Tuba v Hersch
2021 NY Slip Op 33508(U)
April 9, 2021
Supreme Court, Westchester County
Docket Number: Index No. 58203/2019
Judge: Janet C. Malone

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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FANNY C. TUBA and LUIS QUINDE,

Plaintiffs,

-against-

BRIANA F. HERSCH, JULIE ANNE FARRAR-HERSCH, LEE E. HERSCH, MARIA T. CHIQUI SINCHI and JOSE LOJANO,

Defendants.

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Index No. 58203/2019

Decision and Order
Motion Sequence Nos. 1 & 2

Upon documents electronically filed with NYSCEF Document Numbers 26-37, 39-40, and 50-51, defendants Briana F. Hersch, Julie Anne Farrar-Hersch and Lee E. Hersch (together, Hersch Defendants) move, in Motion Sequence Number 1, for summary judgment to dismiss the complaint.

Upon documents electronically filed with NYSCEF Document Numbers 41-49 and 52-53, plaintiff Fanny C. Tuba moves, in Motion Sequence Number 2, for partial summary judgment against the Hersch Defendants.

In this case, plaintiff Tuba sues for injuries she claims she sustained in an automobile collision which occurred near the intersection of Route 9 and Diamond Hill Road in Philipstown New York, on August 10, 2018, between a 2003 Subaru owned or leased by defendants Lee E. Hersch and Julie Anne Farrar-Hersch, which was operated by defendant Briana F. Hersch when it made contact with the 2003 Dodge automobile owned by defendant Jose Lojano and operated by defendant Maria T. Chiqui Sinchi, in which plaintiff Tuba was a passenger. Plaintiff Luis Quinde, spouse of Ms. Tuba, asserts a claim for loss of consortium. Defendants Maria T. Chiqui Sinchi and Jose Lojano have been dismissed from this action (Stipulation of Discontinuance, NYSCEF Doc. No. 23).

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329

[1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver,* 90 NY2d 204, 208 [1997]). Summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos,* 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.,* 26 NY2d 255, 259 [1970]). Further, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin,* 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.,* 294 AD2d 348 [2d Dept 2002]).

Motion Sequence Number 1

Hersch Defendants move for summary judgment on the ground that plaintiff Fanny Tuba did not sustain a "serious injury" as defined in Insurance Law section 5102(d) (*see* Notice of Motion, Motion Sequence 1, NYSCEF Doc. No. 26). Insurance Law section 5102 defines a "serious injury" in several ways, including one which causes death or dismemberment 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"

(Insurance Law § 5102[d]). Plaintiff Tuba's claim relies on this last definition. She testifies she stopped working on the date of the collision, and that after the incident:

> "[m]y back was constantly spasming, keeping me from doing just about everything. As a result of these injuries, I had to stay home, in bed for the first three months from the day of the crash, and I stayed home for over six months. During the first one hundred and eighty days (180) after the accident, and continuing thereafter, I was unable to perform substantially all of my customary and daily activities, including working. . . . I did not work during this time. I did not cook or clean in my own home during this time

(Tuba Aff., NYSCEF Doc. No. 47, ¶¶ 3-4). She also states that she did physical therapy but changed to a home exercise program when it became too expensive (Duffy Aff in Opposition, Motion Sequence 1 [Opp 1], NYSCEF Doc. No. 50, at 3). Moving defendants contend Tuba's testimony is insufficient and the independent medical examinations show only "insignificant and nonpermanent soft tissue injuries as a result of the accident," abrogating any claim requiring a "serious injury" under Insurance Law (Memorandum of Law, Motion Sequence 1 [Memo 1], NYSCEF Doc. No. 28, at 4).

"The legislative intent underlying the No-Fault Law [is] to weed out frivolous claims and limit recovery to significant injuries. As such, there must be some objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold, subjective complaints alone are insufficient" (*McEachin v City of New York*, 137 AD3d 753, 756 [2d Dept 2016][internal quotations and citations omitted]). Even medical testimony must include some objective measures to support such a claim. For example:

> "In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. An expert's *qualitative* assessment of a plaintiff's condition also may suffice, 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. When supported by objective evidence, an expert's qualitative assessment of the seriousness of a plaintiff's injuries can be tested during cross-examination, challenged by another expert and weighed by the trier of fact. By contrast, an expert's opinion unsupported by an objective basis may be wholly speculative, thereby frustrating the legislative intent of the No-Fault Law to eliminate statutorily-insignificant injuries or frivolous claims"

(*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350-51 [2002]).

Hersch Defendants provide medical evidence from an examination performed by Dr. Richard N. Weinstein on February 19, 2020, approximately 18 months after the incident, in which he found a normal range of motion and noted a history of lower back and pelvic pain since August

2011, and a neurological examination performed by Dr. Michael Weintraub on February 10, 2020, in which Weintraub noted a prior motor vehicle collision requiring knee surgery in Tuba's patient history, "degenerative changes of the Lumbar Spine," a full range of motion and no neurological disability (Memo 1 at 5-7). Hersch Defendants also point to Tuba's testimony that she did not feel any pain at the scene of the collision, that she went home after the incident, and that when she did seek medical treatment, she received only Tylenol, as well as her admission at deposition that she was able to perform some of her regular activities during the period she claimed to be homebound, as inconsistent with her injury claims (*id.* at 13, citing Transcript of Fanny C. Tuba Deposition [Tuba Tr] dated January 16, 2020, attached as Exhibit E to Ferrara Aff, NYSCEF Doc. No. 33, at 43-47).

Plaintiff Tuba relies on her statements regarding her pain and restrictions after the collision and on affirmations from orthopedic surgeon Dr. William J. Walsh and neurologist Dr. Glenn Seliger, each of whom stated Tuba was unable to return to work more than 90 days after the collision (Opp 1 at 5-6, citing affirmation of Dr. Walsh, NYSCEF Doc. No. 44, and affirmation of Dr. Seliger, NYSCEF Doc. No. 45), and neurologist Dr. Michael Daras (Opp 1 at 6, citing Daras Affirmation, NYSCEF Doc. No. 46). Doctor Daras's affirmation noted, among other findings, he found a reduced range of motion based on a test performed with a goniometer and other objective diagnostic testing, (Daras Aff, ¶¶ 5-7). Accordingly, Tuba's personal statement is supported by medical testimony and objective data. There are issues of fact as to whether plaintiff Tuba has suffered a "serious injury," as defined in Insurance Law section 5102(d), caused by the automobile collision and Hersch Defendants' motion for summary judgment must be denied.

Motion Sequence Number 2

In Motion Sequence Number 2, plaintiff Tuba seeks partial summary judgment against the Hersch Defendants regarding the existence of a serious injury and on the issue of liability, arguing defendant Briana F. Hersch's negligence was the sole cause of the collision, as Briana Hersch admitted rear-ending the stopped car in which Tuba was a passenger, and that Hersch had not seen the car before looking up from her phone, which she was using for directions while driving (Duffy Aff, Motion Sequence 2, NYSCEF Doc. No. 42, ¶ 18, Briana F. Hersch Deposition Transcript, attached as Exhibit 1 to Duffy Aff, NYSCEF Doc. No. 43, at 20, 35).

Plaintiffs also move to dismiss Hersch Defendants' first affirmative defense, for lack of personal jurisdiction, since defendants have failed to make a motion on this defense within the sixty-day time limit provided by CPLR 3211(e), to dismiss the second affirmative defense, the "seat-belt defense," since Tuba testified she was wearing her seat belt at the time of the collision, to dismiss the third affirmative defense, since Tuba was a passenger and does not have any comparative negligence, to dismiss the sixth affirmative defense, since there is no evidence of a sudden emergency not created by Hersch Defendants, and to dismiss the seventh affirmative defense, based on workers' compensation, since Tuba did not work for the Hersch Defendants. (Duffy Affirmation in Support [Duffy Aff 2], NYSCEF Doc No. 42, ¶¶ 18- 23).

As discussed above, there are issues of fact regarding the existence of a "serious injury," as defined in Insurance Law section 5102(d), caused by the automobile collision. Accordingly, the portion of this motion which seeks summary judgment on that question is denied. Hersch Defendants do not oppose the dismissal of the first, second, third, sixth, and seventh affirmative defenses (Ferrara Aff, NYSCEF Doc. No. 51, ¶ 117). Accordingly, this motion shall be granted to the extent of dismissing the first, second, third, sixth, and seventh affirmative defenses.

Hersch Defendants do oppose summary judgment on the issue of liability for the collision. They contend a rear-end impact collision does not automatically entitle the rear-ended party summary judgment on liability, "[w]here there are divergent versions of how an accident occurred and a non-negligent explanation has been submitted for a rear-end collision" (*id.* ¶ 131-33). Hersch Defendants point out that a "short stop" by the car in front can be reckless and create comparative fault (*id.* at 135-39). However, Hersch Defendants do not supply any evidence of short stop by the car in which Tuba was a passenger. Defendant Briana Hersch testified that the other vehicle was stopped when she first saw it, and it did not move before the collision (Deposition Transcript of Briana F. Hersch, dated February 3, 2020, attached as Exhibit 1 to Duffy Affirmation, NYSCEF Doc. No. 42, at 22). Accordingly, there is no issue of fact as to liability for the collision, and bald, conclusory assertions and speculation are insufficient to defat this motion. This portion of the motion seeking summary judgment on liability against Briana F. Hersch shall also be granted.

As the cross-complaint against the other defendants has already been discontinued (NYSCEF Doc. No. 23), the portion of this motion seeking dismissal of the cross-complaint is denied as moot. Accordingly, for the reasons discussed above, it is hereby

ORDERED that Motion Sequence Number 1 is hereby DENIED, as there are genuine issues of material fact as to whether plaintiff Tuba sustained serious injuries caused by the collision at issue in this case; and it is further

ORDERED that Motion Sequence Number 2 is hereby GRANTED IN PART and DENIED IN PART. The first, second, third, sixth, and seventh affirmative defenses are hereby dismissed and summary judgment is granted to plaintiff Tuba on the issue of liability for the automobile collision as against Briana F. Hersch. All other relief sought is hereby denied; and it is further

ORDERED that this case is referred to the Settlement Conference Part for a conference to be set as appropriate.

Date: April 9, 2021
White Plains, New York

ENTER:

Janet C. Malone.

Hon. Janet C. Malone, J.S.C.