D'Orta v Sullivan
2015 NY Slip Op 32449(U)
December 24, 2015
Supreme Court, Suffolk County
Docket Number: 10-22759
Judge: Peter H. Mayer

[* 1]

SHORT FORM ORDER

INDEX No. 10-22759
CAL. No. 15-00095MV

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 4-13-15
ADJ. DATE 5-12-15
Mot. Seq. # 004 - MotD

DOREEN D'ORTA and GINA D'ORTA,

Plaintiffs,

- against -

BRIAN T. SULLIVAN, ROSE TRUCKING, INC., GABRIEL M. DIVONE and JOHN D'ORTA,

Defendants.

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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 defendants Rose Trucking, Inc. and Gabriel M. Divone, dated March 13, 2015, and supporting papers; (2) Affirmation in Opposition by the plaintiffs, dated April 28, 2015, and supporting papers (including Memorandum of Law dated April 28, 2015); (3) Reply Affirmation by defendants Rose Trucking, Inc. and Gabriel M. Divone, dated May 7, 20105, 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 by defendants Rose Trucking, Inc. and Gabriel M. Divone for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability or, in the alternative, for an order granting summary judgment dismissing the complaint of plaintiff Gina D'Orta on the ground that she did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is decided as follows.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiffs as a result of a motor vehicle accident with an automobile owned and driven by defendant Brian T. Sullivan and a truck owned by defendant Rose Trucking, Inc. and driven by defendant Gabriel M. Divone. The accident occurred on February 25, 2010 at approximately 10:30 p.m. on Patchogue Holbrook Road at its intersection with Union Avenue in the Town of Brookhaven, New York. The plaintiffs were passengers in the automobile owned by plaintiff Doreen D'Orta and driven by defendant John D'Orta. It is uncontroverted that defendant Sullivan was making a left turn from Patchogue Holbrook Road, a four lane roadway with two lanes in each direction and left turn lanes in the north and south bound directions, onto Union Avenue, when the vehicle collided with the plaintiffs' automobile. At the time of the collision, the plaintiffs' vehicle was traveling in the left lane of Patchogue Holbrook Road in the opposite direction (*i.e.* southbound). The truck driven by defendant Divone was also traveling in the southbound direction on Patchogue Holbrook Road immediately prior to the accident, although he states that he was traveling in the right lane next to the plaintiffs' vehicle while the plaintiffs and defendant John D'Orta claim he was driving behind them in the left lane.

Defendants Rose Trucking, Inc. and Divone now move for an order granting summary judgment dismissing the complaint and all cross claims asserted against them. Movants allege that they are not liable for the accident, that defendant Divone acted reasonably in the face of an emergency situation, and that he did not cause or contribute to the accident. In support, movants submit, *inter alia*, the pleadings, the bill of particulars, his own deposition transcript, and the transcripts of the deposition testimony of the plaintiffs and defendants John D'Orta and Sullivan.

At his deposition, John D'Orta testified that while he traveled in the "left" southbound lane of Patchogue Holbrook Road, the truck operated by defendant Divone was behind him. Approximately 25 to 30 yards from the intersection with Union Avenue, he observed the vehicle operated by defendant Sullivan, which was traveling northbound on Patchogue Holbrook Road. The Sullivan vehicle entered the intersection to make a left turn in front of him. John D'Orta averred that he was rendered unconscious by the impact with the Sullivan vehicle.

At her deposition, Doreen D'Orta testified that she was a front seat passenger in the vehicle operated by John D'Orta. She stated that the Sullivan vehicle in front of them came into contact with the front of their vehicle, and the Divone truck "instantly" hit their vehicle in the rear.

At her deposition, Gina D'Orta testified that she was a back seat passenger in the vehicle operated by John D'Orta. She stated that when the subject accident happened, she felt two impacts. Although two impacts happened simultaneously, she "felt a jolt in the back" prior to the impact of the collision between their vehicle and the Sullivan vehicle.

At his deposition, defendant Divone testified that he had traveled in the "right" southbound lane of Patchogue Holbrook Road next to the plaintiffs' vehicle, and that he never changed lanes to the left lane prior to the subject accident. He stated that he first observed the Sullivan vehicle in the opposite lane when it was only three to four car lengths in front and to the left of his truck. Then, he immediately took his foot off the accelerator. However, he did not have a chance to apply his brakes. He observed the Sullivan vehicle collide with the plaintiffs' vehicle in the middle of the intersection, about two car lengths away from him. As a result of the collision, both vehicles came toward his truck. Although he felt that something hit his truck, he had no recollection as to which vehicle it was.

At his deposition, defendant Sullivan admitted that he went through the subject intersection against a red light and that he never observed the plaintiffs' vehicle prior to the collision. He stated that as he moved into the left turning lane, his vehicle swung out, and he lost control of his vehicle. Prior to the accident, he did not see any other vehicle in the southbound traffic lanes of Patchogue Holbrook Road.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*)

Under the emergency doctrine, when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context (*see* ***Rivera v New York City Tr. Auth.***, 77 NY2d 322, 327, 567 NYS2d 629 [1991]; ***Ardila v Cox***, 88 AD3d 829, 830, 931 NYS2d 120 [2d Dept 2011]; ***Miloscia v New York City Bd. of Educ.***, 70 AD3d 904, 905, 896 NYS2d 109 [2d Dept 2010]). The question of the existence of an emergency and the reasonableness of the response to it is an issue for the trier of fact (*see* ***Dalton v Lucas***, 96 AD3d 1648, 947 NYS2d 285 [4th Dept 2012]; ***Mitchell v City of New York***, 89 AD3d 1068, 933 NYS2d 405 [2d Dept 2011]; ***Khan v Canfora***, 60 AD3d 635, 874 NYS2d 243 [2d Dept 2009]), although those issues may in appropriate circumstances be determined as a matter of law (*see* ***Ardilla v Cox***, 88 AD3d 829, 931 NYS2d 120 [2d Dept 2011]; ***Brannan v Korn***, 84 AD3d 935, 923 NYS2d 345 [2d Dept 2011]; ***Jones v Geoghan***, 61 AD3d 638, 876 NYS2d 508 [2d Dept 2009]).

Here, the deposition testimony of the plaintiffs and defendants John D'Orta and Divone conflict as to the happening of the accident (*see* ***Pyke v Bachan***, 123 AD3d 994, 999 NYS2d 508 [2d Dept 2014]; ***Viggiano v Camara***, 250 AD2d 836, 673 NYS2d 714 [2d Dept 1998]). While John D'Orta testified that the truck operated by Divone was behind him in the "left" southbound lane of Patchogue Holbrook Road at the time of the accident, Divone testified that he was in the "right" lane. Moreover, although Divone testified that as a result of the collision between the plaintiffs' vehicle and the Sullivan vehicle, one of them hit his truck, Gina D'Orta testified that she felt an impact from the back prior to the collision with the Sullivan vehicle. Under these circumstances, there are questions of fact as to how and where the accident happened, and as to whether comparative negligence on Divone's part contributed to the subject accident (*see* ***Ruthinoski v Brinkman***, 63 AD3d 900, 882 NYS2d 165 [2d Dept 2009]). Furthermore, other factual issues exist as to whether Divone was faced with an emergency situation and whether his response to the situation was reasonable and prudent under the circumstances (*see* ***Khan v Canfora***, 60 AD3d 635, 874 NYS2d 243 [2d Dept 2009]). Thus, movants have failed to sustain the initial burden of establishing prima facie entitlement to judgment as a matter of law. Accordingly, the branch of their motion on the issue of liability as asserted against them is denied.

Alternatively, defendants Rose Trucking, Inc. and Divone seek summary judgment dismissing the complaint of plaintiff Gina D'Orta as asserted against them on the ground that she did not sustain a "serious injury" as defined in Insurance Law § 5102 (d).

By the bill of particulars, plaintiff Gina D'Orta alleges that, as a result of the subject accident, she sustained serious injuries including sprain and tendonitis of the right ankle; contusion and cuts to the right arm; a meniscus tear in the right knee; and lumbar and cervical sprain.

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***, 18 NY3d 208, 936 NYS2d 655 [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 Eyler***, 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 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, movants made a prima facie showing that Gina D'Orta did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of the moving defendants' examining physician (*see* ***Bailey v Islam***, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; ***Sierra v Gonzalez First Limo***, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]). On April 22, 2014, approximately four years and two months after the subject accident, the moving defendants' examining orthopedist, Dr. Michael Katz, examined Gina D'Orta using certain orthopedic and neurological tests including Adson's test, straight leg raising test, Babinski sign, Patrick sign, Tinel's test, Lachman's test, and McMurray's test. Dr. Katz found that all the test results were negative or normal. Dr. Katz performed range of motion testing on Gina D'Orta's cervical and lumbar spine, elbows, arms, left hip, right knee, and right foot and ankle using a goniometer, and reported range of motion testing results that when compared to normal findings were all normal. Dr. Katz opined that Gina D'Orta had no orthopedic disability at the time of the examination, and that he may continue with his activities of daily living (*see* ***Willis v New York City Tr. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]).

Further, at her deposition, Gina D'Orta testified that at the time of the accident, she worked at a sandblasting company; that following the accident, she was confined to her bed for two days and missed 10 days or almost two weeks from work; that she returned to work without restrictions; and that she did not undergo surgery or physical therapy. Gina D'Orta also testified that there is no activity that she is unable to perform. Her deposition testimony established that her injuries did not prevent her from performing "substantially all" of the material acts constituting her customary daily activities during at least 90 out of the first 180 days following the accident (*see* ***Burns v McCabe***, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; ***Curry v Velez***, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]).

In opposition, Gina D'Orta contends that she did sustain a serious injury within the meaning of Insurance Law § 5102 (d). In support, Gina D'Orta submits, *inter alia*, the unsworn medical report dated April 28, 2010 of her treating radiologist, Dr. Alex Rosioreanu and the medical report dated September 7, 2012 of a neurologist, Dr. Daniel Cohen.

On September 7, 2012, approximately two years and six months after the subject accident, Dr. Cohen administered certain orthopedic and neurological tests, and found that all the test results were negative. Dr. Cohen stated that there was full range of movement of Gina D'Orta's cervical and lumbar

spine. Dr. Cohen opined that Gina D'Orta had no neurological disability at the time of the examination, although she had right foot pain related to sprain.

Under the circumstances, the Court finds that Gina D'Orta failed to raise a triable issue of fact that she sustained a "serious injury" under Insurance Law § 5102 (d) as a result of the subject accident.

In the view of foregoing, the branch of the motion by defendants Rose Trucking, Inc. and Divone for summary judgment on the issue of Gina D'Orta's serious injury is granted, and the complaint of Gina D'Orta as asserted against them is dismissed.

Moreover, this court has the authority to search the record and grant summary judgment to a non-movant who is entitled to such relief without the necessity of a cross motion (CPLR 3212 [b]). Although defendant Brian T. Sullivan did not move for summary judgment dismissing Gina D'Orta's complaint insofar as asserted against him on the ground of a lack of serious injury, upon searching the record, this court grants summary judgment to him as well (*see* ***Joseph v Layne***, 24 AD3d 516, 808 NYS2d 253 [2d Dept 2005]; ***Jason v Danar,*** 1 AD3d 398, 767 NYS2d 779 [2d Dept 2003]).

Dated: 12/24/15

PETER H. MAYER, J.S.C.