Shapiro v Mehta
2012 NY Slip Op 30543(U)
February 16, 2012
Supreme Court, Suffolk County
Docket Number: 09-25895
Judge: Peter H. Mayer
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SHORT FORM ORDER

INDEX No. 09-25895
CAL No. 11-01289MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 8-30-11
ADJ. DATE 11-21-11
Mot. Seq. # 006 - XMotD
007 - MD

COPY

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LINDA SHAPIRO and SCOTT SHAPIRO,

Plaintiffs,

- against -

FAROKH MEHTA and ANN M. MEHTA,

Defendants.

---X

ELAN WURTZEL, ESQ.
Attorney for Plaintiffs
527 Old Country Road
Plainview, New York 11803

NICOLINI, PARADISE, FERRETTI & SABELLA, PLLC
Attorney for Defendants
114 Old Country Road, Suite 500
Mineola, New York 11501

MARTIN FALLON & MULLE
Attorney for Plaintiff on Counter Claim Scott Shapiro
100 East Carver Street
Huntington, New York 11743

Upon the reading and filing of the following papers in this matter: (1) Notice of Cross Motion (006) by the defendants Mehta Cooling dated July 19, 2011, and supporting papers numbered 1-9; Notice of Motion (007) by defendants Mehta dated July 13, 2011 and supporting papers numbered 10-19; Opposition by affidavit of plaintiff Linda Shapiro dated October 31, 2011 and supporting papers numbered 20(~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED; that motion (006), Scott Shapiro as plaintiff on the counterclaim, pursuant to CPLR 3212, seeks summary judgment dismissing the defendants' counterclaim on the basis that he bears no liability for the occurrence of the accident, or, alternatively, for summary judgment dismissing the complaint on the basis that the plaintiff, Linda Shapiro, has not sustained a serious injury as defined by Insurance Law § 5102(d), is granted on the issue of liability and the defendant's counterclaim for contribution and apportionment of damages is dismissed, but is otherwise denied as to the issue of serious injury; and it is further

ORDERED that motion that motion (007) by the defendants Farokh Mehta and Ann Mehta pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Linda Shapiro, has not sustained a serious injury as defined by Insurance Law § 5102(d) is denied; and it is further

ORDERED that the Mehta defendants are directed to serve a copy of this order with notice of entry, within thirty days of the date of this order, upon the plaintiffs and the Clerk of the Calendar Department, Supreme Court, Riverhead, New York, and said Clerk is directed to set this matter down for a trial on damages forthwith.

This negligence action arises out of a motor vehicle accident which occurred on June 22, 2008, when the vehicle in which Linda Shapiro was a passenger, and which was operated by her husband, Scott Shapiro, was struck in the rear at the intersection of Express Drive South in Huntington, New York, by the vehicle operated by Ann Mehta and owned by Farokh Mehta. Damages are sought by Linda Shapiro personally, and by Scott Shapiro derivatively, for the injuries claimed to have been sustained by Linda Shapiro in this accident.

By way of her bill of particulars, Linda Shapiro alleges that as a result of the accident, she was caused to sustain injuries consisting of post-traumatic impingement syndrome of the right shoulder and right supraspinatus musculature with loss of range of motion; sprain and strain of the right shoulder; rotator cuff injury to the right shoulder; bursitis of the right shoulder, right scapula and right suprachromial bursa; tendonitis of the right shoulder with pain radiating down the arm; and the need for surgery to the right shoulder.

In motion (006), the plaintiff on the counterclaim, Scott Shapiro, seeks summary dismissal of the counterclaim asserted by the defendants for contribution and apportionment of liability on the basis that he bears no liability for the occurrence of this accident, and further seeks summary judgment dismissing the complaint on the basis that Linda Shapiro did not sustain a serious injury as defined by Insurance Law §5102 (d).[1] Scott Shapiro, by counsel, incorporates by reference, the arguments asserted by John R. Ferretti submitted with motion (007), and those exhibits annexed thereto.

