Charles v Hanoman

2021 NY Slip Op 33976(U)

October 8, 2021

Supreme Court, Queens County

Docket Number: Index No. 714000/2019

Judge: Maurice E. Muir

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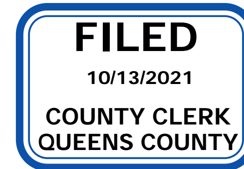
Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice



ROCHELE CHARLES,

Plaintiff,

-against-

BABITA HANOMAN and RAVENDRA HANOMAN,

Defendants.

BABITA HANOMAN and RAVENDRA HANOMAN,

Third-Party Plaintiffs,

-against-

PETER P. FIGUEROA,

Third-Party Defendant.

IAS Part - 42

Index No.: 714000/2019

Motion Date: 7/22/21

Motion Cal. No. 3

Motion Seq. No. 2

The following electronically filed ("EF") documents read on this motion by Peter P. Figueroa ("Mr. Figueroa" or "Third-Party Defendant") for summary judgment, pursuant to CPLR § 3212, dismissing the complaint upon the ground that Rochele Charles ("Ms. Charles" or "plaintiff") did not sustain a "serious injury" as defined by § 5102(d) of the New York's Insurance Law as a result of the motor vehicle accident. Moreover, Mr. Figueroa also cross moves for an order pursuant to CPLR § 3212 granting him summary judgment and dismissing the Third-Party Complaint against him on the grounds that he bears no liability for the subject accident.

	Papers Numbered
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Reply Affirmation..	EF 92

Upon the foregoing papers, it is ordered that the motion and cross-motion are combined herein for disposition, and determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by Ms. Charles in a motor vehicle collision. In particular, the plaintiff alleges on April 15, 2019, the motor vehicle owned by Babita Hanoman ("Babita") and operated by Ravendra Hanoman ("Ravendra") (collectively, the "defendants") struck the right-side of the motor vehicle, which she was a front-right seat passenger of Mr. Figueroa -- at Liberty Avenue at or near its intersection with Sutphin Boulevard, in the County of Queens, City and State of New York ("subject accident"). The plaintiff that she sustained serious injuries to her right shoulder and cervical spine. On August 14, 2019, the plaintiff commenced the instant action against the defendants; and on September 19, 2019, issue was joined, wherein defendants interposed an answer. Thereafter, on or about October 16, 2019, the defendants impleaded Mr. Figueroa by way of a Third-Party summons and complaint; and on or about November 27, 2019, issue joined, wherein he interposed a verified answer. Now Mr. Figueroa seek summary judgment on the ground that Ms. Charles did not sustain a "serious injury" as defined by § 5102(d) of the New York's Insurance Law and he bears no liability for the subject accident.

I. Third-Party Defendant's Motion to Dismiss Based on Serious Injury

It has long been established that the "legislative intent underlying the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (i.e., Insurance Law § 5101, *et seq.* – commonly known as New York's "No-Fault" Insurance Law) was to weed out frivolous claims and limit recovery to significant injuries (*Licari v. Elliot*, 57 NY2d 230 [1982]; *see also Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002] quoting *Duel v. Green*, 84 NY2d 795 [1995]). New York's No-Fault Insurance Law § 5102 (d) defines "serious injury" as follows:

> … 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.

The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see Licari v. Elliott*, 57 NY2d 230 [1982]; *see also Charley v. Goss*, 54 AD3d 569 [1st Dept 2008] *aff'd* 12 NY3d 750 [2009]; *Porcano v. Lelzman*, 255 AD2d 430 [2d Dept 1998]; *Nolan v. Ford*, 100 AD2d 579 [2d Dept 1984], *aff'd* 64 NYS2d 681 [1984]).

On a motion for summary judgment, the defendant has the initial burden of making a *prima facie* showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of New York's No-Fault Insurance Law § 5102(d) (*see Toure v. Avis Rent A Car Sys.,* 98 NY2d 345 [2002]; *Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Akhtar v. Santos*, 57 AD3d 593 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*Moore v. Edison*, 25 AD3d 672 [2d Dept 2006]; *Farozes v. Kamran*, 22 AD3d 458 [2d Dept 2005]). 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 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment by using medical reports and records prepared by the plaintiff's own physicians (*see Fragale v. Geiger*, 288 AD2d 431 [2d Dept 2001]; *Grossman v. Wright*, 268 AD2d 79 [2d Dept 2000]; *Vignola v. Varrichio*, 243 AD2d 464 [2d Dept 1997]; *Torres v. Micheletti*, 208 AD2d 519 [2d Dept 1994]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Xin Fang Xin v. Saft,* 177 AD3d 823 [2d Dept 2019]; *Rosenblum v. Schloss*, 175 AD3d 1339 [2d Dept 2019]; *Burns v. Stranger*, 31 AD3d 360 [2d Dept 2006]). Once defendant has met this

burden, 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 Duel v. Green*, 84 NY2d 795 [1995]; *Pagano v. Kingsbury*,182 AD2d 268 [2d Dept 1992]). The mere parroting of language tailored to meet statutory requirements is insufficient (*see Grossman v. Wright*, 268 AD2d at 84). Further, a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings, which shall be based on a recent examination of the plaintiff (*Kauderer v. Penta*, 261 AD2d 365 [2d Dept 1999]; *Tobiolo v. Friedman*, 283 AD2d 483 [2d Dept 2001]). Lastly, the 90/180 category requires a demonstration that plaintiff has been unable to perform substantially all of his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the injury (*see Licari*, 57 NY2d at 236; *Romero v. Brathwaite*, 154 AD3d 894 [2d Dept 2017]). The words "substantially all" mean that the person has been "curtailed from performing his or her usual activities to a great extent rather than some slight curtailment" (*Licari*, 57 NY2d at 236).

Here, in support of the instant motion for summary judgment, Mr. Figueroa submitted, *inter alia*, an affirmed medical report from Dana Mannor, M.D. ("Dr. Mannor"), who is a Board-Certified Orthopedist. Dr. Mannor performed an independent orthopedic examination ("IME") on the plaintiff on September 9, 2020, wherein she found that Ms. Charles' objective tests (e.g., Drop-Arm, Spurling, Straigh Leg Raises, Neer, Hawkins, etc.) were negative and the range of motion of the plaintiff's relevant body parts (i.e., cervical, right shoulder, thoracic spine, left shoulder and lumbar spine) were completely within normal limits. Furthermore, Dr. Mannor opined that "[b]ased on my examination of the cervical spine, thoracic spine, lumbar spine and right shoulder, review of medical records and history provided by claimant, all tests including Sprurling's Test . . . produced negative results, as noted above and there were no positive objective clinical findings on examination of the above diagnosed sites to substantiate the claimants subjective complaints of pain. Neurological examination was objectively normal as noted above." As such, Dr. Mannor diagnosed plaintiff with a resolved cervical spine sprain/strain, a resolved thoracic spine sprain/strain, a resolved lumbar spine sprain/strain, and a resolved right shoulder sprain/strain.

In further support of the instant motion, Mr. Figueroa provided the affirmed medical report of Sheldon Feit, M.D. ("Dr. Feit") who is a certified Radiologist. On September 16,

2020, Dr. Feit reviewed the magnetic resonance imaging ("MRI") on the plaintiff's cervical spine, shoulders and lumbar spine, which was performed at Stand-Up MRI of Queens. P.C. ("Stand-Up MRI") on December 9, 2017. Dr. Feit concluded that "[r]eview of the MRI of the right shoulder obtained just under two months following the date of accident fails to demonstrate evidence of any rotator cuff tear or fracture. The impingement on the supraspinatus muscle at the acromioclavicular joint is entirely degenerative. No posttraumatic changes are identified and there are no abnormalities causally related to the accident of 04/15/2019." Dr. Feit also reviewed the plaintiff's cervical spine MRI, which was taken on May 29, 2019 at Stand-Up MRI, wherein he concluded that "Disc bulges are not posttraumatic but are degenerative secondary to annular degeneration and/or chronic ligamentous laxity. The associated herniation at C5-C6 is also degenerative as it is seen in association with disc bulge as well as osteophyte formation. No posttraumatic changes are identified and there are no abnormalities causally related to the accident of 04/15/2019. "

In opposition to the instant motion, the plaintiff provided several affirmed medical reports from physicians, who examined her since the subject accident. For instance, the plaintiff provided an affirmed medical report, dated December 9, 2020, from Usman Saleem ("Dr. Saleem"), who is a Doctor of Anesthesiology and Pain Management. Dr. Saleem concluded that "[i]t is my opinion with a reasonable degree of medical certainty that based on history, examinations and aforesaid testing and MRI findings, Ms. Rochele Charles has sustained a permanent loss of use a body system or function of her cervical spine, thoracic spine, and right shoulder, in that the chronic internal derangement of the cervical spine, thoracic spine, and right shoulder, has caused her to lose 35% of her range of motion of her cervical spine; 30% of her range of motion of her thoracic spine; and 30% of her range of motion of her right shoulder, as observed during my last October 28, 2020 examination of Ms. Rochele Charles and which is one and a half (1.5) years after the accident, indicating their permanency." Dr. Saleem also opined that "[i]t is my opinion with a reasonable degree of medical certainty that all of the foregoing injuries including right shoulder tear of the superior labrum and anterior inferior labrum; anterior capsular thickening, which can be seen with adhesive capsulitis; infraspinatus tendinopathy with 2 mm cyst in the humeral head; cervical spine posterior disc herniations at the C5-C6 level favoring the left approaching the left ventral cord surface narrowing the left lateral recess; disc herniation at the C7-T1 favoring the left, impressing upon the thecal sac, narrowing the left

lateral recess and left C7-T1 neural foramen; posterior marginal osteophyte formation; discs bulges at the C3-C6, C4-CS, and C6-C7 levels approaching the ventral cord surface; straightening of the normal cervical lordosis are casually related to the motor vehicle accident and trauma of April 15, 2019, which has affected plaintiff's ability to carry or left heavy objects, run or walk for long period of time, climbing stairs and changing positions and which was the competent producing cause of her injuries."

In further opposition to the instant motion, the plaintiff provided a sworn report, dated December 7, 2020, from Philip D. P. Abessing ("Dr. Abessing"), who is a licensed Chiropractic. Dr. Abessing opined that "[i]t is my opinion with a reasonable degree of chiropractic certainty that all of the foregoing injuries including right shoulder tear of the superior labrum and anterior inferior labrum; anterior capsular thickening, which can be seen with adhesive capsulitis; infraspinatus tendinopathy with 2 mm cyst in the humeral head; cervical spine posterior disc herniations at the C5-C6 level favoring the left approaching the left ventral cord surface narrowing the left lateral recess; disc herniation at the C7-T1 favoring the left, impressing upon the thecal sac, narrowing the left lateral recess and left C7-T1 neural foramen; posterior marginal osteophyte formation; discs bulges at the C3-C6, C4-C5, and C6-C7 levels approaching the ventral cord surface; straightening of the normal cervical lordosis are casually related to the motor vehicle accident and trauma of April 15, 2019." Moreover, Dr. Abessing opined that "... it is well known that age-related stenosis is usually asymptomatic in the cervical spine and although it can produce pain (especially in lumbar spine), the pain would emerge gradually over time and not as suddenly and severely as the pain that MS. ROCHELE CHARLES had been experiencing. Therefore, the injuries to MS. ROCHELE CHARLES' cervical spine and severe pain in her cervical spine region are a direct result of the motor vehicle accident of April 15, 2019, and were not caused by any possible degenerative and/or pre-existing condition." Additionally, Dr. Jasjit Singh, who is a Musculoskeletal and Spine Radiologist reviewed the plaintiff's shoulder MRI films, wherein he found a tear of superior labrum and anterior inferior labrum; Anterior capsular thickening, which can be seen with adhesive capsulitis; and Infraspinatus tendinopathy with 2 mm cyst in the humeral head. Lastly, the plaintiff testified that prior to the subject accident she had been asymptomatic and pain free in her neck, back, and right shoulder. In fact, she testified that she had "no issue with mobility or restrictions or range of motion or strength." Therefore, any pre-existing degenerative condition, prior to the subject

