

Diaz v Avila-Herrera

2020 NY Slip Op 30889(U)

February 6, 2020

Supreme Court, Bronx County

Docket Number: 36037/2017E

Judge: John R. Higgitt

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

[*1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

-----X
NORMA DIAZ,

Plaintiff, DECISION AND ORDER

- against - Index No. 36037/2017E

WILMER AVILA-HERRERA, S.L. BENFICA
TRANSPORTATION INC. and KRASDALE FOODS,
INC.,

Defendants.
-----X

John R. Higgitt, J.

Upon defendants’ September 10, 2019 notice of motion and the affirmation, affidavit and exhibits submitted in support thereof; plaintiff’s January 14, 2020 affirmation in opposition and the affidavit, exhibits and memorandum of law submitted therewith; defendants’ January 27, 2020 affirmation in reply and the affidavit and exhibits submitted therewith; and due deliberation; defendants’ motion for an order permitting them to amend their answer to assert the affirmative defense of the emergency doctrine, and for an order granting summary judgment on the grounds that they bear no liability for the happening of the subject September 1, 2017 motor vehicle accident and that plaintiff did not sustain a “serious injury” causally related to the accident is granted in part.

AMENDMENT

Defendants assert that defendant Avila-Herrera’s attempt at an evasive maneuver to avoid the accident warrants the application of the emergency doctrine.

“Leave [to amend a pleading] shall be freely given upon such terms as may be just including the granting of costs and continuances” (CPLR 3025[b]). Leave should not be granted where prejudice or surprise results from the delay in amending (*see Byrne v Fordham Univ.*, 118 AD2d 525 [1st Dept 1986]), but mere lateness does not necessarily bar amendment (*see*

[*2]

Edenwald Contr. Co. v New York, 60 NY2d 957 [1983]). “Prejudice may be found where a party has incurred some change in position or hindrance in the preparation of its case which could have been avoided had the original pleading contained the proposed amendment” (*Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288, 293 [1998] [citations omitted]). Such prejudice, however, must be “significant” (*see Spitzer v Schussel*, 48 AD3d 233 [1st Dept 2008]).

The movant need not prove the merit of the proposed defense as on a motion for summary judgment, but only that “the proffered amendment is not palpably insufficient or clearly devoid of merit” (*Fairpoint Cos., LLC v Vella*, 134 AD3d 645, 645 [1st Dept 2015]). “Where a proposed defense plainly lacks merit, however, amendment of a pleading would serve no purpose but needlessly to complicate discovery and trial, and the motion to amend is therefore properly denied” (*Thomas Crimmins Contracting Co. v New York*, 74 NY2d 166, 170 [1989] [citation omitted]). Unless the “alleged insufficiency or lack of merit [of the proposed amendment] is clear and free from doubt,” the proposed amendment should be permitted (*Miller v Staples the Off. Superstore E., Inc.*, 52 AD3d 309, 313 [1st Dept 2008]).

“Th[e emergency] doctrine recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context” (*Rivera v N.Y.C. Transit Auth.*, 77 NY2d 322, 327 [1991]). “This is not to say that an emergency automatically absolves one from liability for his [or her] conduct. The standard then still remains that of a reasonable man [or woman] under the given circumstances, except that the circumstances have changed.

Accordingly, the actor may still be found to be negligent if, notwithstanding the emergency, the acts are found to be unreasonable. Nor does the fact that the emergency action was reasonable

[*3]

insulate an actor from liability for prior tortious conduct that brought on the emergency” (*Ferrer v Harris*, 55 NY2d 285, 292-93 [1982] [citations and quotation marks omitted]).

Plaintiff testified that she was driving in the left lane and defendant Avila-Herrera (an employee of defendant S.L. Benfica Transportation, Inc., the registrant of the tractor-trailer defendant Avila-Herrera was driving) was driving in the right lane. Defendant Avila-Herrera turned right, and the “last tires” of the driver side of defendants’ tractor-trailer made contact with the passenger side of plaintiff’s vehicle, dragging plaintiff’s vehicle. At the time of the accident, plaintiff’s vehicle was next to the tractor-trailer, with part of the tractor-trailer ahead of plaintiff’s vehicle. Plaintiff testified that she had been travelling in the left lane for approximately five minutes prior to the accident.

Defendant Avila-Herrera testified that he signaled to change from the right to the left lane, checked both mirrors before changing lanes, and, seeing no vehicles, started to move to the left lane. When the cab of the tractor-trailer entered the left lane, defendant Avila-Herrera noticed plaintiff’s vehicle in the left lane less than one foot away from the rear of the trailer. He applied the brakes and attempted to return to the right lane.

Plaintiff points to defendant Avila-Herrera’s testimony that he last checked his mirrors prior to moving from the right to left lane “more or less” than 30 seconds before changing lanes as unreasonable and indicative that the circumstances faced by defendant Avila-Herrera were a product of his own making in failing to execute a safe lane change (*see Caristo v Sanzone*, 96 NY2d 172 [2001] [holding that the emergency doctrine is not available where the actor seeking its protection created the emergency]). According to the errata sheet submitted on the motion, however, defendant Avila-Herrera amended this testimony to “three seconds” (*see CPLR*

[*4]

3116[a)].¹

Because the testimony relied on by plaintiff does not demonstrate the patent insufficiency of the proposed defense, because plaintiff does not claim prejudice or surprise emanating from the proposed amendment (*see Caso v Miranda Sambursky Sloane Sklarin Ver Veniotis LLP*, 150 AD3d 422 [1st Dept 2017]), and given the questions of fact presented by the parties' differing versions of the events (*see Cenpark Realty LLC v Gurin*, 118 AD3d 553 [1st Dept 2014]), the amendment is permitted (*see Freder v Costello Indus., Inc.*, 162 AD3d 984, 986 [2d Dept 2018] ["Except in [the] most egregious circumstances, it is normally left to the trier of fact to determine if [a particular] situation rises to the level of [an] emergency"] [citation omitted]).

LIABILITY

Defendants assert that the testimonial evidence establishes that plaintiff sideswiped the rear of defendants' tractor-trailer and is solely liable for the accident. Alternatively, defendants assert that plaintiff rear-ended defendants' tractor-trailer (the photographic evidence does not support this assertion [*see Perris v Maguire*, 148 AD3d 570 (1st Dept 2017)]). As alluded to above, the parties' vastly differing accounts of the events make the grant of summary relief on this ground inappropriate (*see Gyamfi v Citywide Mobile Response Corp.*, 146 AD3d 612 [1st Dept 2017]).

Whether the emergency doctrine applies to shield defendants from liability remains a question of fact for the factfinder. Defendants assert that the emergency arose when defendant Avila-Herrera became aware of plaintiff's presence in the left lane; however, the issue is whether

¹ "[A] witness may make substantive changes to his or her deposition testimony provided the changes are accompanied by a statement of the reasons therefor" (*Cillo v Resjefal Corp.*, 295 AD2d 257, 257 [1st Dept 2002]). The reason may be "either that it is an incorrect transcript or that [the witness'] present recollection of the facts is more accurate, and [the witness] may then state what his [or her] corrected answer is and give any other explanation he [or she] desires with respect to his [or her] prior answer" (*Skeaney v Silver Beach Realty Corp.*, 10 AD2d 537, 538 [1st Dept 1960]). Changes that are sufficiently explained may still raise issues of the witness's credibility (*see Cillo, supra*).

[*5]

he should have seen plaintiff's vehicle sooner (*see Gutierrez v Hoyt Transp. Corp.*, 117 AD3d 420 [1st Dept 2014]).

“SERIOUS INJURY”

Plaintiff, 72 years old at the time of the accident, alleges injuries to her shoulders and the cervical and lumbar aspects of her spine. Although plaintiff failed to specify the Insurance Law § 5102(d) categories under which she claims “serious injury” (*see* CPLR 3043[a][6]), it is apparent from a review of the injuries alleged in the bills of particulars that the relevant categories are permanent consequential limitation, significant limitation and 90/180-day injury (*see Khamidov v Chase Manhattan Bank, N.A.*, 18 Misc 3d 137[A], 2008 NY Slip Op 50283[U] [App Term 2d Dept 2008]).

In support of the motion, defendants submit the affirmed reports of Drs. Sherry and Elkin, various of plaintiff's medical records and the transcript of plaintiff's March 19, 2019 deposition testimony.