In motion (007), the defendants seek summary judgment dismissing the complaint on the basis that the plaintiff, Linda Shapiro, did not sustain a serious injury as set forth in Insurance Law §5102 (d).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case ***(Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

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[1] It is noted that by moving to dismiss the complaint on the basis that the plaintiff, Linda Shapiro, has not sustained a serious injury within the meaning of Insurance Law § 5102(d), a conflict is created by counsel on the counterclaim for Scott Shapiro, as Scott Shapiro has asserted a derivative claim on his own behalf in the complaint, and counsel seeks dismissal against his client's interest.

Turning to motion (006), the plaintiff on the counterclaim, Scott Shapiro, seek summary judgment on the issue of liability dismissing the counterclaim for contribution and apportionment of damages as asserted against him, or in the alternative summary judgment dismissing the complaint on the basis that Linda Shapiro has not sustained a serious injury as defined by Insurance Law §5102 (d). In support of motion (006), the plaintiff on the counterclaim has submitted an attorney's affirmation; signed copies of the transcripts of the examinations before trial of Scott Shapiro, Ann Mehta, Linda Shapiro, and copies of the pleadings. Counsel for plaintiff on counterclaim incorporates by reference the attorney's affirmation and exhibits served in motion (007).

The accident occurred on June 22, 2008 at Route 110 and the Long Island Expressway. Scott Shapiro testified that he was operating a 2000 Nissan Pathfinder, traveling in a southerly direction in the left travel lane on Route 110 which had three southbound travel lanes and a left turn lane at that location. There was a traffic signal light which turned red at its intersection with the service road. He brought his vehicle to stop in the left travel lane behind two cars. The traffic light turned green for his travel direction. The two vehicles ahead of him in his left travel lane did not move as there were two cars which came from the service road perpendicular to them blocking the left travel lane. He changed travel lanes about three car lengths from the traffic light and brought his vehicle to a stop in the right hand lane. About three to five seconds later, his vehicle was struck in the rear by the defendant's vehicle. Prior to the impact to the rear of his vehicle, through his rear view mirror, he saw the defendants' vehicle, a blue Ford Explorer, behind him in the left lane, about six or seven or eight cars back. When he began to change lanes, he saw the blue Ford begin to change lanes at the same time.

Ann Mehta testified to the effect that she had been traveling for about two miles in the left travel lane of Route 110 in a southbound direction. As she approached the north service road by Route 110, she observed that the traffic light at the intersection was green. When she first saw the other vehicle involved in the accident, she was in the left lane and the other vehicle was in the left lane ahead of her, with cars in between. The vehicles in front of her in her travel lane put their brake lights on, and came to a "halted position" north of the south service road. She observed the plaintiff's vehicle about three or four vehicles ahead of her, braking in her lane. She waited while two vehicles passed on her right, and looked into her rear view mirror and side view mirrors to check traffic in the middle lane. Once she saw the cars passing to her right had cleared, she pulled into the center lane. She observed the plaintiff's vehicle move from the left lane to the middle lane. She then testified that after she moved into the middle lane from the left lane less than five seconds later, the impact occurred with the plaintiff's vehicle. The left front of her vehicle came into contact with the right rear of the plaintiff's vehicle. She testified that the plaintiff's vehicle had been stopped for a couple of seconds when she hit it. She observed the vehicle in front of the plaintiff's vehicle pull out in front of him into the middle lane, causing the plaintiff to stop his vehicle.

Linda Shapiro testified that she was in the right front passenger seat while her husband, Scott Shapiro, was operating their vehicle. They were traveling southbound on Route 110, described as having three southbound lanes and a left turn lane. They stopped in the left travel lane about six or seven cars back from the eastbound service road. There were cars stopped in the left travel lane behind them while they were stopped. One by one, the vehicles ahead of them in the left lane put their blinkers on and moved over to the center lane. She understood that her husband wanted to move to the right, so she looked in her mirror and to the right and saw no cars coming in the center lane after some cars passed them to the right. Her husband had her blinker on and began to move into the middle lane. They then stopped behind a big black SUV that had pulled out and stopped in front of them in the middle lane. They were stopped for a few seconds prior to the impact. While they were stopped, she looked into her mirror and saw a car coming fast at them from directly behind in the middle lane.

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (***Chepel v Meyers,*** 306 AD2d 235, 762 NYS2d 95 [2003]; ***Power v Hupart,*** 260 AD2d 458, 688 NYS2d 194 [1999]; *see also,* Vehicle and Traffic Law § 1129[a]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, and unavoidable skidding on a wet pavement or some other reasonable excuse (*see,* ***Rainford v Han,*** 18 AD3d 638; 795 NYS2d 645 [2005]; ***Thoman v Rivera***, 16 AD3d 667, 792 NYS2d 558 [2005]; ***Power v Hupart,*** *supra*).

In the instant action, Scott Shapiro has established that his vehicle was struck in the rear by the vehicle operated by defendant Ann Mehta when Scott Shapiro moved from the left to the middle lane and came to a stop when the vehicle in front pulled out in front of his vehicle and came to a stop due to traffic. Although the defendant testified that the plaintiff stopped his vehicle in the middle lane after pulling out from the left lane, this is not a sufficient defense to rebut the presumption of negligence (***Danza v Longieliere,*** 256 Ad2d 434, 681 NYS2d 603 [2d Dept 1998]; ***Mitchell v Gonzales,*** 269 AD2d 250, 703 NYS2d 124 [1st Dept 2000]). Here, defendant Mehta had been stopped, observed the traffic conditions, and was aware that traffic ahead was stopped due to the traffic from the service road. Although the parties had a green light to travel south, the defendant was also aware that cars in front of her in the left travel lane were pulling into the middle lane to get around the stopped traffic ahead. The defendant, instead of yielding to the vehicles ahead, came out behind the vehicles in front of her, and struck the plaintiff's vehicle in the rear. Under the circumstances, it is determined as a matter of law, that the proximate cause of the accident was defendant's failure to keep a safe distance between her vehicle and vehicles in front of her, and the failure to avoid striking the plaintiff's vehicle in the rear when it came to a stop. When the only explanation provided for the accident is that the vehicle in front had stopped suddenly and without warning, as such, the driver's failure to maintain a safe distance between the two vehicles, in the absence of an adequate, nonnegligent explanation, constitutes negligence as a matter of law (***Silberman et al v Surry Cadillac Limousine Service, Inc.*** 109 AD2d 833, 486 NYS2d 357 [2d Dept 1985]; ***Barile v Lazzarini,*** 222 AD2d 635, 635 NYS2d 694 [2d Dept 1995]; ***Brando-Twomey v Richheimer,*** 229 AD2d 554, 646 NYS2d 155 [2d Dept 1996]). A motorist is under a duty to see that which under the facts and circumstances he should have seen by the proper use of his senses (***Lester v Jolicofur***, 120 AD2d 574, 502 NYS2d 61 [2d Dept 1986]). It is determined as a matter of law that the defendant failed to see that which under the facts and circumstances she should have seen with the proper use of her senses (*see,* ***Gerdvil v Tarnowski***, 43 AD2d 995, 842 NYS2d 71 [2d Dept 2007]).

Based upon the foregoing, Scott Shapiro has established prima facie entitlement to summary judgment dismissing the counterclaim on issue of liability. The defendants have not opposed this motion and have failed to raise a factual issue to preclude summary judgment on the issue of liability in Scott Shapiro's favor, and dismissal of the defendants' counterclaim for contribution and apportionment of damages.

Accordingly, motion (006) is granted to the extent that the defendants' counterclaim is dismissed as a matter of law on the basis that Scott Shapiro bears no liability for the occurrence of the accident; and is denied on the issue that the plaintiff, Linda Shapiro, did not sustain a serious injury in light of the decision rendered in motion (007).

In support of motion (007), the defendants have submitted, inter alia, an attorney's affirmation; copies of the pleadings and plaintiff's bill of particulars; signed copies of the transcripts of the examination before trial of

Linda Shapiro dated October 18, 2010 and February 23, 2011; and the sworn reports of Robert Israel, M.D., P.C. dated April 5, 2011 concerning his independent orthopedic examination of the plaintiff, and Melissa SapanCohn, M.D. dated February 13, 2010 concerning her independent radiology review of the plaintiff's MRI of the right shoulder dated November 4, 2008. The defendants have failed to submit to this court, as required by CPLR 3212 (*see*, ***Friends of Animals v Associated Fur Mfrs.***, *supra*; ***Hornbrook v Peak Resorts, Inc.***, 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Thompkins County 2002]), the copies of the medical records and MRI reports upon which the defendants' experts base their opinions, leaving this court to speculate as to the contents of plaintiff's medical records and reports.

