

Reyes v Reyes-Echeverria

2021 NY Slip Op 33565(U)

November 16, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 610332/2019

Judge: Joseph A. Santorelli

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ORIGINAL

SHORT FORM ORDER

INDEX No. 610332/2019
CAL. No. 202001121MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 9/2/21
ADJ. DATE 10/14/21
Mot. Seq. # 005 MD
Mot. Seq. # 006 MD

-----X
VALERIE REYES,

Plaintiff,

CARNER & DEVITA, PC
Attorney for Plaintiff
350 Veterans Highway
Commack, New York 11725

- against -

GENTILE & TAMBASCO
Attorney for Defendant Reyes-Echeverria
115 Broad Hollow Road, Suite 300
Melville New York 11747

NAIN REYES-ECHEVERRIA and DEBBY
TORRES,

Defendants.
-----X

RUSSO & GOULD LLP
Attorney for Defendant Torres
12 Fountain Plaza, Suite 600
Buffalo, New York 14202

Upon the following papers read on these e-filed motions for summary judgment: Notice of Motions/Order to Show Cause and supporting papers by defendant Torres, dated August 12, 2021; by defendant Reyes-Echeverria, dated August 23, 2021; Notice of Cross-Motion and supporting papers __; Answering Affidavits and supporting papers by defendant Reyes-Echeverria, dated August 23, 2021; by plaintiff, dated September 28, 2021 and September 28, 2021; Replying Affidavits and supporting papers by defendant Torres, dated October 10, 2021; by defendant Reyes-Echeverria, dated October 13, 2021; Other __; it is

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that this motion by defendant Debby Torres for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against her is denied; and it is further

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ORDERED that the motion by defendant Nain Reyes-Echeverria for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries sustained by plaintiff, when the vehicle in which she was a passenger collided with a vehicle owned and operated by defendant Nain Reyes-Echeverria. The accident allegedly occurred on September 10, 2017, at approximately 7:20 p.m., on Wicks Road, at or near the intersection of Bluejay Drive, in Brentwood, New York. At the time of the accident, plaintiff was a passenger in the vehicle owned and operated by defendant Debby Torres.¹

Defendant Torres now moves for summary judgment dismissing the complaint and all cross claims against her on the ground that the accident was solely the result of defendant Reyes-Echeverria’s failure to control his vehicle by making an illegal U-turn. She also seeks summary judgment on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d). In support, Torres submits, *inter alia*, the pleadings, the transcripts of the parties’ testimony, and an affirmed report of Dr. Noah Finkel.

At her deposition, plaintiff testified that she was a front-seat passenger in the vehicle operated by her mother, defendant Torres. Prior to the accident, plaintiff had been traveling on the left lane of the southbound Wicks Road. When she first saw the Reyes vehicle coming from Bluejay Drive, it was approximately 100 feet away from the Torres vehicle. Plaintiff testified that the Reyes-Echeverria vehicle traveled through her lane, made a U-turn, and stopped in front of the Torres vehicle. Plaintiff testified that although Torres slowed down her vehicle, she was not able to avoid the accident. The front of the Torres vehicle came into contact with the rear driver’s side of the Reyes-Echeverria vehicle. Plaintiff testified that when the impact occurred, the Reyes-Echeverria vehicle was facing east.

At her deposition, Torres testified that she had been traveling southbound on Wicks Road. When she first saw the Reyes vehicle, it came from a side street on her left, made a U-turn, and stopped in front of her. Torres testified that although she applied her brakes hard, she was not able to avoid the accident. She testified that the front of her vehicle came into contact with the rear driver’s side of the Reyes-Echeverria vehicle.

At his deposition, Reyes-Echeverria testified that after he left a gas station located on Wicks Road, one block north of Bluejay Drive, he had traveled about a half block on the left lane of the southbound Wicks Road at approximately 20 to 25 miles per hour. He testified that as he was about to get into the left turn lane, the rear left side of his vehicle was struck by the front of the Torres vehicle, which had been traveling behind his vehicle. Reyes-Echeverria testified that the accident happened before he arrived the intersection with Bluejay Drive, and that when the impact occurred, his vehicle was facing south.

¹ The Court notes that in its order issued on August 10, 2021, it misidentified the owners and operators of the respective vehicles.

