

Pumilla v Reilly

2021 NY Slip Op 33619(U)

July 12, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 614995/2016

Judge: Martha L. Luft

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Short Form Order

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

P R E S E N T:

Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND ORDER

DEANNA M. PUMILLA. x

Plaintiff,

-against-

RICHARD T. REILLY, JESSICA E.
REILLY, JASON MACCARON, TRACEY
L. MACCARON, J. WALTERS and EAN
HOLDING, LLC

Defendants.
_____ x

Mot. Seq. No.: 002 - MG
Orig. Return Date: 03/09/2021
Mot. Submit Date: 03/09/2021

Mot. Seq. No.: 003 - Mot.D
Orig. Return Date: 03/09/2021
Mot. Submit Date: 03/09/2021

Mot. Seq. No.: 004 - XMD
Orig. Return Date: 03/09/2021
Mot. Submit Date: 03/09/2021

Mot. Seq. No.: 005 - XMD
Orig. Return Date: 03/09/2021
Mot. Submit Date: 03/09/2021

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Upon the e-filed documents numbered 34 through 109, it is

ORDERED that the motion (#002) by the defendants Jason Maccaron and Tracey Maccaron (“the Maccaron defendants”) for an order granting summary judgment in their favor dismissing the complaint as asserted against them is granted; it is further

ORDERED that the motion (#003) by the defendant J. Walters for an order granting summary judgment dismissing the complaint in its entirety based upon the plaintiff’s failure to establish that she suffered a “serious injury” as a result of the subject accident, pursuant to Insurance Law § 5104, or in the alternative, for an order granting summary judgment in his favor dismissing the complaint as asserted against him is granted to the extent described herein, but is otherwise denied; it is further

ORDERED that the portion of Mr. Walter’s motion seeking an order granting summary judgment dismissing the complaint as asserted against him is granted; it is further

ORDERED that the cross motions (#004 and #005) by the Maccaron defendants and the defendants Richard T. Reilly and Jessica E. Reilly (“the Reilly defendants”) for an order granting summary judgment dismissing the complaint in its entirety based upon the plaintiff’s failure to establish that she suffered a “serious injury” as defined by Insurance Law § 5104 as a result of the subject accident is denied; and it is further

ORDERED that this matter is scheduled for a virtual compliance conference on **Tuesday August 10, 2021 at 2:30pm** via Microsoft Teams, a link to which will be provided to the emails addresses on file with the New York State Courts Electronic Filing system (NYSCEF) with Andrea Mims, law clerk to Judge Luft, for the purposes of discussing what, if any, further steps are necessary to certify this matter ready for trial, or if this matter is ready for trial, the parties may contact chambers via email at sufluft@nycourts.gov to receive a blank certification order with instructions.

This is an action to recover damages for injuries allegedly sustained by the plaintiff Deanna Pumilia as a result of a motor vehicle accident which occurred on April 6, 2016, on Nicolls Road, near the intersection with Horseblock Place, in the Town of Brookhaven, New York. The accident allegedly happened when a vehicle owned by the defendant Richard T. Reilly and operated by the defendant Jessica E. Reilly came into contact with a vehicle owned by the defendant EAN Holdings, LLC and operated by the defendant J. Walter, then the Reilly defendants’ vehicle struck a vehicle owned by the defendant Tracey Maccaron and operated by the defendant Jason Maccaron, and then collided with the plaintiff’s vehicle as it was stopped in traffic. By her complaint, as amplified by her bill of particulars, the plaintiff alleges that, as a result of the accident, she suffered serious injuries, namely labral tears of the left and right hip, for which she underwent surgical repair, and strains of the cervical and lumbar spine. By

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stipulation dated December 23, 2019, the plaintiff voluntarily discontinued the action as asserted against the defendant EAN Holdings, LLC with prejudice.

The defendants now move for summary judgment dismissing the complaint, alleging that Insurance Law § 5104 precludes the plaintiff from pursuing a personal injury claim because she did not suffer a “serious injury” within the meaning of Insurance Law § 5102 (d). In the alternative, the Maccaron defendants and Mr. Walter move for an order granting summary judgment in their favor dismissing the complaint as asserted against them, arguing that they are not liable for the accident. In support, the defendants submit, among other things, transcripts of the parties’ deposition testimony, and the affirmed report of orthopedic surgeon Craig B. Ordway, M.D. At the defendants’ request, Dr. Ordway conducted an examination of the plaintiff and reviewed medical records related to the injuries alleged in this action.

The plaintiff opposes the motions, arguing that, as a result of the accident, she sustained a “serious injury” as defined by the statute because she suffers from, among other things, restrictions of range of motion in her left and right hips, as well as her cervical and lumbar spine. The plaintiff further alleges that the accident exacerbated a pre-existing condition in her hips, and that these restrictions permanently and significantly limit the use of these areas, and that she was prevented from performing substantially all of her usual and customary daily activities for at least 90 days during the 180 days after the accident. In addition, the plaintiff argues that there are triable issues of fact as to the Maccaron defendants’ and Mr. Walter’s liability in the happening of the accident. In opposition, the plaintiff submits several documents, including an affirmation of her attorney, the affirmed report of Sreevathsa Boriah, M.D., her treating orthopedic surgeon, and various records related to her medical treatment following the accident.

