Clarke v Burger
2021 NY Slip Op 30243(U)
January 26, 2021
Supreme Court, Kings County
Docket Number: 502518/2019
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17
--X
MARCIA CLARKE,

Plaintiff,

- against –

EUGENE BURGER, DANIELA TIZZANO,
JEFFREY SMITH and LORI SMITH,

Defendants.
--X

Index No.: 502518/2019
Motion Seq.: 01, 02

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 01) 15-26, 46-52, and 62-72, and (Motion 02) 27-32, 41-45, and 58-59 were read on these motions for summary judgment.

In this action to recover damages for personal injuries, defendants Lori Smith and Jeffrey Smith move for an Order (Motion 01) pursuant to CPLR § 3212 granting summary judgment based on 1) liability; and 2) plaintiff's failure to meet the serious injury threshold of New York Insurance Law § 5102. Co-defendants Eugene Burger and Daniela Tizzano also move for an Order (Motion 02) pursuant to CPLR § 3212(e) granting summary judgment on the basis that plaintiff did not suffer a serious injury. The plaintiff opposed both motions. Co-defendants Mr. Burger and Ms. Tizzano opposed Motion 01 with regard to liability but adopted the arguments pertaining to the serious injury threshold. For the reasons set forth below, Motion 01 is granted and Motion 02 is denied.

This action arises out of a motor vehicle accident that occurred on or about October 11, 2018 in Nassau County, New York. At the time of the accident, the plaintiff was employed as a baby nurse by defendants Lori Smith and Jeffrey Smith. On the date of the accident, Ms. Smith was driving home from the mall. Ms. Smith's baby and Ms. Clarke were passengers in Ms. Smith's vehicle. The accident occurred on a two-way street at an intersection at or near Manhasset Avenue and Shore Road, which had a traffic light that controlled both the street and a parking lot for Target. Ms. Smith and Ms. Clarke both testified that the light was green when they passed through it, and that as they entered the intersection, their vehicle came into contact with Ms. Tizzano's vehicle. *See* Exhibit D, NYSCEF Doc. No. 20, pgs. 25-26; *see also* Exhibit F, NYSCEF Doc. No. 22, pgs. 29-34. Ms. Tizzano and Ms. Smith also exchanged text messages after the accident in which Ms. Tizzano explained that she had told the insurance carrier that the accident was "totally" her fault and that she had assumed all responsibility for it. *See* Exhibit B, NYSCEF Doc. No. 18.

In her Verified Bill of Particulars, the plaintiff claims that she has suffered permanent injuries that include, *inter alia*: disc herniation in the cervical spine and impingement on the thecal sac with narrowing of the neural foramina at C3-4, C4-5, C5-6, and C6-7; a partial tear of the anterior distal insertion of the supraspinatus tendon with a subdeltoid bursal effusion of the left shoulder; and demyelinating and axonal right median sensorimotor neuropathy at the wrist.

The Smith defendants move for summary judgment on the ground that Ms. Smith is not liable for the subject accident. VTL § 1110(a)(1) requires that "[e]very person shall obey the instructions of any official traffic-control device applicable to him placed in accordance with the provisions of this chapter." VTL § 1111(d) provides that "[t]raffic, except pedestrians, facing a circular red signal…shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection…and shall remain standing until an indication to proceed is shown…" A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law. *Joaquin v Franco*, 116 AD3d 1009 (2d Dept 2014); *see also Vainer v C.J. DiSalvo*, 79 AD3d 1023 (2d Dept 2010); *Maliza v Puerto-Rican Transp. Corp.*, 50 AD3d 650 (2d Dept 2008). Moreover, "[a] driver is required to see what is there to be seen, and a driver who has the right of way is entitled to anticipate that the other motorist will obey the traffic law requiring him or her to yield." *Francavilla v Doyno*, 96 AD3d 714, 715 (2d Dept 2012); *see also Keller v Rashid*, 100 AD3d 831 (2d Dept 2012). It is not necessary for a party to demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment (*see Rodriguez v City of New York*, 31 NY3d 312 (2018)), as the issue may be decided where a party seeks summary judgment dismissing a defendant's affirmative defense of comparative negligence. *Poon v Nisanov*, 162 AD3d 804 (2d Dept 2018).

In support of this prong of their motion, the Smith defendants offer, *inter alia*, the deposition testimony of Ms. Clarke, Ms. Smith, and Ms. Tizzano, a certified copy of the police report, and text messages between Ms. Smith and Ms. Tizzano. The plaintiff and Ms. Smith both testified unequivocally that the light was green when Ms. Smith's vehicle entered the intersection. *See* Exhibits D and F. Furthermore, the certified police report further supports the assertion that Ms. Smith's vehicle had a "steady green" as she entered the intersection. *See* Exhibit H, NYSCEF Doc. No. 24. In Ms. Tizzano's text messages to Ms. Smith, she stated "it's totally my fault" "because I was the one who actually hit her." Furthermore, when Ms. Tizzano was confronted with her text messages to Ms. Smith during her deposition, and specifically asked if she disagreed with anything she stated in those texts, Ms. Tizzano responded "[e]verything I said I would say it again." As such, the Smith defendants have established their *prima facie* entitlement to judgment as a matter of law by submitting evidence demonstrating that Ms. Tizzano's vehicle entered the intersection against a red traffic light, in violation of VTL § § 1110(a)(1) and 1111(d), and that this was the sole proximate cause of the accident. *See Joaquin* at 1009-1010; *see also Chen v Heart Transit, Inc.*, 143 AD3d 945 (2d Dept 2016). Ms. Smith established that she had the right of way and was entitled to assume that Ms. Tizzano would obey the traffic law by stopping for the red light and yielding to her. *See Derosario v Gill*, 118 AD3d at 739 (2d Dept 2014); *Vainer* at 1024.

In opposition, the plaintiff and co-defendants, Ms. Tizzano and Mr. Burger, failed to raise a triable issue of fact requiring a trial on the issue of liability as Ms. Tizzano's own deposition testimony regarding the color of the traffic light was equivocal. While Ms. Tizzano initially testified at her deposition that "I believe I had [a] green light," when she entered the intersection (Exhibit E, NYSCEF Doc. No. 21, pgs. 25-26), she later testified "I think I had the right of way because I think it was green," and then further testified "I have to assume, I cannot say either way." *Id.* at pgs. 46-47. Generally, the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and "mere conclusions, expressions of

hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman v City of New York,* 49 NY2d 557, 562 (1980). Speculative and conclusory deposition testimony is also insufficient to defeat a motion for summary judgment. *Grange v Jacobs*, 11 AD3d 582 (2d Dept 2004). As such, Motion 01 seeking summary judgment as to liability is granted in favor of the Smith defendants.

Since the co-defendants, Ms. Tizzano and Mr. Burger, have also moved for summary judgment on the basis that the plaintiff has failed to meet the serious injury threshold, adopting all of the arguments made by the Smith defendants, the Court will now address this issue.

The defendants offer the affirmed report of Dr. John Denton, a board-certified orthopedic surgeon, who examined the plaintiff approximately one year after her accident. In addition to reviewing the Bill of Particulars, Dr. Denton reviewed the Jewish Medical Center emergency department records, X-ray report of the chest, and X-ray and CT scan reports of the cervical spine, all of which were dated October 13, 2018. In a report dated October 16, 2019, Dr. Denton stated that he measured the plaintiff's range of motion with the use of a handheld goniometer (and/or bubble inclinometer where applicable). With regard to the cervical spine, Dr. Denton found flexion at 40 degrees (50 degrees normal), extension at 20 degrees (60 degrees normal), right lateral flexion at 20 degrees (45 degrees normal), left lateral flexion at 20 degrees (45 degrees normal), right rotation at 60 degrees (80 degrees normal), and left rotation at 70 degrees (80 degrees normal). Dr. Denton also found reduced ranges of motion in the right shoulder, with a forward flexion at 150 degrees (180 degrees normal) abduction at 150 degrees (180 degrees normal), external rotation at 80 degrees (90 degrees normal). Furthermore, Dr. Denton found decreased range of motion in the left shoulder, with forward flexion at 75 degrees (180 degrees normal), extension at 30 degrees (40 degrees normal), abduction at 70 degrees (180 degrees normal), adduction at 0 degrees (30 degrees normal), and internal rotation at 60 degrees (80 degrees normal). Finally, with regard to causation, Dr. Denton states: "Based upon the history provided and findings on examination, there is a casual relationship between the accident of record and Ms. Clarke's reported injuries."

A motion for summary judgment is granted in favor of the moving party where there are no material issues of fact, and as a result, the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). As the proponent of the summary judgment motion, the defendants have the initial burden of establishing that the plaintiff did not sustain a serious injury under the categories of injury claimed in her Bill of Particulars. *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002). A defendant can satisfy the initial burden by relying on statements of defendants' examining physician(s), or plaintiff's sworn testimony, or by the affirmed reports of plaintiff's own examining physicians. *See Pagano v Kingsbury*, 182 AD2d 268 (2d Dept 1992). The defendants' medical expert must specify the objective tests upon which the medical opinions are based, and when rendering an opinion as to the range of motion measurement, must compare the range of motion findings to those that are considered to be normal for the particular body part. *See Browdame v Candura*, 25 AD3d 747 (2d Dept 2006).

Here, the defendants failed to meet their *prima facie* burden as to the category of a significant limitation of use of a body function or system under Insurance Law § 5102(d). A significant limitation need not be permanent in order to constitute a "serious injury." *Partlow v*

Meehan, 155 AD2d 647, 647 (2d Dept 1989) quoting Insurance Law § 5102(d) (internal quotation marks omitted). "[A]ny assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of limitation, but of its duration as well, notwithstanding the fact that Insurance Law § 5102(d) does not expressly set forth any temporal requirement for a significant limitation." *Griffiths v Munoz*, 98 AD3d 997, 998 (2d Dept 2012) (internal quotation marks omitted); *see Lively v Fernandez*, 85 AD3d 981, 982 (2d Dept 2011); *Partlow* at 648. Using objective testing, the Smith defendants' own medical expert, Dr. Denton, recorded decreased range of motion of plaintiff's cervical spine, along with decreased range of motion of both shoulders. Significantly, Dr. Denton also opined that these injuries were causally related to the accident. Considering the report of Dr. Denton, defendant's own doctor, which finds decreased range of motion in the plaintiff's cervical spine and shoulders, in tandem with the plaintiff's testimony, the Court cannot conclude that the defendants are entitled to judgment as a matter of law on the significant limitation of use category under the Insurance Law. *See Holtz v Y. Derek Taxi*, 12 AD3d 486 (2d Dept 2004) (defendants failed to make a *prima facie* showing that plaintiff did not sustain a serious injury within Insurance Law § 5102(d) where one of the defendant's examining physicians reported finding limitations of range of motion of plaintiff's cervical spine); *see also Servones v Toribio*, 20 AD3d 330 (1st Dept 2005); *Meyer v Gallardo*, 260 AD2d 556 (2d Dept 1999).

In addition, since the defendants failed to meet their *prima facie* burden of showing that the plaintiff did not suffer a serious injury, it is unnecessary to consider the plaintiff's opposing papers in this regard. *See Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851 (1985); *Fils-Aime v Colombo*, 152 AD3d 493 (2d Dept 2017); *Scinto v Hoyte*, 57 AD3d 646 (2d Dept 2008). As a result, Motion 02 is denied.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the motion of defendants Lori Smith and Jeffrey Smith for summary judgment (Motion 01) dismissing all claims and cross-claims is GRANTED; and it is further

ORDERED, that the motion of defendants Eugene Burger and Daniela Tizzano for summary judgment (Motion 02) dismissing the plaintiff's complaint on the ground that the plaintiff did not sustain a serious injury is DENIED in its entirety.

This constitutes the decision and order of the Court.

DATED: January 26, 2021

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.