Marte v Vlaun
2017 NY Slip Op 31372(U)
June 26, 2017
Supreme Court, Kings County
Docket Number: 500392/14
Judge: Debra Silber

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of June, 2017

P R E S E N T :

HON. DEBRA SILBER

Justice.

YADIRA K. MARTE,

Plaintiff,

-against-

NALINI VLAUN, JOSEPH ALAN COURTON, BONIFACE EZE,

Defendants.

DECISION / ORDER

Index No. 500392/14
Mot. Seq. # 3 & 4
Cal. # 29 & 30
Submitted: 5/4/17

Papers numbered 1 to 29 were read on this motion:	Papers Numbered:
Notice of Motion/Order to Show Cause/Exhibits	1-14, 15-24
Affirmation in Opposition/Exhibits	25-27, 28
Reply Affirmation/Exhibits	29

Defendants Joseph Courton and Boniface Eze move for summary judgment and dismissal of plaintiff Yadira Marte's action, pursuant to CPLR Rule 3212, in that plaintiff

has failed to sustain a "serious injury" pursuant to Insurance Law § 5102(d). Defendant Nalini Vlaun cross-moves for dismissal on "serious injury" grounds and also seeks dismissal, as against her, on the ground that she was not liable for the accident.

As concerns the branch of the Vlaun cross-motion seeking summary judgment on liability, the court denied it on the record on May 4, 2017, as further explained below.

The subject auto accident took place January 22, 2013 on the Triborough Bridge in New York County. Plaintiff testified at her EBT she was a passenger in a black town car owned by defendant Eze and driven by defendant Courton, who had picked her up to bring her to a medical appointment at Mount Sinai Hospital. She was seated in the front passenger seat. They were traveling in the center lane. She did not see the other vehicle. She only felt "the crush." The front driver's side was impacted. The airbags were deployed. She could not remember if she saw a car in front of them before the accident.

Movant Vlaun states in her affidavit that her vehicle was struck in the rear by the Courton vehicle. She was driving on the northbound side of the RFK bridge. The weather was clear. The road was dry. Traffic was light. She was stopped in the left lane. She was at a complete stop for five to ten minutes. Her vehicle had stopped moving. Her hazard lights were on. She could not move. She was on the phone, talking with 911, seeking assistance. Courton's vehicle hit her in the rear. She did not hear any horns, brakes or screeching tires prior to the impact. She had no ability to do anything to avoid the accident, she states.

The certified police report indicates that Vlaun was hit in the rear and that Courton hit her with his front bumper. It says Vlaun reports to have been stalled when Courton struck her from behind and that Courton reports not being able to stop in time

to avoid hitting her, "based upon witness statement, physical evidence, personal observation, it appears VEH #2 (Courton) caused the accident by traveling too fast."

On this record, movant has failed to establish that the reason for her vehicle's loss of power was lawful, and was not merely the result of a foreseeable problem of her own making, such as running out of fuel. See, *Marsicano v Fabrizio*, 61 AD3d 941, 941-942 [2d Dept 2009]; *Gregson v Terry*, 35 AD3d 358, 36 [2006]. As she has failed to make out a prima facie case for dismissal, her motion seeking summary judgment on the issue of liability is denied.

Turning to the serious injury motions, movants have made a *prima facie* case with objective medical findings with regard to the following categories of injury:

- ☐ a permanent consequential limitation of use of a body organ or member
- ☐ a significant limitation of use of a body function or system
- ☒ a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident

As regards plaintiff's claim, set forth in her bill of particulars, that she sustained "a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident," defendants contend that there is no evidence that plaintiff was directed to stay home by her doctor or that she was unable to go to work, but they offer no medical records or other evidence to show that she was able to return to work or was not substantially disabled from performing her usual

activities.

Ordinarily, poking holes in a plaintiff's case is insufficient. However, defendants provide an affirmation from defendants' Independent Trauma Expert, Dr. Ronald A. Paynter, who is board certified in emergency medicine. He reviewed the plaintiff's emergency room records, the police accident report, the plaintiff's bill of particulars and the EMS records. He did not examine the plaintiff. Dr. Paynter states that plaintiff complained at the emergency room of "neck, back, right shoulder, right arm, and right knee pain." She had no chest pain or abdominal pain. She denied right elbow pain, wrist pain, hand pain, finger pain, and hip pain. She denied inability to ambulate/bear weight. X-rays of the cervical spine, right shoulder and chest were negative for acute traumatic injuries. No CT scans or MRIs were taken. Tylenol and Codeine were prescribed upon discharge. She was instructed to follow up with her primary care physician and an orthopedist. She was instructed to ice the areas of pain. She was diagnosed with right shoulder and back contusions. There were no complaints of any pains or injuries to the head, left shoulder, hips, pelvis or left knee. Dr. Paynter notes that no specialists were asked to provide consults, and she wasn't given a neck brace, a cervical collar, a back brace, a shoulder immobilizer or a sling when she was discharged. He concludes that "had the plaintiff suffered the injuries claimed in her Bill of Particulars in a recent acute trauma," the emergency room report would indicate skin marks such as redness, abrasions or lacerations, and she would not have had full and unrestricted range of motion as is reported in the record. There would have been swelling to some part of her body noted, but it isn't so noted. She would have been given some equipment and/or an orthopedist referral, but she wasn't. Further, Dr. Paynter states that, as the ER diagnosis was mild shoulder and back contusions, he

concludes that "the ER records reviewed are inconsistent with the injuries alleged in the Bill of Particulars and show that the claimed injuries do not have an acute traumatic origin and so could not be causally related to the accident on 1/22/13." Finally, he states "it is my opinion within a reasonable degree of medical certainty that there are no acute traumatic findings to causally relate Ms. Marte's accident on 01/22/13 and the claimed injuries, other than mild shoulder and back contusion from the [accident]."

While a novel approach to making a prima facie case for dismissal under this category of injury, the court finds this affirmation to be sufficient in this regard. See *Poorun v Decosa Enterprises, Inc.*, 2014 NY Slip Op 33343(U) [Sup Ct Queens Co].

However the court notes that, in finding that movants have not make a prima facie showing with regard to "a permanent consequential limitation of use of a body organ or member" and "a significant limitation of use of a body function or system," that defendant's Independent Medication Examination by Dr. Edward Torriello, dated October 12, 2016, indicates that plaintiff's range of motion in her lumbar and cervical spine was not normal. Plaintiff told Dr. Torriello that she is a medial assistant and she lost 18 months from work after the accident. She was still experiencing back pain. She was 23 years old on the date of the accident.

In his range of motion testing of plaintiff's cervical spine, extension was 32 degrees, with normal being 55-60 degrees. In his range of motion testing of the plaintiff's lumbar spine, flexion was 45 degrees, while normal is 65-70 degrees. He concludes that "range of motion is a subjective finding under the voluntary control of the individual." He also states that plaintiff's MRI of her right shoulder indicates that she "did not sustain any injury to her right shoulder . . . that would have required surgical intervention," despite the fact that plaintiff claims she had arthroscopic surgery to her

right shoulder because of injuries caused by this accident. Her MRI report (in defendant's motion) states that there is a rotator cuff tear. Plaintiff's bill of particulars claims she sustained injuries to her right and left shoulders, cervical and lumbar spine, right hip, left hip, pelvis and left and right knees.

The defendants have failed to meet their prima facie burden of showing that the plaintiff Yadira Marte did not sustain a serious injury within the meaning of Insurance Law § 5102(d) with regard to all applicable categories of injury as a result of the subject accident. See, *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]. Since the defendants failed to meet their prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition are sufficient to raise a triable issue of fact. See, *Yampolskiy v Baron*, 2017 NY App Div Lexis 3492 [2d Dept]; *Valerio v Terrific Yellow Taxi Corp.*, 2017 NY App Div Lexis 3141 [2d Dept]; *Koutsoumbis v Pacciocco*, 2017 NY App Div Lexis 3121 [2d Dept]; *Aharonoff-Arakanchi v Maselli*, 2017 NY App Div Lexis 2898 [2d Dept]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011].

Therefore, defendants' motions for summary judgment are denied.

This constitutes the decision and order of the court.

ENTER:

Hon. Debra Silber, J.S.C.

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Hon. Debra Silber
Justice Supreme Court