

Bertuglia v Cascio
2024 NY Slip Op 35520(U)
March 1, 2024
Supreme Court, Nassau County
Docket Number: Index No. 610012/2021
Judge: Vito M. DeStefano
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,

Justice

TRIAL/JAS, PART 3
NASSAU COUNTY**CHRISTOPHER BERTUGLIA, ASHLEY
BERTUGLIA and NICHOLAS BERTUGLIA,**

Plaintiffs,

Decision and Order

MOTION SEQUENCE: 01, 02

-against-

INDEX NUMBER: 610012/2021

**ANDREW CASCIO, JOHN CASCIO, DONALD
FLORES, JEREMY FELDSCHUH and
MITCHELL FELDSCHUH,**

Defendants.

The following papers and the attachments and exhibits thereto have been read on these motions:

Notice of Motion Sequence No.: 01

Affirmation in Support	1
Statement of Material Facts	2
Affirmation in Opposition	3
Response to Defendant's Statement of Material Facts	4
Affirmation in Reply	5

Notice of Motion Sequence No. 02

Affirmation in Support	1
Statement of Material Facts	2
Affirmation in Opposition	3
Counter-Statement of Material Facts	4
Affirmation in Reply	5

The Defendants Andrew Cascio and John Cascio move (Seq.01) for an Order pursuant to CPLR 3212 and Article 51 of the Insurance Law of the State of New York granting summary judgment dismissing the complaint; Plaintiffs move (Seq.02) for partial summary judgment on the issue of liability against Defendants Andrew Cascio and John Cascio.

Facts

The instant action involves a collision between four motor vehicles occurring on July 25, 2019, in the Town of Oyster Bay, Nassau County, New York, on the Seaford Oyster Bay Expressway (a/k/a "Route 135"). Specifically, Plaintiffs claim that the motor vehicle operated by Defendant Andrew Cascio struck the rear of a motor vehicle owned and operated by Defendant Donald Flores and that as a result of that impact, Flores' vehicle struck the rear of the motor vehicle operated by Defendant Jeremy Feldschuh. Feldschuh's vehicle then struck the rear of the motor vehicle owned and operated by Plaintiff Christopher Bertuglia. At his deposition, Defendant Andrew Cascio admitted to falling asleep just prior to the accident happening and when the accident occurred.

Plaintiff Christopher Bertuglia alleges in his Bill of Particulars that as a result of the accident, he suffered serious personal injuries to his right knee, including clicking, swelling, stiffness, post-traumatic chondromalacia patella, post-traumatic chondral fracture of the patella, and post-traumatic patellofemoral osteoarthritis. He claims the following categories of serious injury under Insurance Law § 5102(d): permanent consequential limitation of loss of use of a body organ, member; a fracture; significant limitation of use of a body function or system, and 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 (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment ("90/180-day"). Plaintiff Ashley Bertuglia claims loss of services as a result of the injuries to her husband.

Plaintiff Nicholas Bertuglia discontinued the action against Defendants Andrew Cascio and John Cascio only, pursuant to a Partial Stipulation of Discontinuance dated October 24, 2023.

The Court's Determination

Defendants' Motion for Summary Judgment (Seq. 01)

Defendants Andrew Cascio and John Cascio seek summary judgment pursuant to CPLR 3212, dismissing the complaint of Plaintiffs, on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102(d), and therefore, the claim for personal injuries and the derivative claim by Plaintiff Ashley Bertuglia, for loss of services of her husband Christopher Bertuglia, are barred by Insurance Law § 5104(a).

Serious injury is a threshold issue, and thus, a necessary element of a plaintiff's *prima facie* case (Insurance Law 5104[a]). The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the Court, which may be decided on a motion for summary judgment.

Within the context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears the specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Insurance Law § 5102(d). A defendant can satisfy the initial

burden by relying on the sworn or affirmed statements of their own examining physician, plaintiff's sworn testimony, or plaintiff's unsworn physician's records (*McGovern v Walls*, 201 AD2d 628 [2d Dept 1994]). Defendant's medical expert(s) must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the body part under evaluation (*Black v Robinson*, 305 AD2d 438 [2d Dept 2003]; *Minlionic v Shahabi*, 296 AD2d 569 [2d Dept 2002]). The burden then shifts to plaintiff to set forth sufficient evidence demonstrating that he/she sustained a serious injury within the meaning of the statute (*Pommels v Perez*, 4 NY3d 566 [2005]).

In support of their position, Defendants submit, *inter alia*, a sworn report from expert radiologist Dr. Alan Greenfield, dated April 23, 2023, and a sworn report from expert orthopedist, Dr. Dorothy Scarpinato, dated May 18, 2023. Defendants also refer to the unsworn report of Plaintiff's orthopedist, Dr. Jonathan Mallen, who examined Christopher Bertuglia on February 6, 2020, as well as Plaintiff's unsworn right knee MRI studies dated September 20, 2019, and February 13, 2020, to support their position.

The reports of Dr. Alan Greenfield, Dr. Dorothy Scarpinato, and Dr. Jonathan Mallen all fail to indicate whether the Plaintiff's MRI films were reviewed in preparation of their findings and reports. Therefore, it is not readily apparent whether Dr. Greenfield, Dr. Scarpinato or Dr. Mallen solely relied on the unsworn MRI reports in reaching their respective conclusions, which raises a question of fact (*See, Friedman v U-Haul Truck Rental*, 216 AD2d 266 [2d Dept 1995] [reliance upon an unsworn MRI report without reviewing the actual MRI films is insufficient]). In addition to the above, the statements contained in the reports of Dr. Mallen and Dr. Scarpinato demonstrate the existence of issues of fact, further rendering the reports insufficient to summarily dismiss Plaintiff's claims. Specifically, Dr. Mallen states, *inter alia*, that "[s]ymptoms not well explained from prev MRI. pt now 7 mons from MVA without meaningful improvement. Discussed possible missed pathology on MRI - rec comparison MRI." Separately, Dr. Scarpinato's report states, *inter alia*, that "[i]f the history provided is accurate and based on the medical records provided and my examination performed today, there is a causal relationship between the claimant's initial complaints and the accident of record." As such, the aforementioned reports are insufficient to summarily establish that Christopher's injuries relating to his right knee do not constitute a "serious injury" within the meaning of the insurance law.

The Defendants have failed to proffer sufficient evidence that Plaintiff's injuries are not a fracture, permanent consequential limitation of use or significant limitation of use of a body function as enumerated in Insurance Law § 5102(d). This Court finds that Defendants have not met their *prima facie* burden of establishing that Plaintiff Christopher Bertuglia did not sustain a "serious injury." As such, Defendants' motion for summary judgment regarding fracture, permanent consequential limitation of use and significant limitation of use of a body function is denied.

Based upon the insufficiency of Defendant's *prima facie* proof, this Court need not determine whether the papers submitted by Plaintiff were sufficient to raise a triable issue of fact in this respect

(*Ciuffo v Testa*, 118 AD3d 737 [2d Dept 2014]).

Defendants further argue that Plaintiff's deposition transcript establishes that he did not sustain an injury that presented him from performing substantially all of his customary daily activities for at least 90 days of the 180 days immediately after the accident ("90/180 day"). Christopher testified, *inter alia*, that he was confined to bed for one (1) week after the accident and thereafter resumed his same duties and position upon his return to work. (*see Dae Kyoo Kim v Lemon Transp. Corp.*, 156 AD3d 757 [2d Dept 2017]; *John v Linden*, 124 AD3d 598 [2d Dept 2015]). Therefore, Defendants have met their *prima facie* burden as to whether Plaintiff suffered permanent loss of use and permanent consequential limitation of use and impairment of 90/180 days.

The burden then shifts to Plaintiff to raise a triable issue of fact to defeat summary judgment on the claims of permanency and impairment of 90 out of 180 days. (Insurance Law 5102[d]). Plaintiff failed to submit the required admissible competent medical evidence to establish that he has been "curtailed from performing his usual activities to a great extent." (*Lanzarone v Goldman*, 80 AD2d 667 [2d Dept 2011]). The opposition papers of Plaintiffs are devoid of any argument to the contrary, or contemporaneous medical evidence to support Plaintiffs' claim that he was unable to perform substantially all of his daily activities for not less than 90 of the 180 days immediately following the accident that was caused by said accident. Plaintiffs failed to raise a triable issue of fact as to the 90/180-day category since the records and deposition testimony do not indicate that Christopher Bertuglia was prevented from performing "substantially all" of his usual and customary activities for the requisite period (*see, John v Linden*, 124 AD3d at 599). For these reasons, Defendants' motion for summary judgment regarding the 90/180 day category is granted.

In view of the foregoing, the branch of the motion to dismiss Ashley Bertuglia's derivative claim is denied.

Plaintiffs' Motion for Partial Summary Judgment on Liability (Seq. 02)

Plaintiffs seek partial summary judgment pursuant to CPLR 3212, on the issue of liability against Defendants Andrew Cascio and John Cascio. Plaintiffs claim that the vehicle driven by Defendant Andrew Cascio was traveling too close to the first vehicle that he struck, in violation of Vehicle and Traffic Law 1129(a), thereby causing a "chain-reaction" collision. Plaintiffs further claim that since Defendant Andrew Cascio admitted that the accident occurred when he fell asleep while driving, they are entitled to judgment as a matter of law as it relates to liability only.

Drivers have "a duty to be aware of traffic conditions, including vehicle stoppages" (*Johnson v Phillips*, 261 AD2d 269, citing *Sass v Ambu Trans, Inc.*, 238 AD2d 570 [2d Dept 1997]; VTL 1129). The rule been applied even where the front vehicle stops suddenly (*See, Mascitti v Greene*, 250 AD2d 821 [2d Dept 1998]; *Barba v Best Sec. Corp.*, 235 AD2d 381 (2d Dept 1997); *Leal v Wolff*, 244 AD2d [2d Dept 1996]). Further, "drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*Johnson v Phillips*, 261 AD2d 269 [1st Dept 1999]). When a driver collides with another vehicle that is stopped in traffic, the "rear-end collision creates a *prima facie* case of liability" against the driver. (*Crisano v Comp.*

Tools Corp., 295 AD2d 393, 393 [2d Dept 2002]). Moreover, in a chain-reaction collision, responsibility presumptively rests with the rearmost driver (*Mustafaj v Driscoll*, 5 AD3d 138 [1st Dept 2004]; see also *Ferguson v Honda Lease Trust*, 34 AD3d 356, 357 [1st Dept 2006]). To rebut the presumption, the driver must then “provid[e] some non-negligent explanation for the collision.” (Id.)

The plaintiffs’ submissions establish entitlement to judgment as a matter of law on the issue of liability.

Defendants Andrew Cascio and John Cascio failed to raise an issue of material fact to preclude partial summary judgment on liability. Defendants do not offer any admissible evidence to contradict Plaintiffs’ version of events nor any non-negligent excuse for the accident. Further, Defendants failed to submit any admissible evidence that Plaintiffs could have avoided the accident or were negligent in any way. Accordingly, Plaintiffs motion for partial summary judgment on the issue of liability is granted.

Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiffs’ motion for partial summary judgment on the issue of liability (Seq. 02) is GRANTED; and it is further

ORDERED, that Defendants’ motion for summary judgment (Seq. 01) is GRANTED IN PART, to the extent that the Plaintiffs’ claim based on the 90/180 day threshold category, is dismissed, and the motion is DENIED in all other respects; and it is further

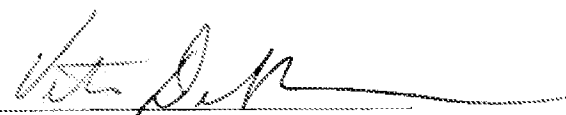
ORDERED, that all requests for relief not addressed herein are denied; and it is further

ORDERED, that this matter shall proceed to DCM for a pre-trial conference on the issue of damages on April 9, 2024, subject to the discretion of the judge presiding in DCM.

ORDERED, that Plaintiffs are directed to serve a copy of this Order with notice upon all parties within thirty (30) days from its date of entry.

This constitutes the decision and order of the court.

Dated: March 1, 2024



Hon. Vito M. DeStefano, J.S.C.

ENTERED

Mar 05 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE