Seidenstein v Mejia
2012 NY Slip Op 32933(U)
December 7, 2012
Sup Ct, Suffolk County
Docket Number: 10-23701
Judge: Jerry Garguilo
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]

COPY

SHORT FORM ORDER

INDEX No. 10-23701
CAL No. 11-02417MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 4-4-12 (#002)
MOTION DATE 4-30-12 (#003)
ADJ. DATE 10-10-12
Mot. Seq. # 002 - MG
003 - MD

ALAN SEIDENSTEIN and BARBARA SEIDENSTEIN,

Plaintiffs,

- against -

CARLOS M. MEJIA, DUCKY'S TOWING, INC. and DUCKY'S TRUCKING & RIGGING, INC.,

Defendants.

SALENGER, SACK, KIMMEL & BAVARO, LLP
Attorney for Plaintiffs
180 Froehlich Farm Boulevard
Woodbury, New York 11797

MINTZER, SAROWITZ, ZERIS, LEDVA & MEYERS, LLP
Attorney for Defendants
17 West John Street, Suite 200
Hicksville, New York 11801

Upon the following papers numbered 1 to 68 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; 18 - 29; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 14 - 15; 30 - 66; Replying Affidavits and supporting papers 16 - 17; 67 - 68; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiffs for summary judgment and the motion by defendants for summary judgment are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (002) by plaintiffs for an order pursuant to CPLR 3212 granting summary judgment in their favor on the issue of liability is granted; and it is further

ORDERED that the motion (003) by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint on the grounds that plaintiff Alan Seidenstein did not sustain a serious injury as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Alan Seidenstein on October 23, 2009 in a rear-end motor vehicle accident. By his bills of

[* 2]

particulars, plaintiff alleges said accident caused, aggravated, accelerated, and/or exacerbated serious injuries including herniated discs at the L3-4, L4-5, and L5-S1 levels and bulging discs at the L2-3 level, lumbosacral spine radiculopathy, and ridge/disc complexes at the C2-3, C3-4, C4-5, and C5-6 levels.

Defendants now request summary judgment dismissing the complaint on the ground that plaintiff Alan Seidenstein did not sustain a serious injury as defined in Insurance Law § 5102 (d)[1]. They assert that plaintiff's pre-existing herniated and bulging cervical and lumbar discs, minor subjective limitations, subjective complaints of pain, and self-imposed activity restrictions do not satisfy Insurance Law § 5102 (d). Their submissions in support of the motion include the pleadings, plaintiff's bill of particulars and supplemental bill of particulars, plaintiffs' deposition transcripts, the affirmed report dated June 23, 2011 of defendants' examining orthopedist, Isaac Cohen, M.D., the affirmed report dated June 27, 2011 of defendants' examining neurologist, Howard B. Reiser, M.D., and the affirmed MRI report dated February 27, 2012 of defendants' examining radiologist, John T. Rigney, M.D.

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 Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). 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 "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of plaintiff must be provided 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* ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]). In order to qualify under the 90/180-days category, an injury must be "medically determined" meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see* ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011]).

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49

---

[1] Defendants argue that plaintiffs have failed to comply with CPLR 3016 (g), which argument lacks merit inasmuch as plaintiffs' complaint expressly alleges that plaintiff sustained a serious injury as defined in Insurance Law § 5102 (d) as well as economic loss greater than basic economic loss as defined in Insurance Law § 5102 (*see* CPLR 3016 [g]).

NY2d 557, 427 NYS2d 595 [1980]). 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.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Dr. Cohen indicated in his affirmed report that he performed an orthopedic examination of plaintiff on June 23, 2011 and noted plaintiff's complaints to be recurrent pain in the lower back and neck, radiation of pain into his shoulders and pain into the left lower extremity. Dr. Cohen indicated that he performed range of motion testing and that all measurements were obtained using a goniometer and/or a bubble inclinometer and/or by visual inspection. Dr. Cohen reported the results of his examination of plaintiff's cervical spine indicating range of motion results as flexion 45 degrees (normal 50 degrees), extension to 40 degrees (normal 60 degrees), left and right lateral bending in the 40-degree range (45 degrees normal), and right and left rotation to 70 degrees (normal 80 degrees). He added that the compression test was negative and that plaintiff's paravertebral muscles were supple and non-tender with no spasms. With respect to plaintiff's lumbosacral spine, Dr. Cohen reported range of motion as forward flexion of 55 degrees (normal 60 degrees), hyperextension 25 degrees (normal 25 degrees), right and left lateral bending in the 25-30 degree range (normal 25 degrees), and left and right rotation possible in the 25-30 degree range (normal up to 30 degrees). He also noted that on palpation, plaintiff's paravertebral muscles were supple and non-tender and that spasms and trigger points were absent.

In conclusion, Dr. Cohen diagnosed status post motor vehicle accident, cervical strain, resolved, and low back strain superimposed on pre-existing degenerative spondylolisthesis, improved. He stated that a review of medical records revealed significant pre-existing degenerative disc disease throughout plaintiff's cervical spine area with marked degenerative changes and osteophytes that clearly pre-existed the subject accident by an extensive period of time. Dr. Cohen added that plaintiff's lumbosacral spine area showed significant degenerative disc disease from L3 to L4-5, L5-S1 "associated with spondylolisthesis of a severe nature on the right at L4/5 as well as retrolisthesis of L5/S1" which conditions he opined were not accident related and pre-existed the subject accident. He noted that based on submitted records plaintiff had been involved in a previous rear-end motor vehicle accident in 2003 and opined that said history "played a significant role in the development or exacerbation of the significant degenerative changes that took many years to develop." Dr. Cohen also concluded that there was no evidence of objective disability except for subjective complaints of persistent discomfort.

Defendants' examining neurologist, Dr. Reiser, indicated in his report that he examined plaintiff on June 27, 2011 and noted that straight leg raising on the left was mildly positive at approximately 50 degrees and was negative on the right. During the sensory examination, Dr. Reiser found no abnormality in the upper extremities, although plaintiff reported slightly diminished response to pin stimulation in a diffuse distribution with normal thermal perception in the same distribution. He also noted that in plaintiff's lower extremities there was an area of mildly reduced response to pin and thermal stimulation on the anterior surface of the right lower leg and on the dorsum of the right foot and that in his left lower extremity there was an area of mildly reduced response to pin and temperature stimulation adjacent to a left medial calf scar from childhood. Dr. Reiser found that common and cortical modalities were otherwise symmetrical and intact. He concluded that based on his examination and a review of the submitted records that it appeared that plaintiff developed his symptomatology after the subject accident, and that diagnostic tests revealed

evidence of chronic, pre-existing involvement with superimposed symptomatic involvement and subtle findings of his neurological examination which were chronologically attributable to the subject accident.

The affirmed report dated February 27, 2012 of defendant's examining radiologist, Dr. Rigney, indicates that he reviewed the MRI scan of plaintiff's cervical spine performed on January 7, 2011 and found straightening of cervical curvature with multilevel degenerative changes and reviewed the MRI scan of plaintiff's lumbar spine and found multilevel degenerative changes. In summary, Dr. Rigney opined that there was nothing characteristic in appearance of any finding at any level of both scans to definitively state that the findings were due to the subject accident. He added that the cervical and lumbar spine had the appearance of a chronic multilevel degenerative/arthritic condition rather than a condition which was the result of a single traumatic event. Dr. Rigney concluded that there was no evidence that plaintiff suffered any injury to his cervical spine or to his lumbar spine as a result of the subject accident.

Here, defendants failed to meet their prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see* ***Keenum v Atkins***, 82 AD3d 843, 918 NYS2d 547 [2d Dept 2011]). Dr. Cohen found a significant limitation, 33 percent, of plaintiff's cervical extension a year-and-a-half after the subject accident (*see* ***Uvaydov v Peart***, 99 AD3d 891, 951 NYS2d 912 [2d Dept 2012]). Defendants failed to demonstrate that the limitations found by Dr. Cohen were the result of the prior, 2003, accident rather than from exacerbations caused by the subject accident (*see* ***Little v Ajah***, 97 AD3d 801, 949 NYS2d 109 [2d Dept 2012]; ***Edouazin v Champlain***, 89 AD3d 892, 933 NYS2d 85 [2d Dept 2011]).

Inasmuch as defendants failed to meet their prima facie burden of showing that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102 (d), the Court need not determine whether the papers submitted by plaintiffs in opposition were sufficient to raise a triable issue of fact (*see* ***Pero v Transervice Logistics, Inc.***, 83 AD3d 681, 920 NYS2d 364; ***Cues v Tavarone***, 85 AD3d 846, 925 NYS2d 346 [2d Dept 2011]). Therefore, the request by defendants for summary judgment dismissing the complaint is denied.

Plaintiffs now seek summary judgment in their favor on the issue of liability on the grounds that plaintiff's vehicle was stopped at a red traffic light when it was rear-ended twice by defendants' truck. In support of their motion, plaintiffs submit the summons and complaint, affidavits of service, plaintiffs' original and supplemental bills of particulars, the preliminary conference order, the compliance conference order, the note of issue, the police accident report, the deposition transcripts of plaintiff and James Donnelly on behalf of defendants Ducky's Towing Inc. and Ducky's Trucking & Rigging, Inc., and a stipulation dated January 25, 2012 signed by the parties' attorneys agreeing that defendant Carlos M. Mejia would not be produced for an examination before trial.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595). 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.***, 64 NY2d 851, 487 NYS2d 316). "Once this showing has been made, however, the burden shifts

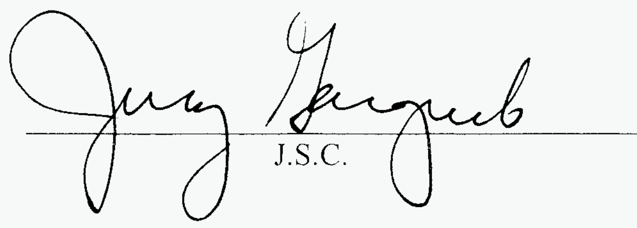
to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rearmost vehicle, imposing a duty of explanation on that operator to excuse the collision either through a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or any other reasonable cause (*see* ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 AD3d 489, 904 NYS2d 761 [2d Dept 2010]; ***Klopchin v Masri***, 45 AD3d 737, 846 NYS2d 311 [2d Dept 2007]; ***Leal v Wolff***, 224 AD2d 392, 638 NYS2d 110 [2d Dept 1996]). In addition, when a driver of an automobile approaches another automobile from the rear, he or she 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* ***Filippazzo v Santiago***, 277 AD2d 419, 716 NYS2d 710 [2d Dept 2000]).

Plaintiff's deposition testimony on April 13, 2011 reveals that at the time of the accident he was retired, it was 8:30 a.m., the weather was dry, and plaintiff was operating a 2006 Chrysler 300 en route to a doctor's appointment. The accident occurred on Route 111 (Wheeler Road) at its intersection with Veteran's Memorial Highway in Hauppauge. Plaintiff testified that his was the first vehicle stopped at the red traffic light at said intersection, traffic was light, and while he was stopped a truck rear-ended his vehicle twice. James Donnelly testified at his deposition on June 20, 2011 that he is the owner of Ducky's Towing and that Carlos Mejia was a driver for the company until December 2009.

Here, plaintiffs established their prima facie entitlement to judgment as a matter of law on the issue of liability by submitting evidence that plaintiff's stopped vehicle was struck twice in the rear by the vehicle operated by defendant Carlos M. Mejia and owned by defendants Ducky's Towing Inc. and Ducky's Trucking & Rigging, Inc. (*see* ***Kastritsios v Marcello***, 84 AD3d 1174, 923 NYS2d 863 [2d Dept 2011]; ***Ballatore v Hub Truck Rental Corp.***, 83 AD3d 978, 922 NYS2d 180 [2d Dept 2011]). The burden then shifted to defendants to come forward with a non-negligent explanation for the accident (*see* ***Costa v Eramo***, 76 AD3d 942, 907 NYS2d 510 [2d Dept 2010]). Defendants submitted their attorney's affirmation in partial opposition to the motion stating that the motion on liability cannot include a determination of whether plaintiff sustained a serious injury pursuant to Insurance Law § 5102 (d). Thus, in opposition, defendants failed to raise a triable issue of fact as to the existence of a non-negligent explanation for the accident (*see* ***Ballatore v Hub Truck Rental Corp.***, 83 AD3d 978, 922 NYS2d 180). Therefore, the request of plaintiffs for summary judgment in their favor on the issue of liability is granted.

Dated: 12/7/12



J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION