

Scolpini v Town of Greenburgh

2023 NY Slip Op 35003(U)

November 3, 2023

Supreme Court, Westchester County

Docket Number: Index No. 65870/2021

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period 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
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

----- X

TINA SCOLPINI,

Plaintiff,

Index No. 65870/2021

– against –

**DECISION & ORDER
Seq. #2**

TOWN OF GREENBURGH, TOWN OF GREENBURGH
POLICE DEPARTMENT and OFFICER JOSEPH
FALCONE,

Defendants.

----- X

In an action to recover damages for alleged serious personal injuries stemming from a motor vehicle accident, defendant Officer Joseph Falcone moves, pursuant to CPLR §3212 for summary judgment on liability and on the basis that plaintiff did not sustain a serious injury as defined in §5102(d) of the Insurance Law of the State of New York; and for such other and further relief as the court deems just and proper.

The following papers were read and considered on this motion:

Papers Considered

NYSCEF Doc. No. 26-58

1. Notice of Motion/Affirmation of Thomas J. Troetti, Esq. in Support/Exhibits A-P/Statement of Material Facts/Memorandum of Law in Support.
2. Memorandum of Law in Opposition/Response to Statement of Material Facts/Affirmation of John V. Tait, Esq. in Opposition/Exhibits 1-4.
3. Memorandum of Law in Reply.
4. Letter Correspondence to the Court.

Discussion

In this action by plaintiff to recover for alleged serious personal injuries, defendant Officer Joseph Falcone moves for summary judgment dismissing the complaint on multiple grounds. Plaintiff opposes the motion.

Factual and Procedural Background

Plaintiff commenced this action by the filing of a summons and complaint on November 1, 2021, alleging she was seriously injured in a motor vehicle accident that occurred on June 7, 2020 in the vicinity of Tarrytown Road (Main Street) and Route 9A in the Village of Elmsford. The complaint further alleges that the accident occurred when plaintiff's vehicle and a police vehicle operated by Officer Joseph Falcone ("Officer Falcone") collided at the intersection. Defendant Officer Falcone filed his Answer with Affirmative Defenses on May 14, 2022. On May 16, 2022, defendants Town of Greenburgh and Greenburgh Police Department interposed their Answer with Affirmative Defenses.

In support of the instant motion, Officer Falcone relies upon, *inter alia*, the Affidavits of Michael Marino and Officer Falcone, an audio transcript, a dash-cam video of the accident, the police report, the Notice of Claim, the Hospital Record of plaintiff, medical record of Doctors United, the pleadings and the Affidavit of Tina Scolpini, plaintiff's 50-h hearing transcript, the deposition transcripts of the parties and a non-party and the Medical Report of William Walsh, M.D. who performed an independent orthopedic medical examination of plaintiff.¹

In further support of his motion, Officer Falcone initially argues that summary judgment in his favor is warranted because his conduct was privileged under New York Vehicle and Traffic Law §1104. Officer Falcone submits he is entitled to immunity because, at the time of the motor vehicle accident, he was engaged in an emergency operation with his emergency lights and siren activated and was not acting with reckless disregard for the safety of others. Defendant relies on VTL §1104 which grants the driver of an authorized emergency vehicle special driving privileges during involvement in an emergency operation. The privileges afforded by VTL §1104 include passing through red lights and stop signs, exceeding speed limits and disregarding regulations which govern the direction of movement or turning in specified directions. Therefore, defendant submits that plaintiff's claims must be dismissed due to his actions being privileged under the VTL.

Additionally, defendant submits that he has have established his *prima facie* entitlement to judgment as a matter of law as there are no material issues of fact with regard to Officer Falcone's alleged reckless disregard for public safety as he was on duty in a marked patrol car when he received a radio call, which is corroborated by other evidence in the record. Defendant contends that his response to the radio call formed the basis for his lawful engagement in an emergency operation and that he activated his lights and sirens before the accident occurred.

Furthermore, defendant submits that the relevant inquiry here is whether he as a police officer took sufficient precautionary measures under the circumstances presented to avoid injury to the public citing *Khalique v City of NY*, 2019 NY Slip Op 33874 (U) Sup Ct. Queens Cty 2019. Defendant contends that the record unequivocally shows that he

¹ Se Defendant's Exhibits filed to NYSCEF as Doc. No. 29-43

took sufficient precautionary measures under the circumstances presented as he activated his emergency lights and sirens and slowed down his vehicle's rate of speed as he passed through the intersection.

In the event the Court does not dismiss the complaint on liability grounds, defendant also moves to dismiss the Complaint on the ground plaintiff did not sustain a serious injury as defined in §5102(d) of the Insurance Law of the State of New York.

In opposition, plaintiff relies upon, *inter alia*, the complaint, the report of Dr. Gerald Gaughan, M.D. and MRI reports of plaintiff's lumbar and cervical spine². As to liability, plaintiff contends that Officer Falcone acted in reckless disregard for the safety of others when he drove through a red light in front of a stopped vehicle, which blocked his view and the view of oncoming traffic, without making sure that no other vehicles were coming. Plaintiff submits that Officer Falcone's actions were unsafe and careless and demonstrate both an unreasonable risk and a reckless disregard for the safety of others traveling in the area. Also, plaintiff submits that Officer Falcone turned off the "welp" siren as he was passing through the intersection, and plaintiff could not see Officer Falcone's vehicle approaching as a large black SUV was blocking both Officer Falcone's vision and plaintiff's vision. Therefore, plaintiff maintains that Officer Falcone's actions in driving through a red traffic light without his siren activated and without ensuring there were no other vehicles entering this busy intersection constituted a reckless disregard of the standard of care set forth in VTL §1104.

As to plaintiff's injuries, plaintiff asserts she sustained a serious injury. Furthermore, plaintiff argues that defendant has not made a *prima facie* showing that defendant did not sustain a serious injury as Dr. Walsh's findings in his IME report are implausible and plaintiff's MRI reports do not note any degenerative changes. Plaintiff refers to the report of Dr. Gerald Gaughan, M.D., her treating physician who found plaintiff to have sustained a loss of range of motion in her spine which has affected her ability to bend, lift, sit, stand and walk which persists.

In reply, defendant asserts, *inter alia*, that plaintiff has not created any issue of fact which would warrant denial of his motion for summary judgment. Defendant submits that as his vehicle approached and entered the intersection, he slowed down his rate of speed and activated both his siren and emergency lights. Also, defendant submits that the narrative report of Dr. Gaughan should not be considered by the Court as it was not produced before plaintiff filed opposition to the instant motion.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (*See Winegrad v New York Univ Med Ctr*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). "Once this showing has been made ... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form

² See plaintiffs' Exhibits filed to NYSCEF as Doc. No. 50-53.

sufficient to establish the existence of material issues of fact which require a trial of the action" See *Zuckerman v. City of New York*, 49 NY2d 557 [1980]. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a *prima facie* showing of entitlement to summary judgment See *Zuckerman v New York*, 49 NY2d 557 at 562.

"The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see *Dykeman v Heht*, 52 AD3d 767, 768 [2d Dept 2008]). Additionally, in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant (see *Pearson v Dix McBride*, 63 AD3d 895 [2d Dep't 2009]; *Brown v Outback Steakhouse*, 39 AD3d 450, 451 [2d Dept 2007]).

Notably, as the court's function is issue finding, not issue determination the court may not attempt to determine questions of credibility. See *SJ Capelin Assoc v Globe*, 34 N.Y.2d 338 [1974]. Questions of credibility, accuracy of witnesses and reconciling the testimony of witnesses are for the trier of fact to determine. See *Republic Long Island, Inc v Andrew J Vanacore, Inc*, 29 AD3d 66 [2d Dept 2006]; See also, *Harty v Kornish Distributors, Inc*, 119 AD2d 729 [2d Dept. 1986].

A review of the deposition testimony of the parties and the surveillance video alone demonstrate the existence of material issues of fact and credibility which require a trial of this action. See *Zuckerman v City of New York*, 49 NY2d 557 [1980]. Knowing that "(t)he manner in which a police officer operates his or her vehicle in an emergency situation may not form the basis for civil liability to an injured third party unless the officer acted with reckless disregard for the safety of others (See Vehicle and Traffic Law §1104; See also *Baker v City of White Plains*, 169 AD3d 980 [2d Dept 2019] and the cases cited therein), the Court finds questions of fact exist as to, *inter alia*, whether Officer Falcone acted with reckless disregard for the safety of others. While Officer Falcone argues he activated his emergency light and siren as he approached the intersection, the dash-cam video shows that the "welp" siren was not on right before impact and Officer Falcone admitted he turned it off. This creates a material issue of fact to be resolved by a jury.

As to that branch of defendant's motion which seeks to dismiss the complaint based upon threshold, New York Insurance Law §5102(d) defines "serious injury" as "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."

In support of his motion, defendant established entitlement to summary judgment as a matter of law by demonstrating that plaintiff did not sustain a “serious injury” under any definition of the Insurance Law. See Insurance Law §5102[d]. That showing shifted the burden to plaintiff to demonstrate the existence of an issue of fact requiring a trial as to the extent of plaintiff’s injuries. See *Gaddy v Eyer*, 79 N.Y.2d 955,956-957 [1992]. The court finds that plaintiff raised issues of fact in opposition as to whether she sustained a serious injury pursuant to Insurance Law § 5102(d), as a result of the subject accident. See *Yu Feng Jiang v Francois*, 177 AD3d 826 [2d Dept 2019].

The conflicting medical reports of the parties’ respective medical experts raise triable issues of fact as to whether plaintiff sustained serious injuries within the meaning of Insurance Law § 5102 (d). See *Perl v Meher*, 18 NY3d 208, 960 N.E.2d 424 [2011]; *Garcia v Long Is MTA*, 2 AD3d 675 [2d Dept 2003]; *Kraemer v Henning*, 237 AD2d 492 [2d Dept 1997]. The report of Dr. Gaughan contains his medical findings as to *inter alia*, causation and plaintiff’s limitations, which were based upon his own examinations, tests, observations and not simply on subjective complaints from plaintiff. See *Vlachos v New York City Tr Auth*, 139 AD3d 938 [2d Dept 2016]. It is well-settled that conflicting expert medical opinions lie within the province of a jury. See *Moreno v Chemtob*, 271 AD2d 585 [2d Dept 2000].

While defendant argues that plaintiff should not be permitted to rely on Dr. Gaughan’s report in opposition, the Court finds that plaintiff’s failure to exchange this report earlier is not fatal to her opposition. The Court finds that defendant was aware that Dr. Gaughan was plaintiff’s treating medical provider for this accident, which is demonstrated by the fact that defendant used plaintiff’s records from Doctors United in support of his motion, which contain a report from Dr. Gaughan. See *Logan v Roman*, 58 AD3d 810 [2d Dept. 2009]; CPLR §3101(d).

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this Court, notwithstanding the specific absence of reference thereto.

Accordingly, it is hereby

ORDERED that defendant’s motion for summary judgment seeking dismissal of the complaint is DENIED; and it is further

The parties are directed to appear for a Settlement Conference in Courtroom 102 of the Westchester County Courthouse on December 5, 2023 at 10:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
November 3, 2023


HON. WILLIAM J. GIACOMO, J.S.C.