

Renaud v Pastreich
2021 NY Slip Op 32634(U)
December 11, 2021
Supreme Court, Kings County
Docket Number: Index No. 522899/2019
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

X

JANET RENAUD and REINERE RENAUD,

Plaintiffs,

-against-

YITZHAK PASTREICH,

Defendant.

X

DECISION / ORDER

Index No. 522899/2019
Motion Seq. No. 001, 002
Date Sub: 11/4/21

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits and Exhibits.....	<u>15-30</u>
Notice of Cross Motion, Affirmations, Affidavits and Exhibits	<u>36-45</u>
Affirmation in Opposition, Affidavits and Exhibits Annexed.....	<u>33-35, 46</u>
Reply	<u>47</u>

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

This is an action for personal injuries arising from a motor vehicle accident that occurred on June 13, 2019 on the Grand Central Parkway in Queens, New York. Plaintiff Reinere Renaud was the driver and plaintiff Janet Renaud was a passenger in an automobile owned by Reinere Renaud. Plaintiffs claim their vehicle was struck from behind in moving traffic by the vehicle owned and operated by defendant. At the time of the accident, both plaintiffs were approximately fifty-eight years old. Janet Renaud was removed from the scene in an ambulance. Both sought medical care after the accident.

In Motion Seq. 1, defendant moves for summary judgment and an order dismissing the complaint of both plaintiffs on the basis that neither can establish a serious injury

under Insurance Law § 5102 (d). In Motion Seq. 2, plaintiffs cross-move for summary judgment on the issue of liability against defendant on the grounds that they bear no fault for the happening of the accident.

Defendant's motion

Defendant moves, pursuant to CPLR 3212, for summary judgment and an order dismissing the complaint for both plaintiff's alleged failure to meet the threshold requirements necessary to recover under Insurance Law § 5102 (d). In their Bill of Particulars, plaintiff Reinere Renaud claims he sustained injuries to his cervical and lumbar spine as a result of the accident, and that the accident activated, aggravated and/or caused the injuries. Plaintiff Janet Renaud claims she sustained injuries to her right shoulder, right knee and to her cervical and lumbar spine as a result of the accident.

Defendant provides, in support of his motion, the emergency room records for Janet Renaud, medical records for both plaintiffs, and an affirmed IME report from an orthopedist who examined plaintiff Janet Renaud, plaintiffs' EBTs and defendant's EBT, plaintiffs' bill of particulars, the pleadings and an affirmation of counsel. Each plaintiff will be discussed separately.

Plaintiff Reinere Renaud

Defendant argues that he makes a prima facie case in the "90 out of 180" category of injury as plaintiff's EBT testimony indicates that he did not miss any time from his desk job for American Airlines as a result of the accident (Doc 27 Page 36 Line 17). Defendant provides copies of plaintiff's medical records from DHD Medical P.C. and states that they demonstrate "that plaintiff did not sustain a fracture, permanent loss of a body organ, member, function, or system, a permanent consequential limitation of use of a body organ or member, [or] a significant limitation of use of a body function or system" (Doc 17 ¶ 34).

The plaintiff's medical records do not support defendant's motion, however.

Defendant provides one medical report from Dr. Yolande Bernard, plaintiff's treating doctor at DHD Medical P.C. dated September 13, 2019, (Doc 25) in which she states that plaintiff had returned for a follow-up exam three months after the accident, was complaining of pain in his neck and headaches, pain in his back radiating to his buttocks, pain in his left shoulder and left knee, and stiffness and cramping in both hands. She determined that his physical therapy should be reduced to two to three times per week for eight weeks and told him to return for a follow up exam. She referred plaintiff to a neurologist with regard to his headaches. Dr. Bernard tested plaintiff's range of motion. She states that his range of motion in his cervical and lumbar spine was somewhat restricted, and that he complained of pain while moving his neck and back. For example, cervical "extension is 55 degrees, normal is 60 degrees; rotation to the right and left is 70 degrees, normal is 80 degrees. Lumbar spine: The patient complains of pain on range of motion. Flexion is 80 degrees, normal is 90 degrees; extension is 20 degrees, normal is 30 degrees; bending to the right and left is 30 degrees, normal is 40 degrees." Dr. Bernard states that "[t]here is a direct causal relationship between the patient's motor vehicle accident on June 13, 2019 and his above complaints, injuries and disabilities."

Dr. Bernard referred plaintiff for several x-rays and MRIs, which were conducted in July 2019. As defendant has provided copies of the plaintiff's radiologists' reports, they do not need to be in admissible form. The x-ray of his hands indicated arthritis, but this is not an injury claimed in the Bill of Particulars. The x-ray of his left shoulder indicated no fractures, but "mild sclerosis¹ at the margin of the acromioclavicular joint," the MRI of his

¹ Defined as "hardening" from inflammation.

lumbar spine found multiple bulges and herniations, all with “bilateral foraminal impingement.”

Reinere Renaud testified at his EBT (Doc 27) that he sustained a back injury while working at a prior job in 1997 or 1998 and had physical therapy for it, and the pain went away [Pages 29-30]. Other than this, he had never injured his neck, back, shoulders or knees. He was not asked about how the accident affected his activities of daily living. There were no questions about exercise, sports, cooking, cleaning, travelling, or anything that referred to his activities in the six months after the accident.

