

Abassi v Johnson

2020 NY Slip Op 34646(U)

July 27, 2020

Supreme Court, Rockland County

Docket Number: Index No. 034994/2018

Judge: Sherri L. Eisenpress

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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X

LADAN ABASSI,

Plaintiff,

-against -

BONNIE C. JOHNSON and RALPH JOHNSON,

Defendants.

-----X

HON. SHERRI L. EISENPRESS, A.J.S.C.

DECISION/ORDER

Index No. 034994/2018

(Motions #1 and #2)

The following papers, numbered 1-6, were read in connection with (Motion #1) Defendants Bonnie C. Johnson and Ralph Johnson’s Notice of Motion for summary judgment and dismissal of the action, on the ground that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d); and (Motion #2) Plaintiff’s un-opposed Notice of Cross-Motion for summary judgment as to liability against defendants:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION (#1)/AFFIRMATION IN SUPPORT/EXHIBITS A-E	1-2
NOTICE OF CROSS-MOTION (#2)/AFFIRMATION IN SUPPORT/EXHIBITS A-F	3-4
AFFIRMATION IN OPPOSITION (#1)/EXHIBITS A-D	5
AFFIRMATION IN REPLY (#1)	6

Liability

Plaintiff commenced the instant matter to recover damages for personal injuries arising out of a two car accident on August 17, 2015, when the rear of her vehicle was struck by the front of Defendants’ vehicle. Plaintiff testified that the accident occurred in the merge lane for Route 59 and Crosfield Avenue, in Rockland County. At the time of the accident, Plaintiff’s vehicle was moving about five miles per hour and she testified that she had no warning before being struck in the rear.

Defendant Bonnie C. Johnson testified that the accident occurred at the yield sign

at the intersection of Crosfiled Avenue and Route 59. She testified that she stopped behind the vehicle operated by Plaintiff while waiting to merge onto Route 59; that she looked back at oncoming traffic; she saw no cars coming; took her foot off the brake; and impacted Plaintiff's vehicle in front of her. She testified that she spoke to Plaintiff afterwards and apologized for hitting her car; that Plaintiff did not stop suddenly and that Plaintiff was not driving erratically.

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). 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).

It is well-settled that a rear-end collision with a stopped or stopping 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. See Smith v. Seskin, 49 A.D.3d 628, 854 N.Y.S.2d 420 (2d Dept. 2008); Harris v. Ryder, 292 A.D.2d 499, 739 N.Y.S.2d 195 (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, 954 N.Y.S.2d 175 (2d Dept. 2012). Drivers must maintain safe distances between their cars and cars in front of them and this rule imposes on them a duty to be aware of traffic conditions, including vehicle stoppages. Johnson v. Phillips, 261 A.D.2d 269, 271, 690 N.Y.S.2d 545 (1st Dept. 1999).

In the matter at bar, the Plaintiff has met her prima facie burden upon summary judgment through her testimony that she was struck in the rear while traveling at a speed of 5 mph, while attempting to merge on Route 59. In response, Defendants have failed to demonstrate a triable issue of fact as they did not submit opposition to the liability motion and Ms. Johnson’s testimony makes clear that there was not a non-negligent explanation for the subject occurrence. Accordingly, Plaintiff is entitled to summary judgment as to liability against defendants.

No-Fault Threshold

Plaintiff alleges that as a result of the accident, she sustained multiple disc bulges and herniations to her cervical spine; neuralgia; ulnar nerve damage to plaintiff’s right hand; and lumbar back pain. In support of their summary judgment motion, Defendants submit the affirmed medical report of defendants’ orthopaedic expert, Steven Renzoni, M.D. In writing his report, Dr. Renzoni reviewed Plaintiff’s medical records from Riverfield Family Health Center; Thomas St. John, M.D.; neurological evaluation by Patrick A. Roth; progress notes from Palisades Pulmonary and Medical P.C.; medical records of Jeff Pan, M.D.; MRI report dated 2/5/2016 of Plaintiff’s cervical spine; medical records from Sports Care Physical therapy; medical reports of Sanford Fineman, M.D.; MRI report of cervical spine dated 9/6/2018; and medical records from MidJersey Orthopaedics.

Upon examination, Dr. Renzoni found normal ranges of motion in Plaintiff’s cervical spine and lumbar spine, with negative orthopaedic testing. He also found negative Tinel and Phalen Tests to Plaintiff’s right wrist/hand. Though Dr. Renzoni noted Plaintiff’s

complaints of numbness in the right little finger and some discomfort over the cubital tunnel on the right arm, he finds that to be unrelated to the accident. His diagnoses include resolved cervical and lumber sprain/strain and resolved right hand sprain/strain, all of which he finds to be causally related to the accident and not attributable to pre-existing conditions or prior injuries.

In opposition thereto, Plaintiff alleges that Defendants have failed to meet their prima facie burden in that Dr. Renzoni does not address the results of the MRI reports and that with respect to the allegation of ulnar nerve damage, while Dr. Renzoni states that Plaintiff suffers with unrelated cubital tunnel syndrome, he fails to state how he arrives at this diagnosis. Additionally, Plaintiff submits the affirmed reports of Sanford Fineman, M.D. dated December 7, 2017; the report of Michael O'Hara, DO, dated May 19, 2020; and the un-certified records of plaintiff's treating providers.

Dr. O'Hara, upon examination of Plaintiff on May 19, 2020, noted a positive Spurling Test, and found restricted range of motion in her cervical spine of forward flexion to 60 degrees (normal 80-90 degrees); extension to 40 degrees (normal 70 degrees); right rotation to 30 degrees on the right (normal 90 degrees); left rotation to 20 degrees (normal 90 degrees) and lateral flexion to 20 degrees on the right and 10 degrees on the left (normal 20-45 degrees.) Additionally, Dr. O'Hara found motor to be decreased +4/5, in the right triceps and right hand grasp. He noted severe spasm with trigger points in the right upper trapezius and upper and lower levator scapula. Dr. O'Hara opines that plaintiff suffered from accident-related herniated discs and cervical radiculopathy which he finds to be permanent and states that Plaintiff is a candidate for further treatment including injections and surgical intervention.

In reply, Defendants argue that Plaintiff has failed to submit evidence in admissible form, as Dr. O'Hara is only licensed to practice medicine in New Jersey, and as such, he cannot affirm his report and it must be submitted in affidavit form. They further submit that even if admissible, Dr. O'Hara's report must be disregarded because he only examined her in

response to the instant summary judgment motion. Lastly, they contend that Plaintiff's medical records are not certified and as such, do not constitute admissible evidence.

In order to be entitled to summary judgment 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, 551 N.Y.S.2d 554 (2d Dept 1990). In the instant matter, Defendants' examining physician found full range of motion in Plaintiff's cervical spine, lumbar spine and right wrist. Additionally, Dr. Renzoni addressed the claim of ulnar nerve damage and found her to be suffering from an unrelated condition. As such, Defendants have met their burden on summary judgment and the burden shifts to Plaintiff to demonstrate a triable issue of fact.

A plaintiff must come forward with sufficient evidentiary proof in admissible form to raise a triable issue of fact as to whether the plaintiff, suffered a "serious injury" within the meaning of the Insurance Law. Zoldas v St. Louis Cab Corp., 108 A.D.2d 378, 489 N.Y.S.2d 468 (1st Dept 1985); Dwyer v Tracey, 105 AD2d 476, 480 N.Y.S.2d 781 (3d Dept. 1984). One way to substantiate a claim of serious injury is through an expert's designation of a numeric percentage of a plaintiff's loss of range of motion, i.e., quantitatively. McEachin v. City of New York, 137 A.D.3d 753, 756, 25 N.Y.S.3d 672 (2d Dept. 2016). However, an expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. Id.

