Chapman v Zunino
2019 NY Slip Op 32633(U)
September 5, 2019
Supreme Court, Kings County
Docket Number: 503718/2017
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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NORMA CHAPMAN,

Plaintiff,

-against-

RICHARD J. ZUNINO,

Defendant.

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DECISION / ORDER

Index No. 503718/2017
Motion Seq. No. 2, 3
Date Submitted: 7/25/19
Cal No. 5, 6

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion and plaintiff's cross motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed..................	20-32
Notice of Cross Motion, Affirmation and Exhibits Annexed........	38-44
Reply Affirmations..	47, 49, 51

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is a personal injury action arising out of a four-vehicle collision on May 8, 2016, at approximately 8:00 P.M. on the Verrazzano Bridge. Plaintiff alleges she was rear-ended by defendant. Defendant contends he is entitled to summary judgment dismissing the complaint. He claims he passed out prior to the accident and has no recollection of the accident because he fainted from a sudden and severe heart arrhythmia. Defendant claims that since he had no prior diagnosis or warning that something like this might occur, it was an unforeseeable medical emergency. Further, defendant contends that, in the alternative, the complaint should be dismissed as plaintiff does not satisfy the serious injury threshold requirements of Insurance Law

§ 5102(d).

Defendant supports the branch of his motion to dismiss the complaint due to an unforeseen medical emergency with an affirmation in support, the pleadings, the police report, both parties' deposition transcripts, a peer review medical report (prepared by a doctor retained by defendant's auto insurance company) following a review of defendant's medical records, and defendant's (certified and voluminous) medical records. He supports the branch of the motion on the issue of the serious injury threshold with the same documents, and, in addition, IME reports from an orthopedist and a neurologist who examined the plaintiff.

Plaintiff cross-moves for summary judgment on the issue of liability. Plaintiff contends that, given the rear-end collision, she is entitled to summary judgment on liability. Further, she maintains that defendant has failed to establish a non-negligent explanation for the rear-end collision or his entitlement to summary judgment based upon an "unforeseen medical emergency." Plaintiff questions the "speculative nature" of the defendant's medical diagnosis and she questions whether the plaintiff's condition was actually unforseen, given the fact that defendant had previously been diagnosed with arrhythmia. Finally, plaintiff maintains that defendant has failed to make a *prima facie* showing that she does not meet the serious injury threshold, and that in any event, she has come forward with medical evidence sufficient to raise an issue of fact on that question.

Plaintiff supports her motion with an attorney's affirmation, an affidavit from plaintiff, an affirmation of the radiologist who read the MRIs of her cervical and lumbar spine, and an affirmation from Dr. Ramy Hanna, her treating doctor.

Discussion

"A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision" (*Pollard v Indep. Beauty & Barber Supply Co.*, 94 AD3d 845, 845–46 [2d Dept 2012]). "If the operator of the offending vehicle cannot come forward with evidence to rebut the inference of negligence, the driver of the lead vehicles may properly be awarded judgment as a matter of law." (*Vecchio v Hildebrand*, 304 AD2d 749, 750 [2d Dept 2003].)

In *McGinn v New York City Transit Auth.* (240 AD2d 378, 379 [2d Dept 1997]), the Second Department explained that:

> "[A]n operator of an automobile who experiences a sudden medical emergency will not be chargeable with negligence provided that the medical emergency was unforeseen (*Thomas v Hulslander*, 233 AD2d 567, citing 8 NY Jur 2d, Automobiles, § 579, at 207; see also, *Aiello v Garahan*, 91 AD2d 839, affd 58 NY2d 1078; *Abish v Cetta*, 155 AD2d 495; *Beiner v Nassau Elec. R. R. Co.*, 191 App Div 371)."

(*See also Pitt v Mroz*, 146 AD3d 913, 914 [2d Dept 2017].)

Defendant has not made a prima facie case in his motion papers on his claim that he had an unforeseeable medical emergency, thereby raising a non-negligent explanation entitling him to summary judgment on liability dismissing the action (*see Doran v Wells*, 101 AD3d 937 [2d Dept 2012] ["defendant, who allegedly experienced a hypoglycemic attack immediately before the accident, raised a triable issue of fact as to whether he suffered a sudden and unforeseeable medical emergency that constituted a non-negligent explanation for the accident"]).

Defendant was admitted to the hospital after the accident for a cardiac evaluation. The affirmation from Dr. Friedman states that defendant had "a history of frequent premature ventricular contractions, bigeminy and trigeminy" and that defendant "had a syncopal episode while driving and it was felt to be due to a ventricular tachycardia."[1] A few days after the accident, defendant had a cardiac MRI, which Dr. Friedman states was performed to see if he had a right ventricular dysplasia. Dr. Friedman states "the imaging quality of this MRI limits the accuracy regarding right ventricular dysplasia." He notes defendant did have "a right bundle branch block." Dr. Friedman notes that Dr. Saith at the hospital noted in his report that defendant "had a previous history[2] of premature ventricular contractions and was prescribed a Holter monitor by a primary care physician two years ago. The physician placed defendant on sub-q anticoagulants every 12 hours and an antibiotic." Defendant received a pacemaker during his hospitalization, which Dr. Friedman calls an "automatic implanted cardioverter defibrillator (AICD)." He was discharged with "the diagnosis of syncope possibly due to cardiac arrhythmia and possible Brugada syndrome."[3] In drafting his opinion letter for defendant's insurance company, Dr. Friedman concludes that "in my

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[1]This is defined as "a rapid heartbeat that originates in one of the lower chambers (the ventricles) of the heart. To be classified as tachycardia, the heart rate is usually at least 100 beats per minute."

[2] The expert's recital of defendant's medical history describes cardiac testing done in January 2014, and that plaintiff acknowledges, in a history given upon admission after the accident, in May 2016, "a previous echocardiogram one year ago and Holter monitor test which showed a bigeminy."

[3]Brugada Syndrome" is defined as "a rare hereditary syndrome, occasionally autosomal dominant, marked by right bundle branch block, S-T segment elevation in the right precordial leads of the ECG, and a high risk of sudden death from ventricular arrhythmias. Medical Dictionary, 2009, Farlex and Partners.

opinion, this syncope episode was the first episode that led to loss of consciousness. Previous episodes of arrhythmia were evaluated that did not lead to an acute event or loss of consciousness. In my opinion, at the time of the accident there was no foreseeable condition that Mr. Zunino would have a syncopal episode, which . . . was a sudden and unforeseen medical emergency." Thus, his insurance company apparently agreed he was insured for the accident.

This is not the same analysis the court must apply on a defendant's motion for summary judgment seeking to dismiss the complaint because defendant has proven that he was not negligent as a matter of law. Here, defendant was aware of his history of an irregular heart beat, even if he denies previously fainting as a result. In addition, defendant's medical records show a family history of heart disease. Thus, defendant has not established, as a matter of law, that his purported medical emergency was unforeseeable (see *McGinn v New York City Transit Auth.* (240 AD2d 378, 379 [2d Dept 1997] ["There are material issues of fact as to whether Siravo did indeed experience a medical emergency, and as to whether such emergency was foreseeable. These and other issues of fact require a trial"). Plaintiff's motion for summary judgment cannot be granted either, as the non-negligent explanation offered by defendant is sufficient to overcome her prima facie case demonstrating that she was rear-ended, and requires a trial so the finder of fact may determine whether defendant was negligent, or whether he was not negligent because he had an unforeseeable medical emergency.

On the other branch of his motion, defendant has failed to make a prima facie showing that plaintiff did not sustain a serious injury as defined by Insurance Law

§ 5102(d). Plaintiff's bill of particulars alleges that, as a result of the accident, she sustained cervical, lumbar and thoracic disc bulges with cervical radiculopathy and derangement, bilateral carpal tunnel syndrome with median nerve entrapment and sprains, strains and derangement of her left knee, and exacerbation of a prior left knee injury. Defendant relies on an affirmation of Chandra M. Sharma, M.D., who conducted a neurological exam on May 8, 2018 and found plaintiff had "resolved cervical and lumbar strain/sprain and a normal neurological examination." Defendant also provides on an affirmation of Alan J. Zimmerman, M.D., who conducted an orthopedic examination on May 8, 2018. Dr. Zimmerman found normal or above normal ranges of motion in plaintiff's neck, back, wrist and knees and completely negative test results. He concluded that plaintiff's back and knee injuries "were resolved, and the carpal tunnel syndrome was not causally related to the accident." Defendant further provides plaintiff's EBT testimony [Page 82] and bill of particulars, where she alleges to have missed only two days (or a week) from work as a result of the accident as evidence that plaintiff did not sustain a medically determined injury or impairment of a non-permanent nature which prohibited her from performing substantially all of the material acts which constitute plaintiff's usual and customary activities for not less than ninety days during the one hundred eighty days immediately following the occurrence.

The court finds that defendant has failed to make a *prima facie* showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Defendant's expert neurologist, Chandra M. Sharma, M.D., upon examining plaintiff, found significant limitations of motion in plaintiff's cervical and lumbar spine (*see Chun Ok Kim v Orourke*, 70 AD3d 995, 995 [2d Dept 2010]). Dr. Sharma notes that "[t]hese

subjective mechanical limitations due to perceptions of pain not confirmed on objective examination do not represent neurological problems. Ranges of motion are normal during spontaneous activities." However, this does not adequately explain or substantiate, with objective medical evidence, the basis for Dr. Sharma's conclusion that the noted limitations were self-restricted (see *Chun Ok Kim v Orourke*, 70 AD3d at 995). The credibility of the doctor is not for the court to determine. Thus, defendant has failed to make a prima facie showing that plaintiff does not meet the serious injury threshold (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). Since the defendant has failed to meet his burden of proof as to all claimed injuries and all applicable categories of injury, the motion must be denied. It is unnecessary to consider the papers submitted by the plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

However, the court notes that the affirmation of Dr. Hanna, plaintiff's treating doctor, overcomes the motion and raises a triable issue of fact as to whether plaintiff has sustained an injury in either the category "a permanent consequential limitation of use" or "a significant limitation of use," as defined by Insurance Law § 5102(d).

Accordingly, it is

ORDERED that the motion and cross motion are both denied.

This constitutes the decision and order of the court.

Dated: September 5, 2019

E N T E R :

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court