Dr. Sherry, an orthopedist, examined plaintiff on March 20, 2019. He measured ranges of motion of, among other things, plaintiff's shoulders and cervical and thoracolumbar spine. Although Dr. Sherry declined to compare his findings to norms, he stated that there was no direct evidence of acute injury directly related to the subject accident, and no evidence of lumbar radiculopathy. Furthermore, he reviewed the films from the MRIs of plaintiff's shoulders and cervical and lumbar spine, finding that they depicted degeneration.

Dr. Elkin, a neurologist, examined plaintiff on March 27, 2019. Dr. Elkin measured reduced ranges of motion in plaintiff's cervical spine and left shoulder. Dr. Elkin did not assess plaintiff's lumbar function. Without elaboration, Dr. Elkin stated that the examination of plaintiff's right shoulder was “normal.” Dr. Elkin concluded that there was no objective finding of any accident-related neurological injury explaining plaintiff's symptoms and limitations. Dr.

[*6]

Elkin also reviewed plaintiff's medical records, including MRI films, and concluded that there was no evidence of acute cervical or lumbar injury attributable to the accident, but that the films showed evidence of degeneration unrelated to the accident, which would provide a basis for plaintiff's symptoms and pain. Dr. Elkin deferred an opinion regarding plaintiff's left shoulder to the appropriate specialty.

The medical records submitted by defendants included a prehospital care report noting plaintiff's complaints solely of neck and back pain and stating that all other physical findings were unremarkable; the report from an "unremarkable" head CT study; the report from an X ray of plaintiff's right shoulder noting that the acromioclavicular and glenohumeral joints were preserved and noting the absence of fracture or dislocation; the report from a lumbar spine imaging study noting chronic degenerative disc disease involving L5-S1 and L2-L3; and the report from a cervical spine CT study noting multilevel degenerative changes.

Defendants' proof was sufficient to demonstrate, prima facie, that plaintiff did not sustain an injury causally related to the accident (*see Deneen v Bucknor*, 178 AD3d 461 [1st Dept 2019]; *Bonilla v Bathily*, 177 AD3d 407 [1st Dept 2019]; *Massillon v Regalado*, 176 AD3d 600 [1st Dept 2019]).

To the extent defendants assert that plaintiff's prior accidents resulting in injury also sever the causal connection between the subject accident and plaintiff's claimed injuries, plaintiff testified that the prior motor vehicle accident resulted in a leg injury and that the more recent accident resulted in a forearm injury. Because those body parts are not at issue here, the testimony regarding prior accidents is not sufficiently "persuasive" with respect to causation (*cf. Chintam v Fenelus*, 65 AD3d 946, 947 [1st Dept 2009]).

In opposition, plaintiff submits various certified medical records and the affirmation of Dr. McMahon, who examined plaintiff on January 6, 2020, in response to the motion, and

[*7]

reviewed plaintiff's records and defendants' experts' reports.

Dr. McMahon concluded that, based on the lack of medical records indicating prior treatment for the alleged injuries and conditions, plaintiff's lack of symptomatology prior to the accident, his examination of plaintiff, his review of the records of plaintiff's medical treatment, including imaging and other diagnostic tools with findings not characterized as degenerative, range-of-motion testing, and physical examinations, plaintiff's contemporaneous complaints, and examination findings indicative of trauma, plaintiff's injuries were attributable to the accident, and not degeneration. Specifically, he found that, upon his review of the MRI films, the injuries depicted were traumatically induced. Furthermore, he opined that herniations require traumatic etiology and degeneration, while to be expected at plaintiff's age, often exists asymptotically.

“[Because] plaintiff's own medical records showed evidence of a preexisting degenerative condition in her [cervical and lumbar] spine, she was required to address those findings and explain why her symptoms were not related to the preexisting condition” (*Ortiz v Boamah*, 169 AD3d 486, 488 [1st Dept 2019]). While defendants characterized Dr. McMahon's opinions and conclusory and speculative, his opinions were appropriately premised on, among other things, a full review of plaintiff's medical history (*see Munoz v Robinson*, 170 AD3d 414 [1st Dept 2019]; *Lazzari v Qualcon Constr., LLC*, 162 AD3d 440 [1st Dept 2018]), his review of objective diagnostic testing (*see Hayes v Gaceur*, 162 AD3d 437 [1st Dept 2018]), the lack of evidence of prior treatment or complaints in plaintiff's own records (*see Bianchi v Mason*, 2020 NY Slip Op 00504 [1st Dept 2020]; *Blake v Cadet*, 175 AD3d 1199 [1st Dept 2019]), the fact that plaintiff was asymptomatic prior to the accident (*see Hamilton v Marom*, 178 AD3d 424 [1st Dept 2019]; *Curet v Kuhlör*, 172 AD3d 634 [1st Dept 2019]), and the onset of plaintiff's symptoms following the accident (*see Montoya v Rosenberger*, 176 AD3d 581 [1st Dept 2019], *Tejada v LKQ Hunts Point Parts*, 166 AD3d 436 [1st Dept 2018]).

[*8]

Furthermore, because there was no evidence of degeneration or other preexisting injury to plaintiff's shoulders documented in plaintiff's own medical records (*see Jenkins v Livo Car Inc.*, 176 AD3d 568 [1st Dept 2019]),² Dr. McMahon's opinions were sufficient to raise issue of fact (*see De Los Santos v Basilio*, 176 AD3d 544 [1st Dept 2019]; *Moreira v Mahabir*, 158 AD3d 518 [1st Dept 2018]), and he was not required to do more than identify conditions correlating to objective evidence of injury and reasonably attribute them to the accident (*see Aquino v Alvarez*, 162 AD3d 451 [1st Dept 2018]; *Rodriguez v Konate*, 161 AD3d 565 [1st Dept 2018]).

Defendants raised a gap in plaintiff's treatment only in their reply papers, thus waiving the argument (*see Lewis v Revello*, 172 AD3d 505 [1st Dept 2019]; *Hayes, supra*), and obviating the need for plaintiff to address the issue in opposition (*see Massillon, supra*).

With respect to the 90/180-day injury claim, defendants' initial demonstration of a lack of causal relationship between the subject accident and the claimed injuries met their prima facie burden (*see Jenkins, supra; Sosa-Sanchez v Reyes*, 162 AD3d 414, 415 [1st Dept 2018]; *see also Massillon, supra; Diakite v PSAJA Corp.*, 173 A.D.3d 535 [1st Dept 2019]; *Andrade v Lugo*, 160 AD3d 535 [1st Dept 2018]).

Defendants' argument is not premised on plaintiff's deposition testimony or allegations in the bills of particulars. Rather, defendants assert that plaintiff has not provided information to substantiate a 90/180-day claim and that plaintiff's medical records fail to establish the extent of activities that she was unable to perform during the statutory period (*see* September 10, 2019 Latella affirmation at paras. 85, 88). Defendants, however, do not submit plaintiff's medical records, other than the diagnostic reports mentioned *supra*. The proponent of a motion for

² The normal right shoulder X ray was also sufficient to shift the burden with respect to causation (*see Henchy v VAS Express Corp.*, 115 AD3d 478 [1st Dept 2014]).

[*9]

summary judgment cannot succeed merely by pointing to gaps in the opponent's proof; movant must affirmatively demonstrate the absence of triable issues of fact (*see Hairston v Liberty Behavioral Mgt. Corp.*, 157 AD3d 404 [1st Dept 2018], *lv dismiss* 31 NY3d 1036 [2018]; *Salgado v Port Auth. of N.Y. & N.J.*, 105 AD3d 417 [1st Dept 2013]; *Alvarez v 21st Century Renovations Ltd.*, 66 AD3d 524 [1st Dept 2009]). Furthermore, the surveillance evidence submitted by defendants in their reply was generated after the expiration of the statutory period and is thus not probative on the issue of whether plaintiff sustained a 90/180-day injury.

Thus, because plaintiff raised an issue of fact as to causation, defendants are not entitled to dismissal of the "serious injury" claim under the 90/180-day injury category (*see Massillon, supra; cf. Sosa-Sanchez, supra; Sanchez v Steele*, 149 AD3d 458 [1st Dept 2017]).

Accordingly, it is

ORDERED, that the aspect of defendants' motion for an order permitting them to amend their answer to assert the affirmative defense of the emergency doctrine is granted, and the amended answer appended to the motion at Exhibit K is deemed served upon plaintiff; and it is further

ORDERED, that defendants' motion is otherwise denied.

The parties are reminded of the February 7, 2020 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: February 6, 2020



John R. Higgitt, J.S.C.