While the Court of Appeals held in Perl v. Meher, 28 N.Y.3d 208, 216, 936 N.Y.S.2d 655 (2011), that a plaintiff is not required to demonstrate contemporaneous numerical measurements of range of motion, the Court nonetheless noted that a contemporaneous doctor's report is important to proof of causation since an examination by a doctor years later cannot reliably connect the symptoms with the accident. Id. See also Rosa v. Mejia, 95 A.D.3d 402, 943 N.Y.S.2d 470 (1st Dept. 2012)(Court of Appeals decision in Perl v. Meher did not

abrogate the need for at least a qualitative assessment of injuries soon after an accident.)

In the instant matter, the Court finds that Plaintiff has set forth sufficient evidence with respect to medical treatment contemporaneous to the time of the accident. While defendants are correct that un-certified medical records are not in admissible form, where medical records or MRI reports are referred to in the affirmed medical report of the defendant's examining physician, the plaintiff and his treating physician may properly submit and rely upon the records in opposition to the motion. Zarate v. McDonald, 31 A.D.3d 632, 819 N.Y.S.2d 288 (2d Dept. 2006); Williams v. Clark, 54 A.D.3d 942, 864 N.Y.S.2d 493 (2d Dept. 2008). Here, the records submitted by Plaintiff in opposition to the summary judgment motion were specifically referenced and reviewed in Dr. Renzoni's report.

CPLR Sec. 2106(a) permits a physician, osteopath or dentist, who is authorized to practice in the state and who is not a party to an action, to provide an affirmation which is affirmed by him to be true under the penalties of perjury, to be served or filed in lieu of and with the same force and effect as an affidavit. Where the physician is not authorized by law to practice medicine in the State of New York, the affirmation pursuant to CPLR Sec. 2106(a) does not constitute competent evidence, and may not be considered by the Court. Kelly v. Fenton, 116 A.D.3d 923, 924, 984 N.Y.S.2d 2014 (2d Dept. 2014); Tomeo v. Beccia, 127 A.D.3d 1071, 1073, 7 N.Y.S.3d 472 (2d Dept. 2015); Lieber v. City of New York, 94 A.D.3d 715, 941 N.Y.S.2d 249, 250, 941 N.Y.S.2d 249 (2d Dept. 2012); Palo v. Latt, 270 A.D.2d 323, 704 N.Y.S.2d (2d Dept. 2000).

In the instant matter, while the Court would have found that the affirmation of Dr. O'Hara raised triable issues of fact as to whether Plaintiff suffered a permanent consequential limitation of use of a body organ or system and/or a significant limitation of a use of a body function or system, Defendants are correct that Dr. O'Hara's report is not in admissible form. Dr. O'Hara is not authorized to practice medicine in the State of New York and therefore, he was required to present his findings in affidavit form as opposed to the affirmation

which accompanied his report. While Courts have routinely considered this to be a trivial error, and have permitted parties to correct this error on reply/sur-reply, or by way of a motion to renew when a reasonable excuse is offered, the Court is nonetheless at this time constrained to dismiss this matter, as Plaintiff has failed to offer admissible evidence as to her present medical condition, so as to demonstrate a triable issue of fact as to whether she has sustained a serious injury.

See Koufalis v. Logreira, 102 A.D.3d 750, 751 (2d Dept. 2013); Hayden v. Gordon, 91 A.D.3d 819, 937 N.Y.S.2d 200 (2d Dept. 2012).

Accordingly, it is hereby

ORDERED that Plaintiff's Notice of Motion (#2) for summary judgment on liability is GRANTED; and it is further

ORDERED that Defendants Bonnie Johnson and Ralph Johnson's Notice of Motion (#1) for summary judgment, for failure to meet the serious injury threshold, is GRANTED, and the action is dismissed, without prejudice to renew.

The foregoing constitutes the Opinion, Decision & Order of the Court on Motions #1-2.

Dated: New City, New York
July 27,2020



HON. SHERRI L. EISENPRESS, A.J.S.C.

TO:
All Parties (by e-file)