

Dowling v Takvorian

2024 NY Slip Op 34655(U)

November 22, 2024

Supreme Court, Kings County

Docket Number: Index No. 505425/2022

Judge: Lisa S. Ottley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

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LYNETTE DOWLING,

Mot. Seq. # 2

Plaintiff,

Index # 505425/2022

-against-

DECISION AND ORDER

VALENTIN TAKVORIAN, RICHARD MONTI, and
ERIN TORRE,

Defendants.

-----x

HON. LISA S. OTTLEY

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this Notice of Motion for Summary Judgment submitted on June 3, 2024.

Papers	Numbered
Notice of Motion and Affirmation	1&2
Affirmation/Affidavit in Opposition.....	4 [Exh. A-H]
Reply Affirmation in Support of Motion.....	5
Memorandum of Law.....	3[Exh. A-H]

Defendants, Valentin Takvorian, Richard Monti, and Erin Torre (hereinafter, “defendants”) move for an order pursuant to CPLR § 3212 granting summary judgment dismissing the complaint and any and all cross-claims against defendants on the grounds that the emergency doctrine is applicable, and plaintiff has not sustained a serious injury pursuant to Insurance Law § 5102(d). Plaintiff opposes defendants’ motion on the grounds that the defendants have failed to meet their prima facie burden, there are issues of fact which preclude summary judgment from being granted, and the emergency doctrine is inapplicable.

This action was commenced action for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on December 5, 2020, while plaintiff was driving on the Cross Island Expressway in the vicinity of Exit 29 of the Grand Central Parkway in Queens, New York. Plaintiff’s vehicle was struck in the rear by the defendant, Valentin Takvorian, the driver of the vehicle, which is owned by the defendants, Richard Monti and Erin Torre.

After careful review of the moving papers, opposition thereto and reply, the court finds as follows:

Liability

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. See, Grassick v. Hicksville Union Free School District, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996). "Where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action or tender an acceptable excuse for his failure and submission of a hearsay affirmation by counsel alone does not satisfy this requirement." See, Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

The defendants argue that they are entitled to summary judgment under the emergency doctrine since the defendant, Takvorian, was faced with a sudden and unexpected circumstance of plaintiff's vehicle unexpectedly stopping short in front of him after another vehicle stopped short in front of plaintiff's vehicle. In support, the defendants offer the plaintiff's deposition testimony, in which she testified that a vehicle in the left lane crossed over from the left lane all the way to the right lane to use an exit, which caused a vehicle in front of plaintiff's vehicle to stop short. Plaintiff testified that she was initially driving in the right lane but then signaled and moved to the middle lane to avoid the vehicle stopping short in front of her vehicle. The defendants also offer the defendant, Takvorian's deposition testimony, in which he testified that there were no vehicles in front of him as he was merging into the middle lane from the right lane and did not see plaintiff's vehicle prior to the merger and rear-end collision. Defendant, Takvorian, testified he braked and swerved to the left to avoid impact with the plaintiff's vehicle after she unexpectedly stopped short.

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. See, Toala v. EAN Holdings, LLC., 191 A.D.3d 724, 137 N.Y.S.3d 713 (2nd Dept., 2021); Vehicle and Traffic Law §1129[a]. A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision. See, Edgerton v. City of New York, 160 A.D.3d 809, 810, 74 N.Y.S.3d 617 (2nd Dept., 2018).

Under the emergency doctrine, those faced with a sudden and unexpected circumstance, not of their own making, that leaves them with little or no time for reflection or reasonably causes them to be so disturbed that they are compelled to make a quick decision without weighing alternative courses of conduct, may not be negligent if their actions are reasonable and prudent in the context of the emergency. See, Shehab v Powers, 150 A.D.3d 918, 54 N.Y.S.3d 104 (2nd Dept., 2017). In general, however, the emergency doctrine does not apply to typical accidents involving rear-end collisions because trailing drivers are required to leave a reasonable distance between their vehicles and vehicles ahead of them. See, Lowhar-Lewis v Metropolitan Transp. Auth., 97 A.D.3d 728, 948 N.Y.S.2d 667 (2nd Dept., 2012). A trailing driver's conduct in failing to leave reasonable distance creates the possibility that a sudden stop will be necessary. See, Pappas v Opitz, 262 A.D.2d 471, 692 N.Y.S.2d 127 (2nd Dept., 1999).

Here, the court finds that defendants have failed to establish their prima facie entitlement to summary judgment as a matter of law on the issue of liability. The defendant's own submissions regarding the incident demonstrated that defendant, Takvorian, was not reacting to an emergency, but rather to a common traffic occurrence of vehicles stopping short. See, Campanella v Moore, 266 A.D.2d 423, 699 N.Y.S.2d 76 (2nd Dept., 1999). The emergency doctrine is an affirmative defense, applicable to instantaneous occurrences such as an offending vehicle's sudden crossover into the actor's oncoming lane of travel. See, Gonzalez v City of New York, 295 AD2d 122 (1st Dept., 2002). It is typically not available to defendants in rear-end collisions, particularly where, as here, the driver was obligated to maintain a safe rate of speed and a reasonable distance between the vehicles. See, Jacobellis v. New York State Thruway Auth., 51 A.D.3d 976, 858 N.Y.S.2d 786 (2nd Dept., 2008). Therefore, the emergency doctrine is inapplicable. Considering the defendant's failure to meet their initial burden, denial of their motion is required without regard to the sufficiency of the papers submitted in opposition. See, Via v Automated Waste Servs., Inc., 96 A.D.3d 733, 945 N.Y.S.2d 753 (2nd Dept., 2012).

Serious Injury Threshold

The defendants argue that the plaintiff has failed to meet the serious injury threshold and the medical reports submitted in support of the motion for summary judgment, objectively demonstrate a lack of disability or impairment to establish proof of a serious injury, pursuant to CPLR Section 5102(d) of the New York State Insurance Law. Specifically, the defendant argues that the plaintiff's alleged injuries are not permanent, did not result in a significant limitation of use of a body part, and did not prevent the plaintiff from performing substantially all his customary daily activities for the 90 days following the accident in question.

In support of defendants' motion for summary judgment as to permanent loss of use, defendant submitted the independent medical findings of Dr. Dorothy Scarpinato, who concluded upon objective tests and examination of the plaintiff, that her bilateral shoulders were normal and revealed subjective complaints of right shoulder tenderness with no positive objective findings. Defendants also submitted the independent medical findings of Dr. Jeffrey Klein, who concluded upon objective tests and examination of the plaintiff, that any multilevel and degenerative radiographic features and findings existed prior to and were not caused by the accident. As to permanent consequential limitation of use, defendants argue that plaintiff's injuries reveal themselves as nothing more than subjective shoulder pain and degenerative back issues that preexisted the date of the incident and were not caused by the incident. Dr. Scarpinato noted in her report that Dr. Kiernan performed an orthopedic IME on plaintiff on May 2, 2022, and found her bilateral shoulder injuries to be resolved. As to significant limitation of use, defendants argue that plaintiff's treatment has essentially ended, and no medical evidence established any limitation for any specific body areas that plaintiff claimed was injured that would meet the threshold. Lastly, as to plaintiff performing substantially all her customary daily activities for the 90 days following the accident, defendants offer the report of Dr. Scarpinato who found that plaintiff may perform activities of daily living and full-time employment without any restrictions or limitations. Dr. Klein also found that the plaintiff continues to work in the same capacity as prior to the

accident. Defendants argue that plaintiff was confined to the emergency room only on December 6, 2020, and confined to bed and house for 3 days following the accident, according to plaintiff's bill of particulars.

In opposition to the defendants' motion for summary judgment, plaintiff argues that the defendants failed to make out a prima facie case of entitlement to summary judgment. Regarding permanent consequential limitation of use or significant limitation of use, plaintiff argues that Dr. Scarpinato reported normal range of motion in plaintiff's bilateral shoulders, which contradicts the findings of plaintiff's treating doctor, Dr. Gordon Davis, who found restricted range of motion in the bilateral shoulders. Dr. Scarpinato made conclusory statements that plaintiff's bilateral shoulders were resolved without explaining the contradiction between this conclusion and plaintiff's subjective complaints and treatment history. In addition, Dr. Klein made conclusory statements that plaintiff's cervical and lumbar injuries existed prior to the accident without explaining the contradiction between this conclusion and plaintiff's subjective complaints and treatment history. Defendants argue that since Dr. Scarpinato and Dr. Klein's examinations of the plaintiff were performed approximately two years and six months post-accident, they cannot comment on the injuries' severity and cannot make a prima facie showing of lack of a significant limitation of use or 90/180-day claim for the period prior to the examination. Defendants also argue that Dr. Scarpinato and Dr. Klein are silent as to the issue of a 90/180-day claim and do not address plaintiff's activities during the first six months after her accident, aside from discussing her medical treatment. Dr. Scarpinato and Dr. Klein do not discuss the nature and extent of plaintiff's physical limitations at home or in any other sense, and therefore completely leave open the question of whether there exists a viable 90/180-day claim. The defendants submitted no testimony or medical records refuting plaintiff's allegations that she was disabled from performing her usual and customary activities for at least 90 of the first 180 days following the accident.

In the alternative, plaintiff argues that she has raised triable issues of fact as to whether she sustained a serious injury under the permanent consequential limitation of use, significant limitation of use, and 90/180-day claim categories by submitting medical findings, certified medical records, and/or affirmations from Dr. Gordon Davis, Dr. David Stemerman, Dr. Steven Winter, Dr. Ramon Vallarino, Dr. Sebastian Lattuga, and Dr. Howard Baum; medical records from Gordon C. Davis Medical, PC, New York Presbyterian Hospital, Pain Physicians of New York, Island Ambulatory Surgery Center, New York Spine Specialists and Bay Ridge Orthopedic Associates, which address the serious injuries sustained and restrictions and limitations to the plaintiff's cervical spine, lumbar spine, and bilateral shoulders. According to Dr. Davis, the plaintiff has sustained continuing range of motion limitations in the cervical spine, lumbar spine, and bilateral shoulders. The records from New York Presbyterian demonstrate complaints of right shoulder pain the morning after the incident. The radiologist affirmations and MRI studies of Dr. Stemerman and Dr. Winter show evidence of plaintiff's cervical spine, lumbar spine, and bilateral shoulders injuries. The records from New York Presbyterian and New York Spine Specialists indicate a traumatically induced herniation a L4/5/S1, which necessitated a lumbar discectomy performed by Dr. Lattuga on February 15, 2022. The records from Dr. Vallarino indicate a recommendation for cervical fusion and further cervical and lumbar epidural steroid injections. An

electrodiagnostic study performed on January 19, 2021, revealed left L5-S1 lumbosacral radiculopathy. Dr. Baum diagnosed the plaintiff with right shoulder derangement and recommended arthroscopy surgery.

A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. See, *Edwards v. Ali*, 75 Misc.3d 1213(a), 168 N.Y.S.3d 676 (2nd Dept., 2022). Once established, the burden shifts to the plaintiff to come forward with evidence to negate the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. See, *Grossman v. Wright*, 268 A.D.2d 79 (2nd Dept., 2000).

Pursuant to Insurance Law 5102(d), a serious injury is defined 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 or not less than ninety days during the one hundred eighty days immediately following the injury or impairment.

To recover under the permanent consequential loss category, the limitation of use or function needs to be significant or consequential as it relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose, and use of a body part. See, *Como v. Tomasky*, 64 Misc.3d 1224(A), 117 N.Y.S.3d 471 (2nd Dept., 2019) citing, (*Dufel v. Green*, 84 N.Y.2d 795 [1995]). A minor, mild, or slight limitation of use cannot satisfy the meaning of serious injury as defined by 5102(d). To satisfy the definition of serious injury under the 90/180 category a plaintiff must provide competent medical evidence to support their claim that they sustained a medically determined injury of a non-permanent nature which prevented them from performing their usual and customary activities for no less than 90 out of 180 days following the subject accident. See, *Sainte-Aime v. Suwai Ho*, 274 A.D.2d 569 (2nd Dept., 2000).

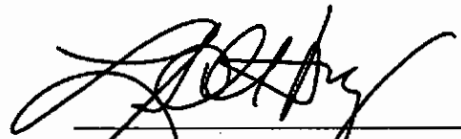
The court finds that the defendants, by submitting sworn reports from their examining doctors who conducted independent medical exams and reviewed plaintiff's MRIs, and using the plaintiffs' deposition testimony, have established a prima facie case that plaintiff did not sustain a serious injury under the categories claimed in plaintiff's Bill of Particulars. The doctors' reports indicate subjective shoulder pain, pre-existing degeneration of the cervical spine and lumbar spine not causally related to the accident, and resolution of plaintiff's injuries. In addition, plaintiff may perform activities of daily living and full-time employment without any restrictions or limitations; plaintiff continues to work in the same capacity as prior to the accident; and plaintiff was confined to the emergency room for one day and confined to bed/house for 3 days following the accident. Once the

defendants established their prima facie case, the burden shifted to the plaintiff to come forward with evidence in admissible form to raise a triable issue of fact as to a serious injury as defined by Insurance Law §5102(d). See, *Gaddy v. Eyler*, 79 N.Y.2d 955 (1992). Here, plaintiff's opposition consisted of evidentiary proof and objective findings sufficient to raise triable issues of fact. Therefore, considering the conflicting expert opinions, the court finds that triable issues of fact have been raised, which preclude summary judgment from being granted. See, *Wilcoxon v Palladino*, 122 A.D.3d 727, 996 N.Y.S.2d 191 (2nd Dept., 2014).

Accordingly, defendants' motion for summary judgment is hereby denied in its entirety.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
November 22, 2024



HON. LISA S. OTTLEY, J.S.C.
HON. LISA S. OTTLEY

KINGS COUNTY CLERK
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