Ciani v Botta
2020 NY Slip Op 35124(U)
October 2, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 602659/2019
Judge: Martha L. Luft
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SHORT FORM ORDER

INDEX No. 602659/2019
CAL. No. 201902405MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 4/14/20 (002)
MOTION DATE 7/21/20 (003)
ADJ. DATE 7/21/20
Mot. Seq. # 002 MD
003 MG

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PAUL CIANI,

Plaintiff,

- against -

NICOLE R. BOTTA,

Defendant.

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Upon the following papers read on this motion and cross motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendant, dated March 6, 2020 ; Notice of Cross Motion and supporting papers by plaintiff, dated June 4, 2020 ; Answering Affidavits and supporting papers by defendant, dated July 9,, 2020 and by plaintiff, dated June 6, 2020 ; Replying Affidavits and supporting papers ____; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Nicole Botta seeking summary judgment dismissing the complaint is denied; and it is further

ORDERED that the cross motion by plaintiff Paul Ciani seeking summary judgment in his favor on the issue of negligence and striking defendant's first, second and fifth affirmative defenses is granted.

Plaintiff Paul Ciani commenced this action to recover damages for injuries allegedly sustained as a result of a motor vehicle accident that occurred on the westbound Northern State Parkway, near Exit 39, in the Town of Huntington on April 18, 2018. It is alleged that the accident occurred when the vehicle owned and operated by defendant Nicole Botta struck the rear of the vehicle owned and operated by plaintiff while it was stopped in traffic in the right lane of travel of the Northern State Parkway. By his bill of particulars, plaintiff alleges, among other things, that he sustained various personal injuries as

a result of the subject collision, including disc herniations at level L2-L3, aggravation of pre-exiting lumbar spine conditions, and cervical and lumbar radiculopathy.

Defendant now moves for summary judgment on the basis that the injuries alleged to have been sustained by plaintiff as a result of the subject accident do not meet the serious injury threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendant submits copies of the pleadings, plaintiff's deposition transcript, and the sworn medical reports of Dr. Edward Toriello and Dr. Jonathan Luchs. At defendant's request, Dr. Toriello conducted an independent orthopedic examination of plaintiff on September 23, 2019. Also at defendant's request, Dr. Luchs performed an independent radiological review of the magnetic resonance images taken of plaintiff's lumbar spine on March 10, 2017 and June 1, 2018. Plaintiff opposes the motion on the grounds that defendant failed to meet her prima facie burden, and that the evidence submitted in opposition demonstrates that he sustained injuries in the "limitations of use" and the "90/180" categories of the Insurance Law due to the subject accident. In opposition to the motion, plaintiff submits the sworn medical report of Dr. Mark Sterling and uncertified copies of plaintiff's medical records concerning the injuries at issue.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [2d Dept], *affd* 64 NY2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997];

Torres v Micheletti, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*).

Here, defendant, by submitting competent medical evidence and plaintiff's deposition transcript, has established a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Al-Khilewi v Turman***, 82 AD3d 1021, 919 NYS2d 361 [2d Dept 2011]). Defendant's examining orthopedist, Dr. Toriello, states in his report that an examination of plaintiff revealed he has full range of motion in his spine, that there was no evidence of tenderness, atrophy or muscle spasm upon palpation of the paraspinal muscles, and that the straight leg raising test was negative. Dr. Toriello states that plaintiff has a normal toe and heel gait, and that there were no sensory or motor deficits in plaintiff's upper and lower extremities. Dr. Toriello opines that the strains and sprains to plaintiff's spine that were superimposed upon pre-existing degenerative disc disease have resolved, and that plaintiff's pre-existing spinal condition was not exacerbated by the subject accident. He states that plaintiff's spinal examination was normal, and that there is no objective evidence of cervical or lumbar radiculopathy. Dr. Toriello further states that plaintiff does not have any objective evidence of a continued orthopedic disability, that he currently is working and may continue to do so without any restrictions, that he is capable of performing all of his activities of daily living without restrictions, and that he does not require any additional orthopedic treatment.

Additionally, defendant's examining radiologist, Dr. Luchs, states in his medical report that a review of plaintiff's MRI films of lumbar spine taken one year before and two months after the subject accident reveals that plaintiff suffers from advanced multilevel lumbar degenerative disc disease and facet arthropathy throughout his lumbar spine. Dr. Luchs states these changes are chronic, longstanding, degenerative, and predate his alleged injuries. Dr. Luchs further states that there are no findings on the MRI study that are causally related to the subject accident.

Furthermore, reference to plaintiff's own deposition testimony sufficiently refutes the allegations that he sustained injuries within the limitations of use and the 90/180 categories of the Insurance Law (*see* ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Marin v Ieni***, 108 AD3d 656, 969 NYS2d 165 [2d Dept 2013]; ***Bucci v Kempinski***, 273 AD2d 333, 709 NYS2d 595 [2d Dept 2000]). Plaintiff testified at an examination before trial that following the accident he missed occasional days from his work as a private investigator, and that, although he has modified his working schedule from six to seven days a week to four days a week and has not been able to work his usual hours of 60 to 70 hours per week since the accident, he has never been directed by a medical professional to do so. He testified that he stopped attending physical therapy around July 2019, because he did not believe that he was getting better, and that he currently has an appointment scheduled with his primary care physician in approximately three months. Plaintiff further testified that he previously has received physical therapy and treatment for low back and neck pain because he has arthritis.

Thus, defendant shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether he sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition to the motion, plaintiff submitted competent medical evidence raising a triable issue of fact as to whether he sustained serious injuries to his spine under the limitations of uses categories of the Insurance Law (*see* ***Garafano v Alvarado***, 112 AD3d 783, 977 NYS2d 316 [2d Dept 2013]; ***David v Caceres***, 96 AD3d 990, 947 NYS2d 990 [2d Dept 2012]; ***Williams v Fava Cab Corp.***, 90 AD3d 912, 935 NYS2d 90 [2d Dept 2011]; ***Compass v GAE Transp.,*** inc., 79 AD3d 1091, 914 NYS2d 255 [2d Dept 2010]). Dr. Sterling, plaintiff's treating physician, states in his report, based upon his contemporaneous and recent examinations of plaintiff and his review of the MRI examinations of plaintiff's lumbar spine, that plaintiff's injuries were permanent, and that the range of motion deficits were significant (*see* ***Bykova v Sisters Trans, Inc.***, 99 AD3d 654, 952 NYS2d 95 [2d Dept 2012]; ***Kanard v Setter***, 87 AD3d 714, 928 NYS2d 782 [2d Dept 2011]; ***Dixon v Fuller***, 79 AD3d 1094, 913 NYS2d 776 [2d Dept 2010]). Dr. Sterling further states that the injuries plaintiff sustained to his spine and the related range of motion limitations are causally related to the subject accident (*see* ***Harris v Boudart***, 70 AD3d 643, 893 NYS2d 631 [2d Dept 2010]). Additionally, Dr. Sterling states that following the subject accident plaintiff began to exhibit radicular symptoms, the onset of poor balance with ambulation, difficulty walking, difficulty lifting and sensation deficits of the lower extremities, along with increased neck and back pain, which he had not experienced during his prior treatment, and that plaintiff's prognosis is poor. Consequently, Dr. Sterling's report is sufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury to his spine within the limitations of uses categories of the Insurance Law as a result of the subject accident (*see* ***Young Chool Yoi v Rui Dong***

Wang, 88 AD3d 991, 931 NYS2d 373 [2d Dept 2011]; ***Gussack v McCoy***, 72 AD3d 644, 897 NYS2d 513 [2d Dept 2010]).

Moreover, where a defendant in an action seeking damages for a serious injury presents evidence that a plaintiff's alleged pain and injuries are related to a pre-existing condition, the plaintiff must come forward with medical evidence addressing the defense of lack of causation (***Pommells v Perez***, 4 NY3d 566, 580, 797 NYS2d 380 [2005]; *see* ***Ciordia v Luchian***, 54 AD3d 708, 864 NYS2d 74 [2d Dept 2008]; ***Luciano v Luchsinger***, 46 AD3d 634, 847 NYS2d 622 [2d Dept 2007]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2d Dept 2005]). Dr. Sterling states that he previously treated plaintiff for back pain with radicular symptoms, but without lower extremity weakness on March 7, 2017. Dr. Sterling explains that he reviewed plaintiff's MRI report for his lumbar spine taken on March 10, 2017, which revealed multilevel lumbar degenerative disc and facet disease, and disc herniations, that plaintiff received physical therapy and treatment for his symptoms until June 8, 2017, that plaintiff's range of motion in lumbar spine was greatly improved when his treatment ceased, and that he was capable of performing all of his daily living activities without restriction. Furthermore, Dr. Sterling explains that plaintiff has sustained an aggravation of the multilevel degenerative disc disease of the lumbar spine with significant progression of his pre-motor vehicle accident condition, and that these limitations and worsening lumbar spinal condition are causally related to the subject accident.

Inasmuch as the affirmed medical reports of plaintiff's expert conflicts with those of defendants' experts, who concluded that the injuries plaintiff sustained to his spine as a result of the subject accident were resolved, triable issues of fact have been raised, precluding the granting of judgment as a matter of law. "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (***Noble v Ackerman***, 252 AD2d 392, 395, 675 NYS2d 86 [1st Dept 1998]; *see* ***Johnson v Garcia***, 82 AD3d 561, 919 NYS2d 13 [1st Dept 2011]; ***LaMasa v Bachman***, 56 AD3d 340, 869 NYS17 [1st Dept 2008]; ***Ocasio v Zorbas***, 14 AD3d 499, 789 NYS2d 166 [2d Dept 2005]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]). Furthermore, "where [a] plaintiff establishes that at least some of his injuries meet the 'no-fault' threshold, it is unnecessary to address whether his proof with respect to other injuries he allegedly sustained would have been sufficient to withstand defendant's motion for summary judgment" (***Linton v Nawaz***, 14 NY3d 821, 822, 900 NYS2d 239 [2010]; *see* ***Rubin v SMS Taxi Corp.***, 71 AD3d 548, 898 NYS2d 110 [1st Dept 2010]). Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

Plaintiff cross-moves for summary judgment in his favor on the issue of negligence, arguing that defendant is the sole proximate cause of the subject accident, because his stopped vehicle was struck in the rear by defendant's vehicle. Plaintiff also argues that the first, second and fifth affirmative defenses of defendant's should be stricken as such defenses are without merit. In support of the motion, plaintiff submits copies of the pleadings, and the parties' deposition transcript. Defendant opposes the motion on the grounds that there are triable issues of fact as to the subject accident's occurrence.

It is well settled that a driver approaching a vehicle from the rear is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see* Vehicle and Traffic Law § 1129 [a]; *see also* ***Nsiah-Ababio v***

Hunter, 73 AD3d 672, 913 NYS2d 659 [2d Dept 2010]). A rear-end collision with a stopped vehicle creates a prima facie case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see* ***Tutrani v County of Suffolk***, 10 NY3d 906, 861 NYS2d 610 [2008]; ***Pollard v Independent Beauty & Barber Supply Co.***, 94 AD3d 845, 942 NYS2d 360 [2d Dept 2012]; ***Cortes v Whelan***, 83 AD3d 763, 922 NYS2d 410 [2d Dept 2011]; ***Ramirez v Konstanzer***, 61 AD3d 837, 837 NYS2d 381 [2d Dept 2009]). A non-negligent explanation for the collision, such as mechanical failure, a sudden stop of the vehicle ahead, or an unavoidable skidding on wet payment is sufficient to overcome the inference of negligence and preclude an award of summary judgment (*see* ***Ramos v TC Paratransit***, 96 AD3d 924, 946 NYS2d 644 [2d Dept 2012]; ***Fajardo v City of New York***, 95 AD3d 820, 943 NYS2d 587 [2d Dept 2012]; ***Davidoff v Mullokandov***, 74 AD3d 862, 903 NYS2d 107 [2d Dept 2010]).

Based upon the adduced evidence, plaintiff established his prima facie entitlement to judgment as a matter of law by demonstrating that the sole proximate cause of the subject accident was defendant's violation of the Vehicle and Traffic Law (*see* ***Clements v Giatas***, 178 AD3d 894, 112 NYS3d 539 [2d Dept 2019]; ***Motta v Gomez***, 161 AD3d 725, [2d Dept 2018]; ***O'Rourke v Carucci***, 117 AD3d 1015, 986 NYS2d 521 [2d Dept 2014]; *see also* ***Rodriguez v City of New York***, 181 AD3d 802, 118 NYS3d 433 [2d Dept 2020];). Plaintiff testified at an examination before trial that he was traveling westbound in the right lane of the Northern State Parkway, that traffic was heavy, that he brought his vehicle to a gradual stop due to traffic condition, and that his vehicle was stopped for approximately four or five seconds when it was struck in the rear by the vehicle operated by defendant. Plaintiff further testified that he was looking straight ahead, that he did not observe defendant's vehicle prior to the subject accident's occurrence, and that prior to the impact he did not hear any tires screeching or horns blowing. A driver approaching a vehicle from the rear is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see* Vehicle and Traffic Law § 1129 [a]; ***Brooks v High St. Professional Bldg., Inc.***, 34 AD3d 1265, 825 NYS2d 330 [4th Dept 2006]). Further, vehicle stops that are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she has a duty to maintain a safe distance between his or her vehicle and the car ahead (***Shamah v Richmond County Ambulance Serv.***, 279 AD2d 564, 565, 719 NYS2d 287 [2d Dept 2001]; *see* Vehicle and Traffic Law § 1129[a]). Therefore, plaintiff has shifted the burden to defendant to come forward with a nonnegligent explanation to raise a triable issue of fact warranting a trial on the merits (*see* ***Emil Norsic & Son, Inc. v L.P. Transp., Inc.***, 30 AD3d 368, 815 NYS2d 736 [2d Dept 2006]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

In opposition to plaintiff's prima facie showing, defendant failed to provide a non-negligent explanation for the collision (*see* (*see* ***Yong Dong Liu v Lowe***, 173 AD3 946, 102 NYS3d 713 [2d Dept 2019]; ***De La Cruz v Ock Wee Leong***, 16 AD3d 199, 791 NYS2d 102 [1st Dept 2005]; ***Agramonte v City of New York***, 288 AD2d 75, 732 NYS2d 414 [1s t Dept 2001]). Defendant's simple offer of her attorney's affirmation is insufficient to defeat plaintiff's motion for partial summary judgment (*see* ***Lazarre v Gragston***, 164 AD3d 574, 81 NYS3d 541 [2d Dept 2018]; ***1375 Equities Corp. v Buildgreen Solutions, LLC***, 120 AD3d 783, 992 NYS2d 288 [2d Dept 2014]; ***Schickler v Cary***, 59 AD3d 700, 874 NYS2d 233 [2d Dept 2009]). Moreover, defendant testified at an examination before trial that the traffic on the Northern State Parkway was stop-and-go, that she was traveling westbound in the right lane prior

to the accident's occurrence, and that she believes she observed plaintiff's vehicle prior to striking the rear of plaintiff's vehicle, although she does not recall when she saw the vehicle for the first time. She testified that at the time of the accident she was looking straight ahead, that he "must have stopped his vehicle, but she did not see him stop and stepped on the gas," striking his vehicle in the rear. Defendant further testified that she pressed hard on her brakes in an attempt to avoid the accident, but was unable to do so. As a result, defendant has failed to produce any evidence that she was faced with an emergency situation not of her own making at the time of the accident's occurrence (*see* ***Mughal v Rajput***, 106 AD3d 886, 965 NYS2d 545 [2d Dept 2013]; ***Muye v Liben***, 282 AD2d 661, 723 NYS2d 510 [2d Dept 2001]). Accordingly, plaintiff's motion for summary judgment in her favor on the issue of negligence and striking defendant's first, second and fifth affirmative defenses is granted.

Dated: October 2, 2020

Martha L Luft

A.J.S.C.
HON. MARTHA L. LUFT

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**