

Fitts v Moss
2021 NY Slip Op 33344(U)
July 27, 2021
Supreme Court, Westchester County
Docket Number: Index No. 70896/2018
Judge: Terry Jane Ruderman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
SHARISSE L. FITTS,

Plaintiff,

-against-

RENADO M. MOSS, RONALD H. SAINTIL and
EAN HOLDINGS, LLC,

Defendants.

-----X
RUDERMAN, J.

DECISION and ORDER

Motion Sequence Nos. 1 - 3
Index No. 70896/2018

The following papers were considered in connection with the motion by defendant Renado M. Moss for summary judgment dismissing the complaint of plaintiff Sharisse Fitts as against him on the ground that the plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102 (d) (sequence 1); the cross-motion by plaintiff for summary judgment on the issue of liability (sequence 2); and the cross-motion by defendant Ronald H. Saintil for summary judgment dismissing plaintiff's complaint as against him on the ground that the plaintiff did not sustain a "serious injury" (sequence 3):

<u>Papers - Sequence 1</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - K	1
Affirmation in Opposition, Exhibits 1 - 8	2
Reply Affirmation	3
Saintil "Reply" Affirmation	4
<u>- Sequence 2</u>	
Notice of Cross-Motion, Affirmation, Exhibits 1 - 5	5
Affirmation in Opposition	6
Reply Affirmation	7
<u>- Sequence 3</u>	
Notice of Cross-Motion, Affirmation	8
Affirmation in Opposition, Exhibits 1 - 8	9

This is an action for personal injuries allegedly sustained by plaintiff in an automobile collision that occurred on May 26, 2018 at approximately 1:32 a.m. on South Broadway and Bright Place in Yonkers, New York. Defendant Renado Moss, driving a vehicle that was owned by defendant EAN Holdings LLC, had been driving on the northbound side of South Broadway, and had pulled to his right, partly into the parking lane, with the intent of making a u-turn. As Moss began to make the u-turn, he collided with the vehicle owned and operated by defendant Ronald Saintil as it drove up alongside him in the northbound driving lane. The impact was between the front driver's side of Moss's vehicle and the front passenger side of Saintil's vehicle, which in turn collided with a third vehicle, which had been parked and unoccupied. Plaintiff was a passenger in Moss's vehicle.

This action was commenced on December 21, 2018; defendants Renado Moss and EAN Holdings, LLC filed an answer with cross claims on February 19, 2019, and defendant Ronald Saintil filed an answer with cross claims on February 15, 2019. Discovery is complete and a note of issue has been filed. Plaintiff now moves for partial summary judgment on the issue of liability, and defendants now move for summary judgment dismissing the complaint on the ground that the injuries allegedly sustained by plaintiff do not satisfy the serious injury threshold of Insurance Law § 5102 (d).

Plaintiff's Motion Sequence 2

Plaintiff moves for partial summary judgment against all defendants on the issue of liability. She acknowledges that each of the drivers takes the position that the accident was the other driver's fault, and while she admits that she is not certain who is responsible, she also asserts that both drivers were negligent, and suggests that it does not matter which driver or drivers caused the accident, because as an innocent passenger she has a right to summary

Limousine Serv., Inc. (109 AD2d 833 [2d Dept 1985]) and *Johnson v Phillips* (261 AD2d 269 [1st Dept 1999]).

“There can be more than one proximate cause of an accident” (*Lopez v Reyes-Flores*, 52 AD3d 785, 786 [2d Dept 2008]). While plaintiff, as a passenger, cannot under these circumstances be found comparatively liable, the liability of either or both of the two drivers may not be determined on summary judgment under these circumstances.

Importantly, even drivers who had the right-of-way must establish, prima facie, that their conduct was not a proximate cause of the accident (*see Desio v Cerebral Palsy Transp., Inc.*, 121 AD3d 1033, 1034–1035 [2d Dept 2011]). “[A] driver traveling with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident” (*Todd v Godek*, 71 AD3d 872, 895 NYS2d 861 [2010]). Where there is a dispute between the witnesses as to the speed at which an approaching vehicle was traveling, this too creates a question of fact as to the drivers’ respective negligence. Therefore, issues of fact are presented as to whether defendant Moss was negligent when he proceeded to begin to make a u-turn as defendant Saintil was approaching, and whether defendant Saintil was negligent in approaching at too fast a rate of speed or when it was otherwise unsafe to proceed.

Here, unlike *Johnson v Phillips* (261 AD2d 269 [1st Dept 1999]) or *Silberman v Surrey Cadillac Limousine Serv., Inc.* (109 AD2d 833 [2d Dept 1985]), entitlement to summary judgment against either of the defendant drivers is not established as a matter of law. Accordingly, plaintiff’s motion must be denied.

Defendants' Motions Sequence 1 and 3

Both defendants contend that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). The moving defendants bear the initial burden of establishing, prima facie, that the plaintiff did not sustain a serious injury caused by the accident (*see Smith v Matinale*, 58 AD3d 829 [2d Dept 2009]).

Defendant Moss initially emphasizes that after the accident, plaintiff got out of the vehicle and stood on the sidewalk for the five-minute period before the police arrived, and that she did not ask the responding police officer to call an ambulance, but rather, took a cab from the scene of the accident to Moss's home. She went to St. Joseph's Hospital eleven hours after the accident, where x-rays disclosed no fractures.

Defendants suggest that plaintiff's injuries were limited to, at most, some initial slight restriction in her neck or right shoulder. They rely on the affirmed reports of board certified radiologist, Dr. Jessica Berkowitz, who reviewed plaintiff's cervical and lumbar spine MRIs that were taken on November 29, 2018, and who states that she found no evidence of acute traumatic injury to the cervical or lumbar spine, and that such conditions as were disclosed on the MRIs were not causally related to the accident. Defendants also rely on the affirmed report of board certified orthopedic surgeon, Dr. James Dickson, who examined plaintiff on August 3, 2020 and stated that plaintiff's physical examination was completely normal, with no pain or discomfort, no limitations, and no subjective complaints. Dr. Dickson concluded with his opinion, within a reasonable degree of medical certainty, that plaintiff has no limitations of any kind that are related to the motor vehicle accident of May 26, 2018.

Defendants further observe that plaintiff's December 13, 2019 verified bill of particulars claims merely that she sustained neck pain, back pain, and right shoulder pain as a result of the

accident, and that she was confined to bed and home for approximately four days and missed one week from work. Moreover, plaintiff testified that she only missed one day from work as a result of the accident. Additionally, defendants emphasize plaintiff's testimony that during her six months of treatment, she was not prescribed any medication.

Defendants' submissions successfully establish a prima facie showing that plaintiff did not sustain a serious injury for purposes of Insurance Law § 5102 (d).

However, in opposition, plaintiff submits the affirmed report of radiologist Dr. John T. Rigney, who reviewed MRIs of plaintiff's cervical and lumbar spines taken on November 29, 2018, and reported finding slight disc bulges impinging the thecal sac at C2-C3 and C3-C4, and more pronounced posterior bulges impinging the thecal sac at C4-C5, C5-C6, C6-C7, and C7-T1, and at L3-L4, L4-L5, and L5-S1. Dr. Rigney offered the opinion that plaintiff's disc injuries are causally related to the accident.

Plaintiff further submits the medical records of treating physician, Dr. David Dynof; while his medical records are not affirmed, Dr. Dynof has also provided an affirmation reiterating and confirming the contents of those records. Plaintiff first consulted Dr. Dynof on June 15, 2018, for injuries to her neck, back and right shoulder. On that date, Dr. Dynof reported finding moderate tenderness to palpation at C3 to C7, muscle spasm and tenderness in the cervical paraspinal muscles, moderate tenderness on the right and left trigger points in the paracervical and trapezial regions, and pain with left rotation, right rotation and flexion of the neck. He obtained positive results of the foraminal compression test he performed, and found reduced ranges of motion in the cervical spine's flexion, extension and rotation.

