

Ruiz v Stopanio

2012 NY Slip Op 32765(U)

November 1, 2012

Supreme Court, Suffolk County

Docket Number: 10-20519

Judge: Joseph C. Pastorella

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 003 - MD
004 - MD
005 - XMD

-----X		ALBERT ZAFONTE, JR., ESQ.
CHARISSE D. RUIZ, LOUIS RUIZ, Individually	:	Attorney for Plaintiffs
and as f/n/g of ANGELEA RUIZ and ALIVIA	:	215 Uniondale Avenue
RUIZ, infants under the age of 16 years old,	:	Uniondale, New York 11553
	:	
Plaintiffs	:	RUSSO, APOZNANSKI & TAMBASCO
	:	Attorney for Plaintiffs on Counterclaim
	:	87 Merrick Avenue
	:	Westbury, New York 11590
- against -	:	
	:	PICCIANO & SCHAHILL, P.C.
	:	Attorney for Defendant Stopanio
	:	900 Merchants Concourse, Suite 310
	:	Westbury, New York 11590
ANTHONY STOPANIO, GERMAN A. BRETON	:	
and MARIE R. BRETON,	:	NICOLINI, PARADISE, FERRETTI & SABELLA
	:	Attorney for Defendants Breton
Defendants.	:	114 Old Country Road, Suite 500
-----X		Mineola, New York 11501-9006

Upon the following papers numbered 1 to 35 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; 13 - 21; Notice of Cross-Motion and supporting papers 22 - 29; Answering Affidavits and supporting papers 30 - 31; Replying Affidavits and supporting papers 32 - 35; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (# 003) by plaintiff/counterclaim defendant, Charisse Ruiz, the motion (# 004) by defendants German Breton and Marie Breton, and the cross motion (# 005) by defendant Anthony Stopanio are consolidated for purposes of this determination; and it is further

ORDERED that the motion (# 003) by plaintiff/counterclaim defendant, Charisse Ruiz, for an order granting summary judgment dismissing the counterclaims on the issue of liability is denied; and it is further

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ORDERED that the motion (# 004) by defendants German Breton and Marie Breton for an order granting summary judgment dismissing the fourth cause of action, interposed on behalf of plaintiff Angelea Ruiz, on the ground that she did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the cross motion (#005) by defendant Anthony Stopanio for an order granting summary judgment dismissing the fourth cause of action, interposed on behalf of plaintiff Angelea Ruiz, on the ground that she did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is denied.

Plaintiffs commenced this action to recover damages for injuries arising out of a three-car accident which occurred at the intersection of Wading River Road and the south service road of Route 27 in Center Moriches, New York, on November 23, 2009, at approximately 9:00 p.m. It is undisputed that Wading River Road, which is a two-way road, runs north and south, and that the south service road of Route 27 runs east and west. The intersection of Wading River Road and the south service road of Route 27 is controlled by a traffic device. At the time of the accident, plaintiffs Angelea Ruiz and Alivia Ruiz were passengers in a vehicle operated by plaintiff/counterclaim defendant, Charisse Ruiz, who was traveling northbound on Wading River Road. Defendant Anthony Stopanio’s vehicle, which was traveling eastbound on the south service road of Route 27, collided with a vehicle owned by defendant German Breton and operated by defendant Marie Breton, who was traveling southbound on Wading River Road. Plaintiffs allege that, as a result of the collision between the Stopanio vehicle and the Breton vehicle, both vehicles struck the plaintiffs’ vehicle which was stopped at a red light at the subject intersection.

Plaintiff/counterclaim defendant, Charisse Ruiz, moves (# 003) for an order granting summary judgment dismissing all counterclaims asserted by defendants against her on the issue of liability. She alleges that she is not liable for the accident, and that the subject accident was solely the result of the collision between the Stopanio vehicle and the Breton vehicle. In support, Charisse Ruiz submits, *inter alia*, the pleadings, her own deposition transcript, and the transcripts of the deposition testimony given by defendants Anthony Stopanio and Marie Breton.

At her examination before trial, Charisse Ruiz testified to the effect that she had been traveling northbound on Wading River Road, and that she came to a complete stop at a red traffic light at the intersection with the south service road of Route 27. Approximately 15 seconds thereafter, she witnessed the collision between the Stopanio’s vehicle and the Breton’s vehicle which occurred at the intersection. At that time, her vehicle was two or three car lengths away from the collision. She stated that, as a result of the collision, both vehicles struck her vehicle, and she felt more than one impact. As a result of the impacts, her vehicle was moved, but she had no recollection as to what happened thereafter except that the air bags deployed.

At his deposition, defendant Anthony Stopanio testified to the effect that, at the time of the accident, his vehicle was in the right lane of the south service road of Route 27 where it intersected with Wading River Road. Approximately 200 feet away from the intersection, he first observed the green light. After that, he kept the traffic light within his observation, and the light did not change color as he entered the intersection at approximately 30 miles per hour. Approximately 50 feet away from the intersection, he observed the plaintiffs’ stopped vehicle on Wading River Road, facing northbound, and the vehicle was stopped until he entered the intersection. Approximately 20 feet away from the intersection, he first saw the

Breton vehicle traveling southbound on Wading River Road. Two seconds thereafter, his vehicle collided with the vehicle, and his air bags deployed. He temporarily lost consciousness. When he regained consciousness at the scene, he was still in the vehicle which ended up at the southeast corner of the intersection next to a telephone pole. He stated that his vehicle did not come in contact with the plaintiffs' vehicle because he did not feel another impact after the initial collision with the Breton vehicle.

At her deposition, defendant Marie Breton testified to the effect that she had been traveling westbound on Sunrise Highway. When she made a left turn to get onto Wading River Road, she saw the red traffic light at the intersection of Wading River Road and the south service road of Route 27. Traveling southbound on Wading River Road, she observed the light turn from red to green. As she entered the intersection at about 30 to 35 miles per hour, her vehicle collided with the Stopanio's vehicle. Prior to the accident, she did not see the Stopanio vehicle. As a result of the impact, her vehicle spun around several times and came to a stop off the roadway after it traveled approximately 30 yards to her left. She stated that, from the moment of impact with the Stopanio vehicle until the moment it came to a stop, her vehicle did not come in contact with any other vehicle, and that she did not lose consciousness as a result of the impact.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (see, Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223; Andre v Pomeroy, 35 NY2d 361). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (Alvarez v Prospect Hosp., 68 NY2d 320, 324). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853). Further, the credibility of the parties is not an appropriate consideration for the Court (S.J. Capelin Assocs., Inc. v Globe Mfg. Corp., 34 NY2d 338), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (Schaffe v SimmsParris, 82 AD3d 867). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (see, Alvarez v Prospect Hosp., *supra*).

Here, plaintiff/counterclaim defendant, Charisse Ruiz, failed to establish her entitlement to judgment as a matter of law. The deposition testimony of Charisse Ruiz and defendants Anthony Stopanio and Marie Breton conflict as to the happening of the accident (see, Viggiano v Camara, 250 AD2d 836). Several factual issues exist as to how the accident happened including the issue of which defendant may have traversed a red signal, and as to whether the Stopanio vehicle or the Breton vehicle came into contact with the plaintiffs' vehicle (see, Exantus v Town of Ossining, 266 AD2d 502). In view of the foregoing, the motion by plaintiff/counterclaim defendant, Charisse Ruiz, for summary judgment is denied.

Defendants German Breton and Marie Breton move for summary judgment dismissing the fourth cause of action, interposed on behalf of plaintiff Angelea Ruiz, on the ground that she did not sustain a "serious injury" as defined in Insurance Law § 5102 (d).

By their bill of particulars, plaintiffs allege that, as a result of the subject accident, plaintiff Angelea Ruiz sustained serious injuries including bulging discs at C3-C4, C4-C5, and C5-C6; kyphotic cervical curvature; cervical disc displacement; thoracic and lumbar sprain; and numbness.

Insurance Law § 5102 (d) defines “serious injury” as “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 for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

In order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (Oberly v Bangs Ambulance, 96 NY2d 295). 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 a “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 (see, Perl v Meher, 18 NY3d 208). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (Licari v Elliott, 57 NY2d 230).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) (see, Gaddy v Eycler, 79 NY2d 955; Akhtar v Santos, 57 AD3d 593). The defendant may satisfy this burden by submitting the plaintiff’s own deposition testimony and the affirmed medical report of the defendant’s own examining physician (see, Moore v Edison, 25 AD3d 672; Farozes v Kamran, 22 AD3d 458). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see, Winegrad v New York Univ. Med. Ctr., *supra*; Boone v New York City Tr. Auth., 263 AD2d 463).

Here, defendants German Breton and Marie Breton failed to make a prima facie showing that plaintiff Angelea Ruiz did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (see, Reitz v Seagate Trucking, Inc., 71 AD3d 975). They submit, *inter alia*, the pleadings, the bill of particulars, and the unaffirmed medical report dated May 23, 2011 of their examining pediatrician, Dr. Natasha Tellechea. However, the medical report of Dr. Tellechea was without any probative value since it was unaffirmed (see, D’Orsa v Bryan, 83 AD3d 646; Lozusko v Miller, 72 AD3d 908; Choi Ping Wong v Innocent, 54 AD3d 384). In any event, Dr. Tellechea failed to set forth the objective tests that were performed to support her conclusion that plaintiff Angelea Ruiz did not suffer from any limitation of the range of motion in her cervical spine (see, Vazquez v Basso, 27 AD3d 728; Kennedy v Brown, 23 AD3d 625, 805 NYS2d 408 [2d Dept 2005]). Moreover, Dr. Tellechea failed to provide the results of plaintiff Angelea Ruiz’ range of motion testing of the cervical lateral flexion (see, Barrera v MTA Long Island Bus, 52 AD3d 446).

Inasmuch as defendants German Breton and Marie Breton failed to meet their prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiffs in opposition to the moving defendants’ motion for summary judgment were sufficient to raise a triable issue of fact (see, McMillian v

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Naparano, 61 AD3d 943; Yong Deok Lee v Singh, 56 AD3d 662). Accordingly, the motion by defendants German Breton and Marie Breton for summary judgment is denied.

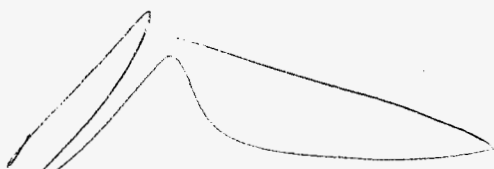
Defendant Anthony Stopanio cross-moves for an order granting summary judgment dismissing the fourth cause of action interposed on behalf of plaintiff Angelea Ruiz, on the ground that she did not sustain a “serious injury” as defined in Insurance Law § 5102 (d).

Here, defendant Stopanio’s cross motion for summary judgment is untimely inasmuch as it was not served within 120 days of the filing of the note of issue on December 1, 2011 (see, CPLR 3212 [a]). Instead, the affirmation of service of the cross motion is dated April 6, 2012, six days after the deadline to file the cross motion for summary judgment. Defendant Stopanio has provided no explanation or “good cause” for serving the cross motion six days late. Nevertheless, an untimely cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds (see, Alexander v Gordon, 95 AD3d 1245; Grande v Peteroy, 39 AD3d 590; Bressingham v Jamaica Hosp. Med. Ctr., 17 AD3d 496). Under the circumstances, the issues raised by the untimely cross motion are already properly before the court and thus, the nearly identical nature of the grounds may provide the requisite good cause (see, CPLR 3212 [b]) to review the untimely cross motion on the merits (see, Alexander v Gordon, supra).

Here, defendant Stopanio failed to make a prima facie showing that plaintiff Angelea Ruiz did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (see, Reitz v Seagate Trucking, Inc., supra). Defendants Stopanio submits, *inter alia*, the pleadings, the bill of particulars, and solely the unaffirmed medical report dated May 23, 2011 of their examining pediatrician, Dr. Natasha Tellechea. As discussed above, Dr. Tellechea’s report is insufficient to sustain defendant Stopanio’s prima facie burden.

Inasmuch as defendant Stopanio failed to meet his prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiffs in opposition to defendant Stopanio’s cross motion for summary judgment were sufficient to raise a triable issue of fact (see, McMillian v Naparano, supra; Yong Deok Lee v Singh, supra). Accordingly, the cross motion by defendant Stopanio for summary judgment is denied.

Dated: November 1, 2012



HON. JOSEPH C. PASTORESSA, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION