

Kattu v Lizarraga
2023 NY Slip Op 35235(U)
October 16, 2023
Supreme Court, Queens County
Docket Number: Index No. 707408/2018
Judge: Lance Evans
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LANCE EVANS
Justice

IA Part 5, 32

KULWINDERA KATTU, x

Plaintiff.

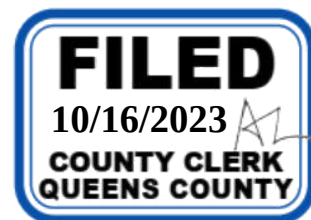
Index 707408 2018
Motion Seq. Nos. 5, 6

-against-

ANDREA LIZARRAGA, DAVID LIZARRAGA
and SANDY BESELINOFF,

Defendants.

x



The following electronically filed (EF) papers read on the motions by defendants Andrea Lizarraga and David Lizarraga for summary judgment on the issue of liability and by defendant Sandy Beselinoff for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102 (d).

Papers
Numbered

Notice of Motion (Seq. No. 5) – Affidavits – Exhibits EF 69 – 78
Notice of Motion (Seq. No. 6) – Affidavits – Exhibits EF 79 – 88
Answering Affidavits – Exhibits EF 91– 100
Reply Affidavit EF 101

Upon the foregoing papers, it is ordered that the motions are consolidated for disposition and are decided as follows:

This is an action to recover damages for personal injuries that plaintiff allegedly sustained as a result of a three-vehicle, chain-collision accident that occurred on January 31, 2017 in the County of Queens. Plaintiff's verified bill of particulars alleges that she sustained injuries to her cervical and lumbosacral spine and right shoulder, and that she

sustained medically-determined injuries or impairments of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary activities for not less than 90 days during the 180 days immediately following the subject accident.

The court will first address defendant Beselinoff's motion. It is defendant's burden to establish that plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102 (d). (*See Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345 [2002]; *Christian v My Car Auto Transp., Inc.*, 219 AD3d 796, 797 [2d Dept 2023].) In support of his motion, defendant Beselinoff submitted a copy of the pleadings, plaintiff's verified bill of particulars, plaintiff's deposition testimony and the affirmed reports of Dr. Edward A. Toriello, an orthopedist, and Dr. Marianna Golden, a neurologist.

Defendant Beselinoff failed to meet his prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident, since his experts' conflicting reports raise triable issues of fact. (*See Christian v My Car Auto Transp., Inc.*, 219 AD3d at 797; *Almady v Martinez*, 208 AD3d 545, 546 [2d Dept 2022].) Dr. Marianna Golden concluded after objective testing that plaintiff had normal range of motion in her cervical and lumbosacral spine. However, Dr. Toriello's testing revealed that plaintiff demonstrated significant limitations in the range of motion of her cervical spine. (*See Matveieva v Metro. Transportation Auth.*, 212 AD3d 726, 726 [2d Dept 2023]; *Curiale v Delfavero*, 211 AD3d 905, 906 [2d Dept 2022].) While Dr. Toriello opined that range-of-motion testing is subjective and under the voluntary control of the individual being tested, he failed to explain or substantiate with any objective medical evidence that the limitations noted were self-imposed. (*See Augustus v Negron*, 210 AD3d 735, 736 [2d Dept 2022]; *Bouzas v Schroeder*, 205 AD3d 993, 994 [2d Dept 2022].) Thus, his findings and conclusions failed to establish that the limitations in plaintiff's cervical spine were not caused by the subject accident. (*See Mahler v Lewis*, 210 AD3d 673, 674 [2d Dept 2022].)

Since defendant Beselinoff failed to meet his prima facie burden, it is not necessary to determine whether plaintiff's other claimed injuries meet the threshold. (*See Navarro v Afifi*, 138 AD3d 803 [2d Dept 2016]; *Uribe v Jimenez*, 133 AD3d 844 [2d Dept 2015]; *Rivera v Ramos*, 132 AD3d 655 [2d Dept 2015].)

It is also not necessary to determine whether the submissions by plaintiff in opposition were sufficient to raise a triable issue of fact as to whether she sustained a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the accident. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Bouzas v Schroeder*, 205 AD3d 993, 994 [2d Dept 2022]; *Kumar v Water Auth. of Nassau*, 200 AD3d 668 [2d Dept 2021]; *McGee v Bronner*, 188 AD3d 1033, 1034 [2d Dept 2020].)

Next, the court will turn to the motion by defendants Andrea and David Lizarraga (hereinafter the Lizarraga defendants) on the issue of liability. “The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.” (Vehicle and Traffic Law § 1129 [a].) “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, 771 [2d Dept 2020].) “In chain collision accidents, the operator of the middle vehicle may establish prima facie entitlement to judgment as a matter of law by demonstrating that the middle vehicle was struck from behind by the rear vehicle and propelled into the lead vehicle.” (*Skura v Wojtowski*, 165 AD3d 1196, 1198-99 [2d Dept 2018], quoting *Kuris v El Sol Contr. and Const. Corp.*, 116 AD3d 675, 676 [2d Dept 2014].)

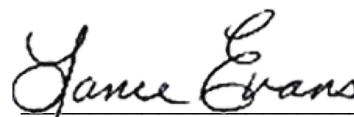
Here, the Lizarraga defendants failed to make a prima facie showing of their entitlement to judgment as a matter of law on the issue of liability. David Lizarraga’s deposition testimony indicated that he was traveling on 83rd Street and the traffic light at the 32nd Avenue intersection was green. He testified that the accident occurred when plaintiff’s vehicle in front of him came to an abrupt stop and he applied his brakes, but his vehicle was struck in the rear by another vehicle and the impact caused his vehicle to propel forward into plaintiff’s vehicle.

The Lizarraga defendants’ submissions also included a transcript of plaintiff’s deposition testimony, which set forth a conflicting account of how the accident occurred. Plaintiff testified that at the time of the accident, she was stopped at a red light for about ten seconds with one car in front of her. She felt a heavy impact to her rear and the impact propelled her vehicle into the vehicle in front of her. The conflicting deposition testimony of the parties raises a triable issue of fact as to whether David Lizarraga contributed to the accident by failing to leave a reasonable safe distance between his vehicle and plaintiff’s vehicle. (See *Marcellin v Passaro*, 118 AD3d 758, 759 [2d Dept 2014].)

Since the Lizarraga defendants failed to meet their prima facie burden, summary judgment is denied without regard to the sufficiency of the opposition papers. (See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *Georgiadis v Feder*, 210 AD3d 954, 956 [2d Dept 2022].)

Accordingly, it is Ordered that the motion by the Lizarraga defendants for summary judgment on the issue of liability is denied. It is Ordered that the motion by defendant Beselinoff for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102 (d) is also denied. It is further Ordered that any application for reconsideration, reargument or renewal shall be only by Order to Show Cause returnable to the assigned Justice.

Dated: October 16, 2023



LANCE EVANS, JSC

