Phelan v Agostino
2020 NY Slip Op 35032(U)
November 5, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 613149-2019
Judge: David T. Reilly

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY

PRESENT:
HON. DAVID T. REILLY, JSC

INDEX NO.: 613149-2019

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DAVID PHELAN,

Plaintiff,

-against-

DOMENICO AGOSTINO,

Defendant.

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MOTION DATE: 06/24/20
SUBMITTED: 07/29/20
MOTION SEQ. NO.: 1 & 2
MOTION:
001 MD
002 MG

Upon the following papers read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-9 ; Notice of Cross Motion and supporting papers 10-25; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers 26 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that Motion Seq. 001 and Motion Seq. 002 are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Domenico Agostino for summary judgment dismissing the complaint is denied; and is further

ORDERED that plaintiff's "cross-motion" for partial summary judgment on the issue of liability is granted.

Plaintiff David Phelan commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Route 231 and Nicolls Road in the Town of Babylon on February 25, 2019. It is alleged that the accident occurred when the vehicle operated by defendant struck the rear of the plaintiff's vehicle which was stopped for the red light. Plaintiff, by his bill of particulars, alleges, among other things, that he sustained various personal injuries as a result of the subject accident, including but not limited to, multilevel

spinal disc herniations and bulges; cervical and lumbar radiculopathy; and bilateral knee sprains.

Defendant now moves for summary judgment on the basis that the injuries alleged to have been sustained by plaintiff as a result of the subject accident do not meet the serious injury threshold requirement of Section 5102 (d) of the Insurance Law. In support of the motion, defendant submits copies of the pleadings, plaintiff's deposition transcript, and the sworn medical report of Dr. Dorothy Scarpinato. At defendant's request, Dr. Scarpinato conducted an independent orthopedic examination of plaintiff on February 14, 2020.

Plaintiff opposes the motion on the grounds that defendant has failed to demonstrate *prima facie* entitlement to judgment as a matter of law that he did not sustain serious injuries within the meaning of the Insurance Law as a result of the subject accident, and that his evidence in opposition raises triable issues of fact, particularly as to whether he sustained injuries within the "limitations of use" category of the Insurance Law. In opposition to the motion, plaintiff submits his and defendant's deposition transcripts, certified copies of his medical records regarding the injuries at issue, an unsworn narrative report from plaintiff's chiropractor, Craig Selzer, D.C., the affirmation of Glenn Gray, M.D. who performed MRIs on the plaintiff and the sworn medical report of plaintiff's orthopedist, David J. Weissberg, M.D.

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*see* ***Licari v Elliott***, *supra)*. Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see* Insurance Law §5104 [a]; ***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [1st Dept 2003]). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Martin v Schwartz***, *supra*).

Insurance Law §5102 (d) defines a "serious injury" as "a personal 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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], affidavits and affirmations, and not unsworn reports"

to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*). However, if a defendant does not establish a *prima facie* case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, the defendant, through the submission of competent medical evidence and plaintiff's deposition transcript, established a *prima facie* case that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Davis-Hassan v Siad***, 101 AD3d 932, 957 NYS2d 205 [2d Dept 2012]). Defendant's examining orthopedist, Dr. Scarpinato, used a inclinometer and/or goniometer to test the ranges of motion in plaintiff's spine, shoulders and knees, and compared his respective findings to the normal range of motion values for each region (*see e.g.* ***Cantave v Gelle***, 60 AD3d 988, 877 NYS2d 129 [2d Dept 2009]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***Desulme v Stanya***, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). Dr. Scarpinato states in her medical report that an examination of plaintiff reveals he has full range of motion in his spine, shoulders and knees, that plaintiff reported subjective complaints of paraspinal tenderness in the cervical, thoracic and lumbar spine areas without swelling, that plaintiff's handgrip, pinch and grasp were all normal, that plaintiff's knees had full range of motion with no tenderness or swelling, that plaintiff's quad strength was intact with no instability and that he ambulates with a normal gait without assistive devices. Dr. Scarpinato further states that there are no objective signs of ongoing disability as a result of the accident and that he is capable of working full time and performing his normal activities of daily living.

Furthermore, reference to plaintiff's own deposition testimony sufficiently refutes the allegations that he sustained injuries within the 90/180 category of the Insurance Law (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Knox v Lennihan***, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009]; ***Rico v Figueroa***, 48 AD3d 778, 853 NYS2d 129 [2d Dept 2008]). Plaintiff testified at his examination before trial that he missed one day from work following the accident. He further stated that there are no activities of daily life that he can no longer do, but has decreased the frequency of gym attendance and lowered the amount of weight he used to work out. Finally, plaintiff testified that his back begins to hurt after one to two hours of driving a bus at work.

Defendant, having made a *prima facie* showing that plaintiff did not sustain a serious injury

