

**Halvatssis v AA Truck Renting Corp.**

2012 NY Slip Op 32428(U)

September 20, 2012

Supreme Court, Queens County

Docket Number: 25769/2010

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
Justice

- - - - - x

GLORIA HALVATZIS, Index No.: 25769/2010  
Plaintiff, Motion Date: 06/28/2012  
- against - Motion No.: 21

Motion Seq.: 2

AA TRUCK RENTING CORPORATION and MYER  
WILLIAM,

Defendants.

- - - - - x

The following papers numbered 1 to 17 were read on this motion by defendants, AA TRUCK RENTING CORPORATION and WILLIAM MYER, for an order pursuant to CPLR 3212(b) granting defendants summary judgment and dismissing the plaintiff's complaint on the issue of liability and/or for an order pursuant to CPLR 3212(b) granting summary judgment and dismissing the plaintiff's complaint on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104.;

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 7  
Affirmation in Opposition-Affidavits-Exhibits.....8 - 13  
Reply Affirmation.....14 - 17

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In this negligence action, plaintiff, Gloria Halvatzis s/h/a Gloria Halvatzis, seeks to recover damages for personal injuries she sustained as a result of a motor vehicle accident that occurred on January 25, 2010, between the plaintiff's vehicle and the vehicle owned by defendant AA Truck Renting Corporation and operated by defendant William Myer s/h/a Myer William. The accident took place at the intersection of Woodhaven Boulevard and Jamaica Avenue, Queens County, New York. Plaintiff was allegedly injured as a result of the impact.

Defendants now move for an order granting summary judgment

on the issue of liability, alleging that the plaintiff, who was allegedly stopped at a red light, failed to yield the right of way to defendants' truck which was in the intersection with the green light in its favor and drove her vehicle into the defendants' vehicle precipitating the subject accident. Defendants also move for summary judgment on the issue of damages contending that the plaintiff's injuries do not meet the "serious injury" threshold as set forth in Insurance Law § 5102.

In support of the motion, the defendants submit an affidavit from counsel, Jesse J. Prisco, Esq; a copy of the pleadings; photographs depicting the intersection in question and photographs depicting the damage to the vehicles; copies of the examinations before trial of the plaintiff and defendant William Myer; plaintiff's verified bill of particulars and supplemental bill of particulars; a copy of the affirmed medical report of board certified neurologist Dr. Chandra Sharma; a copy of the affirmed medical report of board certified orthopedist, Dr. Edward J. Toriello; a copy of the police accident report (MV-104); a copy of the MV104 accident report filed by the defendant William Myer; and a 22 page transcription of a recorded sworn statement that eyewitness Rosemary Pagan gave to defendant's investigator, Josh Williams, on January 27, 2010.

In the accident description section of the police report, the officer, who did not witness the accident, describes the accident, based upon statements of the two drivers as follows:

"Driver Veh #2 (defendant) states he was traveling W/B on Jamaica Avenue at Woodhaven Boulevard when Veh #1(plaintiff) who was traveling S/B on Woodhaven Boulevard at Jamaica Avenue collided into his vehicle. Driver veh #1 (plaintiff) states she was traveling S/B on Woodhaven Boulevard going with the green light when Veh #2(defendants) collided into her." The police officer also noted that there was a witness on the scene and provides her name, Rosemary Pagan and her address and phone number.

In her examination before trial taken on May 17, 2011, the plaintiff, Gloria Halvatzis, age 44, testified that she is employed as a registered nurse practitioner for Medysis Clock Tower. As a result of the accident she missed two weeks of work immediately following the accident. She stated that on the date of the accident, January 25, 2010, she was on her way to work in East New York and was traveling south on Wodhaven Boulevard towards Jamaica Avenue. When she arrived at the intersection with Jamaica Avenue she observed that she had a green light in her favor. She entered the intersection, proceeding at a rate of

speed of 15 - 20 miles per hour intending to proceed straight through. As she was in the middle of the intersection, the defendants' truck, which came from her left, struck her vehicle in the front. She stated that upon impact she lost consciousness. She regained consciousness a short time later while still in her vehicle. She left the scene in an ambulance and was transported to the emergency room at Jamaica Hospital.

The plaintiff testified that she was admitted due to severe headache and neck pain and then discharged the following evening. Approximately one week later, the plaintiff sought medical treatment with her neurologist, Dr. Nandakumar. He treated her for severe headache, neck, upper back and left arm pain. She also received physical therapy, chiropractic care and occupational therapy treatments at Millenium Physical Therapy and Sports Medicine. After her no-fault benefits ran out the plaintiff ceased the physical therapy treatments because she did not know if her regular insurance would pay for it. However, she continued treating with Dr. Nandakumar.

Ms. Pagan, age 28, described the two vehicles as a grey Jeep and a white and red milk truck. She was in a vehicle behind the grey vehicle going straight on Woodhaven Boulevard. She stated that the truck was on Jamaica Avenue proceeding from her left to her right. She described the accident as follows: "We was waiting for the light to turn green. And as the light is turning green the truck is coming by. When the truck came by there was a truck on our left side which was on her left side, which was on the Jeep's left side. And that truck saw the other truck coming on Jamaica Avenue, which was a milk truck coming. When the milk truck was coming, the truck had beeped the horn for the Jeep to wait. And the milk truck was going. I think we..the, the head passed us. It passed the Jeep, the head, and then that's when the Jeep went right into the truck, right in the middle of the truck. After she hit the truck her bumper got caught and the truck dragged her vehicle about 2 or 3 feet. She testified that she believed that the other truck that had stopped in the intersection had obstructed the plaintiff's view of what was already in the intersection. She stated that the milk truck had the green light when he entered the intersection but that because he was stuck in the intersection waiting for another truck and other vehicles to move, the light turned again while he was in the intersection.

The defendant William Myer, who was working as a truck driver for Queensborough Farms at the time of the accident, testified at an examination before trial on May 17, 2011. On the date of the accident he was driving a Mack truck owned by AA Trucking delivering milk. His helper Dwight Tracey was a front

seat passenger. He stated that he was traveling westbound on Jamaica Avenue. When he arrived at the intersection of Jamaica Avenue and Woodhaven he stopped at a red traffic signal. He stated that when the light changed to green he moved half way into the intersection but he had to stop in the intersection because a tractor-trailer was jack-knifed in the intersection. After 15 seconds the other truck moved, so defendant starting to move further into the intersection, however, he had to stop again to wait for another vehicle that was making a left turn. After the vehicle made its left turn he began to proceed through the intersection at which time his vehicle was struck by the plaintiff's vehicle. He stated that when he first saw the plaintiff's vehicle it was stopped at the intersection but he then saw her proceed when the light turned green in her favor. He stated that the light changed while he was still in the intersection. He stated that his vehicle hit the plaintiff's vehicle in the front with the side of his truck. Rosemary Pagan, an eyewitness who was in a vehicle behind the plaintiff, told the defendant that she observed the plaintiff's vehicle heading straight into the truck.

In her verified bill of particulars, the plaintiff, states that as a result of the accident she sustained posterior disc bulges impinging on the thecal sac at C3-C4, C4-C5 and C5-C6 and limited range of motion of the cervical spine. In her supplemental bill of particulars she states that on March 17, 2010 she received an injection of lidocaine to alleviate pain.

Defendants' counsel also submits a copy of the affirmed medical report of orthopedist, Dr. Edward J. Toriello who was retained by the defendants to perform an independent medical evaluation of the plaintiff. The plaintiff told Dr. Toriello that she lost two weeks from work as a result of the accident. She presented with neck pain including pain radiating into her right arm. The doctor conducted objective and comparative range of motion testing and found that the plaintiff had no significant limitations of range of motion of the right shoulder, left shoulder, right elbow, left elbow, right wrist and hand and left wrist and hand. However, Dr. Toriello reported significant limitations of range of motion of the plaintiff's cervical spine. He explained that the range of motion examination is a subjective test and under the voluntary control of the individual being tested. He states that the plaintiff revealed evidence of a resolved cervical hyperextension injury.

Dr. Sharma performed an independent neurological examination

on the plaintiff on October 19, 2011. She presented with pain to her neck, upper back and both arms. The doctor found no limitations of range of motion of the lumbar spine but did find a limitation of range of motion of the cervical spine. The doctor stated that the plaintiff sustained cervical and lumbar sprain, resolved and demonstrated a normal neurological examination. She concluded that there will be no permanent neurological problems of a causally related nature.

Defendants' counsel contends that the medical report of Drs. Toriello and Sharma as well as the plaintiff's deposition testimony are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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 opposition to the motion to dismiss plaintiff's complaint on the issue of serious injury, plaintiff submits the affirmed medical report of Dr. Nandakumar who examined the plaintiff eight days after the accident. At that time the doctor found that the plaintiff suffered from neck pain radiating to the left arm in addition to low back pain causally related to the accident. The plaintiff was re-examined by Dr. Avgerinos who submits an affidavit stating that plaintiff exhibited significant limitations of range of motion of the cervical spine which he relates to the subject accident and considers to be permanent in nature. Plaintiff also submits an affirmation from radiologist, Dr. Winter who read the MRI studies of the plaintiff's cervical spine and found that she sustained disc bulges impressing on the thecal sac at C3-4, C4-5 and C5-6.

#### SERIOUS INJURY

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her

allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557[1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

As stated above, the medical report of both the defendants' examining neurologist, Dr. Sharma, and defendants' examining orthopedist, Dr. Toriello, clearly set forth that upon their respective examinations of the plaintiff they each found significant limitations of range of motion of the plaintiff's cervical spine. Neither expert attempted to explain the limitations in range of motion of plaintiff's cervical spine other than to say that the cervical spine injury had resolved. As the independent physicals indicated that the plaintiff has limitations of range of motion post-accident, the defendants have failed to make a prima facie showing that the plaintiff does not have a physical injury as defined in the Insurance Law (see Katanov v County of Nassau, 91 AD3d 723 [2d Dept. 2012]; Astudillo v MV Transp., Inc., 84 AD3d 1289 [2d Dept. 2011]; Artis v Lucas, 84 AD3d 845 [2d Dept. 2011]; Borras v Lewis, 79 AD3d 1084 [2d Dept. 2010]; Smith v Hartman, 73 AD3d 736 [2d Dept. 2010]; Leopold v New York City Tr. Auth., 72 AD3d 906 [2d Dept. 2020]; Catalan v G & A Processing, Inc., 71 AD3d 1071[2d Dept. 2010]; Croyle v Monroe Woodbury Cent. School Dist., 71 AD3d 944 [2d Dept. 2010]; Kim v Orourke, 70 AD3d 995 [2d Dept. 2010]; Kjono v Fenning, 69 AD3d 581[2d Dept. 2010]; Loor v Lozado, 66 AD3d 847 [2d Dept. 2009]). Without an explanation of the limitations in range of motion the Court cannot conclude that there were no abnormal findings in the defendants' reports (see Moore v Stasi, 62 AD3d 764 [2d Dept. 2009]; Marshak v Migliore, 60 AD3d 647 [2d Dept. 2009]).

Thus, the defendants failed to objectively demonstrate that plaintiff did not sustain a serious injury under the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102 (d) (see Aronov v Leybovich, 3 AD3d 511 [2d Dept. 2004]). Therefore, this Court finds that the defendant failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851[1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]).

Since the defendants failed to satisfy their initial burden on their motion, it is not necessary to consider whether the plaintiffs' papers in opposition were sufficient to raise a triable issue of fact (see Perez v Fugon, 52 AD3d 668 [2d Dept. 2008]; Gaccione v Krebs, 53 AD3d 524 [2d Dept. 2008]; Coscia v

938 Trading Corp., 283 AD2d 538 [2d Dept. 2001]).

Therefore, the defendants' motion for an order granting summary judgment dismissing plaintiff's complaint on the ground that the plaintiff did not sustain a serious injury under insurance law § 5102 is denied.

#### LIABILITY

Section 1111(a) (1) of the Vehicle and Traffic Law states:

"1. Traffic, except pedestrians, facing a steady circular green signal may proceed straight through or turn right or left unless a sign at such place prohibits either such turn. Such traffic, including when turning right or left, shall yield the right of way to other traffic lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited."

Thus, § 1111(a) of the Vehicle and Traffic Law permits motorists approaching an intersection with a green traffic signal to proceed through the intersection provided they yield to vehicles lawfully within the intersection and exercise reasonable care under the circumstances (see Nuziale v Paper Transp. of Green Bay Inc., 39 AD3d 833 [2d Dept. 2007]).

Defendants contend that the evidence submitted in support of the motion for summary judgment demonstrates that the defendant lawfully entered the intersection with the green light in his favor. Defendants contend that the cause of the accident was the failure of the plaintiff to yield the right of way to the defendants' truck in the intersection. Counsel contends that the plaintiff was stopped at a red light when the defendant first entered the intersection and when the light turned green in her favor she recklessly proceeded into the intersection without keeping a proper lookout and drove her vehicle directly into the defendants' truck precipitating the subject accident. Defendant contends that he was stuck in the intersection for an extended period of time because a tractor trailer had jack-knifed stopping traffic and he had to stop in the middle of the intersection to wait for the trailer to clear the intersection and then had to wait for another vehicle to make a left turn before he could proceed. Defendant contends that he was proceeding slowly in the intersection and that there was nothing the defendant could do to avoid the accident. Counsel contends that the plaintiff was negligent for violating VTL §§ 1140 and 1142(a) which require vehicles stopped at an intersection to yield the right of way to vehicle already in the intersection (citing Marcel v. Chief Energy Corp., 38 AD3d 502 [2d Dept. 2007]; Gergis v Miccio, 39



AD3d 468 [2d Dept. 2007]).

Defendant contends, therefore, that he is entitled to summary judgment dismissing the plaintiff's complaint because the plaintiff driver was solely responsible for causing the accident while the defendant driver was free from culpable conduct.

In opposition to the motion, plaintiff's counsel, Si Aydiner, Esq., contends that there are triable issues of fact with respect to defendant's negligence in the happening of the accident. Counsel argues that deposition testimony of the parties does not establish the defendant's freedom from culpable conduct. Counsel claims that the defendant's vehicle was required to yield to the plaintiff's vehicle in the intersection. Counsel also contends that there are questions as to whether the defendant was negligent in failing to properly use his senses to see that which he should properly have seen and to try to avoid the accident and whether defendant used reasonable care to avoid the accident.

Defendant's counsel contends that the testimony of the two drivers contains conflicting versions of the accident and raises questions of fact as to liability. Counsel states that the evidence shows that the defendant was aware that his vehicle was still in the intersection when the light changed to green in favor of the plaintiff and yet continued across the intersection and did not attempt to avoid the accident by turning away from the plaintiff's vehicle. Defendant testified that because of the traffic in the intersection he lost sight of the plaintiff's vehicle. Plaintiff's counsel contends therefore, there are issues as to whether the defendant negotiated the intersection properly, whether defendant used reasonable care to avoid the accident.

Upon review of the defendants' motion, the plaintiff's opposition and the defendant's reply thereto this court finds as follows:

The courts have held that a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle in the intersection (see Sirov v Troiano, 66 AD3d 763 [2d Dept. 2009]). Here, the testimony reflects that both vehicles entered the intersection with the green light in their favor. Thus, "under the doctrine of comparative negligence, a driver who lawfully enters an intersection . . . may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection" (see Romano v 202 Corp., 305 AD2d 576 [2d Dept. 2003]).

The driver of the vehicle with the right-of-way, was entitled to assume that the opposing driver will obey the traffic laws requiring her to yield (see Ahern v Lanaia, 85 AD3d 696 [2d Dept. 2011]; Mohammad v Ning, 72 AD3d 913 [2d Dept. 2010]; Loch v Garber, 69 AD3d 814 [2d Dept. 2010]; Yelder v Walters, 64 AD3d 762 [2d Dept. 2009]). However, "a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle already in the intersection" (Todd v Godek, 71 AD3d 872 [2d Dept. 2010]; also see Steiner v Dincesen, 95 AD3d 877 [2d Dept. 2012]; Pollack v Margolin, 84 AD3d 1341 [2d Dept. 2011]). Thus, even though the defendant had the green light in his favor, there is testimony that he observed the plaintiff's vehicle in the intersection prior to the accident. In this regard there is a question of fact as to defendant's actions while in the intersection, if he negotiated the other vehicles properly while in the intersection, if he was negligent in failing to proceed through the intersection in sufficient time, when the defendant first saw plaintiff's vehicle and whether defendant had adequate time to perceive and react to its entry into the intersection (see Bonilla v Gutierrez, 81 AD3d 581 [2d Dept. 2011]). Further the parties provided conflicting versions of the accident as to which vehicle struck the other in the intersection.

Therefore, there is a question of fact as to whether defendant exercised reasonable care when he entered the intersection or if he failed to use reasonable care to avoid a collision with the plaintiff's vehicle which was also in the intersection (see Wilson v Rosedom, 82 AD3d 970 [2d Dept. 2011]; Cox v Weil, 66 AD3d 634 [2d Dept. 2009]; Borukhow v Cuff, 48 AD3d 726 [2d Dept. 2008]). Thus, the defendant's evidentiary submissions did not prove his freedom from negligence as a matter of law, and as such, were insufficient to establish, prima facie, that the plaintiff's actions were the sole proximate cause of the accident or to eliminate all issues regarding the facts surrounding the accident and whether either or both parties were negligent (see Allen v Echols, 88 AD3d 926 [2d Dept. 2011]; Pollack v Margolin, 84 AD3d 1341 [2d Dept. 2011]; Myles v Blain, 81 AD3d 798 [2d Dept. 2011]; Sayed v Aviles, 72 AD3d 1061 [2d Dept. 2010]).

Accordingly, as triable questions exist as to whether both drivers exercised due care as they entered the intersection and, if not, whether such lack of care was a proximate cause of the accident (see Gorham v Methun, 57 AD3d 480 [2d Dept. 2008]), it is hereby

ORDERED, the motion by defendant for summary judgment

dismissing the complaint on the ground of liability is denied,  
and it is further,

ORDERED, that the motion by defendant to dismiss the  
plaintiff's complaint on the ground that she did not sustain a  
physical injury as defined in the Insurance Law is denied.

Dated: September 20, 2012  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**