Berger v Siu Yin Wong

2013 NY Slip Op 31080(U)

May 9, 2013

Supreme Court, Suffolk County

Docket Number: 09-46153

Judge: Jerry Garguilo

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SHORT FORM ORDER

INDEX No. 09-46153

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

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 2-15-11
ADJ. DATE 4-11-13
Mot. Seq. # 002 - MG
003 - MD

RICHARD A. BERGER and MARY F. BERGER, Individually and as husband and wife,

Plaintiffs,

- against -

SIU YIN WONG,

Defendant.

CELLINO & BARNES, P.C.
Attorney for Plaintiffs
600 Old Country Road, Suite 500
Garden City, New York 11530

RICHARD T. LAU & ASSOCIATES
Attorney for Defendant
300 Jericho Quadrangle, P.O. Box 9040
Jericho, New York 11753

Upon the following papers numbered 1 to 49 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002)1 - 9 ; Notice of Cross Motion and supporting papers (003) 10-24; Answering Affidavits and supporting papers 25-32; 33-45; 48-49; Replying Affidavits and supporting papers 46-47; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by plaintiffs, Richard A. Berger and Mary F. Berger, pursuant to CPLR 3212 for summary judgment on the issue of liability in their favor and against the defendant Siu Yin Wong is granted, and it is

ORDERED that the plaintiffs are directed to file a note of issue and certificate of readiness within thirty days of the date of this order, and to serve a copy of this order with notice of entry upon the defendant and the Calendar Clerk of the Supreme Court, Riverhead within thirty days of the date of this order, and the Clerk is directed to calendar this action for a trial on damages forthwith; and it is further

ORDERED that motion (003) by defendant, Siu Yin Wong, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff has not sustained serious injuries as defined by Insurance Law § 5102 (d) is denied.

The plaintiffs, Bernard A. Berger, personally, and Mary F. Berger, derivatively commenced this action, to recover for personal injuries they allege were sustained by Bernard Berger on June 24, 2009 on Route 495 (Long Island Expressway) at approximately Exit 52, in the Town of Huntington, New York,

when the vehicle operated by Bernard Berger was struck in the rear by the vehicle operated by defendant Sui Yin Wong.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case ***(Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of motion (002), the plaintiffs have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint; defendant's answer, and plaintiff's verified bill of particulars; the transcripts of the examinations before trial of Bernard A. Berger and Siu Yin Wong each dated October 11, 2010; and an uncertified copy of an MV 104 Police Accident report which this court notes constitutes hearsay and is inadmissible (*see* ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]).

MOTION (002)

Bernard Berger testified to the extent that at the time of the accident, the weather was wet and misty. Traffic was heavy and stop-and-go. His windshield wipers and lights were on. He entered onto the Long Island Expressway at Exit 39, Glen Cove Road, traveling eastbound until the accident occurred just before Exit 52. He had been traveling about fifty-five miles per hour for about a half mile. At one point, his vehicle was completely stopped for several minutes in the left travel lane of three eastbound lanes. When he first noticed the defendant's car, about one half mile prior to the accident, it was stopped behind his vehicle in the left lane. When the traffic moved, the defendant's vehicle was in excess of one hundred yards behind his car, but came closer behind him again. He remained stopped for about a full minute. Traffic started again, and the defendant's vehicle was quite a distance behind him again. Traffic stopped again, and the defendant's vehicle again approached the rear of his vehicle, striking his vehicle in the rear with the front of her vehicle with a heavy impact. His vehicle was caused to move forward at least a car length. He heard no horns or the screeching of brakes prior to the impact.

Siu Yin Wong testified to the extent that she was involved in the subject motor vehicle accident while driving her Honda on the Long Island Expressway eastbound in the left of three regular travel lanes (not including the HOV lane to her left), with the intent to exit the roadway at Exit 53. She stated that there was heavy rain and fog and her windshield wipers were turned on. She described traffic as bumper to bumper. She had been traveling about forty-five miles per hour in the left travel lane, but when she

reached Exit 45, she traveled about fifteen miles per hour through exit 52. There was a vehicle in front of her, a black Honda, which was traveling "stop-and-go." She could see the brake lights on that vehicle. At times, a distance of about two hundred feet separated the front of her car from the rear of the plaintiff's car. From Exit 46, she had to bring her vehicle to a stop many times prior to the accident. About five seconds before the accident, she was traveling about five to ten miles per hour, when the plaintiff's vehicle began to move, then braked suddenly. A few seconds, later described as two to three seconds, passed from when the plaintiff applied his brakes until the front bumper and hood of her vehicle struck the rear of the plaintiff's car. She thought that she was ten to fifteen feet behind the plaintiff's vehicle when she saw him brake and she jammed on her brakes with medium pressure. She did not know if her car skidded, and she did not hear it skid until she pressed down on her brakes with more force, but struck the plaintiff's car. She called the police following the accident and told the officer that the plaintiff braked, and she braked and then rammed into the back of his car. She did not tell the officer that she could not see because of the weather conditions. She testified that it cost $3,000 to repair the front of her vehicle, and that she only saw a scratch on the plaintiff's bumper.

When a driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate of speed and to maintain control of his vehicle and use reasonable care to avoid colliding with the other vehicle (***Chepel v Meyers,*** 306 AD2d 235, 762 NYS2d 95 [2003]; ***Power v Hupart,*** 260 AD2d 458, 688 NYS2d 194 [1999]; *see also,* Vehicle and Traffic Law § 1129[a]). Vehicle & Traffic Law § 1129 (a) provides that 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 vehicles and the traffic upon and the condition of the highway. A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that the defendant rebut the inference of negligence by providing a nonnegligent explanation that she applied her brakes but her vehicle was unable to stop as her vehicle skid on the wet road condition (***Grimm v Bailey***, 2013 NY Slip Op 2220 [Supreme Court, New York, Appl Div. 2d Dept]). Under the circumstances of this case, such explanation by the defendant is insufficient to rebut the inference of negligence caused by the rear-end collision, as a claim of a sudden stop by the leading vehicle, standing alone, is insufficient to rebut the presumption of negligence (see ***Byrne v Smith***, 96 AD3d 704, 945 NYS2d 737 [2d Dept 2012]; ***Franco v Bauguste***, 70 AD3d 767, 895 NYS2d 152 [2d Dept 2010]). Moreover, the defendant has further failed to rebut the inference that she did not maintain a safe distance between her vehicle and the plaintiff's vehicle, thus proximately causing the subject accident.

A driver, as a matter of law, is charged with seeing what there is to be seen on the road, that is, what should have been seen, or what is capable of being seen at the time (***People of the State of New York v Anderson,*** 7 Misc3d 1022A, 801 NYS2d 238 [City Ct, Ithaca 2005]). Here, the defendant testified that ten seconds prior to the accident, she was looking straight ahead and saw the brake lights on the plaintiff's vehicle illuminate. However, she could not stop her vehicle prior to striking the rear of the plaintiff's vehicle, clearly establishing that she was following too closely behind the plaintiff's vehicle and did not properly and safely leave sufficient space between the front of her vehicle and the rear of the her vehicle given the traffic conditions. Consequently, the defendant failed to meet the burden of establishing through admissible evidentiary proof, the existence of a triable issue of fact sufficient to defeat the summary judgment motion. She has failed to come forward with a non-negligent

explanation for the occurrence of the accident and her failure to safely stop and not strike the plaintiffs' vehicle, or to rebut the inference that she was traveling too closely behind the plaintiff's vehicle.

Accordingly, motion (002) is granted in favor of the plaintiffs on the issue of liability.

MOTION (003)

Pursuant to Insurance Law § 5102 (d), "'[s]erious injury' means 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

In order to recover under the "permanent loss of use" category, a 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 a specific percentage of the loss of range of motion must be ascribed 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 (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

In support of motion (003), the defendant has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendant's answer, and plaintiff's verified bill of particulars; transcript of the examination before trial of Bernard A. Berger dated October 11, 2010; uncertified copy of plaintiffs emergency room record at Good Samaritan Hospital dated June 24, 2009; an interpretation of an EMG and Nerve Conduction study dated July 7, 2009; report of Sondra J. Pfeffer, M.D. dated November 8, 2010 concerning her independent radiological review of the plaintiff's MRI studies dated March 9, 2008 and July 12, 2009, lumbar MRI of July 23, 2010, right knee MRI dated July 11, 2009; report of Isaac Cohen, M.D. dated December 2, 2010; and an uncertified copy of plaintiff's No-Fault application which is not in admissible form.

By way of his verified bill of particulars, the plaintiff alleges that as a result of the subject accident, injuries consisting of the following have been sustained: cervical spine C4-5 discontinuity of

the flaval ligament posteriorly representing a posttraumatic tear; C5-5 disc bulge with narrowing of the central canal compression on the ventral cord and narrowing the bilateral neural foramina; C5-6 disc herniation with spinal cord compression and compression of both C6 nerve roots; C6-7 left lateral recess disc herniation extending into the proximal neural foramen with spinal cord compression and impingement at the left C7-C8 nerve roots; cervicalgia; cervical radiculopathy; cervical radiculitis; cervical sprain; submandibular gland stone; reversal of the cervical lordosis; surgical intervention necessitated by the foregoing consisting of an anterior cervical discetomy and fusion at the levels of C5-6 and C6-7; arthrodesis at C5-6 and C6-7 using 8mm lordotic inter-body device with four 14 x 3 mm cranial screws and two 14 x 3 mm caudal screws; anterior segmental instrumentation of C5-6 and C6-7; use of autograft; use of DBX; use of fluoroscopy; need for future surgery due to loss of function, movement and range of motion, severe pain swelling and tenderness; disc bulge at T6-T7 indenting the thecal sac; disc bulge at T7-8 indenting the thecal sac; need for future surgery to the thoracic spine; multilevel Schmorl's nodes of the lumbar spine; central spinal stenosis at L1-2 through L4-5; lumbar radiculopathy; lumbar sprain; need for future surgery of the lumbar spine; right knee-tear of the apex of the left meniscus with loss of cartilage along the medial femoral condole and the medial tibial plateau with subchondral edema along the mid aspect of the medial tibial plateau; chondromalacia along the medial femoral condole and the medial tibial plateau; joint effusion of the right lateral meniscus with need for future surgery; concussion/head trauma; posttraumatic headache; post-operative hoarseness and loss of voice for eight weeks due to trauma to laryngeal nerve; post-operative difficulty swallowing, eating and drinking for ten weeks due to trauma to the esophagus; post-operative weight loss; and exacerbation and/or aggravation of pre-existing injuries.

Upon review of the defendant's evidentiary submissions, it is determined as a matter of law that the defendant has not established prima facie entitlement to summary judgment pursuant to either category of injury defined by Insurance Law § 5102 (d).

While the plaintiff has alleged that he sustained cervical radiculitis and cervical radiculopathy, as well as posttraumatic headaches and concussion, no report from a neurologist who examined the plaintiff on behalf of the moving defendant has been submitted to rule out these claimed neurological/ radicular injuries (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), thus raising factual issues precluding summary judgment.

The defendant has further failed to support this motion with copies of the medical records and initial test results for the MRI studies of the plaintiffs' cervical spine, lumbar spine, and right knee commented upon by Dr. Pfeffer and reviewed by Dr. Cohen, as set forth in Dr. Cohen's report, leaving the court to speculate as to the contents of those original records and reports of the MRI studies generated by the plaintiff's treating physicians. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and the expert testimony is limited to facts in evidence (*see,* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]). Such records are not in evidence, precluding summary judgment.

Additionally, although Dr. Cohen reviewed the cervical MRI report of August 4, 2009, Dr. Pfeffer has not included this study in her review or opinions, leaving the court to speculate as to whether her opinions would be affected by review of the same, and why this MRI study was excluded from review.

While Dr. Cohen performed physical examination of the plaintiff, including determining range of motion values of plaintiff's cervical spine, thoracolumbar spine, and right knee, he compared his findings to normal range of motion values set forth in a spectrum, leaving it to the court to speculate under what conditions the ranges would be applied (*see* ***Spencer v Golden Eagle, Inc.***, 82 AD3d 589, 920 NYS2d 24 [1st Dept 2011]; ***Lee v M & M Auto Coach, Ltd.***, 2011 NY Slip Op 30667U, 2011 NY Misc Lexis 1131 [Sup Ct, Nassau County 2011]). When a normal reading for range of motion testing is provided in terms of a spectrum or range of numbers rather than one definitive number, the actual extent of the limitation is unknown (*see* ***Sainnoval v Sallick***, 78 AD3d 922, 923, 911 NYS2d 429 [2d Dept 2010]; ***Lee v M & M Auto Coach, Ltd.***, *supra*; ***Hypolite v International Logistics Management, Inc.***, 43 AD3d 461, 842 NYS2d 453 [2d Dept 2007]; ***Somers v Macpherson,*** 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). Thus, Dr. Cohen's report raises factual issues which precludes summary judgment.

Upon examination of the plaintiff's right knee, post ACL reconstruction, Dr. Cohen found a minimal amount of patellofemoral joint crepitation on flexion and extension, with flexion up to 130 degrees out of a normal of 130-150 degrees. He stated that there is no evidence of acute findings, but does not express an opinion as to the need for the knee surgery or rule out that it was not causally related to the accident. He does indicate that chondromalacia is evident on a clinical basis, and that there is preexistent degenerative arthritis. Again, factual issues are raised as the normal range of motion to which Dr. Cohen compared his range of motion findings of the plaintiff's knee is set forth in a range of numbers, precluding summary judgment.

Dr. Cohen stated that examination of the plaintiff's thoracolumbar area was unremarkable and that the plaintiff had preexistent degenerative disc disease that was temporarily exacerbated by the accident. Dr. Cohen continued that the plaintiff also had a temporary exacerbation of an otherwise preexistent degenerative condition involving the cervical spine, and further stated that his examination demonstrates no significant objective findings, then contradicts this opinion by stating that there is some "minimal" restriction of the range of motion, which he determined objectively. Although he indicated that the plaintiff was treated with surgery at C5-6 and C6-7, he stated that this was performed for pathology that was preexistent to the accident, although exacerbated by the accident. Thus, Dr. Cohen has not ruled out that the surgery was causally related to the exacerbation which Dr. Cohen stated was due to the subject accident.

It is further noted that the defendant's examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendant's physician's affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following

the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio***, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]). Additionally, the expert offers no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]), precluding summary judgment.

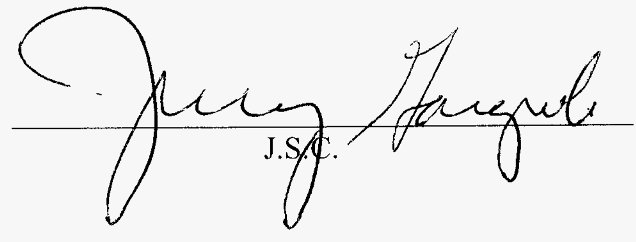
Bernard Berger testified to the extent that he had been employed by Pall Corporation since 2007 as a business development manager with the industrial materials group, which required his traveling to various parts of the world. After the accident, he had to work at home two to three days a week until September 2010. He was passed over for a promotion and was unable to travel. Immediately after the collision, he felt pain in his neck, back, and right knee. Thereafter, as he drove from the scene of the accident, he had spasms up and down from his knee to his ankle in his right leg, and had difficulty driving, which required him to stop at intervals to massage his leg until the spasms stopped. After he arrived home, he went to the hospital with complaints of a severe headache, back and neck pain, spasms in his neck, and pain and spasms in his right knee. X-rays were taken and he was prescribed Valium for the spasms. He followed up with Dr. Panzer. He previously treated with Dr. Alpert, an orthopedist for a prior injury to his right knee involving a torn ACL, partially torn MCL, and torn meniscus for which he had surgery in about 2003, followed by physical therapy. In about 2006-2007, he had previous neck pain without injury, relieved with physical therapy prescribed by neurologist Dr. Firouztale.

The plaintiff continued that after this accident, Dr. Firouztale ordered an MRI of his neck. He was referred to Dr. Elfiki, a neurosurgeon, but returned to Dr. Firouztale who then ordered an EMG and nerve conduction studies. He was advised that he had several bulging discs causing "blocked nerves" in his neck, and was referred to Dr. Sathi who ordered a new MRI of his cervical spine. Dr. Sathi recommended immediate surgery. He obtained a second visit with Dr. Lattuga who recommended surgery within a week. He obtained another consult with Dr. Reid, also a neurosurgeon, who performed surgery on his neck on September 9, 2009 for which he wore a collar postoperative through New Years, even while sleeping. In August 2010, he obtained treatment from Dr. Fandos, a pain management specialist for which he received injections into his cervical spine. He received care with Dr. Ritter for his knee. An MRI diagnosed a tear in the meniscus of his right knee. Surgery was recommended, but he had not yet had it performed at the time of his deposition. He testified that his condition had become progressively worse. He can no longer play golf and he was an avid golfer. He cannot go on playground equipment with his daughter, and cannot play with his older children as he used to do. He previously played the outfield position on the company softball team and can no longer. He cannot do yard work and lifting as he used to. He can only cook in a limited fashion.

Based upon the foregoing, the defendant has failed to demonstrate entitlement to summary judgment on either category of injury defined in Insurance Law § 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving party has failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]), as the burden has not shifted to the plaintiff.

Accordingly, motion (003) by the defendant Wong for summary judgment dismissing the complaint on the basis that the plaintiff did not suffer serious injury as defined by Insurance Law §5102 (d) is denied.

Dated: 5/9/13



J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**