Defendant has not submitted anything in support of his motion for summary judgment as regards plaintiff Reinere Renaud except for his own medical records, described above, and his EBT transcript. The court finds that defendant has not made a prima facie case for summary judgment dismissing the complaint.

Since defendant has failed to meet his burden of proof as to all of plaintiff’s claimed injuries and all applicable categories of injury in Insurance Law § 5102 (d), 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]).

Even if defendant had established a prima facie case for summary judgment, plaintiff's submissions are sufficient to overcome the motion and raise a triable issue of fact.

Plaintiff Janet Renaud

The first document provided is the FDNY ambulance report [Doc 22]. It is very hard to read. It states that plaintiff had no visible injuries. Next, are plaintiff's emergency room records from Jamaica Hospital [Doc 23]. These too are hard to read. The chief complaint is neck pain, radiating to the shoulder. A CT scan of her cervical spine found no fractures and she was given a shot of Toradol (NSAID), an oral dose of Robaxin (pain killer) and was discharged. She was told to follow up with her primary care doctor.

Defendant provides some of plaintiff's records from DHD Medical, P.C., from a neurologist, her MRI reports and an orthopedist's report [Doc 24]. She initially complained to DHD Medical of headaches, severe pain in her neck radiating to her right arm, with numbness and tingling, severe pain in her lower back radiating to her right leg, with numbness and tingling, and pain in her right leg and right knee. She was referred for physical therapy and for MRIs. She was referred to a neurologist for the headaches. The MRI report for her cervical spine taken July 3, 2019 indicates bulges or herniations at every level, most with impingement of the thecal sac. The MRI report for the lumbar spine, taken on the same day, also indicates a bulge or herniation at just about every level. A few days later, she had an MRI of her right knee, and the report indicates multiple tears of the menisci, the ACL, the collateral ligament, swelling cartilage loss and a popliteal cyst. Dr. Barry Katzman, an orthopedist, saw plaintiff on 8/9/19. She complained of right knee and right shoulder pain. She told the doctor she had been in a prior accident 20 years earlier, which caused injuries to her back and right knee, and she had arthroscopic surgery to her

right knee at that time. Her range of motion in her right shoulder and right knee were significantly restricted. He referred her for an MRI of the shoulder. If there is a follow up report, defendant did not provide it.

Defendant next provides plaintiff's EBT transcript. She testified [June 11, 2020] that she is miserable and in a lot of pain. She cannot stand for long periods of time, and if she bends down, she cannot get up [pages 28-29]. She missed more than six months from her job as a baby nurse. She had arthroscopic knee surgery during that time [Page 10].

Dr. Ronald P. Grelsamer, an orthopedist, examined plaintiff on July 21, 2020 and prepared an affirmed IME report [Doc 30]. At the exam, plaintiff complained of continuing pain in her hands, low back, and neck. The court notes that her hand injury, carpal tunnel, is not related to this accident, and is not mentioned in the bill of particulars. He tested her range of motion in her knee and states that it is normal, and he opines that she could not have injured her knee in this accident. He also states that the injuries on the MRI could not have been caused by the plaintiff's knee hitting the dashboard, and so they must have been pre-existing, or the MRI report is an "over-read." He concludes, with regard to the plaintiff's knee, that the arthroscopic surgery was unnecessary, and the pain from bruising resolved with time. Dr. Grelsamer did not examine plaintiff's right shoulder, or her cervical or lumbar spine.

The court finds that defendant has not made a prima facie case for summary judgment dismissing the complaint.

Since defendant has failed to meet his burden of proof as to all of plaintiff's claimed injuries and all applicable categories of injury in Insurance Law § 5102 (d), 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]).

Even if defendant had established a prima facie case for summary judgment, plaintiff's submissions are sufficient to overcome the motion and raise a triable issue of fact.

Plaintiffs' Cross Motion

In support of their cross motion for summary judgment on the issue of liability, plaintiffs submit an affirmation of counsel, which references the plaintiff driver's [Reinere Renaud] and the defendant driver's EBT transcripts which were included in defendant's motion as Docs 27 and 28, and the uncertified police report, Doc 29. Defendant testified that he was driving behind plaintiffs' car on the Grand Central Parkway eastbound in Queens in bumper-to-bumper traffic when his foot "slipped off the brake" and his car "tapped the car in front of me at an incredibly slow speed." [Page 40].

The court finds that plaintiffs have established their entitlement to judgment as a matter of law on the issue of liability by demonstrating, prima facie, that their vehicle was struck in the rear by defendant's vehicle. "A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision" (*Volpe v Limoncelli*, 74 AD3d 795 [2d Dept 2010]). In opposition to the plaintiffs' motion, defendant has failed to provide a nonnegligent

explanation for the rear-end collision and has failed to raise a triable issue of fact as to whether either of the plaintiffs was at fault in the happening of the accident.

Conclusion

Accordingly, it is **ORDERED** that defendant's motion (Seq. #1) for summary judgment dismissing the complaint is denied with regard to both plaintiffs, and it is further **ORDERED** that plaintiffs' motion (Seq. #2) for summary judgment on the issue of liability is granted. This case shall proceed to trial on the issue of damages only once the note of issue is filed. Defendant's affirmative defenses of comparative fault and assumption of the risk are hereby stricken.

This constitutes the decision and order of the court.

Dated: December 11, 2021

ENTER :



Hon. Debra Silber, J.S.C.