Mercado v Pitre
2017 NY Slip Op 31265(U)
May 30, 2017
Supreme Court, Suffolk County
Docket Number: 14-4227
Judge: Peter H. Mayer

SHORT FORM ORDER

INDEX No. 14-4227
CAL. No. 16-00862MV

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 6-7-16 (001)
MOTION DATE 9-30-16 (002)
ADJ. DATE 1-20-17
Mot. Seq. # 001 - MG
002 - MD

---X

MARILY MERCADO and MARIA TEJADA,

Plaintiffs,

- against -

EDWARD PITRE and TOWN OF BABYLON,

Defendants.

---X

LAW OFFICES OF MARK E. ALTER
Attorney for Plaintiffs
320 Old Country Road, Suite 103
Garden City, New York 11530

LAW OFFICE OF STUART P. BESEN
Attorney for Defendants
825 East Gate Blvd., Suite 202
Garden City, New York 11530

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiffs, dated September 9, 2016, and supporting papers; (2) Notice of Motion/Order to Show Cause by the defendants, dated September 9, 2016); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiffs, dated December 9, 2016 , and supporting papers; (4) Reply Affirmation by the defendants, dated January 19, 2017, and supporting papers; (5) Other ___ (~~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 the motion (#001) by plaintiffs Marilyn Mercado and Maria Tejada and the motion (#002) by defendants Edward Pitre and Town of Babylon hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by plaintiffs Marilyn Mercado and Maria Tejada for summary judgment in their favor on the issue of negligence is granted; and it is further

ORDERED that the motion by defendants Edward Pitre and Town of Babylon for summary judgment dismissing the complaint on the basis that plaintiffs failed to sustain an injury within the meaning of the serious injury threshold requirement of Insurance Law § 5102(d) is denied.

Plaintiffs Marilyn Mercado and Maria Tejada commenced this action to recover damages for injuries they allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Montauk Highway and Hawkins Boulevard in the Town of Babylon on March 7, 2013. It is alleged that the accident occurred when the vehicle operated by defendant Edward Pitre and owned by defendant Town of Babylon struck the rear of the vehicle owned ad operated by plaintiff Marilyn Mercado while it was stopped at a red traffic light on Montauk Highway. At the time of the accident, defendant Edward Pitre was operating a Town of Babylon vehicle in the course of his employment, and plaintiff Maria Tejada was riding as a front seat passenger in the Mercado vehicle. By their bill of particulars, plaintiffs allege that plaintiff Mercado sustained various personal injuries as a result of the subject collision, including disc herniations a levels L2 through S1, level C2 through C7, and level T1-T2, disc bulges at level L3-L4, and lumbar radiculopathy. Plaintiff Mercado further alleges that she was confined to her bed for approximately two months, and to her home for approximately 10 months as a result of the injuries she sustained in the accident. Plaintiffs, in their bill of particulars, also allege that plaintiff Tejada sustained numerous injuries due to the subject accident, including right knee internal derangement and lateral meniscus tear of the right knee. Plaintiff Tejada further alleges that she was confined to her bed for approximately two weeks, and to her home for approximately four months following the subject accident.