Insurance Law § 5102 (d) defines “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 by 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.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Beltran v Powow Limo, Inc.*, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). When such a defendant’s motion relies upon 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 (see *Brite v Miller*, 82 AD3d 811, 918

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NYS2d 349 [2d Dept 2011]; *Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], citing *Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692, 694 [2d Dept 1992]). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which creates a material issue of fact (see *Gaddy v Eyler*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Beltran v Powow Limo, Inc.*, *supra*).

A plaintiff claiming injury within the “permanent consequential limitation” or “significant limitation” of use categories of the statute must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (see *Schilling v Labrador*, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; *Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; *McLoud v Reyes*, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination or a sufficient description of the “qualitative nature” of the plaintiff’s limitations, with an objective basis, correlating the 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*; *McEachin v City of New York*, 137 AD3d 753, 756, 25 NYS3d 672, 675 [2d Dept 2016]). Further, a plaintiff seeking to recover damages under the “90/180” category must prove the injury is “medically determined,” meaning that the condition must be substantiated by a physician, and causally related to the accident (see *Pryce v Nelson*, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; *Strenk v Rodas*, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; *Beltran v Powow Limo, Inc.*, *supra*).

The defendants’ submissions, namely Dr. Ordway’s report, establish, prima facie, that the alleged injuries to plaintiff’s hips and spinal regions do not constitute “serious injuries” within the meaning of Insurance Law § 5102 (d) (see *Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, *supra*; *Beltran v Powow Limo, Inc.*, *supra*). By his affirmed report, Dr. Ordway opines that, although he found restrictions in the plaintiff’s range of motion in the left and right hips, such limitations are a result of an underlying condition of bilateral femoral acelarabular impingement syndrome, not causally related to the accident, and the accident did not exacerbate this pre-existing condition (see *Inzalaco v Consalvo*, 115 AD3d 807, 982 NYS2d 165, [2d Dept 2014]). In addition, Dr. Ordway states that his examination found normal range of motion in the plaintiff’s cervical and lumber spine, and he diagnoses the plaintiff as having suffered sprains of these areas, and concludes that these conditions have resolved. As such, the defendants have presented competent medical evidence that none of plaintiff’s alleged injuries fall under the “permanent consequential limitation” or “significant limitation” of use categories of the statute (see *Perl v Meher*, *supra*; *Schilling v Labrador*, *supra*; *Rovelo v Volcy*, *supra*). Moreover, through the plaintiff’s own deposition testimony that she missed only two days of school and two weeks of work immediately following the accident, the defendants established, prima facie, that the plaintiff did not suffer injury within the “90/180” category of the statute (see *Pryce v Nelson*, *supra*; *Strenk v Rodas*, *supra*; *Beltran v Powow Limo, Inc.*, *supra*).

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The defendants having met their initial burden on the motion, the burden shifted to plaintiff to raise a triable issue of fact (*see Gaddy v Eycler, supra; Zuckerman v City of New York, supra; Beltran v Powow Limo, Inc., supra*). The plaintiff's submissions in opposition are sufficient to raise a triable issue of fact as to whether she sustained a serious injury to her hips as a result of the subject accident, resulting in a permanent consequential or significant limitation of their use (*see Schilling v Labrador, supra; Rovelo v Volcy, supra; McLoud v Reyes, supra*). Dr. Boriah sufficiently explains, in a specific and nonconclusory manner, how the subject accident exacerbated the plaintiff's pre-existing condition of bilateral hip dysplasia, necessitating immediate surgery (*cf. Inzalaco v Consalvo*, at 809). As such, the portions' of the defendants motions seeking summary judgment dismissing the complaint in its entirety on the basis of "serious injury" is denied.

As to the portions of the Maccaron defendants' and Mr. Walter's motion seeking summary judgment dismissing the complaint as asserted against them as they are not liable for the accident, these parties argue, among other things, that they were not negligent in the happening of the accident.

At his deposition, Mr. Walters testified that, just before the accident, he was stopped in traffic on Nicolls Road when another vehicle operated by Ms. Reilly, a Kia, collided with the right passenger side of his vehicle, then the Kia struck the vehicle ahead of him, which was operated by the plaintiff. Mr. Walters further testified that his vehicle did not come into contact with the plaintiff's vehicle after the impact from the Kia. At his deposition, Mr. Maccaron testified that he was traveling northbound on Nicolls Road at about 15 miles per hour when the driver side of his vehicle was struck by Ms. Reilly's vehicle. Mr. Maccaron further testified that, as a result of the impact, his vehicle was forced off the road, and that his vehicle did not make any contact with any other vehicle afterwards. At her deposition, Ms. Reilly testified that, just before the accident, she was stopped in traffic on Nicolls Road when a gray Jeep sideswiped her vehicle on the driver's side, and that she lost consciousness as a result. At her deposition, the plaintiff testified that, as she was stopped in traffic on Nicolls Road for 2 to 3 seconds, Ms. Reilly's vehicle struck a vehicle two cars behind hers, the Maccaron defendants' vehicle, then it struck the car directly behind hers, Mr. Walter's vehicle, before striking her vehicle. The plaintiff further testified that there were two impacts to her vehicle, the first from Ms. Reilly's vehicle and the second from Mr. Walter's vehicle, the latter making contact with her vehicle's back bumper.

