

<b>Andriotty-Bara v King</b>
2013 NY Slip Op 33175(U)
December 8, 2013
Supreme Court, Suffolk County
Docket Number: 11-15797
Judge: Peter H. Mayer
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

***PRESENT:***

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 3-8-13 (#001)

MOTION DATE 5-8-13 (#002)

MOTION DATE 8-5-13 (#003)

ADJ. DATE 9-9-13

Mot. Seq. # 001 - MD

# 002 - XMG

# 003 - XMotD

-----X			
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	:		
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants Gerald Mulderig and Jason Mulderig, dated January 31, 2013, and supporting papers; (2) Notice of Cross Motion/Order to Show Cause by the defendant Daphne King, dated April 22, 2013, and supporting papers; (3) Notice of Cross Motion/Order to Show Cause by the plaintiffs, dated July 30, 2013, and supporting papers (including Memorandum of Law dated July 30, 2013); (4) Affirmation in Opposition by the defendants Gerald Mulderig and Jason Mulderig, dated September 6, 2013, and supporting papers; (5) Affirmation in Opposition by the defendant Daphne King, dated August 22, 2013, and supporting papers; (6) Affirmation in Support by the defendant Daphne King, dated March 1, 2013, and supporting papers; (7) Reply Affidavit by the defendants Elene Andriotty and Gordon Bara, dated August 22, 2013, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that the motion (# 001) by defendants Gerald Mulderig and Jason Mulderig for summary judgment dismissing the complaint against them on the ground that plaintiff Elene Andriotty-Bara did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; in its further

**ORDERED** that the cross motion (# 002) by defendant Daphne King for summary judgment dismissing the complaint and all cross claims against her is granted; in its further

**ORDERED** that the cross motion (# 003) by plaintiffs for an order granting them summary judgment on the issue of liability is decided as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Elene Andriotty-Bara, with a derivative claim on behalf of Gordon Bara, as a result of a chain-reaction, rear-end motor vehicle collision which occurred on Nichols Road, a two-way roadway with one lane in each direction, in the Town of Smithtown, New York, on December 31, 2010. The following facts are undisputed. There were three vehicles involved in the accident. The lead vehicle was the vehicle owned by plaintiff Gordon Bara and operated by plaintiff Elene Andriotty-Bara; behind it was the vehicle owned and operated by defendant Daphne King; and last in line was the vehicle owned by defendant Gerald Mulderig and operated by defendant Jason Mulderig.

Defendants Gerald Mulderig and Jason Mulderig now move (# 001) for summary judgment dismissing the complaint against them on the ground that plaintiff Andriotty-Bara has not sustained a serious injury as defined in Insurance Law § 5102 (d).

By her bill of particulars, plaintiff Andriotty-Bara alleges that, as a result of the subject accident, she sustained serious injuries including cervical and lumbar injury with radiculitis; right C6 radiculopathy; right shoulder derangement and impingement; minimal subacromial-subdeltoid bursal effusion and peribursal edema consistent with bursitis; irregular SLAP tear extending from the posterior-superior to the anterior labrum; surgical scarring in the right shoulder; and pain and numbness in the right arm.

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*, 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 a “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 (see *Perl v Meher*, 2011 NY Slip Op 8452, 2011 NY Lexis 3320 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) (see *Gaddy v Eyster*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos* 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff’s own deposition testimony and the affirmed medical report of the defendant’s own examining physician (see *Moore v Edison*, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; *Farozes v Kamran* 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). 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, 853, 487 NYS2d 316 [1985]; *Boone v New York City Tr. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendants Gerald Mulderig and Jason Mulderig failed to make a prima facie showing that plaintiff Andriotty-Bara did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (see *Reitz v Seagate Trucking, Inc.*, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). On May 15, 2012, approximately one year and four months after the subject accident, the Mulderig defendants’ examining orthopedist, Dr. John Killian, examined plaintiff Andriotty-Bara using certain orthopedic tests and neurological tests. Dr. Killian found that all the test results were negative or normal. Dr. Killian performed range of motion testing on plaintiff Andriotty-Bara’s cervical spine and right shoulder using a goniometer, and found that she had range of motion restrictions in her right shoulder: external rotation was to 50 degrees (70 degrees normal) and forward flexion was to 130 degrees (180 degrees normal) (see *Jean v New York City Tr. Auth.*, 85 AD3d 972, 925 NYS2d 657 [2d Dept 2011]; *Reitz v Seagate Trucking, Inc.*, *supra*). Dr. Killian found that although plaintiff Andriotty-Bara complained of pain at the extremes of right rotation and left lateral flexion, she had full range of motion in her cervical spine. However, the normal range of motion values for cervical rotation and lateral flexion set forth in Dr. Killian’s report were illegible. Moreover, although plaintiff Andriotty-Bara claimed in the bill of particulars that she sustained lumbar injury with radiculitis as a result of this accident, Dr. Killian failed to discuss the degree of range of motion of her lumbar spine (see *Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]). Dr. Killian’s report is insufficient to sustain the Mulderig defendants’ prima facie burden.

Inasmuch as Mulderig defendants failed to meet their prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiffs in opposition to the moving defendants’ motion for summary judgment were sufficient to raise a triable issue of fact (see *McMillian v Naparano*, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; *Yong Deok Lee v Singh*, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]). Thus, the motion (# 001) by defendants Gerald Mulderig and Jason Mulderig for summary judgment is denied.

Defendant Daphne King cross-moves (# 002) for summary judgment dismissing the complaint and all cross claims against her, asserting that she bears no liability for the plaintiff’s accident, and that the accident was solely the result of defendant Jason Mulderig’s failure to control his vehicle. In support, she submits, *inter alia*, the pleadings and the transcripts of the deposition testimony given by plaintiff Andriotty-Bara, defendant Daphne King and defendant Jason Mulderig.

Plaintiffs cross-move (# 003) for summary judgment in their favor on the issue of liability on the ground that they were not negligent, and that the subject accident was solely the result of defendants’ failure to control their vehicle. In support, plaintiffs submit, *inter alia*, the pleadings and the transcripts of the

deposition testimony given by plaintiff Andriotty-Bara, defendant Daphne King and defendant Jason Mulderig.

At her deposition, plaintiff Andriotty-Bara testified that on the day of the accident, after having traveled southbound on Nichols Road, she stopped and illuminated her left turn signal, intending to turn left into the driveway of her house, which is located on the northbound lane of Nichols Road. She had waited 20 to 25 seconds for northbound traffic to clear, when she heard a loud noise and felt one impact to the rear of her vehicle.

At her deposition, defendant Daphne King testified to the effect that she had been traveling southbound on Nichols Road. When she observed the plaintiffs' vehicle in front of her activating its left turn signal, she slowed down. As the plaintiffs' vehicle stopped, she came to a complete stop about a car length behind it. Subsequently, she was struck from the rear by the Mulderig vehicle, and was propelled into the rear of the plaintiffs' vehicle, which was stopped.

At his deposition, defendant Jason Mulderig testified to the effect that he had been traveling southbound on Nichols Road at approximately 20 to 25 miles per hour. While he was observing the plaintiffs' vehicle in front of the King vehicle decelerate and come to a gradual stop for about five to ten seconds, he saw the King vehicle stop suddenly in front of him. He then hit the brakes and pulled the emergency brakes, but was unable to stop in time to avoid the collision. At the time of the impact, he was driving at the speed of 20 miles per hour. Prior to the accident, there was nothing obstructing his view of the roadway in front of him.

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed, to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see* Vehicle and Traffic Law § 1129 [a]; *Gibson v Levine*, 95 AD3d 1071, 944 NYS2d 610 [2d Dept 2012]; *Zweeres v Materi*, 94 AD3d 1111, 942 NYS2d 625 [2d Dept 2012]; *Nsiah-Ababio v Hunter*, 78 AD3d 672, 913 NYS2d 659 [2d Dept 2010]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on wet pavement or some other reasonable excuse (*see Fajardo v City of New York*, 95 AD3d 820, 943 NYS2d 587 [2d Dept 2012]; *Giangrasso v Callahan*, 87 AD3d 521, 928 NYS2d 68 [2d Dept 2011]; *Ortiz v Hub Truck Rental Corp.*, 82 AD3d 725, 918 NYS2d 156 [2d Dept 2011]). A claim that the driver of the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence (*see Zdenek v Safety Consultants, Inc.*, 63 AD3d 918, 883 NYS2d 57 [2d Dept 2009]; *Jumandeo v Franks*, 56 AD3d 614, 867 NYS2d 541 [2d Dept 2008]). If the operator of the moving vehicle cannot come forward with any evidence to rebut the inference of negligence, the driver of the lead vehicle may properly be awarded judgment as a matter of law (*see Russ v Investech Sec.*, 6 AD3d 602, 775 NYS2d 867 [2d Dept 2004]; *Reid v Courtesy Bus Co.*, 234 AD2d 531, 651 NYS2d 612 [2d Dept 1996]).

Here, the adduced evidence indicates that the King vehicle was stopped or stopping when she was struck from the rear, and that defendant Jason Mulderig started the chain of events. Thus, the requisite prima facie case of negligence has been established and there is no material triable issue of fact as to the

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negligence of defendant Jason Mulderig regarding the subject accident (*see Volpe v Limoncelli*, 74 AD3d 795, 902 NYS2d 152 [2d Dept 2010]; *Johnson v Spoto*, 47 AD3d 888, 850 NYS2d 204 [2d Dept 2008]).

In opposition, the Mulderig defendants have failed to rebut the inference of negligence by providing a non-negligent explanation for the collision. Defendant Jason Mulderig's testimony that, although he observed the plaintiffs' vehicle in front of the King vehicle slowing and come to a stop, he was unable to avoid the collision with the King vehicle because its stop was sudden and unexpected does not adequately rebut the inference of negligence. Defendant Jason Mulderig was obligated to take appropriate precautions, including maintaining a safe distance (*see Volpe v Limoncelli, supra; Harrington v Kern*, 52 AD3d 473, 859 NYS2d 480 [2d Dept 2008]).

In view of the foregoing, the cross motion (# 002) by defendant Daphne King for summary judgment is granted, and the complaint and cross claims against her are severed as well as dismissed. The branch of the cross motion (# 003) by plaintiffs for summary judgment on the issue of liability against the Mulderig defendants is granted, and the branch of the cross motion (# 003) by plaintiffs for summary judgment on the issue of liability against defendant Daphne King for summary judgment is denied as moot. Plaintiffs are directed to serve a copy of this order with notice of entry upon the Calendar Clerk of this Court. Upon such service, the Calendar Clerk is directed to place this matter on the Calendar Control Part Calendar for the next available date.

Dated: \_\_\_\_\_

12/8/13

  
PETER H. MAYER, J.S.C.

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