Defendants now move for summary judgment on the basis that neither plaintiff Mercado nor plaintiff Tejada sustained a serious injury within the meaning of the serious injury threshold requirement of Section 5102(d) of the Insurance Law as a result of the subject accident. In support of the motion, defendants submit copies of the pleadings, plaintiffs' 50-h hearing and deposition transcripts, uncertified copies of plaintiffs' medical records regarding the injuries at issue, and the sworn medical reports of Dr. Noah Finkel. At defendants' request, Dr. Finkel conducted independent orthopedic examinations of plaintiff Mercado and plaintiff Tejada on June 2, 2015. Plaintiffs oppose the motion on the grounds that defendants failed to meet their prima facie burden establishing that they did sustain a serious injury within the meaning of Section 5102(d) of the Insurance Law, and that the evidence in opposition demonstrates that they each sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law as a result of the subject accident. In opposition to the motion, plaintiffs submit their own affidavits, uncertified copies of their medical reports concerning the injuries at issue, the sworn medical reports of Dr. Ronald Wagner, Dr. Roger Kasendorf, Dr. Nizarali Visram, and Dr. Daniel Lerner. Plaintiffs also submit the sworn medical reports of Dr. Jasjit Singh and Dr. Barry Katzman.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries (***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; *see also* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *affd* 64 NYS2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *surpa*). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Based upon the adduced evidence, defendants have failed to meet their prima facie burden showing that neither plaintiff Mercado nor plaintiff Tejada sustained a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Balducci v Velasquez***, 92 AD3d 626, 938 NYS2d 178 [2d Dept 2012]). Defendants' orthopedic expert, Dr. Finkel, despite opining that plaintiffs Mercado and Tejada's injuries were resolved and that they did not have evidence of any orthopedic disability as a result of the accident, found significant range of motion limitations in each plaintiff's cervical spine, as well as significant range of motion limitations in plaintiff Mercado's lumbar region and plaintiff Tejada's right knee during his examination of each plaintiff (*see* ***Ramos v Baig***, 145 AD3d 695, 41 NYS3d 902 [2d Dept 2016]; ***Dean v Coffee-Dean***, 144 AD3d 1080, 41 NYS3d 750 [2d Dept 2016]; ***Mueckenheim v Smith***, 143 AD3d 957, 39 NYS3d 511 [2d Dept 2016]; ***Goldstein v Baez***, 132 AD3d 631, 17 NYS3d 313 [2d Dept 2015]; ***Brits v Flores***, 130 AD3d 769, 12 NYS3d 567 [2d Dept 2015]). In fact, Dr. Finkel failed to even state what objective testing he performed on plaintiff Tejada's lumbar spine prior to determining that her injuries were resolved, thus rendering his determination conclusory (*see* ***Orejuela v Francis***, 71 AD3d

857, 895 NYS2d 851 [2d Dept 2010]; ***Stern v Oceanside School Dist.***, 55 AD3d 596, 865 NYS2d 325 [2d Dept 2008]; ***Paradizov v Doan***, 46 AD3d 787, 848 NYS2d 303 [2d Dept 2007]; ***Cedillo v Rivera***, 39 AD3d 453, 835 NYS2d 238 [2d Dept 2007]). As a consequence, defendants have failed to submit competent medical evidence establishing, prima facie, that plaintiff Mercado did not sustain a serious injury to the cervical or lumbar region of her spine, or that plaintiff Tejada did not sustain a serious injury to her spine or right knee under the limitations of use category of the Insurance Law as a result of the subject collision (*see* ***Magione v Bua***, 148 AD3d 799, 48 NYS3d 518 [2d Dept 2017]; ***Mercado v Mendoza***, 133 AD3d 833, 19 NYS3d 757 [2d Dept 2015]; ***Miller v Bratsilova***, 118 AD3d 761, 987 NYS2d 44 [2d Dept 2014]).

Since defendants failed to sustain their prima facie burden, it is unnecessary to determine whether the papers submitted in opposition by plaintiffs were sufficient to raise a triable issue of fact (*see* ***Spann v City of New York***, 145 AD3d 932, 43 NYS3d 143 [2d Dept 2016]; ***Che Hong Kim v Kossoff***, 90 AD3d 969, 934 NYS2d 867 [2d Dept 2011]). Accordingly, defendants' motion for summary judgment dismissing the complaint is denied.

Plaintiffs move for summary judgment on the issue of negligence on the basis that defendant Pitre's negligent operation of the Town of Babylon's vehicle was the sole proximate cause of the subject accident and that plaintiff Mercado did not cause or contribute to the happening of the subject accident. In support of the motion, plaintiff Mercado submits copies of the pleadings, her own affidavit, and a certified copy of the police accident report. Defendants have not submitted any evidence in opposition to the motion.

It is well settled that a driver approaching a vehicle from the rear is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see* Vehicle and Traffic Law § 1129 [a]; ***Brooks v High St. Professional Bldg., Inc.***, 34 AD3d 1265, 825 NYS2d 330 [4th Dept 2006]). "A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation " (*see* ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 AD3d 489, 904 NYS2d 761 [2d Dept 2010]; ***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]; ***Harrington v Kern***, 52 AD3d 473, 859 NYS2d 480 [2d Dept 2008]). However, the lead vehicle also has a duty not to stop suddenly or slow down without proper signaling so as to avoid a collision (***Chepel v Meyers***, 306 AD2d 235, 237, 762 NYS2d 95 [2d Dept 2003]; *see* ***Carhuayano v J&R Hacking***, 28 AD3d 413, 813 NYS2d 162 [2d Dept 2006]; ***Gaeta v Carter***, 6 AD3d 576, 775 NYS2d 86 [2d Dept 2004]; ***Purcell v Axelsen***, 286 AD2d 379, 729 NYS2d 495 [2d Dept 2001]; ***Colonna v Suarez***, 278 AD2d 355, 718 NYS2d 618 [2d Dept 2000]; *see also* Vehicle and Traffic Law § 1163). A non-negligent explanation for the collision, such as mechanical failure or the sudden and abrupt stop of the vehicle ahead, is sufficient to overcome the inference of negligence and preclude an award of summary judgment (***Danner v Campbell***, 302 AD2d 859, 859, 754 NYS2d 484 [4th Dept 2003]; *see* ***Davidoff v Mullokandov***, 74 AD3d 862, 903 NYS2d 107 [2d Dept 2010]; ***Rodriguez-Johnson v Hunt***, 279 AD2d 781, 718 NYS2d 501 [3rd Dept 2001]).

In the instant matter, plaintiffs have demonstrated their entitlement to judgment as a matter of law with evidence showing that plaintiff Mercado did not contribute to the happening of the subject accident (*see* ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]; ***Savarese v Cerrachio***, 79 AD3d 725, 911 NYS2d 921 [2d Dept 2010]; ***Ramirez v Konstanzer***, 61 AD3d 837, 878 NYS2d 381 [2d Dept 2009]). In her affidavit, plaintiff Mercado states that her vehicle was struck from the rear by defendants' vehicle while it was stopped at a red traffic light on westbound Montauk Highway. Thus, plaintiffs have submitted admissible proof that the Mercado vehicle was impacted from the rear after it had been brought to a lawful stop at a red light on Montauk Highway, and that plaintiff Mercado was not a proximate cause of the subject accident's occurrence (*see* ***Krutul v Tanner***, 139 AD3d 1015, 33 NYS3d 331 [2d Dept 2016]; ***Elezovic v Harrison***, 292 AD2d 416, 739 NYS2d 410 [2d Dept 2002]; ***Ahmad v Grimaldi***, 40 AD3d 786, 834 NYS2d 480 [2d Dept 2007]). In opposition to plaintiffs' prima facie showing, defendants have failed to rebut the inference of negligence by providing a non-negligent explanation for the collision or to show negligence on the part of plaintiff Mercado that contributed to the collision (*see* ***Franco v Breceus***, 70 AD3d 767, 895 NYS2d 152 [2d Dept 2010]; ***Campbell v City of Yonkers***, 37 AD3d 750, 833 NYS2d 101 [2d Dept 2007]; ***Russ v Investech Secs.***, 6 AD3d 602, 775 NYS2d 867 [2d Dept 2004]; ***Belitsis v Airborne Express Frgt. Corp.***, 306 AD2d 507, 761 NYS2d 320 [2d Dept 2003]). Indeed, defendants have failed to submit any evidence in opposition to plaintiffs motion for summary judgment. Accordingly, plaintiffs' motion for summary judgment in their favor on the issue of negligence is granted.

Dated: May 30, 2017

PETER H. MAYER, J.S.C.