filing of Defendant's Answer through the NYSCEF system on May 22, 2017. The parties exchanged paper discovery and conducted depositions of Plaintiff and Defendant.

Plaintiff filed the instant Notice of Motion on June 27, 2018 through the NYSCEF system seeking an Order granting summary judgment in favor of Plaintiff on the issue of liability and setting the matter down for a trial as to damages only. Defendant filed the instant Notice of Cross Motion on June 29, 2018 through the NYSCEF system seeking an order granting summary judgment and dismissing Plaintiff's Complaint based on the issue of serious injury.

The Court notes that Defendant's cross motion does not raise any opposition as to the Plaintiff's motion for summary judgment on liability. Rather, it focuses solely on the argument that the Plaintiff has failed to demonstrate she sustained a serious injury as defined in Insurance Law § 5102(d).

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. [*Giuffrida v. Citibank Corp., et al.*, 100 N.Y.2d 72 (2003), citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986)]. The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. [*Lacagnino v. Gonzalez*, 306 A.D.2d 250 (2d Dept. 2003)]. However, once such a showing has been made, the burden shifts to the party opposing the motion to produce

evidentiary proof in admissible form demonstrating material questions of fact requiring trial. [*Gonzalez v. 98 Mag Leasing Corp.*, 95 N.Y.2d 124 (2000), citing *Alvarez, supra*, and *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851 (1985)]. Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. [*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966 (1988); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)].

According to the Summons and Complaint the Plaintiff alleged that the Defendant's vehicle struck the vehicle she was in from behind, thus making the Defendant negligent. Plaintiff further states that the answering Defendants, admitted ownership of the vehicle operating the vehicle at the time that the Plaintiff's vehicle was struck from behind. This matter is ripe for summary judgment. If the accident occurred as Plaintiff described, then Defendant struck Plaintiff's vehicle while she was traveling on the Palisades Parkway.

It is well-settled that a rear-end collision with a stopped vehicle creates a prima facie case of liability with respect to the operator of the moving vehicle, unless the operator of the moving vehicle can come forward with an adequate, non-negligent explanation for the accident. [*Smith v. Seskin*, 49 A.D.3d 628 (2d Dept. 2008); *Harris v. Ryder*, 292 A.D.2d 499 (2d Dept. 2002)]. Further, when the driver of an automobile approaches another from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle. [VTL § 1129(a) ("The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon the condition of the highway."); *Tainq v. Drewery*, 100 A.D.3d 740 (2d Dept. 2012)].

Based upon a recent Court of Appeal decision, "[t]o be entitled to partial summary judgment a plaintiff does not bear the...burden of establishing...the absence of his or her own comparative fault." [*Rodriguez*, 31 NY3d 312, 324-325 (2018)]. The Appellate Division, Second Department applied the holding in *Rodriguez* to a plaintiff's motion for summary judgment on

liability upholding the lower court's granting of summary judgment on liability stating "a plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case." [*Edgerton v. City of New York*, 160 AD3d 809, 811 (2d Dept 2018)].

Based upon the recent decision in Rodriguez Plaintiff's motion for summary judgment for liability is granted in its entirety.

Turning now to Defendant's motion for summary judgment based on the Plaintiff's alleged failure to demonstrate a serious injury as defined in Insurance law § 5102, the Court will consider the medical evidence and reports submitted by the parties. In order to be entitled to summary judgment on the issue of "serious injury" it is incumbent upon the defendant to demonstrate that plaintiff did not suffer from *any* condition defined in *Insurance Law* §5102(d) as a serious injury [*Healea v. Andriani*, 158 A.D.2d 587 (2d Dept 1990)]. As the proponent of this summary judgment motion defendants must make a prima facie showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to eliminate any material issues of fact from the case and to warrant a court to direct judgment in their favor, as a matter of law [*Civil Practice Law and Rules* § 3212(b); *Giuffrida v. Citibank Corp., et al*, 100 NY2d 72 (2003), citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986); and *Zuckerman v. City of New York*, 49 NY2d 557 (1980)]. Summary judgment will be granted only if there is no triable issue of fact, issue finding, rather than issue determination, is the key to summary judgment, and the papers on the motion should be scrutinized carefully in the light most favorable to the party opposing the relief [*Judice v. DeAngelo*, 272 AD2d 583 (2d Dept 2000)].

To meet their summary judgment burden plaintiffs must come forward with sufficient evidentiary proof in admissible form to raise a triable issue of fact as to whether Plaintiff suffered a "serious injury" within the meaning of the Insurance Law [*Zoldas v. St. Louis Cab Corp.*, 108 A.D.2d 378 (1st Dept. 1985), *Dwyer v. Tracey*, 105 A.D.2d 476 (3rd Dept. 1984)]. By establishing that any one of several injuries sustained in an accident is a serious injury within the meaning of *Insurance Law* §5102 (d), a plaintiff is entitled to seek recovery for all injuries

incurred as a result of the accident [*Bonner v Hill*, 302 A.D.2d 544 (2d Dept., 2003); *O'Neill v O'Neill*, 261 A.D.2d 459 (2d Dept., 1999)].

In opposition to Plaintiff's summary judgment motion Defendants submit the Independent Medical Examination report of Dr. Robert E. Todd, M.D. Based on the medical report of Dr. Todd Defendant argues that, in response to Plaintiff's motion, demonstrated factual disputes as to Plaintiff's claim of having sustained a personal injury which resulted in 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 if 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 following the occurrence of the injury or impairment

Where as here Plaintiff's doctor's findings are set forth in admissible form in sworn statements and are based on their personal examination and observations, the such examination and observation form an acceptable basis for that doctor's opinion regarding the existence and extent of Plaintiff's range of motion limitation, and, where those findings conflict with those of the Defendant's examining doctor issues of fact exist that preclude summary judgment and that require a trial [*O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418 (1st Dept 1998)].

Additionally, where conflicting medical evidence is offered on the issue of whether the Plaintiff's injuries are permanent or significant, and varying inference may be drawn, the question is one for the jury [*Martinez v. Pioneer Transportation Corp.*, 48 AD 3d. 306 (1st Dept 2008)]. Where the medical affirmations submitted create a triable issue of fact on the question of whether Plaintiff sustained a serious injury, Defendant's motion should be denied [*Chand v. Asghar*, 6 Misc.3d 1010(A), 800 N.Y.S.2d 344, 2005 N.Y. Slip Op. 50025(U)] and discrepancies between the competing reports of the treating physicians and the defendants's examining physicians create issues of credibility and issues of fact that cannot be resolved on summary

judgment and that require a trial [*Francis v. Basic Metal, Inc.*, 144 AD2d 634 (2d Dept 1981); *Cassagnol v. Williamsburg Plaza Taxi*, 234 AD2d 208 (1st Dept 1996)]. Summary judgment will be granted only if there is no triable issue of fact. Issue finding, rather than issue determination, is the key to summary judgment, and the papers on the motion should be scrutinized carefully in the light most favorable to the party opposing the relief [*Judice v. DeAngelo*, 272 AD2d 583 (2d Dept 2000)].

In the instant action the medical reports submitted by Plaintiff in support of his application for summary judgment are in direct contrast to the medical reports submitted by Defendant in opposition to the Plaintiff's application. As such, the Court finds that a triable issue of fact exists as to whether the Plaintiff suffered a "serious injury" as defined by *Insurance Law* § 5102 (d) and Defendant's motion for summary judgment is denied.

In arriving at this decision the Court has reviewed, evaluated and considered all of the issues framed by these motion papers and the failure of the Court to specifically mention any particular issue in this Decision and Order does not mean that it has not been considered by the Court in light of the appropriate legal authority.

Accordingly, it is hereby

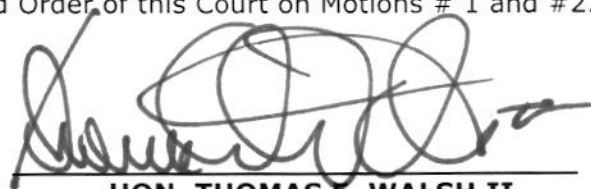
ORDERED that Plaintiff's Notice of Motion for Summary Judgment (Motion #1) on the issue of liability is granted in its entirety; and it is further

ORDERED that Defendant's Notice of Cross Motion for Summary Judgment (Motion #2) is denied in its entirety; and it is further

ORDERED that counsel for the parties shall appear before the undersigned for a pre-trial conference on **WEDNESDAY JANUARY 9, 2019 at 9:30 a.m. before the Honorable William Sherwood in the Trial Assignment Part (TAP).**

The foregoing constitutes the Decision and Order of this Court on Motions # 1 and #2.

Dated: New City, New York
November 26, 2018



HON. THOMAS E. WALSH II
Justice of the Supreme Court

TO:

e-filed -

CRAIG A. POST, ESQ.
THE POST LAW FIRM, PLLC
Attorney for Plaintiff
(via e-file)

HAGELIN SPENCER
Attorney for Defendants
(via e-file)