Various tests Dr. Dynof performed on plaintiff's right shoulder on that date were reportedly positive, and reduced ranges of motion were found in that shoulder's forward flexion,

extension, abduction and rotation. Reduced ranges of motion were also found by Dr. Dynof on June 15, 2018 in plaintiff's lumbosacral spine, along with positive test results.

Dr. Dynof performed additional examinations of plaintiff on July 20, 2018 and on December 21, 2018, during which time plaintiff also received physical therapy and chiropractic treatment. Dr. Dynof finally performed a follow-up examination on April 16, 2021, at which time he found similar reductions in ranges of motion, positive test results and tenderness to palpation. He concluded, to a reasonable degree of medical certainty, that plaintiff sustained significant limitations and permanent consequential limitations to her cervical spine, thoracic spine, lumbar spine and her right shoulder that are causally related to the May 26, 2018 accident.

While MRI results indicating the presence of soft tissue injury such as bulging discs are insufficient in themselves to establish a claim of significant limitation or permanent consequential limitation (*see Kears v New York City Tr. Auth.*, 16 AD3d 45, 46 [2d Dept 2005]), such an injury may satisfy the statutory definition of serious injury if objective evidence establishes a significant or permanent extent and duration of physical limitations resulting from the claimed injury (*see Clervoix v Edwards*, 10 AD3d 626, 627 [2d Dept 2004]).

The MRI results, as interpreted by Dr. Rigney, together with Dr. Dynof's findings and opinions, are sufficient to create an issue of fact as to whether plaintiff sustained a physical injury resulting in significant or permanent limitations. Since Dr. Dynof provided an affirmation, effectively confirming the contents of his unaffirmed medical reports, in which he described and identified his objective tests, this Court declines to apply the cases cited by defendants, in which plaintiffs failed to provide a physician's affirmation identifying the objective tests the physician performed.

As to defendants' suggestion that plaintiff's claims are invalidated by her gap in

treatment – or cessation of treatment – after December 21, 2018 (*see Pommells v Perez*, 4 NY3d 566 [2005]), plaintiff's explanation in her deposition, stating that she stopped treatment because it was not working, constitutes "some reasonable explanation" for the cessation of treatment, sufficient to create an issue of fact on that point (*see Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 907 [2013]).

However, plaintiff's claim based on the 90/180 category of serious injury, which requires that the plaintiff have sustained a medically determined injury of a nonpermanent nature that prevented her from performing her usual and customary activities for 90 of the 180 days following the subject accident, must be dismissed. Defendant made a prima facie showing in favor of dismissing such a claim by citing plaintiff's deposition testimony in which she acknowledged missing only one day of work (*see John v Einden*, 124 AD3d 598 [2d Dept 2015]; *Marin v Ieni*, 108 AD3d 656, 657 [2d Dept 2013]), and plaintiff then failed to sustain her responsive burden of submitting competent medical evidence sufficient to raise a triable issue of fact on that issue.

For the foregoing reasons, it is hereby

ORDERED that defendants' motions for summary judgment dismissing the complaint for failure to satisfy the serious injury threshold (sequences 1 and 3) are denied, except that her claim based on the 90/180 category of serious injury is dismissed, and it is further

ORDERED that plaintiff's cross-motion for summary judgment on liability (sequence 2) is denied except to the extent that it is determined that plaintiff bears no liability for the accident, and it is further

ORDERED that the parties shall appear in the Settlement Conference Part on a date and in a manner of which they will be notified by that Part, to schedule a trial.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
July 27, 2021


HON. TERRY JANE RUDERMAN, J.S.C.