Dunn-Cantatore v Avalos
2019 NY Slip Op 34660(U)
December 31, 2019
Supreme Court, Westchester County
Docket Number: Index No. 62517/2018
Judge: Sam D. Walker
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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
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.

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SHARON M. DUNN-CANTATORE,
Plaintiff,

-against-

ROBERTO A. M. AVALOS a/k/a R. A. MARROQUINAVALOS,
Defendant.

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DECISION & ORDER
Index No. 62517/2018
Seq. # 1 & 2

The following papers were read and considered in deciding the present motions:

Notice of Motion/Affirmation/Exhibits A-G	1-9
Notice of Cross-Motion/Affirmation/Exhibits 1-9	10-20
Affirmation in Opposition/Exhibit A	21-22

Upon the foregoing papers it is ordered that the motion is GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, Sharon M. Dunn-Cantatore, commenced this action on August 13, 2018, in Westchester County, to recover monetary damages for alleged injuries sustained in a motor vehicle accident that occurred on January 17, 2013, on Saw Mill River Road, at or near the intersection of Donald Drive, in the Village of Hastings-on-Hudson in the County of Westchester.

The plaintiff alleges that the defendant was traveling northbound on Saw Mill River Road, when his vehicle, without warning, swerved into the opposite southbound lane and struck the plaintiff's vehicle head-on.

The bill of particulars alleges Cervical spine disc herniation, significant stenosis,

impingement, straightening of cervical lordosis; Lumbar spine disc and impingement; Thoracic spine disc bulge with impingement; fracture of 5th metacarpal of right hand; and nervousness, anxiety and PTSD.

The defendant now files the instant motion for summary judgment pursuant to CPLR 3212, seeking dismissal of the action, asserting that the plaintiff did not sustain a serious injury as defined under New York Insurance Law §§ 5102(d) and 5104(a). The plaintiff also filed a cross-motion for summary judgment pursuant to CPLR 3212, on the issue of liability and that plaintiff has sustained a serious injury, dismissal of the defendant's affirmative defense of comparative negligence and an order denying the defendant's threshold motion pursuant to Insurance law § 5102(d).

Discussion

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). 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 [1985]).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324, citing to *Zuckerman v City of New York*, 49 NY2d at 562). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion (*see Mgrditchian v Donato* , 141

AD2d 513 [2d Dept 1988]).

Serious Injury

Insurance Law §5104(a) provides in pertinent part that:

> Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use of operation of a motor vehicle in this state, there shall be no right to recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss....(McKinney's Insurance Law §5104[a])

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. (McKinney's Insurance Law §5102[d])

"The determination of whether [a] plaintiff sustained a serious injury within the meaning of the statute is, as a rule, a question for the jury." (31 N.Y.Prac., New York Insurance Law § 32:32 [2015-2016 ed.]; *see also*, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]). "[O]n a motion for summary judgment the defendant has the burden to show that the plaintiff has not sustained a serious injury as a matter of law" (*Id.*).

The degree or seriousness of an injury may be shown in one of two ways: either by an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or by an expert's qualitative assessment of a plaintiff's condition provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357 [2002]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of New York State Insurance Law § 5102(d), by the submission of an affirmed medical report from a medical expert who has examined the plaintiff and has determined that there are no objective medical findings to support the plaintiff's alleged claim (*see Rodriguez v Huerfano*, 46 AD3d 794 [2d Dept 2007]).

In this case, the plaintiff did not suffer death, dismemberment, significant disfigurement, or loss of a fetus. Therefore, those categories of the Insurance Law § 5102(d) can be eliminated. The plaintiff alleges that she sustained permanent loss of use of a body organ, member, function or system; a 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 prevented her from performing substantially all of the material acts which constitute her 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.

The defendant argues that the plaintiff did not specify the category of serious injury in her bill of particulars and therefore, the motion should be granted. However, the

bill of particulars is sufficiently detailed to allow a determination of the serious injury under permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; or significant limitation of use of a body function or system (*Epstein v MTA Long Island Bus*, 161 AD3d 821, 822 [2d Dept 2018]).

The defendant submitted a report from a radiologist, David A. Fisher, M.D., who affirmed that the plaintiff did not sustain a fracture as per the two sets of x-ray films reviewed by him. He attest that both of the studies are normal and there is no fracture and no radiographic evidence of traumatic or causally related injury.

The defendant also submitted the report of Elliot Gross, M.D., who performed an independent medical examination ("IME") of the plaintiff on April 11, 2019. Dr. Gross recorded significant deficiencies in range of motion in her cervical spine, two plus spasms in her lumbar spine and deficiencies in range of motion in her thoracolumbar spine.

Dr. Gross found that the lumbar and cervical strain were resolved and opined that there were no accident related injuries and no significant findings on the MRI's of the cervical, thoracic and lumbar regions. He stated that her range of motion was measured with a goniometer and opined that, though her range of motion was limited, it nevertheless is a function of her effort and therefore, considered subjective.

Upon review and viewing the facts in the light most favorable to the plaintiff, this Court finds that the defendant has failed to make a prima facie showing of entitlement to judgment as a matter of law with respect to the plaintiff suffering a serious injury.

The plaintiff's IME showed significant range of motion deficiencies and two plus spasms in the plaintiff's lumbar spine, yet the physician stated in a conclusory manner that the range of motion limitations were subjective, providing no explanation for his determination and no discussion of the spasms that were recorded, which were likely not subjective.

However, with regard to any claims of fracture and any alleged injuries that prevented the plaintiff from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following her alleged injury, such are denied. The defendant demonstrated through the radiologist and the x-ray films that the plaintiff did not sustain a fracture in her hand. Further, to sustain impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute her 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, a plaintiff must present objective evidence of "a medically determined injury or impairment of a non-permanent nature" (*see Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 357 [2002]). Curtailment of recreational and household activities is insufficient to meet the burden (*Omar v Goodman*, 295 AD2d 413 [2d Dept 2002]). The plaintiff testified that she was not unable to perform substantially all of her usual and customary activities and did not offer any medical evidence to support a claim under this category.

The plaintiff's motion for summary judgment on the issue of serious injury is also

denied. The plaintiff's MRI reports were not in admissible form and were not submitted by the defendant on his motion, as claimed by the plaintiff (*Casas v Montero*, 48 AD3d 728, 730 [2d Dept 2008]). Also Dr. Baer's report is not in the proper format and therefore, is inadmissible.

Liabiility

New York Vehicle and Traffic Law § 1126(a), states in pertinent part that:

> When official markings are in place indicating those portions of any highway where overtaking and passing or driving to the left of such markings would be especially hazardous, no driver of a vehicle proceeding along such highway shall at any time drive on the left side of such markings. (New York VTL § 1126[a]).

"A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law" (*Gluck v New York City Transit Authority*, 118 AD3d 667, 669 [2d Dept 2014]; *see also Gadon v Oliva*, 294 AD2d 397 [2d Dept 2002]). A plaintiff driver is entitled to judgment as a matter of law on the issue of liability if he or she demonstrates that the sole proximate cause of an accident was the defendant driver's violation of the vehicle traffic law (*see Gause v Martinez*, 91 AD3d 595, 596 [2d Dept 2012]).

Here, the plaintiff's evidence demonstrates her prima facie entitlement to judgment as a matter of law (*Gluck v New York City Transit Authority*, 118 AD3d @ 669). "Crossing a double yellow line into the opposing lane of traffic, in violation of Vehicle and Traffic Law § 1126(a), constitutes negligence as a matter of law, unless justified by an emergency situation not of the driver's making" (*see Gadon v Oliva*, 294 AD2d 397 [2d Dept 2002]).

The deposition of the plaintiff and the certified police report, , which is admissible since, "[t]he police officer who prepared the report was acting within the scope of his duty in recording the defendant driver's statement and, contrary to the defendant's contention, the statement is admissible as an admission of a party" (*Jackson v Donien Trust*, 103 AD3d 851 [2d Dept 2013]), confirm that the defendants' vehicle entered into the lane in which the plaintiff's vehicle was traveling, in violation of VTL §§ 1126. The evidence submitted by the plaintiff establishes entitlement to summary judgment as a matter of law, thereby shifting the burden to the defendant to demonstrate the existence of a factual issue requiring a trial. (*see Macauley v Elrac, Inc.*, 6 AD3d 584, 585 [2d Dept 2004]). The defendant testified that he did not remember how the accident occurred and therefore, has not created any issue of fact with regard to liability.

Accordingly, based upon the foregoing, it is

ORDERED that the defendant's motion for summary judgment is DENIED and it is further

ORDERED that the plaintiff's motion for summary judgment on the issue of liability and dismissal of the defendant's affirmative defense for comparative negligence is GRANTED; and it is further

ORDERED that the plaintiff's motion on the issue of serious injury is DENIED.

The parties are directed to appear before the Settlement Conference Part in Courtroom 1600 on February 18, 2020 at 9:15 a.m.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
December 31, 2019

HON. SAM D. WALKER, J.S.C.