

Pereverzev v Collins

2012 NY Slip Op 32813(U)

November 20, 2012

Supreme Court, Richmond County

Docket Number: 0102469/2010

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:102469/10
Motion No.:002,003, 004**

MICHAIL PEREVERZEV,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**DEBRA M. COLLINS,
ROBERT F. COLLINS,
DIANA E. MANISTER and
STEVE K. CIALINO,**

Defendants

The following items were considered in the review of the following motions to: 1) granting summary judgment on the grounds of no liability; 2) granting summary judgment pursuant to Insurance Law § 5102(d); and 3) cross motion to dismiss pursuant to Insurance Law § 5102(d).

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed (002)	1
Notice of Motion and Affidavits Annexed (003)	2
Notice of Cross-Motion and Affidavits Annexed (004)	3
Affirmation in Opposition	4
Reply Affirmations	5, 6
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on these Motions is as follows:

The motion made defendants, Diana E. Manister and Steve K. Cialino, seeking to dismiss the plaintiff's complaint on the grounds that there was no liability is granted. The motion made by defendants, Debra M. Collins and Robert F. Collins, seeking summary judgment on the basis that the plaintiff did not suffer a "serious injury" as that term is defined by Insurance Law § 5102(d) is denied. The cross-motion made by the defendants, Diana E. Manister and Steve K. Cialino, seeking summary judgment dismissing the plaintiff's complaint on the basis that the plaintiff did not suffer a "serious injury" is also denied.

Facts

On June 14, 2009, plaintiff claims to have been involved in a motor vehicle accident in which he sustained a “serious injury” as that term is defined in Insurance Law § 5102(d). Specifically, he alleges that he was stopped at a red light on the eastbound Bayway Avenue exit ramp from the Goethal’s Bridge, when he was struck in the rear by a vehicle operated by defendant Steve K. Cialino and owned by defendant Diana E. Manister. Diana E. Manister, who was a passenger in that vehicle at the time of the accident stated in her deposition that Steve K. Cialino had been stopped at a red light for approximately 30 seconds to one minute prior to being struck in the rear by a vehicle owned by Debra M. Collins and operated by the defendant Robert F. Collins.

In support of their motion and cross-motion for summary judgment on the issue of “serious injury” the defendants submit the affirmation of Rahava R. Polavarapu, M.D. a board certified orthopedist. Dr. Polavarapu concluded that the plaintiff was not disabled, even though at the time of his examination the plaintiff exhibited a decrease in the range of motion in his right elbow and right knee. With respect to the causal relationship Dr. Polavarapu stated: “Based upon the history provided, findings on examination and submitted records provided, there is a causal relationship between the accident of record and Mr. Pereverzev’s reported symptomatology.”

Discussion

Hit in the Rear

“A rear end collision with a stationary vehicle creates a prima facie case of liability in favor of the operator of the stationary vehicle unless the operator of the moving vehicle can come forward with an adequate, non-negligent explanation for the accident”¹ Moreover, the Appellate Division, Second Department has held that “[a] rear-end collision with a stopped or stopping

¹ *Ramrattan v. Pondfield Trip Service, Inc.*, 269 AD2d 513 [2d Dept 2000], citing *Mundo v. City of Yonkers*, 249 AD2d 522, 523 [2d Dept 1998]

vehicle creates a prima facie case of liability against 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.²

Here, Diana E. Manister, the passenger in a vehicle operated by Steve K. Cialino testified that her vehicle was stopped at a red light for approximately 30 seconds to one minute prior to being struck in the rear by the Collins vehicle. The operator and owner of the rearmost vehicle, Robert F. Collins and Debra M. Collins do not oppose the motion for summary judgment made by co-defendants. However, the plaintiff opposes this motion by speculating that since his vehicle did not strike any other which may have been stopped in front of him, the Manister vehicle came to rest at an inappropriate distance behind his own. However, there is no disagreement among the parties that the Manister vehicle was at a complete stop behind the plaintiff's vehicle and was only propelled forward due to the impact to its rear by the Collins vehicle. Consequently, the plaintiff's complaint and all cross-claims must be dismissed as against Diana E. Manister and Steve K. Cialino.

Threshold

A defendant can establish that the 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. 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.³ The burden, in other words, shifts to plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact

² *Argiro v. Norfolk Contract Carrier, Inc.*, 275 AD2d 384 [2d Dept 2000]

³ *See, Kordana v. Pomellito*, 121 AD2d 783, appeal dismissed, 68 NY2d 848.

as to whether he or she suffered a serious injury.⁴ The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient.⁵ Additionally, a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings which are based on a recent examination of the plaintiff.

Here, the defendants failed to meet their initial burden. Dr. Polavarapu concluded that the plaintiff suffered no loss of range of motion in the plaintiff's cervical spine and lumbar spine; and a decrease of 10 degrees in the plaintiff's right elbow and right knee; the defendants' expert fails to disclose what tests were used in order to arrive at these ranges of motion except in the case of the plaintiff's right knee. According to Dr. Polavarapu he utilized the "McMurray Test, Lachman, anterior drawer, pivot shift and posterior drawer tests" to find that the plaintiff's right knee range of motion is 140 degrees flexion where 150 degrees flexion is normal. Consequently, the failure to identify the objective tests used to measure the plaintiff's range of motion is fatal to demonstrating an entitlement to summary judgment.⁶

However, even assuming that the defendants' met their burden, the plaintiff's experts raise a triable issue of fact. The plaintiff's submit the affirmation of Conrad R. Williams, M.D. who conducted computerized range of motion tests on May 31, 2012 which demonstrated significant loss of range of motion in plaintiff's cervical spine, lumbar spine, right elbow and right knee. Consequently, even had the defendants' met their burden on this motion for summary judgment this court would still conclude that an issue of fact remains concerning whether the plaintiff suffered a "serious injury."

⁴ See, *Gaddy v. Eylar*, 79 NY2d 955; *Grossman v. Wright* 268 AD2d 79 [2nd Dept 2000].

⁵ *Id.*

⁶ See, *Herman v. Church*, 276 AD2d 471 [2d Dep't. 2000].

Accordingly, it is hereby:

ORDERED, that the motion for summary judgment made by defendants Diana E. Manister and Steve K. Cialino is granted and the complaint is severed and dismissed as to them, furthermore any cross-claims asserted by the co-defendants are also dismissed; and it is further

ORDERED, that the motion and cross motion for summary judgment made by Debra M. Collins, Robert F. Collins and Diana Manister and Steve K. Cialino to dismiss the plaintiff's complaint due to the plaintiff's failure to sustain a serious injury is denied; and it is further

ORDERED, that the Clerk shall enter judgment accordingly; and it is further

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3rd Floor, on **Monday, November 26, 2012 at 9:30 a.m.** for a Pre-Trial Conference.

ENTER,

DATED: November 20, 2012

Joseph J. Maltese
Justice of the Supreme Court