

**Podlewski v Knight**

2013 NY Slip Op 30095(U)

January 12, 2013

Sup Ct, Suffolk County

Docket Number: 11-10593

Judge: Ralph T. Gazzillo

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Plaintiff Sarah Podlewski commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred at the intersection of Route 25 and Wickham Avenue in the Town of Southold on May 22, 2009. The accident allegedly occurred when a vehicle operated by defendant Marvin Knight made a left turn at the subject intersection and struck a vehicle operated by defendant Carley Manwaring and owned by defendant Dawn Gibbs-Manwaring (hereinafter the Manwaring defendants). Plaintiff was riding as a passenger in the vehicle operated by Carley Manwaring at the time of the collision. By her bill of particulars, plaintiff alleges that she suffered various injuries due to the accident, including disc herniations at levels C3-C4 to C6-C7, L5-S1, disc bulges at levels L4-L5 and L5-S1, cervical and lumbar radiculopathy, lumbar and thoracic sprain and strain, and episodic paraparesis.

The Manwaring defendants move for summary judgment dismissing the complaint against them on the grounds that they did not breach any duty to plaintiff and that defendant Knight was negligent as a matter of law because he violated Vehicle and Traffic Law § 1141. In support of their motion, the Manwaring defendants submit, among other things, a copy of the pleadings and transcripts of the parties' deposition testimony. Plaintiff opposes the motion, arguing that a triable issue of fact exists as to whether defendant Manwaring operated her vehicle in a reasonable manner. In opposition, plaintiff submits transcripts of the parties' deposition testimony.

Defendant Knight cross-moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of his motion, defendant Knight submits, among other things, copies of the pleadings, the police accident report, transcripts of the parties' deposition testimony, hospital records related to plaintiff's treatment at Peconic Bay Medical Center, medical records of Dr. Stephen Lastig, and magnetic resonance imaging (MRI) reports of Dr. Melissa Sapan. Defendant Knight also submits medical reports of Dr. Benson Ong Hai and Dr. Maria Audrie DeJesus, and affirmed medical reports of Dr. Marc Chernoff and Dr. Raghava Polavarapu. The Manwaring defendants also move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" and adopt the arguments and evidence concerning serious injury asserted in co-defendant Knight's cross motion papers. Plaintiff opposes the motion and cross motion, arguing that defendants' submissions are insufficient to demonstrate prima facie that she did not sustain a serious injury as a result of the subject accident. In opposition, plaintiff submits, among other things, an affirmed medical report of Dr. Bellamy Brook, hospital records from her multiple visits to the emergency room of Peconic Bay Medical Center, MRI reports of Dr. Melissa Sapan, Dr. Salvatore Parrinello and Dr. David Kirshy, and transcripts of the parties' deposition testimony.

At her examination before trial, defendant Manwaring testified that prior to the accident, she was driving westbound on Route 25 at a speed of approximately 30 miles per hour. She testified that Route 25, which runs east and west with one lane of travel in each direction, is not governed by a stop sign at the intersection with Wickham Avenue. She testified that there is a stop sign controlling northbound and southbound travel at the intersection of Wickham Avenue and Route 25, where the accident occurred. She testified that there was nothing obstructing her view of the intersection, and that she does not recall if there was a vehicle parked on the shoulder near the intersection. She testified that she does not recall seeing defendant Knight's vehicle at the subject intersection, and that she "vaguely" remembers

observing it with her peripheral vision when the accident occurred. She further testified that defendant Knight's vehicle contacted the right front panel of her vehicle.

At his examination before trial, defendant Knight testified that prior to the accident, he stopped at a stop sign at the intersection of Wickham Avenue and Route 25. He testified that he intended to make a left turn on to Route 25 and that there was a truck parked on the shoulder of westbound Route 25, which obstructed his view of traffic. He testified that he looked in both directions before entering the intersection, and that he was "inching" out slowly because the truck blocked his view. He further testified that he did not observe defendant Manwaring's vehicle prior to the accident, and that his front bumper came into contact with the right passenger side door of the Manwaring vehicle.

At her examination before trial, plaintiff testified that she was riding as a passenger in the Manwaring vehicle on the date of the accident. She testified that the accident occurred at the intersection of Route 25 and Wickham Avenue, and that there is a stop sign controlling travel for vehicles on Wickham Avenue. She testified that prior to the accident she observed defendant Knight's vehicle stopped at the intersection and a vehicle parked on the right shoulder of Route 25. She further testified that the front of defendant Knight's vehicle struck the passenger side door and tire of the vehicle she was riding in.

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."

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.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyley*, 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, i.e., 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 also may 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]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Pagano v Kingsbury*, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (see *Gaddy v Eyley*, *supra*; *Pagano v Kingsbury*, *supra*; see generally *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

The evidence submitted by defendants established prima facie that plaintiff did not sustain a serious injury as a result of the subject accident (*see Toure v Avis Rent A Car Sys., supra; Al-Khilewi v Turman*, 82 AD3d 1021, 919 NYS2d 361 [2d Dept 2011]; *Singh v City of New York*, 71 AD3d 1121, 898 NYS2d 218 [2d Dept 2010]). Here, the affirmation of Dr. Polavarapu states that an examination of plaintiff's cervical spine reveals minimal tenderness to palpation of the cervical paraspinal musculature and no muscle spasm. It states that range of motion testing reveals flexion to 50 degrees (50 degrees normal), extension to 60 degrees (60 degrees normal), right and left rotation to 80 degrees (80 degrees normal), and right and left lateral flexion to 45 degrees (45 degrees normal). It states that an examination of plaintiff's thoracic spine reveals no tenderness to palpation over the paraspinal musculature and no spasm. It states that range of motion testing reveals right and left lateral bending to 45 degrees (45 degrees normal) and right and left rotation to 30 degrees (30 degrees normal). It states that range of motion testing of plaintiff's lumbar spine reveals flexion to 60 degrees (60 degrees normal), extension to 25 degrees (25 degrees normal) and right and left lateral bending to 25 degrees (25 degrees normal). It further states that range of motion testing of plaintiff's right shoulder and knees reveals normal range of motion. Dr. Polavarapu concludes that there is no evidence that plaintiff has an orthopedic disability and that she is able to perform all activities of daily living as well as her duties of her occupation without restrictions.

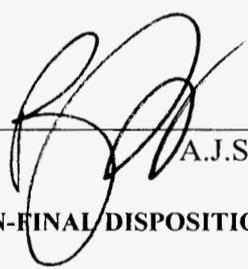
The affirmation of Dr. DeJesus states that a motor examination of plaintiff reveals normal muscle tone and bulk, and no atrophy. It states that range of motion testing of plaintiff's cervical spine reveals flexion to 50 degrees (50 degrees normal), extension to 60 degrees (60 degrees normal), right and left rotation to 80 degrees (80 degrees normal), and right and left lateral flexion to 45 degrees (45 degrees normal) with complaints of pain only on forward flexion. It states that range of motion testing of plaintiff's thoracolumbar spine reveals flexion to 60 degrees (60 degrees normal), extension to 25 degrees (25 degrees normal), and right and left lateral bending to 25 degrees (25 degrees normal) with complaints of pain. Dr. DeJesus opines that there is no indication that plaintiff has a neurologic disability, and that she is able to perform all usual daily activities without restrictions.

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see Gaddy v Eyler, supra*). In opposition, plaintiff has raised a triable issue of fact as to whether she sustained a "serious injury" within the meaning of Insurance Law § 5102(d) as a result of the accident (*see Walker v Esses*, 72 AD3d 938, 899 NYS2d 321 [2d Dept 2010]; *Yeong Hee Kwak v Villamar*, 71 AD3d 762; 894 NYS2d 916 [2d Dept 2010]; *Parker v Singh*, 71 AD3d 750, 896 NYS2d 437 [2d Dept 2010]; *Sanevich v Lyubomir*, 66 AD3d 665, 885 NYS2d 635 [2d Dept 2009]). The medical report of Dr. Brook reveals that significant limitations were still present when plaintiff was examined on May 30, 2012, three years post accident. The medical report states that plaintiff was asymptomatic prior to the accident, and that the accident directly caused the injuries suffered by plaintiff. Thus, "where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (*Noble v Ackerman*, 252 AD2d 392, 395, 675 NYS2d 86 [1st Dept 1998]; *see LaMasa v Bachman*, 56 AD3d 340, 869 NYS17 [1st Dept 2008]; *Reynolds v Burgezi*, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]). Accordingly, defendant Knight's cross motion and the Manwaring defendants' motion for summary judgment motion dismissing the complaint on the ground that plaintiff did not sustain "serious injury" within the meaning of Insurance Law § 5104(d) is denied.

As to the Manwaring defendants' motion for summary judgment on the issue of liability, a driver attempting a left turn at an intersection is required to yield the right of way to a vehicle approaching from the opposite direction "which is within the intersection or so close as to constitute an immediate hazard" (see Vehicle and Traffic Law § 1141). While a driver who has the right of way is entitled to anticipate that other vehicles will obey the traffic laws that require them to yield (see *Moreno v Gomez*, 58 AD3d 611, 872 NYS2d 143 [2d Dept 2009]; *Palomo v Pozzi*, 57 AD3d 498, 869 NYS2d 153 [2d Dept 2008]; *Jenkins v Alexander*, 9 AD3d 286, 780 NYS2d 133 [1st Dept 2004]), he or she is not entitled to blindly or wantonly enter an intersection (see Vehicle and Traffic Law § 1180; *Bonilla v Calabria*, 80 AD3d 720, 915 NYS2d 615 [2d Dept 2011]; *King v Washburn* 273 AD2d 725, 710 NYS2d 185 [3d Dept 2000]). Under the doctrine of comparative negligence, a driver who lawfully enters an intersection still may be found partially at fault for an accident if he or she failed to use reasonable care to avoid a collision with another vehicle in the intersection (*Romano v 202 Corp.*, 305 AD2d 576, 577, 759 NYS2d 365 [2d Dept 2003]; see *Tapia v Royal Tours Serv., Inc.*, 67 AD3d 894, 889 NYS2d 225 [2d Dept 2009]; *Sirot v Troiano*, 66 AD3d 763, 886 NYS2d 504 [2d Dept 2009]).

Here, the Manwaring defendants failed to make a prima facie showing of entitlement to judgment as a matter of law on the issue of liability (see *Simmons v Canaday*, 95 AD3d 1201, 945 NYS2d 138 [2d Dept 2012]; *Bonilla v Calabria, supra*; *Cali v Mustafa*, 68 AD3d 700, 888 NYS2d 912 [2d Dept 2009]). Defendant Knight testified that he was "inching" out slowly into the intersection, because his view was obstructed by a truck, and that his vehicle moved a few feet prior to the accident. Defendant Manwaring testified that she does not recall any obstruction at the intersection, and that she did not observe the Knight vehicle until the accident occurred. Thus, triable questions exist as to whether defendant Manwaring exercised due care as she entered the intersection and, if not, whether such lack of care was a proximate cause of the accident (see *Gause v Martinez*, 91 AD3d 595, 936 NYS2d 272 [2d Dept 2012]; *Gorham v Methun* 57 AD3d 480, 869 NYS2d [2d Dept 2008]; *Kuris v Albano*, 38 AD3d 849, 832 NYS2d 674 [2d Dept 2007]). Furthermore, as there is conflicting deposition testimony regarding the facts surrounding the accident, the Manwaring defendants failed to establish, prima facie, that defendant Knight's conduct was the sole proximate cause of the accident (see *Todd v Godek*, 71 AD3d 872, 895 NYS2d 861 [2d Dept 2010]; *Borukhow v Cuff*, 48 AD3d 726, 851 NYS2d 374 [2d Dept 2008]; *Gordon v Honig*, 40 AD3d 925, 837 NYS2d 197 [2d Dept 2007]). Thus, the Manwaring defendants' motion for summary judgment on the issue of liability is denied.

Dated: 1/12/13

  
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A.J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION