

Elmer v Amadio

2018 NY Slip Op 34355(U)

January 11, 2018

Supreme Court, Westchester County

Docket Number: Index No. 67999/2016

Judge: Terry Jane Ruderman

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
DAWN M. ELMER,

Plaintiff,

-against-

DECISION and ORDER
Sequence Nos. 1 & 2
Index No. 67999/2016

DAMON A. AMADIO, EVAN K. AMADIO and
WEAVER STREET PROPERTIES, LLC.,

Defendants.
-----X

RUDERMAN, J.

The following papers were considered in connection with the motion of defendant Weaver Street Properties LLC for summary judgment dismissing the complaint as against it on the ground that as a matter of law it may not be held liable for the accident (sequence 1); and the motion by Damon A. Amadio and Evan K. Amadio for an order granting them summary judgment dismissing the complaint on the grounds that plaintiff did not incur a serious injury as that term is defined by Insurance Law § 5102(d) (sequence 2):

<u>Papers - Sequence 1</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - J	1
Affirmation in Opposition, Exhibit 1	2
Reply Affirmation	3
 <u>- Sequence 2</u>	
Notice of Motion, Affirmation, Exhibits A - K	4
Affirmation in Opposition, Exhibits 1 - 12, Daras Affirmation	5
Reply Affirmation	6

This action arises out of a motor vehicle accident that occurred on January 16, 2016 at

approximately 12:00 p.m. on Weaver Street in New Rochelle, New York. Plaintiff Dawn M. Elmer claims that just after she began driving southbound on Weaver Street from the Heathcote Bypass, her vehicle was struck by a vehicle owned by defendant Damon A. Amadio and operated by defendant Evan K. Amadio, as he attempted to make an illegal left turn onto Weaver Street northbound from the driveway of commercial premises located at or near 1479 Weaver Street, owned by defendant Weaver Street Properties. The collision allegedly caused plaintiff injuries to her head, neck, back, shoulders and right hand.

Plaintiff's claim against Weaver Street Properties is based on the contention that it breached a duty of care based on signage placed on its property. Plaintiff's expert engineer, Harold Krongelb, P.E., expressed the opinion that an exiting driver's view of oncoming southbound traffic is obscured by a "Scarsdale Corners" shopping center sign, the size of which he approximated at seven feet by five feet. Krongelb asserted that the Scarsdale Corners sign violates section 270-8(D) of the Code of the City of New Rochelle, which provides in pertinent part that "[n]o sign or other advertising structure, as regulated by this chapter, shall be erected at the intersection of any streets in such a manner as to obstruct free and clear vision." He further opined that two adjacent traffic-control signs, one containing a "No Left Turn" symbol, the other a "One Way" sign, were confusing, making it foreseeable that a driver would attempt to make a left turn into oncoming traffic.

Weaver Street Properties argues in its motion for summary judgment (sequence 1) that as a matter of law, it may not be held liable, first, because it was not negligent, and second, because even assuming negligence in the content or placement of signs on the property, any such negligence was not a proximate cause of the accident.

The Amadio defendants' motion (sequence 2) for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against them on the grounds that plaintiff did not incur a serious injury as that term is defined by Insurance Law § 5102(d).

Analysis

Sequence 1

Plaintiff relies on her expert's report to establish liability on the part of Weaver Street Properties. However, her expert's assertion that the traffic-control signs are confusing does not raise a material issue of fact. It is irrelevant whether a driver about to pull onto Weaver Street from that driveway understood that left turns onto Weaver Street were prohibited from that location. Regardless of whether the driver was properly informed not to make a left turn – indeed, regardless of whether left turns were permitted there – the form of negligence that constituted the cause of the accident was not a left turn. It was Evan Amadio's failure to yield right of way when he proceeded from the driveway onto the roadway into the path of a southbound vehicle already on the roadway, a violation of Vehicle & Traffic Law § 1143, which directs that "the driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed."

Turning next to plaintiff's claim that Weaver Street Properties may be found liable based on the placement of the "Scarsdale Corners" sign in violation of the New Rochelle city code, because it "obstruct[s] free and clear vision" (Code of the City of New Rochelle § 270-8[D]): notwithstanding the expert's opinion, the photographs the expert provides disprove plaintiff's characterization of the sign as "very large and opaque," and indeed, effectively undermines the

expert's assertion that the sign measures an obscuring seven feet by five feet area. The photographs show that while the sign's outside dimensions may be seven feet by five feet, the sign itself is far smaller. Moreover, while the two opaque portions of the sign may limit a complete view of southbound approaching vehicle from a particular location in the driveway, the photographs establish that the sign is placed at least several feet back from the Weaver Street curb, so that when a vehicle in the driveway is pulled all the way up to the end of the driveway, the driver's view of oncoming southbound traffic is virtually unimpacted by the sign.

Furthermore, the deposition testimony of Evan Amadio establishes that the presence of the "Scarsdale Corners" sign did not contribute to the causation of the accident, and that the content of the traffic-control signs had no impact on him or his driving decisions.

Plaintiff's claims against Weaver Street Properties are comparable to those against the School District defendant in *Lugo v Brentwood Union Free Sch. Dist.* (212 AD2d 582, 583 [2d Dept 1995]). There, plaintiff was driving eastbound on Ninth Avenue in Brentwood, New York, when her automobile was struck by a vehicle that had exited, without first stopping, from a driveway located on the grounds of the Brentwood Middle School. The plaintiff contended that the stop sign at the driveway exit was turned around, so that it improperly faced Ninth Avenue rather than controlling the traffic exiting the driveway.

The Court held that not only did the School District have no a duty to prevent the negligence of the driver leaving its driveway, but even assuming it had and that it breached a duty of care by improperly placing the stop sign, the sole proximate cause of this accident was the other driver's failure to exercise reasonable care before proceeding from the driveway onto Ninth Avenue (*id.* at 583).

Similarly, Weaver Street Properties had no a duty to prevent the negligence of a driver leaving its driveway, but even assuming it had and that it breached a duty of care in the placement or content of signage on its property, the sole proximate cause of this accident was Evan Amadio's violation of Vehicle & Traffic Law § 1143, in that he entered the roadway from a driveway without yielding the right of way to a vehicle approaching on the roadway.

Accordingly, Weaver Street Properties has established its right to summary judgment dismissing the complaint as against it, and plaintiff's submissions fail to create an issue of fact on the question of whether Weaver Street Properties may be held liable.

Sequence 2

On a motion for summary judgment dismissing a complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), the defendant bears the initial burden of establishing, prima facie, that plaintiff did not sustain a serious injury caused by the accident" (*Smith v Matinale*, 58 AD3d 829 [2d Dept 2009]). Pursuant is relying on the categories of serious injury defined as a permanent consequential limitation or a significant limitation of use of a body function or system (*see* Insurance Law § 5102[d]).

To satisfy the statutory serious injury threshold, "there must be some objective proof of a plaintiff's injury . . . [;] subjective complaints alone are insufficient" (*see McEachin v City of New York*, 137 AD3d 753, 756 [2d Dept 2016], citing *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352 [2002] and *Perl v Meher*, 18 NY3d 208, 216 [2011]). In addition, the mere fact that an MRI reveals bulging or herniated discs is insufficient to per se establish serious injury; the necessary showing requires objective evidence of physical limitations resulting from the disc

injury (see *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 46 [2d Dept 2005]).

Defendants contend that plaintiff's claims are limited to merely sprains and strains and subjective complaints of pain. They cite the medical records of plaintiff's physicians, and rely on the conclusions reached by their own experts' following examinations of plaintiff. Dr. George Burak, defendants' orthopedist, after reviewing plaintiff's medical history and conducting an examination on August 13, 2018, concluded that plaintiff appeared to have sustained an acute cervical strain. However, he acknowledged that plaintiff had a positive Spurling's test, and limitations in her range of motion. Specifically, the results of his range of motion tests of plaintiff's cervical spine using a geolometer included the observation that she had 60 degrees of rotation to the left and 70 degrees of rotation to the right, with 80 degrees being normal, and 35 degrees of inclination to the right and left, with 45 degrees being normal. Defendants' neurologist, Dr. Ronald M. Silverman, concluded, that plaintiff experienced cervical strain which has no resolved.

Defendants' submissions made a prima facie showing that plaintiff did not sustain a serious injury caused by the accident. Dr. Burak's acknowledgment of a certain reduced range of motion is not sufficient in itself to negate defendants' prima facie showing. Although "[o]ne way to substantiate a claim of serious injury is through 'an expert's designation of a numeric percentage of a plaintiff's loss of range of motion,' i.e., quantitatively" (*McEachin v City of New York*, 137 AD3d at 756, quoting *Toure v Avis*, 98 NY2d at 350)), and even a finding of a ten-degree limitation in range of motion may be sufficient for the denial of a defendants' summary judgment motion, that is so where the limitation is the basis for a medical opinion that the plaintiff suffered a significant limitation of use of a body part or system (see *Lopez v Senatore*,

65 NY2d 1017, 1020 [1985]). Dr. Burak offered no such opinion.

However, plaintiff's submissions in opposition to the motion provided objective proof of plaintiff's injury beyond plaintiff's subjective complaints, sufficient to create an issue of fact as to whether she sustained a 'serious injury' within the meaning of Insurance Law § 5102 (d), precluding summary judgment. Through the affirmation of plaintiff's board-certified neurologist, Michael Daras, M.D., and the radiologist's report of the MRI of plaintiff's cervical spine performed on February 8, 2016 in accordance with Dr. Daras's direction, plaintiff provided evidence of a disc bulge at C5-6 effacing the thecal sac, and a decreased range of motion in plaintiff's neck, in addition to spasm and tenderness in the paraspinal muscles in the cervical and lumbar spine. Additionally, on February 22, 2016 a Segmental Somatosensory Evoked Potential study of plaintiff's upper extremities disclosed abnormal findings consistent with the presence of radicular pathology involving right C8/T1 and left C-5 nerve roots. These objective findings of injury and functional limitations provide the necessary support for Dr. Daras's conclusion that plaintiff sustained significant limitations in the use of her cervical spine as a result of the January 16, 2016 accident. Moreover, the objective evidence of the continuing presence of the observed limitations through Dr. Daras's affirmation of October 25, 2018, confirmed by the range of motion limitations found by Dr. Burak on August 13, 2018, provide sufficient support for Dr. Daras's assertion that the significant consequential limitations are permanent. Issues of fact as to whether plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d) require the denial of defendants' motion for summary judgment.

Based on the foregoing, it is hereby

ORDERED that motion sequence 1 by defendant Weaver Street Properties LLC is

granted, and the complaint as against it is severed and dismissed; and it is further

ORDERED that motion sequence 2 by defendants Damon A. Amadio and Evan K.

Amadio is denied; and it is further

ORDERED that the caption is amended to read

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
DAWN M. ELMER,

Plaintiff,

-against-

Index No. 67999/2016

DAMON A. AMADIO and EVAN K. AMADIO,

Defendants.

-----X;

and it is further

ORDERED that all remaining parties are directed to appear in the Settlement Conference Part on Tuesday, February 19, 2019 at 9:15 a.m., in room 1600 of the Westchester County Courthouse located at 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York, 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
January 11, 2018


HON. TERRY JANE RUDERMAN, J.S.C.