

Lorenzo v Fine

2019 NY Slip Op 34639(U)

December 18, 2019

Supreme Court, Westchester County

Docket Number: Index No. 57395/2018

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period 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
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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LUIA SILVANO LORENZO and ANTHONY B.
LORENZO,

Plaintiffs,

Index No. 57395/2018

Sequence No. 1 & 2

– against –

DECISION & ORDER

TAMMY SUE FINE,

Defendant.

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In an action to recover damages for personal injuries (1) the plaintiffs move for partial summary judgment on the issues of liability (motion sequence #1); and (2) the defendant moves for summary judgment dismissing the complaint on the grounds that the plaintiff did not sustain a serious injury pursuant to Insurance Law 5102 (motion sequence #2):

Papers Considered

1. Notice of Motion/Affirmation of Angela Morcone Giannini, Esq./ Exhibits 1-8;
2. Affirmation of Tulia Garavito, Esq. in Opposition;
3. Reply Affirmation of Angela Morcone Giannini, Esq.
4. Notice of Motion/Affirmation of Tulia Garavito, Esq./Exhibits A-F;
5. Affirmation of Angela Morcone Giannini, Esq. in Opposition/Affidavit of Sherry K. Solomon, M.D./Exhibits 1-9/Supplemental Affirmation of Sherry K. Solomon, M.D.;
6. Reply Affirmation of Tulia Garavito, Esq.

Factual and Procedural Background

Plaintiffs commenced this action for personal injuries sustained as a result of a motor vehicle accident that occurred on November 1, 2016, on the northbound Bronx River Parkway at the intersection with Route 22. Plaintiff struck the right side of her head and sustained a laceration to the right upper eyelid. She was taken to White Plains hospital and underwent a surgical repair of her lid laceration. Plaintiff was diagnosed with benign vitreous floaters with flashing light symptoms.

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Plaintiff's Motion for Partial Summary Judgment on the Issue of Liability

Plaintiff Luisa Silvano Lorenzo testified at a deposition that the accident occurred at approximately 8:30 a.m. where the Bronx River meets Route 22. She was stopped at a stop sign waiting for a left merge onto Route 22. Traffic conditions were light and the weather was clear. There were two lanes on Route 22 going north. She moved approximately 15 feet and looked to the left because the visibility was not great from the stop sign. After traveling 15 feet at 2, 3 or 4 mph, she noticed a car fast approaching on Route 22 and she slowly stopped her vehicle. She heard screeching and a slam and her vehicle was hit from behind.

The defendant Tammy Sue Fine testified at a deposition that she was traveling on the Bronx River Parkway north and struck plaintiff's vehicle in the rear. Plaintiff's vehicle was in front of her vehicle at a stop sign. She observed the cars passing on Route 22 with the right of way. Plaintiff's car pull forward at a slow rate to feed into the right lane of Route 22. Defendant pulled her vehicle up to the stop sign and stopped. Defendant observed a vehicle in the left lane of Route 22 that quickly moved to the right lane preventing plaintiff's vehicle from merging. Plaintiff's vehicle was moving very slow. Defendant had proceeded past the stop sign about a half a car length from plaintiff's vehicle. Plaintiff's vehicle came to a stop and defendant's vehicle was less than six feet behind at that point. Defendant testified, "since I had started to feed too by moving up the road, I hit [plaintiff's vehicle]".

Plaintiffs move for summary judgment on the issues of liability. Plaintiffs argue that defendant violated Vehicle and Traffic Law 1129 by striking plaintiffs' vehicle in the rear.

In opposition, defendant argues that there is a non-negligent explanation as to the happening of the accident requiring denial of plaintiffs' motion. Defendant argues that the accident was caused by the driver of an unidentified vehicle on Route 22 abruptly entering the right lane. Defendant argues that the unidentified vehicle executed an unsafe lane change and defendant was unable to avoid striking plaintiffs' vehicle.

Serious Injury

Defendant moves for summary judgment dismissing the complaint on the grounds that the plaintiff Luisa Silvano Lorenzo did not sustain a serious injury.

Defendant submits the affirmed IME report of ophthalmologist Neil Katz, M.D. Upon Dr. Katz' examination, on May 17, 2019, plaintiff complained of flashing lights and floaters in the right eye as a result of the accident. Dr. Katz averred that there were no significant objective findings to correlate with the persistent complaint except for benign ageing changes of the vitreous gel in both eyes. There is no evidence of any significant retinal pathology and plaintiff's vision was 20/20 in both eyes. Plaintiff did sustain contusions to her face with bruising and an eyelid laceration which required surgical repair which have healed well over time and her prognosis is excellent. Dr. Katz averred that plaintiff's symptoms of flashes and floaters should gradually fade over time and she did

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not need any special ophthalmological monitoring. Dr. Katz concluded that plaintiff's eyes are healthy and normal and any persistent floaters and flashing light are most likely not related to the accident. Thus, defendant demonstrated that the injury to plaintiff's eye did not constitute a serious injury within the meaning of Insurance Law 5102(d) (see *Moran v Kollar*, 96 AD3d 811 [2d Dept 2012]).

In opposition, plaintiffs argue that issues of fact exist as to whether Silvano Lorenzo sustained a permanent consequential limitation of use as well as a significant limitation of use of her right eye as a result of the automobile accident.

Plaintiffs submit an affirmation of Sherry K. Solomon, M.D., board certified in the field of Ophthalmology. Dr. Solomon examined plaintiff the day after the accident and concluded that plaintiff sustained a large vitreous detachment of the right eye without any evidence of a retinal hole or tear. Dr. Solomon examined plaintiff again on December 7, 2016, January 9, 2017, July 2, 2018, and August 26, 2019. During each exam Dr. Solomon observed vitreous detachment and plaintiff had continued complaints of flashing light. According to Dr. Solomon, vitreous detachment is a permanent condition and there is no medication or procedure to restore the surface of the vitreous once it has detached. Patients with vitreous detachment require ophthalmological monitoring to examine the retina for any damage. Dr. Solomon opines that plaintiff sustained a permanent consequential limitation of use as well as a significant limitation of use of her right eye as a result of the automobile accident.

Discussion

To prevail on a motion for summary judgment on the issue of liability, a plaintiff must establish, prima facie, that the opposing party was negligent (*Phillip v D & D Carting Co., Inc.*, 136 AD3d 18, 22 [2d Dept 2015]). A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (*Theo v Vasquez*, 136 AD3d 795, 796 [2d Dept 2016]; *Le Grand v Silberstein*, 123 AD3d 773, 774 [2d Dept 2014]).

A nonnegligent explanation for a rear-end collision may be a sudden stop of the lead vehicle (see *Le Grand v Silberstein*, 123 AD3d 773, 774 [2d Dept 2014]). However, "vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead" (*Shamah v Richmond County Ambulance Serv.*, 279 AD2d 564, 565 [2d Dept 2001]).

Plaintiffs demonstrated entitlement to judgment as a matter of law by submitting evidence establishing that Silvano Lorenzo's vehicle was stopped or slowing down for traffic when it was struck in the rear by defendant's vehicle (see *Giangrasso v Callahan*, 87 AD3d 521 [2d Dept 2011]; *Le Grand v Silberstein*, 123 AD3d 773). In opposition, defendant failed to raise a triable issue of fact.

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On a motion for summary judgment in a personal injury action arising from a motor vehicle accident, the defendants are required to establish that the plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Licari v Elliott*, 57 NY2d 230 [1982]).

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."

Defendant failed to demonstrate, prima facie, that plaintiff did not sustain a serious injury (see *Cubero v Venditti*, ___ AD3d ___, 2019 NY App Div LEXIS 8908 [2d Dept December 11, 2019]). Even if defendant did demonstrate entitlement to summary judgment, the plaintiffs through their expert affidavit raised an issue of fact as to whether Silvano Lorenzo sustained a permanent consequential limitation of use or a significant limitation of use of her right eye as a result of the automobile accident.

Accordingly, it is

ORDERED that plaintiffs' motion for partial summary judgment on the issues of liability is **GRANTED** (motion sequence #1); and it is further

ORDERED that the defendant's motion for summary judgment dismissing the complaint on the grounds that the plaintiff did not sustain a serious injury pursuant to Insurance Law 5102 is **DENIED** (motion sequence #2).

Counsel for all parties are directed to appear in the **Settlement Conference Part, room 1600, on January 28, 2020, at 9:15 a.m.** for further proceedings.

Dated: White Plains, New York
December 18, 2019



HON. WILLIAM J. GIACOMO, J.S.C.