Mooring v Uddin
2022 NY Slip Op 31648(U)
May 19, 2022
Supreme Court, Kings County
Docket Number: Index No. 523537/20
Judge: Lillian Wan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
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BEVERLY MOORING,

Plaintiff,

Index No.: 523537/20
Motion Nos. 01 & 02

- against -

DECISION AND ORDER

SALAH UDDIN and NGAR CHUNG,

Defendants.
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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the summary judgment motions of the plaintiff and defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 01) 18-34, 46, 52 were and (Motion 02) 35-45, 47-48 read on these motions for summary judgment.

The defendants seek an order granting summary judgment pursuant to CPLR §3212 (Motion 01), and dismissal of the complaint on the grounds that the injuries sustained by the plaintiff as a result of a motor vehicle accident fail to meet the "serious injury" threshold of Insurance Law § 5102(d) and § 5104. The plaintiff seeks summary judgment, pursuant to CPLR § 3212 (Motion 02), on the issue of liability as against the defendants, Salah Uddin (Uddin) and Ngar Chung (Chung), and directing that the matter be set down for an assessment of damages. Upon careful consideration of the parties' submissions the defendants' motion is denied, and the plaintiff's motion is granted for the reasons set forth below.

The plaintiff's injuries arise from a motor vehicle accident that occurred on May 13, 2019, on Eastern Parkway near Schenectady Avenue, in the County of Kings, City and State of New York. At the time of the accident, the plaintiff, Beverly Mooring, was a passenger on a school bus which was being operated by non-party Jean Nelson. The plaintiff was in the scope of her employment as a matron on the bus, and was responsible for supervising the children at the time of the occurrence. The plaintiff alleges that the bus was struck in the rear by the vehicle operated by defendant Uddin, and owned by defendant Chung, causing her to sustain serious personal injuries. The plaintiff was transported from the scene of the accident to Kings County Hospital for medical treatment. According to the certified police report submitted by the plaintiff, Uddin admitted that his vehicle struck the rear of the school bus.

As a result of the accident the plaintiff alleges she sustained numerous serious injuries that include, inter alia, tears to various tendons of the right shoulder requiring steroid injections and ultimately right shoulder arthroscopy in March of 2020; torn meniscus of the left knee requiring arthroscopic surgery in November of 2020; cervical herniations at C3-C4 and C7-T1, C4-C5, C5-C6, and C6-C7, with radiculopathy requiring cervical trigger point injections and multiple epidural injections, and ultimately a cervical discectomy and fusion at C4-C7 with insertion of hardware; lumbar disc herniations at L4-L5 and L5-S1, with L5 radiculopathy.

According to the bill of particulars and the plaintiff's deposition testimony, she has been unable to return to work as a result of the injuries she sustained, and with the exception of one week, she has been out of work from the date of the accident to the present. Further, the plaintiff testified that because of her injuries Dr. Gautam Khakhar, the plaintiff's treating physician, instructed her not to work after the accident. The plaintiff also testified that she is unable to perform many activities she had engaged in prior to the accident, such as bowling, playing handball, and shopping alone, and that she continues to have difficulty climbing up and down the stairs, doing laundry, making her bed and reaching.

In support of their motion (Motion 01), the defendants submit the pleadings, a certified copy of the prehospital care report summary of the Fire Department of the City of New York, the Kings County Hospital emergency room records, and the affirmed report of their medical expert, Dr. Pierce Ferriter, a board-certified orthopedic surgeon. Dr. Ferriter examined the plaintiff on September 27, 2021, nearly two and a half years after the accident. In preparation for the examination, Dr. Ferriter reviewed the plaintiff's bill of particulars, supplemental bill of particulars, and the police accident report. Upon examination of the plaintiff's cervical and lumbar spine, right and left shoulders and left knee he determined that the plaintiff had normal range of motion, and that other objective testing of those areas was within normal limits. Dr. Ferriter's impression was sprain/strain of the cervical and lumbar spine and left shoulder, and status post-surgery of the right shoulder and left knee was determined to be "healed by exam." He opined that the plaintiff had no orthopedic limitations in use of the body parts examined, and that she was able to work without limitations and perform normal activities of daily living.

A motion for summary judgment is granted in favor of the moving party where there are no material issues of fact, and as a result, the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp*., 68 NY2d 320 (1986). As the proponent of the summary judgment motion, the defendants have the initial burden of establishing that the plaintiff did not sustain a serious injury under the categories of injury claimed in his bill of particulars. *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002). A defendant can satisfy the initial burden by relying on statements of defendants' examining physician, or plaintiff's sworn testimony, or by the affirmed reports of plaintiff's own examining physicians. *See Pagano v Kingsbury*, 182 AD2d 268 (2d Dept 1992). The defendants' medical expert must specify the objective tests upon which the medical opinions are based, and when rendering an opinion as to the range of motion measurement, must compare the range of motion findings to those that are considered to be normal for the particular body part. *See Browdame v Candura*, 25 AD3d 747 (2d Dept 2006).

Based on the foregoing, the defendants' motion must be denied since they failed to meet their prima facie burden of showing that the plaintiff did not sustain a serious injury under the 90/180–day category of Insurance Law § 5102(d). *See Toure v Avis Rent A Car Sys*., 98 NY2d 345; *McEachin v City of New York*, 137 AD3d 753 (2d Dept 2016). The papers submitted by the defendants failed to adequately address plaintiff's claim, as set forth in the bill of particulars, that she sustained a serious injury under this category of serious injury. *See Che Hong Kim* v *Kossoff*, 90 AD3d 969 (2d Dept 2011). The plaintiff's inability to work was medically determined, and supported by the plaintiff's deposition testimony that her treating physician, Dr. Khakhar, told her that she should refrain from working as a result of the injuries she sustained in the accident. The defendants' medical expert, Dr. Ferriter, examined the plaintiff more than two

years after the accident, and failed to relate his findings to the 90/180 category of serious injury for the period of time immediately following the accident. *See Rouach v Betts*, 71 AD3d 977 (2d Dept 2010). In particular, Dr. Ferriter's report did not address the plaintiff's claim that she has been unable to work as a result of her injuries. Further, his report shows that Dr. Ferriter did not review any of the plaintiff's medical records in reaching his conclusion that she was able to return to work and was capable of performing normal activities of daily living.

Since the defendants failed to meet their prima facie burden of showing that the plaintiff did not suffer a serious injury, it is unnecessary to consider the plaintiff's opposing papers in this regard. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Marmer v IF USA Express, Inc.*, 73 AD3d 868 (2d Dept 2010).

Turning to the plaintiff's motion (Motion 02), it is well-settled that a rear-end collision with a stopped or stopping vehicle 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. *Perez v Persad*, 183 AD3d 771 (2d Dept 2020); *see also Edgerton v City of New York*, 160 AD3d 809 (2d Dept 2018); *Billis v Tunjian*, 120 AD3d 1168 (2d Dept 2014). A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle. *Perez v Persad*, 183 AD3d 771; *Tutrani v County of Suffolk*, 10 NY3d 906 (2008); *Witonsky v New York City Transit Authority*, 145 AD3d 938 (2d Dept 2016); *Nsiah-Ababio v Hunter*, 78 AD3d 672 (2d Dept 2010); *see* Vehicle and Traffic Law § 1129(a). Further, a plaintiff's right to summary judgment on the issue of liability as an innocent passenger is not barred or restricted by any potential issue of comparative fault as between the owners and operators of the two vehicles involved in the accident. *See Phillip v D & D Carting Co., Inc.*, 136 AD3d 18 (2d Dept 2015). In *Wise v Boyd Bros. Transportation, Inc.*, 194 AD3d 1096 (2d Dept 2021), the Appellate Division, Second Department held that an innocent passenger must demonstrate, prima facie, that the operator of the offending vehicle was at fault, or that there are no triable issues of fact raised by the defendants in order to be awarded summary judgment on liability.

Here, the plaintiff has demonstrated her prima facie entitlement to summary judgment on liability as a matter of law, as the plaintiff has established that she was a passenger in the school bus, and that she did not contribute to the happening of the accident. *See Phillip v D&D Carting Co., Inc.*, 136 AD3d 18. According to the plaintiff's sworn affidavit, she was working as a matron on the school bus at the time of the accident, and was sitting in the third row on the right side when the collision occurred without any warning. There is no evidence submitted that imputes any liability to the plaintiff passenger with respect to the happening of the accident. Moreover, the certified police report contains defendant Uddin's admission that his vehicle struck the rear of the school bus, which according to the plaintiff's deposition testimony, was moving at the time of the impact.

In opposition, the defendants have failed to submit proof sufficient to rebut the inference of negligence, and therefore have not set forth a non-negligent explanation for the rear-end collision. The affirmation of the defendants' attorney alone is insufficient to raise a triable issue of fact. *See Browne v Castillo*, 288 AD2d 415 (2d Dept 2001). Therefore, the issue of the

comparative negligence of the owners and operators of the two vehicles does not preclude a grant of summary judgment on liability in favor of the plaintiff. *See Phillip v D&D Carting Co., Inc.*, 136 AD3d 18.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the defendants' motion (Motion 01) is **DENIED**; and it is further

ORDERED, that the plaintiff's motion (Motion 02) is **GRANTED**, to the extent that the plaintiff is entitled to summary judgment on liability.

This constitutes the decision and order of the Court.

Dated: May 19, 2022

Lillian Wan

HON. LILLIAN WAN, J.S.C.
Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.