Siewdass v McGowan
2011 NY Slip Op 33361(U)
November 30, 2011
Supreme Court, Queens County
Docket Number: 7946/10
Judge: Janice A. Taylor
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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CHANDRIKA SIEWDASS and CASSANDRA SEEPERSAD,

Index No.:7946/10

Plaintiff(s),

Motion Date:10/4/11

- against -

Motion Cal. No.: 32
Motion Seq. No: 1

MATTHEW S. MCGOWAN,

Defendant(s).

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The following papers numbered 1 - 17 read on this motion by the defendant for an order granting summary judgment on the issue of damages; and a cross-motion by the plaintiffs for summary judgment on the issue of liability.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Notice of Cross-Motion-Affirmation-Exhibits-Service..	5 - 8
Affirmation in Opposition-Exhibits-Service.....	9 - 11
Affirmation in Opposition-Exhibits-Service.....	12 - 14
Reply Affirmation-Exhibits-Service.....	15 - 17

Upon the foregoing papers it is **ORDERED** that the motion and cross-motion are considered together and decided as follows:

This is an action for personal injuries allegedly sustained by plaintiffs on July 19, 2008 when they were involved in a motor vehicle accident with the defendant on Boyle Plaza/12th Street near the Holland Tunnel in the County of Hudson, State of New Jersey. It is alleged that, at the time of the accident, plaintiff Cassandra Seepersad ("Seepersad") was a passenger in the vehicle operated by plaintiff Chandrika Siewdass ("Siewdass") when it was struck in the rear by the vehicle owned and operated by defendant Matthew S. McGowan ("McGowan"). This action was commenced on March 31, 2010 by the filing of a summons and complaint.

Defendant's Motion for Summary Judgment

Defendant McGowan now moves, pursuant to CPLR §3212, for an order granting summary judgment and dismissing the complaint of both plaintiffs on the grounds that neither has sustained serous injuries as defined by Insurance Law §5102(d). On a motion for summary judgment, parties must lay bare their proofs in non-hearsay from, and the movant must establish its *prima facie* entitlement to judgment as a matter of law (*Zuckerman v. City of New York*, 49 N.Y.2d 547, 562 [1980]).

Plaintiff Chandrika Siewdass

Defendant McGowan's moving papers present proof in admissible form, including the affirmed report, dated July 8, 2010, of defendant's consulting orthopaedist, Michael J. Katz, M.D., the affirmed report, dated August 10, 2010, of defendant's consulting neurologist, Daniel Feuer, M.D., the pleadings, and the examination-before-trial transcript of plaintiff Siewdass. The defendant's examining physicians both affirm that plaintiff Siewdass suffered no serious injury as a result of this accident. Thus, the burden shifts the plaintiff Siewdass to demonstrate the existence of a triable issue of fact (*see, Gaddy v. Eyler,* 79 N.Y.2d 955 [1992]).

In opposition to the motion, plaintiff Siewdass submits his own affidavit, the July 22, 2011 affidavit, narrative report and medical records of Philip Abessinio, D.C., his treating chiropractor and the affirmation, dated July 7, 2011, of Robert Diamond, M.D., plaintiff Siewdass' consulting radiologist. It is also noted that Dr. Diamond did not physically examine the plaintiff, but reviewed MRI films of plaintiff Siewdass' lumbar and cervical spine. It is also noted that, although Dr. Diamond's affirmation includes his interpretation of the MRI films, the report does not state Dr. Diamond's opinion on the permanency of plaintiff Siewdass' condition. Thus, defendant McGowan cannot rely on Dr. Diamond's affirmation to support his contention that plaintiff Siewdass has not sustained a serious injury as a result of this accident.

It is uncontested that plaintiff Siewdass did not receive medical treatment from July, 2009 to July, 2011. In his affidavit, plaintiff Siewdass states that, after one year of treatment, Dr. Abessinio advised him that he had reached a "plateau" in his progress and would have to learn to live with persistent pain. In his affidavit, Dr. Abessinio avers that plaintiff Siewdass has sustained a permanent injury as a result of this accident. However, neither plaintiff Siewdass nor Dr. Abessinio state that this "plateau" was permanent and that further treatment would not be needed. Thus, plaintiff Siewdass has failed to adequately address the nearly two-year gap in his treatment. This deficiency is fatal to plaintiff Siewdass' case (*see, Pommells v. Perez*,4 NY3d

566 [2005]; *West v. Martinez*, 78 Ad3d 934 [2d Dept. 2010]). Accordingly, that portion of defendant McGowan's motion which seeks summary judgment and dismissal of plaintiff Chandrika Siewdass' complaint is granted.

Plaintiff Cassandra Seepersad

Defendant McGowan's moving papers present proof in admissible form, including the affirmed report, dated July 8, 2010, of defendant's consulting orthopaedist, Michael J. Katz, M.D., the report, dated July 27, 2010, of defendant's consulting neurologist, Daniel Feuer, M.D. and the pleadings. It is noted that, although Dr. Feur's affirmation states that it is a three-page document, only two pages are annexed to the instant motion. Thus, as the submission does not contain Dr. Feur's signature, his affirmation, nor his opinion on the permanency of plaintiff Seepersad's condition, it is inadmissible and was not considered by this court. In his report, Dr. Katz affirms that plaintiff Cassandra Seepersad suffered no serious injury as a result of this accident. Thus, the burden shifts to the plaintiff Seepersad to demonstrate the existence of a triable issue of fact (*see, Gaddy v. Eyler,* 79 N.Y.2d 955 [1992]).

In opposition to the instant motion, plaintiff Seepersad submits her own affidavit, the July 22, 2011 affidavit, narrative report and medical records of Philip Abessinio, D.C., her treating chiropractor, and the affirmation, dated July 22, 2011, of Jagga Alluri, M.D., her consulting neurologist. In their respective affidavit and affirmation, Dr. Abessinio and Dr. Alluri each assert that plaintiff Seepersad has sustained permanent injuries as a result of this accident. Dr. Abessinio also states that the two-year gap in plaintiff Seepersad's treatment occurred after he determined that the plaintiff had reached the maximum benefit for chiropractic care.

The court's function, when presented with a summary judgment motion, is not to determine the credibility or engage in issue determination, but rather to determine whether there are material issues of fact for the court to determine (see, *Quinn v. Krumland*, 179 A.D.2d 448 [1st Dept. 1992]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law (*see, Friends of Animals, Inc., v. Associated Fur Mfrs.*, N.Y.2d 1065 [1979]; *Orwell Bldg. Corp. v. Bessaha,* 5 A.D.3d 573 [2d Dept. 2003]). In this action, plaintiff Seepersad has demonstrated that triable issues of fact exist. Accordingly, that portion of defendant McGowan's motion which seeks summary judgment and dismissal of plaintiff Cassandra Seepersad's complaint is denied.

Plaintiffs' Cross-Motion for Summary Judgment

Plaintiffs now cross-move, pursuant to CPLR §3212, for summary judgment on the issue of liability. As this court has now dismissed plaintiff Chandrika Siewdass' complaint, the cross-motion will be considered only as to plaintiff Cassandra Seepersad, the remaining plaintiff. In support of the instant motion, plaintiff Seepersad submits the affidavit of Chandrika Siewdass, the driver of the vehicle in which she rode. Mr. Siewdass states that, immediately prior to the accident, he was stopped for traffic on the New Jersey side of the Holland Tunnel and that the defendant's vehicle struck him in the rear.

A rear-end collision into a stopped automobile creates a *prima facie* case of negligence on the part of the operator of the moving vehicle and imposes a duty on him or her to provide a non-negligent explanation to rebut the inference of negligence and to explain how the accident occurred (*see, Gross v. Marc*, 2 AD3d 681 [2d Dept. 2003]; *Russ v. Investech Secs.*, 6 AD3d 602 [2d Dept. 2004]; *Milskiy v. Solanky*, , 8 AD3d 353 [2d Dept. 2004]; *Vlachos v. Saueracker*, 2004 NY App. Div. LEXIS 10951 [2d Dept. 2004]; *Ortega v. City of New York*, 281 AD2d 466 [2d Dept. 2001]; *Mendiolaza v. Novinski*, 268 AD2d 462 [2d Dept. 2000]; *Leal v. Wolff*, 224 AD2d 392 [2d Dept. 1996]). Drivers must maintain safe distances between their cars and cars in front of them, (*see*, Vehicle and Traffic Law §1129 [a]), and this rule imposes on them a duty to be aware of traffic conditions, including vehicle stoppages (*see, Sass v. Abu Trans Inc.*, 238 AD2d 570 [2d Dept. 1997]). It is axiomatic that drivers have a "duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*DeAngelis v. Kirschner*, 171 AD2d 593, 595 [1st Dept. 1991]).

In further support of the motion, plaintiff Seepersad also submits the examination of trial transcript of defendant McGowan. In his deposition, defendant McGowan states that, although he believes that the plaintiff's vehicle was stopped at the time of the collision, he cannot so state with certainty. Defendant McGowan did testify that the front vehicle was either stopped or moving slowly at the time of the collision. Thus, plaintiff Seepersad is not entitled to a *prima facie* inference of negligence, nor has she sufficiently demonstrated that no triable issues of fact remain as to defendant McGowan's liability. Accordingly, the cross-motion is denied in its entirety.

Sua Sponte Amendment of the Caption

As the complaint of Chandrika Siewdass has now been dismissed, this court *sua sponte* amends the caption to reflect this dismissal. The amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
----------x
CASSANDRA SEEPERSAD,

Index No.:7946/10

Plaintiff(s),

- against -

MATTHEW S. MCGOWAN,

Defendant(s).
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Dated: November 30, 2011

JANICE A. TAYLOR, J.S.C.

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