accident, was aggravated or exacerbated, which had not manifested itself to Ms. Charles prior to the April 15, 2019 trauma. Moreover, Ms. Charles has never re-injured her right shoulder subsequent April 15, 2019 accident.

Here, the complete record before the Court indicates that there are conflicting medical reports submitted by the parties, which raise triable issues of fact as to whether plaintiff sustained serious injuries within the meaning of Insurance Law § 5102(d) (*see Pommells v. Perez*, 4 NY3d 566 [2005]; *Wilcoxen v. Palladino*, 122 AD3d 727 [2d Dept 2014]; *Garcia v. Long Island MTA*, 2 AD3d 675 [2d Dept 2013]; *Tinao v. City of New York*, 112 AD2d 363 [2d Dept 1985]; *Cassagnol v. Williamsburg Plaza Taxi*, 234 AD2d 208 [1st Dept 1996]). It is well settled that conflicting medical evidence on the issue of the permanency and significance of a plaintiff's injuries warrants denial of summary judgment. (*Pommells v. Perez*, 4 NY3d 566 [2005]; *Wilcoxen v. Palladino*, 122 AD3d 727 [2d Dept 2014]; *Garcia v. Long Island MTA*, 2 AD3d 675 [2d Dept 2013]; *Noble v. Ackerman*, 252 AD2d 392 [1st Dept 1998]). This is a matter to be resolved by a trier of fact.

With respect to the alleged cessation of treatment, the plaintiff provided an adequate explanation by averring that the no-fault insurance ceased paying for her treatment. As a result, she could not afford further treatment. (*see Encarnacion v. Castillo*, 146 AD3d 600 [1st Dept. 2017]; *Jenkins v. Livo Car Inc.*, 176 AD3d 568, 569-570 [1st Dept. 2019]). However, the plaintiff failed to raise a triable issue of fact with respect to her 90/180 claim: Specifically, the plaintiff failed to establish that she had a medically determined injury that prevented her from performing substantially all of her customary daily activities within the relevant period. (*see Frias v. Gonzalez-Vargas*, 147 AD3d 500, 502 [1st Dept 2017]; *Cartha v. Quinn*, 50 AD3d 530 [1st Dept 2008] *lv denied* 11 NY3d 704 [2008]; *see also Perl v. Meher*, 18 NY3d 208, 220 [2011]; *Licari v. Elliott*, 57 NY2d 230, 236 [1982]). In fact, the plaintiff testified that she only missed one (1) day of work following the subject accident; and she works on a full-time basis without limitations. (*see Romero v. Brathwaite*, 154 AD3d 894 [2d Dept 2017]; *Kreimerman v. Stunis*, 74 AD3d 753 [2d Dept 2010]; *Roman v. Fast Lane Car Service, Inc.*, 46 AD3d 535 [2d Dept 2007]; *Sainte-Aime v. Ho*, 274 AD2d 569 [2d Dept 2000]; *A.H. v. Munson*, 189 AD3d 794 [2d Dept 2020]).

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II. The Third-Party Defendant's Cross Motion for Summary Judgment

Additionally, Mr. Figueroa cross moves to dismiss the Third-Party Complaint against him on the grounds that he bears no liability for the subject accident, pursuant to CPLR § 3212. In support of the instant cross motion, Mr. Figueroa relies upon Ms. Charles testimony, who the testified Mr. Figueroa vehicle was stopped at the intersection for the red traffic light for approximately one minute and was the first vehicle stopped at the light. When the light at the intersection turned green, Mr. Figueroa's vehicle proceeded through the intersection and an SUV struck his vehicle, wherein she was a passenger. Moreover, Mr. Figueroa provided a certified copy of the Police Accident Report, which it states, in relevant part, the following:

> At TPO Vehicle 1 states he was traveling east bound on Liberty Avenue at Sutphin Bvld (sic) intersection, when his light turned green, Vehicle 1 started to proceed through the intersection and Vehicle 2 shot out in front of him. Vehicle 2 states he was travelling south bound on Sutphin Bvld (sic) crossing over Liberty Avenue when Vehicle 1 blew the light and slammed into the side of him. Female passenger from front seat of Vehicle 2.

Furthermore, Mr. Hanoman testified that "I told the police that this guy ran the red light because I had the green light."

It is well settled law that even though the operator of a motor vehicle traveling with the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring them to yield (*see Mu-Jin Chen v. Cardenia*, 138 AD3d 1126 [2d Dept 2016]; *Stanford v. Smart Pick, Inc.*, 134 AD3d 1096 [2d Dept 2015]; *Baulete v. L & N Car Serv., Inc.*, 134 AD3d 753 [2d Dept 2015]), the operator with the right-of-way also has an obligation to keep a proper lookout and see what can be seen through the reasonable use of his or her senses to avoid colliding with other vehicles (*Ballentine v. Perrone*, 179 AD3d 993 [2d Dept 2020]; *Twizer v. Lavi*, 140 AD3d 736, 737 [2d Dept 2016]; *Mu-Jin Chen v. Cardenia*, 138 AD3d at 1127-1128 [2d Dept 2016]; *Jones v. Pinto*, 133 AD3d 634, 635 [2d Dept 2015]; *Jimenez v. Batista,* 123 AD3d 668 [2d Dept 2014]). Since there can be more than one proximate cause of an accident, a plaintiff moving for summary judgment on the issue of liability has the burden of establishing, *prima facie*, not only that the defendant was negligent, but that the plaintiff was free from comparative fault (*Mu-Jin Chen v. Cardenia*, 138 AD3d at 1128; *Stanford v. Smart Pick, Inc.*, 134 AD3d at 1096; *Jones v. Pinto*, 133 AD3d at 635). The issue of comparative fault is generally a question for the trier of fact (*see Cattan v. Sutton*, 120 AD3d 537 [2d Dept 2014]). Here, Mr. Hanoman and Mr.

Figueroa provided testimony, which contain conflicting accounts as to how and why the subject accident occurred, thus precluding the granting of summary judgment. (*Cordero v. Escobar*, 186 AD3d 1315 [23d Dept 2020]; *Bernstein v. New York City Tr. Auth,* 153 AD3d 897 [2d Dept 2017]; *Han v. Gladyshev*, 153 AD3d 762 [2d Dept 2017]; *Jones v. American Commerce Ins. Co.*, 92 AD3d 844 [2d Dept 2012]; *Gardner v. Cason, Inc.*, 82 AD3d 930 [2d Dept 2011]).

Accordingly, it is hereby

ORDERED, that the Third-Party Defendant's motion for summary judgment on the issue of serious injury, pursuant to CPLR § 3212, is granted only to the extent that plaintiff's 90/180 claim is dismissed with prejudice; and it is further,

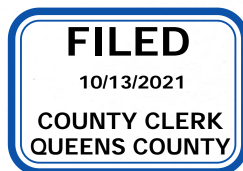
ORDERED, that the Third-Party Defendant's cross-motion for summary judgment on the issue of liability, pursuant to CPLR § 3212, is denied; and it is further,

ORDERED, that all other relief requested in the motion and cross-motion, which has not been specifically addressed above is denied; and it is further,

ORDERED, that plaintiff shall serve a copy of this decision and order with notice of entry upon all parties and the clerk of this court on or before November 5, 2021.

The foregoing constitutes the decision and order of the court.

Dated: October 8, 2021
Long Island City, NY



MAURICE E. MUIR, J.S.C.