A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident (*see Estate of Cook v Gomez*, 138 AD3d 675, 30 NYS3d 148 [2d Dept 2016]; *Boulos v Lerner-Harrington*, 124 AD3d 709, 709, 2 NYS3d 526 [2d Dept 2015]; *Rungoo v Leary*, 110 AD3d 781, 782, 972 NYS2d 672 [2d Dept 2013]). While there can be more than one proximate cause of an accident and it is generally for the trier of fact to determine, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the

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established facts (*see Estate of Cook v Gomez, supra; Jones v Vialva-Duke*, 106 AD3d 1052, 966 NYS2d 187 [2d Dept 2013]; *Kalland v Hungry Harbor Assoc., LLC*, 84 AD3d 889, 922 NYS2d 550 [2d Dept 2011]).

When the driver of an automobile approaches another automobile 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 (*see Vehicle and Traffic Law § 1129 [a]; Melendez v McCrowell*, 139 AD3d 1018, 32 NYS3d 604 [2d Dept 2016]; *Singh v Avis Rent A Car Sys., Inc.*, 119 AD3d 768, 989 NYS2d 302 [2d Dept 2014]; *Martinez v Martinez*, 93 AD3d 767, 941 NYS2d 189 [2d Dept 2012]). Accordingly, a rear-end collision establishes a prima facie case of negligence on the part of 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 (*see Strickland v Tirino*, 99 AD3d 888, 952 NYS2d 599 [2d Dept 2012]; *Martinez v Martinez, supra; Giangrasso v Callahan*, 87 AD3d 521, 928 NYS2d 68 [2d Dept 2011]). Evidence that a vehicle was struck in the rear and propelled into the vehicle in front of it may provide a sufficient non-negligent explanation (*see Hartfield v Seenarraine*, 138 AD3d 1060, 30 NYS3d 316 [2d Dept 2016]; *Kuris v El Sol Contr. & Constr. Corp.*, 116 AD3d 675, 983 NYS2d 580 [2d Dept 2014]; *Strickland v Tirino, supra*). Thus, in a chain-reaction accident, the operator of the middle vehicle may establish prima facie entitlement to judgment as a matter of law by demonstrating that it was struck from behind by the rear vehicle and propelled into the lead vehicle (*see Chuk Hwa Shin v Correale*, 142 AD3d 518, 36 NYS3d 213 [2d Dept 2016]; *Niosi v Jones*, 133 AD3d 578, 19 NYS3d 550 [2d Dept 2015]; *Kuris v El Sol Contr. & Constr. Corp., supra*).

Here, the Maccaron defendants and Mr. Walter have sustained their burden on their motions that they were not at fault in the happening of the accident (*see Estate of Cook v Gomez, supra; Boulos v Lerner-Harrington, supra; Rungoo v Leary, supra*). Mr. Maccaron and Mr. Walter testified that Ms. Reilly's vehicle struck their vehicles, but that their vehicles did not come into contact with the plaintiff's vehicle. Although the plaintiff testified that the Reilly defendants vehicle and Mr. Walter's vehicle made contact with her vehicle, if such contact occurred, Mr. Walter's submissions demonstrate that his vehicle was struck by the Reilly defendants' vehicle and propelled into the plaintiff's vehicle, providing a non-negligent explanation for the collision between his vehicle and the plaintiff's vehicle (*see Chuk Hwa Shin v Correale, supra; Hartfield v Seenarraine, supra; Strickland v Tirino, supra*). As such, only one conclusion may be drawn from the established facts, and the Maccaron defendants' and Mr. Walter's demonstrate, as a matter of law, that their actions were not a proximate cause of the accident (*see Estate of Cook v Gomez, supra; Jones v Vialva-Duke, supra; Kalland v Hungry Harbor Assoc., LLC, supra*). In opposition, the plaintiff submits an affirmation of her attorney, arguing, among other things, that there are triable issues of facts as to whether Mr. Maccaron or Mr. Walter were at fault in the happening of the accident. However, the affirmation from an attorney having no personal knowledge of the facts is without evidentiary value and, thus, is insufficient to raise a triable issue of fact (*see Zuckerman v City of New York, supra*). As such,

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the plaintiff's submissions fail to rebut the Maccaron defendants' and Mr. Walter's prima facie showing of entitlement to summary judgment on the issue of liability.

Accordingly, the Maccaron defendants' motion for summary judgment on the issue of liability is granted, Mr. Walter's motion for summary judgment is granted in part and denied in part, and the Maccaron defendants' and the Reilly defendants' cross motions for summary judgment dismissing the complaint in its entirety are denied.

ENTER

Date: July 12, 2021
Riverhead, New York



HON. MARTHA L. LUFT, A.J.S.C.

____ Final Disposition

X Non-Final Disposition