within the meaning of the statute, shifted the burden to plaintiff to come forward with evidence to overcome defendant's submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Small v City of New York***, 148 AD3d 959, 49 NYS3d 176 [2d Dept 2017]). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition, plaintiff has raised a triable issue of fact as to whether he sustained a "serious injury" within the meaning of Insurance Law § 5102(d) as a result of the accident (*see* ***Walker v Esses***, 72 AD3d 938, 899 NYS2d 321 [2d Dept 2010]; ***Yeong Hee Kwak v Villamar***, 71 AD3d 762; 894 NYS2d 916 [2d Dept 2010]; ***Parker v Singh***, 71 AD3d 750, 896 NYS2d 437 [2d Dept 2010]; ***Sanevich v Lyubomir***, 66 AD3d 665, 885 NYS2d 635 [2d Dept 2009]). Dr. Weissberg states in his medical report that he first saw plaintiff for an examination on March 12, 2019. At that time, using a goniometer, the doctor noted substantial range of motion deficits in plaintiff's cervical spine with tenderness and spasm on the trapezial muscles, deficits in the thoracolumbar spine with tenderness and spasms on the paraspinal musculature and significant range of motion deficits in the plaintiff's knees. Dr. Weissberg noted that x-rays of plaintiff's spine showed straightening of the normal lardotic curve and an MRI revealed bulges and herniations in plaintiff's cervical spine. Dr. Weissberg treated plaintiff with, among other things, trigger point injections, physical therapy and chiropractic sessions. Plaintiff continued to treat with Dr. Weissberg until at least June 2, 2020. At that time Dr. Weissberg opined that plaintiff sustained multiple sprains to his spinal area with herniated disks to both his cervical spine and lumbar spine, as well as sprains to his bilateral knees which have caused ongoing pain and limitation in range of motion. Dr. Weissberg states "all the above injuries are directly and causally related to the accident of 2/25/2019 and will leave this patient with a partial permanent disability which may require intermittent treatment in the future for ongoing spinal complaints."

Thus, here "where conflicting medical evidence is offered on the issue of whether plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (***Noble v Ackerman***, 252 AD2d 392, 395, 675 NYS2d 86 [1st Dept 1998]; *see* ***LaMasa v Bachman***, 56 AD3d 340, 869 NYS17 [1st Dept 2008]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]). Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

With respect to plaintiff's "cross-motion," to establish *prima facie* entitlement to judgment as a matter of law on the issue of liability, a plaintiff is no longer required to show freedom from comparative fault (*see* ***Rodriguez v City of New York***, 31 NY3d 312, 76 NYS3d 898 [2018]; *see* ***Simon v Rent-A-Center E., Inc.***, ___ AD3d ___, 2020 NY Slip Op 01379 [2d Dept 2020]; ***Samouhi v Retamales***, ___ AD3d ___, 2020 NY Slip Op 01378 [2d Dept 2020]). A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law (*see* ***Simon v Rent-A-Center E., Inc.***, *supra*; ***Edwards v J & D Express Serv.Corp.***, ___ AD3d ___, 2020 NY Slip Op 01145 [2d Dept 2020]; ***Spratley v Lafortune***, 176 AD3d 1247, 109 NYS3d 667 [2d Dept 2019]). The presumption of negligence in rear-end cases arises from the duty of the driver of the following vehicle to keep a safe distance and not collide with the traffic ahead (*see* Vehicle and Traffic Law § 1129 [a]; ***Witonsky v New York City Tr. Auth.***, 145 AD3d 938, 43 NYS3d 505 [2d Dept 2016]; ***Service v McCoy***, 131 AD3d 1038, 16 NYS2d 283 [2d Dept 2015]). A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on that driver to proffer a non-negligent explanation for the collision ***(Clements v Giatas***, 178 AD3d 894, 112 NYS3d 539 [2d Dept 2019]; ***Conroy v New York City Tr. Auth.***, 167 AD3d 977, 91 NYS3d 183 [2d Dept 2018]; ***Tsyganash v Auto Mall Fleet Mgt.***, *Inc.*, 163 AD3d 1033, 83 NYS3d 74 [2d Dept 2018]; ***Edgerton v City of New York***, 160 AD3d 809, 74 NYS3d 617 [2d Dept 2018]). If the driver of the offending vehicle cannot come forward with evidence to rebut the inference of negligence, the driver of the stopped or stopping vehicle is entitled to summary judgment on the issue of liability (***Tsyganash v Auto Mall Fleet Mgt., Inc.***, *supra*; ***Cortes v Whelan***, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]).

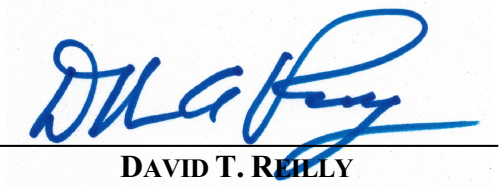
Plaintiff made a *prima facie* case of entitlement to summary judgment in his favor on the issue of liability by demonstrating that defendant's negligence was the legal and proximate cause of the accident (*see* ***Lopez v Dobbins***, 164 AD3d 776, 79 NYS3d 566 [2d Dept 2018]; ***Niyazov v Hunter EMS, Inc.***, 154 AD3d 954, 63 NYS3d 457 [2d Dept 2017]). He testified that he was completely stopped at a red traffic light for 12 to 15 seconds when his vehicle was struck from behind by the vehicle operated by defendant.

The burden now shifts to defendant to raise a triable issue of fact as to whether there was a non-negligent explanation for the accident (*see* ***Cortes v Whelan***, *supra*). Defendant testified at his deposition that he was following the plaintiff's vehicle on the day of the accident on Deer Park Avenue. Defendant further testified that he observed the light at Nicolls Road change from green to yellow, he began to slow down and struck the back of plaintiff's car. When questioned as to whether he saw the plaintiff's vehicle come to a stop, defendant responded, "[W]hen it was too late, yeah." Although defendant suggests at his deposition that plaintiff "stopped short" such admission does not preclude summary judgment on the issue of defendant's negligence (*see* ***Rodriguez v City of New York***, *supra*; ***Catanzaro v Edery***, *supra*; ***Buchanan v Keller***, *supra*).

Accordingly, plaintiff's motion for summary judgment on the issue of liability is granted.

This shall constitute the decision and Order of the Court.

Dated: November 5, 2020
Riverhead, New York



DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION