Rivers-Lawrence v Friedlander
2018 NY Slip Op 30864(U)
April 19, 2018
Supreme Court, Bronx County
Docket Number: 0303597/2015
Judge: Robert T. Johnson

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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NERISSA RIVERS-LAWRENCE,

Plaintiff,

- against -

CHARLES N. FRIEDLANDER, Executor of the Estate of STANLEY FRIEDLANDER,

Defendant.

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DECISION AND ORDER
Present: Hon. Robert T. Johnson
Index No. 0303597/2015

Papers considered:	Numbered
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In this case arising from a motor vehicle accident, plaintiff seeks partial summary judgment in her favor on the issue of liability. Defendant opposes the motion and, in a cross-motion, seeks summary judgment pursuant to CPLR 3212 dismissing the complaint upon the ground that plaintiff did not sustain a casually related "serious injury" under Insurance Law § 5102 (d). In support of her motion, plaintiff submits the pleadings and bill of particulars; her own deposition testimony; and her own affidavit. In opposition to plaintiff's motion and in support of his cross-motion, defendant submits, among other things, a certified police accident report; medical records of plaintiff; and affirmations of Dr. Alan Greenfield and Dr. Arnold Berman. In Opposition to defendant's cross-motion, plaintiff submits, *inter alia*, her own affidavit, the affidavit of Dr. Steven Goldstein; and the affirmations of Dr. Mark McMahon, Dr. Raj Tolat, Dr. Robert Lanter, Dr. Matthew Goldstein, Dr.

Steven Winter, Dr. Vidya Malhotra, Dr. Richard Silvergleid and Dr. Adam Silvers. Upon reading and considering the foregoing papers, plaintiff's motion is DENIED and defendant's cross-motion is DENIED.

On May 2, 2013, at about 9:05 a.m., plaintiff's car and Stanley Friedlander's car were both traveling east on Sunrise Highway in the Village of Lynbrook, Nassau County. Plaintiff avers that as she approached the intersection with Peninsula Boulevard, she moved into the left of the multiple eastbound lanes since she planned to turn left at the light onto Peninsula Boulevard. According to plaintiff, she had slowed to 5 miles per hour or less as she approached the traffic light, which was red, and she observed in her rear-view mirror as Friedlander maneuvered several lanes of traffic before impacting her car in the rear and the side. Following the accident, plaintiff was taken by ambulance to an emergency room, where she was treated with pain medicine and released with instructions to follow up with her doctor. A little over a year after the accident and before this action was commenced, Friedlander died of causes unrelated to the accident, and thus his executor was named as the defendant. Plaintiff contends that she suffered back and neck injuries in the accident sufficient to satisfy the serious injury categories of permanent consequential, significant limitation and 90/180. Disclosure has been completed and both parties now move for summary judgment.

Plaintiff's motion for partial summary judgment

Plaintiff seeks summary judgment on the issue of liability contending that Friedlander rear-ended her. A plaintiff moving for summary judgment on the issue of liability bears the burden of establishing a prima facie case of defendant's liability (*see Rodriguez v City of New York*, 2018 NY Slip Op. 02287 [2018]).

It is well settled that that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the driver of the offending vehicle and imposes a burden on him or her to proffer a non-negligent explanation for the accident (*Francisco v. Schoepfer*, 30 AD3d 275 [1st Dept. 2006]; *Mullen v. Rigor*, 8 AD3d 104 [1st Dept. 2004]). A driver is expected to drive at a sufficiently safe speed and maintain enough distance between himself and cars ahead of him so as to avoid a rear-end collision, taking into account the weather and road conditions (*Francisco*, 30 AD3d at 275; *Garcia v. Bakemark Ingredients (E.) Inc.*, 19 AD3d 224 [1st Dept. 2005]; VTL §1129[a]). The failure of an opposing party to rebut the presumption of negligence will entitle the moving party to summary judgment on the issue of fault (*Toulson v. Young Han Pae*, 6 AD3d 292 [1st Dept. 2004]). Consequently, the Court finds that plaintiff has made a prima facie showing of entitlement to summary judgment on the issue of liability. Defendant, however, has failed to provide a non-negligent explanation for the collision.

Defendant contends that there are factual issues as to how the accident occurred. Initially, it merits noting that, to the extent defendant contends that the *Noseworthy* rule (*Noseworthy v. new York*, 298 NY 76 [1948]) is applicable to him since Friedlander is now deceased, such contention lacks merit. The *Noseworthy* doctrine does not apply to hearsay evidence. Defendant's opposition to plaintiff's motion relies, in part, on a certified police accident report in which Friedlander told the officer that plaintiff backed her car into his vehicle. The statement attributed to Friedlander in the report is hearsay. An accident report may be admissible "so long as the report is made based upon the officer's personal observations and while carrying out their police duties" (*Holliday v Hudson Armored Car & Courier Serv.*, 301 AD2d 392, 396 [1st Dept 2003], *lv dismissed, lv denied* 100 NY2d 636 [2003]); however, "a police accident report, which is

based upon information given to the investigating officer by a participant in the accident, is not admissible as a business record since the participant declarant is under no duty to render the information contained therein" (*Cover v Cohen*, 61 NY2d 261, 274 [1984]). No other hearsay exception for Friedlander's statement, which was favorable to his position, has been shown in the motion papers before the Court. Notwithstanding the hearsay nature of Friedlander's purported statement, "hearsay may be used to defeat summary judgment as long as it is not the only evidence submitted in opposition" (*Rugova v Davis*, 112 AD3d 404, 404 [1st Dept 2013]: *see Fountain v Ferrara*, 118 AD3d 416, 416 [1st Dept 2014]; *Bishop v Maurer*, 106 AD3d 622, 622 [1st Dept 2013]). Accordingly, summary judgment is warranted.

Defendant's cross-motion for summary judgment

Defendant's cross-motion for summary judgment alleges that plaintiff did not sustain a causally related serious injury. A defendant seeking summary judgment in an action governed by Insurance Law § 5102 must demonstrate that the plaintiff, as a matter of law, did not sustain a "serious injury" or that the plaintiff's injuries were not causally related to the accident at issue (*see Baez v Rahamatali*, 6 NY3d 868 [2006]; *Pommells v Perez*, 4 NY3d 566 [2005]). Once the proponent of a motion for summary judgment has made a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the plaintiff to demonstrate the existence of a triable issue of fact (*see Gaddy v Eyler*, 79 NY2d 955 [1992]), through the submission of admissible "objective proof of the nature and degree of the injury, that he/she did sustain such an injury, or that there are questions of fact as to whether the purported injury was 'serious'" (*Charley v Goss*, 54 AD3d 569, 570 [1st Dept 2008], *affd* 12 NY3d 750 [2009]). Where, as here,

defendant presents evidence of a pre-existing injury, plaintiff must present competent, nonconclusory evidence as to "how her 'current medical problems, in light of her past medical history, are causally related to the subject accident'" (*Sky v Tabs*, 57 AD3d 235, 237 [1st Dept 2008], quoting *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]; *see Sanchez v Steele*, 149 AD3d 458, 459 [1st Dept 2017). The Court's function in determining a summary judgment motion "is one of issue finding rather than issue determination, and if there is any doubt as to the existence of factual issues, this 'drastic remedy' should not be granted" (*Lugo v LJN Toys*, 146 AD2d 168, 169 [1st Dept 1989]; *see O'Brien v Port Auth. of N.Y. & N. J.*, 29 NY3d 27, 37 [2017]).

Defendant satisfied his threshold burden. Plaintiff's medical records as well as her testimony established that she had injured her back and neck before the subject motor vehicle accident. An MRI report from June 2009 noted the following: mild degenerative disc changes without stenosis or foraminal narrowing at L3-4; central disc protusion (herniation) with mild/moderate thecal sac compression at L4-5; degenerative disc change without stenosis or foraminal narrowing at L5-S1. Pre-accident reports of MRIs from May 2011 and November 2012 indicated no significant change in plaintiff's condition. Dr. William Sonstein, a neurological surgeon who saw her in July 2009 and January 2013, suggested continued conservative treatment including physical therapy; but, after the latter visit, indicated that if she did not improve then she would be a candidate for surgery. Although she was still working at her regular place of employment prior to the motor vehicle accident, notes from her physical therapy indicate that some of her activities had been inhibited by her ongoing neck pain.

Dr. Alan Greenfield, a radiologist who reviewed, at defendant's request, the pre-accident and post accident MRIs of plaintiff, noted some changes, but attributed those changes to

degenerative causes unrelated to the motor vehicle accident. He concluded that there were no new findings in the post accident MRIs attributable to the motor vehicle accident. Defendant further submitted the affirmed report of Dr. Arnold Berman, an orthopedic surgeon, who performed a medical examination of plaintiff in May 2016 at the request of defendant. He conducted range of motion tests, which he found to be normal or to reveal minimal restriction. Dr. Berman beliveved that plaintiff had sustained a strain/sprain of the cervical and lumbar spines with no residuals. He stated that her post accident lumbar spine surgeries resulted from pre-existing discogenic disease unrelated to the subject accident. He concluded that plaintiff's injuries from the motor vehicle accident were fully resolved with no clinical residuals and that she presented with only subjective complaints of pain without any objective findings. Defendant established prima facie that plaintiff did not sustain a casually related serious injury.

In opposition, plaintiff submitted sufficient proof to raise a triable issue. Her proof included the detailed affirmation of Dr. Mark McMahon, who reviewed her medical records, was aware of her pre-accident condition, and examined her in January 2017. With respect to objective medical proof, he stated that a comparison of pre-accident and post accident MRIs revealed that, following the accident, she had new disc bulges at L1-2, L2-3 and L3-4. The L4-5 disc herniation had extended and the L5-S1 disc bulge was impressing on the thecal sac and abutting the S1 nerve roots. He further set forth findings regarding various range of motion tests that he conducted on plaintiff's lumbar and cervical spine. The tests were done using a goniometer and produced results reflecting significant limitations. He noted her history of three surgeries following the accident; two microdisectomy operations and a lumbar fusion operation. McMahon concluded that plaintiff suffered injuries to her cervical and lumbar spine in the subject accident and that the

injuries were permanent and significant in nature.

A detailed affirmation was provided by Dr. Raj Tolat, who began treating plaintiff within less than a week of the accident and saw her many times. He describes the range of motions tests that he conducted, and the results which shown significant limitations. He details the findings in plaintiff's various MRIs and other tests. He was aware of plaintiff's pre-accident medical condition. Dr. Tolat performed NCV/EMG testing in June 2013, which revealed impingement on the exiting L5-S1 nerve root, right side C6 radiculopathy and right median sensory demyelinating entrapment neuropathy. He states that plaintiff's injuries affected her quality of life and hindered her common daily activities. At her first visit to him less than a week after the accident, he advised her not to continue working at the Apple store where she was employed because the injuries she had just sustained prevented her from standing for long periods as required by her job. He kept her out of work until November 2013. He further concluded that, due to accident related injuries, she was unable to perform her customary daily activities including cleaning, bending, and standing or sitting for long periods. Based upon, among other things, the diagnostic reports, medical reports, operative reports, his treatment and range of motion tests, he believes that plaintiff sustained injuries in the subject accident to her cervical and lumbar spine and that such injuries are permanent and significant in nature.

Dr. Robert Lanter sets forth in his affirmation, among other things, the trigger point injection he gave plaintiff as well as a finding of right lumbar radiculopathy revealed by a needle EMG evaluation. Dr. Matthew Goldstein's affirmation describes, among other things, the two microdiscectomy operations he performed in December 2014. Dr. Steven Goldstein's affidavit includes, among other things, details of the various range of motion tests he conducted on

plaintiff; all of which showed significant restrictions. Consistent with other medical opinions submitted by plaintiff, Dr. Steven Goldstein concludes that plaintiff sustained permanent and significant injuries as a result of the motor vehicle accident.

Plaintiff included her affidavit in opposition to defendant's motion. She sets forth her medical history, acknowledging a prior back and neck injury in 2009. She states that, by the May 2013 date of the subject accident, she was feeling fine and was able to do all activities. She describes her current condition as back pain which radiates to her lower extremities, with the pain exacerbated by standing, walking and weather changes. She further complains of ongoing neck pain. Following the accident, she was initially out of work from May 2013 until November 2013; she returned to work for one year; but has been unable to work since November 2014. She has had three surgeries allegedly related to injuries sustained in the accident. Plaintiff states that during the six months following the accident, she was unable to do the following: work at her job at an Apple store from May 2013 to November 2013; lift any bags of groceries; have sexual relations with her spouse; run; walk for long periods; sit for long periods; participate in events for her private jewelry business; drive for long periods; and cook. She adds that she is still unable to engage in sexual relations, she cannot get out of bed without the assistance of a bed-rail, and she needs a cane or walker to ambulate.

When the proof in the papers with respect to defendant's motion is viewed in the light most favorable to plaintiff as the party opposing summary judgment (*see e.g. Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), it is apparent that she has set forth adequate objective proof of casually related injuries to raise triable issues as to whether she sustained a serious injury under the categories of a permanent consequential and/or significant limitation (*see e.g. Coley v*

DeLarosa, 105 AD3d 527, 528 [1st Dept 2013]; *Fuentos v Sanchez*, 91 AD3d 418, 419-420 [1st Dept 2012]) . Further, in light of her detailed description of the limitations on her various activities since the accident as well her previously discussed supporting medical evidence regarding those limitations, the proof is also sufficient to raise a triable issue as to the 90/180 category (*see e.g. Coley v DeLarosa*, 105 AD3d at 528-529; *Fuentos v Sanchez*, 91 AD3d at 420) .

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment is GRANTED; and it is further

ORDERED that defendant's cross-motion for summary judgment is DENIED.

This constitutes the decision and order of the Court.

Dated: APRIL 19, 2018

E N T E R,

ROBERT T. JOHNSON, J.S.C.