Pursuant to Insurance Law § 5102(d), "'[s]erious injury' means 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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

It is determined that the defendants in motion (007) have not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Linda Shapiro did not sustain a serious injury. They failed to support their motion with the medical records upon which their experts base their opinions. Further, the experts' reports raise factual issues which preclude summary judgment. Thus, that part of motion (006) by the plaintiff on the counterclaim, Scott Shapiro, for dismissal of the complaint on the basis that Linda

Shapiro did not sustain a serious injury, must fail as well.

Dr. Israel has set forth in the report concerning his orthopedic examination of the plaintiff, the objective method employed to obtain the range of motion measurements of the plaintiffs' cervical spine and right shoulder by use of a goniometer (*see*, ***Martin v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; ***Vomero v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Supreme Court, Nassau County 2008]), and has compared his findings to the normal ranges of motion for the cervical spine and shoulder. He has found no deficits in range of motion upon examination. Although he reviewed the MRI of the plaintiff's right shoulder conducted on November 4, 2008, he does not indicate if he reviewed the films or the report, and he does not indicate the findings revealed upon his review, leaving this court to speculate as to the same. Although he reviewed the medical records of Kamier Kenneth, M.D., Nathan Jay, M.D., Kula Roger, M.D., and the North Shore University Hospital, the records have not been provided to this court, leaving it to this court to speculate as to the findings and treatment. Opinion evidence must be based on facts in the record and personally known to the witness. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that expert testimony is limited to facts in evidence. (*see*, ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]).

Dr. SapanCohn has not submitted any evidentiary basis for her opinion. Although she concludes that the patient has evidence of degenerative changes, she does not indicate the basis for that opinion, the cause of the degenerative changes, and when the changes began. In addition, she does not state with specificity how her findings are not related to the trauma. She opines that these changes take a long time to develop, but does not indicate what is mean by a long time, in that there was a lapse of five months between the date of the accident and the MRI study. She does not opine as to the causes of the cystic findings and whether or not these findings are inconsistent or consistent with trauma. Additionally, Dr. SapanCohn does not relate her findings to any medical history and clinical presentation by the patient.

The plaintiff testified at her continuing deposition that on the day of the accident, or the day after the accident, she began experiencing pain in her right shoulder and right arm. Prior to the accident, she never experienced any problems with her right arm or right shoulder. On July 10, 2008 following the accident, she presented to Dr. Kula with complaints of nerve pain down her arm to her fingers, pain in her arm, and that she was extremely shaken up and anxious from the accident. She also experienced numbness in her right arm. When her physician sent her for an MRI of her shoulder, she was told that she had a nerve impingement in the right shoulder. She takes Advil for pain in her right arm and shoulder about four times a week and still has tingling in the fingers of her right hand and her right shoulder, and her arm still hurts. As a result of this accident, she has difficulty washing her hair, blow-drying her hair, getting a dish from a cabinet, getting anything off a shelf when out shopping, has difficulty lifting, cannot extend her arm, cannot swing the tennis racquet to hit the ball, and has difficulty vacuuming. She stated that her husband has to empty the dishwasher and clothes dryer for her.

It is noted that the defendant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendant's physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725

[* 7]

NYS2d 433 [3d Dept 2001]; *see*, ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio***, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the experts offer no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). Thus, the defendant has failed to demonstrate entitlement to summary judgment on this category of injury as well.

The factual issues raised in defendant's moving papers preclude summary judgment. The defendant has failed to satisfy his burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see*, ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also*, ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving party has failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see*, ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]), as the burden has not shifted to the plaintiff.

Accordingly, motion (007) by defendants, and that part of motion (006) by the plaintiff on the counterclaim, for summary judgment dismissing the complaint on the basis that the plaintiff did not suffer a serious injury as defined by Insurance Law §5102 (d) is denied.

Dated: 2/16/12

PETER H. MAYER, J.S.C.