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Here, Reyes-Echeverria's deposition testimony conflicts with plaintiff's and Torres' deposition testimony as to the happening of the accident (*see Pyke v Bachan*, 123 AD3d 994, 999 NYS2d 508 [2d Dept 2014]; *Viggiano v Camara*, 250 AD2d 836, 673 NYS2d 714 [2d Dept 1998]). Plaintiff and Torres testified that the accident happened after the Reyes-Echeverria vehicle drove out of Bluejay Drive and made an illegal U-turn at the intersection of Wicks Road and Bluejay Drive. Reyes-Echeverria, however, testified that while traveling on Wicks Road his vehicle was struck in the rear by the Torres vehicle, and that the accident happened before the intersection of Bluejay Drive. Under these circumstances, there are questions of fact as to how and where the accident happened, whether Reyes-Echeverria was making an illegal U-turn at the time of the accident, and whether the alleged negligence of Reyes-Echeverria was a proximate cause of the injuries to plaintiff. Thus, Torres has failed to sustain the initial burden of demonstrating that she was not negligent. Accordingly, the branch of her motion for summary judgment on the issue of liability is denied.

As to the remaining branch of Torres' motion, a defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured 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, 746 NYS2d 865 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Gonzalez v Krumholz*, 192 AD3d 1086, 141 NYS3d 715 [2d Dept 2021]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see Ocasio v New York City Tr. Auth.*, 134 AD3d 789, 20 NYS3d 655 [2d Dept 2015]; *Pamphile v Bastien*, 61 AD3d 659, 877 NYS2d 137 [2d Dept 2009]).

Here, Torres failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see McGee v Bronner*, 188 AD3d 1033, 132 NYS3d 692 [2d Dept 2020]; *Singleton v F & R Royal, Inc.*, 166 AD3d 837, 88 NYS3d 81 [2d Dept 2018]). On October 1, 2020, approximately three years after the subject accident, defendant Torres' examining orthopedist, Dr. Noah Finkel, examined plaintiff and performed certain orthopedic and neurological tests. Dr. Finkel found that all the test results were negative or normal. Dr. Finkel also performed range of motion testing on plaintiff's cervical and lumbar regions and shoulders, using a goniometer to measure her joint movement. Dr. Finkel found that plaintiff had significant range of motion restrictions in her cervical region: 30 degrees of flexion (normal 60 degrees), 20 degrees of extension (normal 35 degrees), and 70 degrees of right rotation and 30 degrees of left rotation (normal 80 degrees). He also found that plaintiff had significant range of motion restrictions in her lumbar region: 40 degrees of flexion (normal 60 degrees), 25 degrees of extension (normal 35 degrees), and 25 degrees of right lateral flexion and 30 degrees of left lateral flexion (normal 35 degrees) (*see Reddick v Hickey*, 197 AD3d 581, 2021 NY Slip Op 04674 [2d Dept 2021]; *Singleton v F & R Royal, Inc.*, *supra*). It is noted that although Dr. Finkel indicated that the range-of-motion limitations in plaintiff's cervical and lumbar regions were self-imposed, he failed to explain or to substantiate, with objective medical evidence, the basis for that conclusion (*see Mercado v Mendoza*, 133 AD3d 833, 834, 19 NYS3d 757 [2d Dept 2015]; *Uvaydov v Peart*, 99 AD3d 891, 951 NYS2d 912 [2d Dept 2012]; *Iannello v Vazquez*, 78 AD3d 1121, 911 NYS2d 654 [2d Dept 2010]). In view of the foregoing, Dr. Finkel's report is insufficient to establish a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

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Inasmuch as Torres failed to meet her prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiff in opposition to the motion were sufficient to raise a triable issue of fact (see *Blau v Benodin*, 190 AD3d 922, 140 NYS3d 576 [2d Dept 2021]; *Giangrasso v Callahan*, 87 AD3d 521, 928 NYS2d 68 [2d Dept 2011]). Accordingly, the branch of defendant Torres' motion for summary judgment dismissing the complaint on the ground that plaintiff's injuries failed to meet the serious injury threshold of Insurance Law § 5102 (d) is denied.

Defendant Reyes-Echeverria moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of his motion, Reyes-Echeverria submits, inter alia, the pleadings and the affirmation of his attorney, which attempts to adopt and incorporate by reference the portion of the arguments and exhibits relating to the issue of serious injury submitted in the motion by defendant Torres. Since the branch of defendant Torres' motion for summary judgment on the issue of serious injury is denied, as discussed above, the motion by defendant Reyes-Echeverria for summary judgment on the issue of serious injury is denied, as moot.

Dated: NOV 16 2021



HON. JOSEPH A. SANTORELLI
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION