Ziegler v Young
2012 NY Slip Op 30506(U)
February 10, 2012
Supreme Court, Nassau County
Docket Number: 16750/10
Judge: Michele M. Woodard
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

---x

ROBERT W. ZIEGLER,

Plaintiff,

-against-

MORRIS YOUNG, SUSAN YOUNG, DIANA VASILI-ALEVEDO, GELCO CORPORATION and GENERAL ELECTRIC COMPANY,

Defendants.

---x

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 8
Index No.: 16750/10
Motion Seq. Nos.: 02, 03 & 04

DECISION AND ORDER

Papers Read on this Motion:

Defendants Morris Young and Susan Young's Notice	02
Plaintiff's Affirmation in Opposition	xx
Defendants Acevedo and General Electric Company's Notice of Cross-Motion	03
Plaintiff's Notice of Cross-Motion	04
Defendants Acevedo and General Electric Company's Affirmation in Partial Opposition	xx
Defendants Morris and Susan Young's Reply	xx
Defendants Acevedo and General Electric Company's Reply	xx
Defendants Morris and Susan Young's Reply	xx
Defendant's Affidavit in Opposition	xx
Plaintiff's Reply Affirmation	xx
Defendants Acevedo and General Electric Company's Affirmation in Opposition	xx

The defendants Morris Young and Susan Young move for an order pursuant to CPLR §3212 granting them summary judgment dismissing plaintiff's complaint and all cross-claims against them on the grounds that: (a) the undisputed evidence establishes that no liability exists against the moving defendants for the accident which gave rise to this action; and b) the injuries claimed by plaintiff do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102(d). The plaintiff cross-moves for an order pursuant to CPLR §3212 granting him summary judgment on the issue of liability as

against defendants Diane Vasili-Alevedo ("Vasili-Alevedo") and General Electric Company ("GE"). The defendants Alevedo and GE cross-move for an order pursuant to CPLR §3212 dismissing the complaint on the grounds that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d).

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a three car accident which occurred in the eastbound lanes of Sunrise Highway, just east of its intersection with Brooklyn Avenue, in the Village of Massapequa Park, County of Nassau.

On June 11, 2010, plaintiff's vehicle was allegedly struck in the rear by the vehicle owned by Susan Young and operated by defendant Morris Young. The Vasili-Alevedo vehicle allegedly rear-ended the Young vehicle, forcing the Young vehicle into the Ziegler vehicle. Prior to this accident, the Ziegler vehicle was coming to a stop for traffic on Sunrise Highway.

By order dated March 31, 2011, the Court granted defendant Gelco Corporation's motion for an order pursuant to CPLR §3212 granting it summary judgment dismissing the complaint and the cross-claim of defendants Morris Young and Susan Young. Hence, the complaint and co-defendant's cross-claims were dismissed against Gelco Corporation.

In moving for summary judgment on the issue of liability, plaintiff and defendants assert that the evidence (the deposition testimony of the respective drivers in this accident) establishes that defendant, Morris Young, stopped his vehicle and was not moving when his vehicle was rear-ended by the Alevedo vehicle. As a result of this impact, the Young vehicle was pushed into the rear of plaintiff's vehicle. Plaintiff was unequivocal that he felt only one rear-end impact. Hence, the sole proximate cause of the accident was the activities of co-defendant Vasili-Alevedo who initiated the accident by rear-ending the Young vehicle.

In opposition to the motion and cross-motion, Vasili-Alevedo relies upon a statement given to Kristen Roche by plaintiff wherein plaintiff testified as follows:

> [The accident] "happened on Sunrise Highway in Massapequa, New York, We were heading eastbound. I was stopped at a light with about 5 to 7 cars in front of me, and the gentlemen behind me drove into the back of my car. I felt the impact, obviously, and then I heard a second crash."

Based upon this statement, Vasili-Alevedo asserts that an issue of fact exists as to the cause of the accident.

A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle (*Giangrasso v Callahan*, 87 AD3d 521 [2d Dept 2011]; *see* Vehicle and Traffic Law § 1129[a]; *Ortiz v Hub Truck Rental Corp.*, 82 AD3d 725 [2d Dept 2011]; *Nsiah-Ababio v Hunter*, 78 AD3d 672 [2d Dept 2010]). Accordingly, a rear-end collision establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (*see Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]; *Giangrasso v Callahan, supra*; *Ortiz v Hub Truck Rental Corp., supra*; *Parra v Hughes*, 79 AD3d 1113, 1114 [2d Dept 2010]).

"The presumption in rear-end cases does not arise from the act of the lead vehicle in stopping or braking, but from the duty of the driver of the vehicle behind to keep a safe distance and not collide with traffic. This duty is codified by VTL §1129(a) which states, 'The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the highway.' The failure of a driver to do so constitutes negligence as a matter of law, entitling the plaintiff lead driver whose vehicle was rear-

ended to summary judgment on the issue of liability in the absence of an adequate non-negligence explanation" *(Leguen v City of New York (Department of Sanitation)*, 30 Misc3d 1235(A); *see, Inzano v Brucculeri*, 257 AD2d 605, [2d Dept 1999]; *Aromando v City of New York*, 202 AD2d 617 [1994]).

"Although a rear-end collision usually results when the lead vehicle decelerates, there is no requirement that it do so in order to impose upon a driver the duty to keep a safe distance and not collide with the vehicle in front. A rear-end collision, in and of itself, creates a presumption of negligence" *(Leguen v City of New York (Department of Sanitation), supra; see generally, Macauley v Elrac, Inc.*, 6 AD3d 584, 585 [2d Dept 2004]).

Here, the Vasili-Alevedo vehicle struck the Young defendant's vehicle in the rear. Hence, the burden shifts to Vasili-Alevedo to come forward with a non negligent explanation for the rear-ending of the Young vehicle. *Simpson v Eastman*, 300 AD2d 647 [2d Dept 2002]. Defendant has failed to do so. Accordingly, plaintiff and defendant Young are entitled to summary judgment on the issue of liability.

Defendants Morris and Susan Young move for summary judgment on the grounds that plaintiff Ziegler did not sustain a serious injury as defined by Insurance Law §5102(d).

In his Verified Bill of Particulars, plaintiff Robert W. Ziegler claims that he sustained the following personal injuries in the accident, all of which he asserts to be "serious injuries" within the meaning of Insurance Law §5102(d):

– Right shoulder rotator cuff tendinosis;
– Tear in the superior labrum, right shoulder;
– Long head biceps tendinosis;
– Right shoulder surgery on November 19, 2010;
– Neck sprain;
– Cervicobrachial syndrome;
–Cervical radiculopathy;
– Lumbosacral sprain;
– Severe restriction of motion in cervical flexion,

extensions and rotation and in lumbar flexion with a positive leg raise at 10 degrees and a significant leg length imbalance;
- Scarring resulting from surgery

In support thereof, defendants submitted the following: (a) Ziegler's Verified Bill of Particulars wherein he does not claim a "serious injury" as defined by the first five categories specified in § 5102(d) of the Insurance Law and the nature of the injuries claimed do not qualify under the sixth category thereof; (b) Ziegler's admissions that he was involved in a prior car accident in the late 1970s wherein he injured his neck and back, received chiropractic treatment for the injuries he sustained, and for which he brought a lawsuit; (c) Ziegler's admissions that he was involved in a second prior car accident in the early 1980s wherein he injured his neck and back, received chiropractic treatment for the injuries he sustained, and for which he brought a lawsuit; (d) Ziegler's admissions that he was involved in a third prior car accident in March 2009 wherein he injured his neck and back and received chiropractic treatment for the injuries he sustained; (e) the affirmed report of Dr. Robert Israel, a board certified orthopedic surgeon, who examined Ziegler, performed quantified range-of-motion testing on his cervical spine, lumbar spine, and right shoulder using a goniometer, compared his findings to normal ranges-of-motion values and concluded that Ziegler had normal ranges of motion of his cervical spine, lumbar spine, and right shoulder; performed other clinical tests, which showed no motor or sensory deficits; and based on his clinical findings, concluded that Ziegler has no disability as a result of the accident; (f) the affirmed report of Dr. Alan B. Greenfield, a board certified radiologist, who reviewed Ziegler's right shoulder MRI films and found "chronic tendinosis of the supraspinatus, along with chronic degenerative arthropathy along the underside of the AC joint," "degenerative narrowing of the glenohumeral joint, with secondary degeneration of the glenoid labra," "congenital/development

foreshortening of the superior glenoid labrum," and "small intra-articular effusion,: with no evidence of any trauma-related injury; and (g) Ziegler's admissions that he was only confined to his home for three days following the accident, and that the only activities in which he was limited were fishing, starting his lawnmower and carrying heavy packages.

As a proponent of the summary judgment motion, movants had the initial burden of establishing that plaintiff did not sustain a causally related serious injury under the permanent consequential limitation of use, significant limitation of use and 90/180-day categories. *(See Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]). Defendants' medical expert must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. (*Browdame v. Candura*, 25 AD3d 747, 748 [2d Dept 2006]).

Defendants established their *prima facie* entitlement to judgement as a matter of law by submitting, *inter alia*, the affirmed medical reports of Dr. Robert Israel, an orthopedist and Dr. Alan Greenfield, a radiologist. These doctors found no significant limitations in the ranges of motion with respect to any of plaintiff's claimed injuries, and no other serious injury within the meaning of Insurance Law § 5102(d) causally related to the collision (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]).

The burden now shifts to plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he sustained a serious injury or there are questions of fact as to whether the purported injury, in fact, is serious. *Perl v Meher*, 18 NY3d 208 [2011].

In order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as serious injury

within the meaning of Insurance Law §5102(d). *See Toure v Avis Rent A Car Sys., Inc., supra; Scheer v Koubek*, 70 NY2d 678, 679 [1987]; *Munoz v Hollingsworth,* 18 AD3d 278, 279 [1st Dept 2005].

Plaintiff must come forth with objective evidence of the extent of alleged physical limitation resulting from injury and its duration. That objective evidence must be based upon a recent examination of the plaintiff (*Sham v B&P Chimney Cleaning*, 71 AD3d 978 [2d Dept 2010]; *Cornelius v Cintas Corp.* 50 AD3d 1085 [2d Dept 2008]; *Sharma v Diaz,* 48 AD3d 442 [2d Dept 2007]; *Amato v Fast Repair, Inc.,* 42 AD3d 447 [2d Dept 2007]) and upon medical proof contemporaneous with the subject accident. *(Perl v Meher, supra*; *Ferraro v Ridge Car Service*, 49 AD3d 498 [2d Dept 2008]; *Manning v Tejeda*, 38 AD3d 622 [2d Dept 2007]; *Zinger v Zylberberg,* 35 AD3d 851 [2d Dept 2006]).

Even when there is medical proof, when contributory factors interrupt the chain of causation between the accident and the claimed injury, summary dismissal of the complaint may be appropriate. *Pommells v Perez,* 4 NY3d 566, 572 [2005]. Whether a limitation of use or junction is significant or consequential relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of a body part. *Dufel v Green*, 84 NY2d 795, 798 [1995].

In opposition to the motion, plaintiff submits an affirmed medical report of Peter Langan, M.D., dated September 15, 2011; an affirmation of Jonathan Klug, M.D., a radiologist; medical records of Dr. Richard Siebert, who first treated plaintiff June 14, 1010; and his own affidavit. In his report, Dr. Langan states that: plaintiff has been under his care since 2010 and postoperatively, "plaintiff's range of motion was measured with a goniometer at extension 40/90 degrees, flexion 60/90 degrees; abduction 60/110 degrees, internal rotation was full and external rotation was 60/75 degrees and abduction and rotation 75/150 degrees. I feel that the right shoulder injury was directly caused by the accident of June

11, 2010. At the present time, he has weather and stress related pain, limited range of motion and scaring."

Based on the record submitted, plaintiff has raised a triable issue of fact by submitting, among other things, affirmed reports describing medical examinations conducted contemporaneously with the collision, as well as affirmed reports describing medical examinations conducted in 2011 (see reports of Drs. Langan, Klug and Siebert). These reports collectively demonstrate that there are triable issues of fact as to whether the collision caused injuries to the plaintiff that were serious injuries under the "permanent consequential limitation" or "significant limitation" of use categories of Insurance Law §5102(d) (*see Evans v Pitt*, 77 AD3d 611 [2d Dept 2010], *lv to app dism.* 16 NY3d 736 [2011]; *Sanevich v Lyubomir*, 66 AD3d 665 [2d Dept 2009]; *Noel v Choudhury,* 65 AD3d 1316 [2d Dept 2009]; *cf. Husbands v Levine,* 79 AD3d 109 [2d Dept 2010]).

Since plaintiff established that at least some of his injuries satisfy the "no-fault" threshold, "it is unnecessary to address whether [his] proof with respect to other injuries he allegedly sustained would have been sufficient to withstand defendant's motion for summary judgment." *Linton v Nawaz,* 14 NY3d 821, 822 [2010]; *McLelland v Estevez,* 77 AD3d 403 [2d Dept 2010].

Finally, plaintiff has not sustained his burden under 90/180 day category which requires plaintiff to submit objective evidence of a "medically determined injury or enforcement of a non-permanent nature which prevents the injured person from performing substantially all of the natural acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury." (Insurance Law §5102[d]).

"When construing the statutory definition of a 90/180 day claim, the words 'substantially all 'should be construed to mean that the person has been prevented from performing his usual activities to

a great extent, rather than some slight curtailment." (*Thompson v Abbasi,* 15 AD3d 95 [1st Dept 2005]; *Gaddy v Eyler, supra*).

While plaintiff was not employed at the time and had not been for several years because of a chronic lung condition, he claims that he never had any prior physical restriction with respect to the use of his arm and is now restricted from many movements, lifting of things and his lifestyle has definitely changed (Plaintiff's Affirmation, ¶ 5).

Specifically, plaintiff has no admissible medical reports stating that he was disabled, unable to work or unable to perform daily activities for the first 90 days out of 180 days. *See, Perl v Meher, supra; Judd Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010].

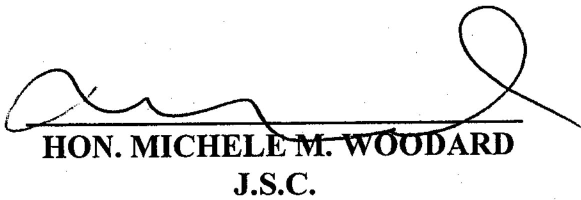
In view of the foregoing, the motion by the Young defendants is ***granted*** as to the issue of liability and ***denied*** as to the threshold requirement; the cross-motion by plaintiff for summary judgment on the issue of liability is ***granted*** and the cross-motion by Alevedo and GE is ***denied***. It is hereby

ORDERED, that the parties are directed to appear on February 16, 2012 at 9:30 a.m. in DCM for trial on damages.

This constitutes the Decision and Order of the Court.

DATED: February 10, 2012
Mineola, N.Y. 11501

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

F:\DECISION - SERIOUS INJURY\Ziegler v Young HBL.wpd

ENTERED
FEB 27 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE