Rosemarie Allen, Plaintiff v. Luis Rivera and Jose R. Diaz, Defendants

Supreme Court, Nassau County, Trial/IAS Part 3

CASE SUMMARY

Justice F. Dana Winslow

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Allen was rear-ended by Rivera in a vehicle owned by Diaz. She moved for partial summary judgment on liability, while defendants moved for dismissal of the complaint arguing Allen failed to sustain a "serious injury" under Insurance Law 5102(d). Allen claimed the accident was caused solely by Rivera's negligence, arguing she was slowing to make a right turn, showed her signal and Rivera hit her car from behind. Rivera claimed Allen did not have her turn signal on, alleging he was traveling approximately 20 miles per hour six feet behind Allen's car, but could not avoid the collision as Allen stopped her vehicle abruptly. The court stated under the LaMasa v. Bachman line of cases, Rivera's allegations were insufficient to rebut the presumption that he was negligent, noting he did not explain why he was not following at a safe speed and distance. Yet, it ruled Rivera's testimony raised the question of comparative negligence, concluding where Allen's "freedom from negligence" was not sufficiently established, summary judgment was unwarranted. The court also found defendants failed to provide a showing necessary to make out a prima facie case that Allen did not suffer from a serious injury, denying both motions.

Cite as: Allen v. Rivera, 013448/10, NYLJ 1202569108542, at *1 (Sup., NA, Decided July 30, 2012)

Justice F. Dana Winslow

Decided: July 30, 2012

ATTORNEYS

Plaintiffs Attorney: Vessa & Wilensky, PC.

Defendant's Attorney: Admas, Hanson, Finder, Hugher, Rego Kaplan & Fishbein.

The following papers read on this motion (numbered 1-6):

001:

Notice of Motion1

Affirmation in Opposition2

Reply Affirmation3

002:

Notice of Motion4

Affirmation in Opposition5

Reply Affirmation6

SHORT FORM ORDER

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The motion of plaintiff ROSEMARIE ALLEN for partial summary judgment pursuant to CPLR 3212, and the motion by defendants LUIS RIVERA and JOSE R. DIAZ for summary judgment pursuant to CPLR 3212 are determined as follows.

Plaintiff ROSEMARIE ALLEN, age 50, alleges that on April 29, 2010 at approximately 12:26 p.m. (the "2010 Accident"), a motor vehicle owned and operated by her came into contact with a motor vehicle operated by defendant LUIS RIVERA ("RIVERA") and owned by defendant JOSE DIAZ ("DIAZ") (collectively, the "defendants"). The 2010 Accident occurred on or about Henry Street near its intersection with Jerusalem Avenue in Hempstead. Plaintiff moves for partial summary judgment pursuant to CPLR 3212 on the issue of liability [Motion Seq. No. 001], and defendants RIVERA and DIAZ move for an order dismissing plaintiff's complaint pursuant to CPLR 3212 on grounds that plaintiff failed to sustain a "serious injury" within the meaning of Insurance Law 5102(d).

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Plaintiff's motion for partial summary judgment on the issue of liability [Motion Seq. No. 001]

Plaintiff asserts that the 2010 Accident was caused solely by RIVERA's negligence. The following account is gleaned from plaintiff's deposition testimony. [See Plaintiff's Exh. F., pp. 35-55.] Plaintiff was traveling southbound on Henry Street, in the right lane, and stopped for a red light at the intersection of Henry Street and Jerusalem Avenue. RIVERA was traveling in the right lane directly behind plaintiff

and also stopped at the traffic light. Plaintiff states that when the light turned green, she put on her right turn signal and proceeded through the intersection. Seconds later, as plaintiff was slowing to turn into a parking lot "just across the street" on the right, "maybe a foot" past the intersection, plaintiff's vehicle was struck in the rear by RIVERA's vehicle.

RIVERA and an unrelated eye witness reported the same essential facts to the police officer at the scene — that RIVERA's vehicle was following behind plaintiff's vehicle and struck plaintiff's vehicle in the rear. [See Plaintiff's Exh. D.] In his opposition to the instant motion, RIVERA's account diverges. He claims that both vehicles were traveling straight and that plaintiff did not have her turn signal on. He states that his vehicle was traveling approximately six feet behind plaintiff's vehicle, at approximately 20-25 mph, when plaintiff stopped her vehicle. Although he swerved, he could not avoid the collision. [Plaintiff's Exh. E, pp. 22-26]. Counsel for RIVERA argues that the conflicting accounts of the 2010 Accident present material issues of fact; namely, whether the two vehicles were proceeding straight (or the lead vehicle was slowing to turn), and whether or not plaintiff's vehicle had on its right turn signal. Counsel argues, further, that plaintiff's sudden stop calls for application of the emergency doctrine, and negates RIVERA's responsibility for the 2010 Accident.

It is well settled that a rear-end collision with a stopped vehicle establishes a prima facie case of negligence against the operator of the rear vehicle, shifting the burden to that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision. Napolitano v. Galletta, 85 AD3d 881; Franco v. Breceus, 70 AD3d 767; Eybers v. Silverman, 37 AD3d 403. This rule extends to the situation where the lead vehicle was slowing at the time of the collision. Dattilo v. Best Transp. Inc., 79 AD3d 432. Further, at least one lower Court has held that a rear-end collision, in and of itself, gives rise to a presumption of negligence on the part of the following driver, even when both vehicles are in motion, and neither is stopped or slowing. See Leguen v. City of New York, 30 Misc 3d 1235(A).

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The rule is generally said to be predicated on the statutory duty of a following driver to maintain a safe speed and distance between his or her vehicle and the vehicle ahead. See Vehicle & Traffic Law 1129; See also LaMasa v. Bachman, 56 AD3d 340; Pena v. Allen, 272 AD2d 311; Mitchell v. Gonzalez, 269 AD2d 250; Zakutny v. Gomez, 258 AD2d 521. In view of this duty, the emergency doctrine is generally unavailable to defendants in a rear-end collision. Jacobellis v. New York State Thruway Authority, 51 AD3d 976.

In order to defeat summary judgment in the context of a rear-end collision, the operator of the rear vehicle must present proof in admissible form sufficient to rebut the inference of negligence. The Second Department has expressly stated that "[o]ne of several nonnegligent explanations for a rear-end collision is a sudden stop of the lead vehicle." Klopchin v. Masri, 45 AD3d 737, 738, quoting Chepel v. Meyers, 306 AD2d 235, 237. See Napolitano, 85 AD3d at 882; Carhuayano v. J&R Hacking, 28 AD3d 413. See also Vargas v. Luxury Family Corp., 77 AD3d 820; Foti v. Fleetwood Ride, Inc., 57 AD3d 724. Although this seems to be a straightforward statement of the law, the cases applying it defy reconciliation.

One line of cases holds that a sudden stop is insufficient to rebut the presumption of negligence, in view of the rear driver's statutory duty

to maintain a safe speed and distance from the vehicle ahead. See Vehicle & Traffic Law 1129(a); LaMasa, 56 AD3d 340; Pena, 272 Ad2d 311; Mitchell, 269 AD2d 250; Zakutny, 258 Ad2d 521. In these cases, a sudden stop by the lead driver does not mitigate the rear driver's negligence, even in bad weather or slippery road conditions, unless the rear driver provides a non-negligent explanation — not for the collision, but for the failure to maintain a safe distance from the vehicle in front. LaMasa, 56 AD3d 340; Mullen v. Rigor, 8 AD3d 104; Pena, 272 AD2d 311; Mitchell, 269 AD2d 250; Zakutny, 258 AD2d 521.

Another line of cases holds that a sudden stop is sufficient. Close examination of these cases, however, suggests that additional factors may also be present which support an inference of negligence on the part of the lead driver. These include the lead driver's failure to signal [Klopchin, 45 AD3d at 738; Drake v. Drakoulis, 304 AD2d 522], the lead driver's unexplained stop in moving traffic [Vargas, 77 AD3d at 821; Foti, 57 AD3d at 725; Chepel, 306 AD2d at 237], or the lead driver's sudden lane change before the stop [Fajardo v. City of New York, 2012 WL 1521808; Briceno v. Milbry, 16 AD3d 448]. These cases do not consistently state whether a showing of negligence on the part of the lead driver rebuts the inference of negligence on the part of the rear driver, or only the inference that such negligence was the sole proximate cause of the accident. In any event, the question of liability is preserved for the jury.

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In the case at bar, RIVERA's opposition rests on the proposition that plaintiff stopped suddenly in front of him, and that, as a result, he could not avoid the accident. Under the LaMasa line of cases, cited above, this is not sufficient to rebut the presumption that RIVERA was negligent. RIVERA does not provide any explanation for why he was not following at a safe speed and distance; i.e., one that would have allowed him to stop in time to avoid the collision. RIVERA testifies that he was driving at a distance of six feet behind plaintiff's vehicle and a speed of 20-25 mph, but there is no evidence demonstrating that such speed and distance was imperative or reasonable under the existing circumstances. The Court takes judicial notice of the Speed/Distance Conversion Table contained in the Bench Book for Trial Judges [2005 NY UCS, 8/2005, 1:5], which shows that a motor vehicle traveling at 20 mph is moving at a speed of 29 feet per second. Thus, if anything, RIVERA's testimony that he was only six feet behind plaintiff's vehicle weakens his rebuttal of negligence.

RIVERA also testifies, however, that plaintiff failed to use her turn signal, which violates Vehicle & Traffic Law 1163. Under the Klopchin line of cases, cited above, this additional factor — some evidence of negligence on the part of plaintiff — is sufficient to defeat summary judgment. In such circumstances, the two lines of case law are not inconsistent. Even if RIVERA's testimony, taken as a whole, is insufficient to rebut the presumption of negligence on his part, it nonetheless raises the question of comparative fault. Where plaintiff's freedom from negligence is not established as a matter of law, summary judgment is not warranted. Abbott v. Picture Cars East, 78 AD3d 869.

Here, an issue of fact has been raised that is central to the question of comparative fault; that is, whether or not plaintiff failed to use her turn signal. The determination of that question will likely turn on the credibility of the witnesses. Accordingly, summary judgment on

liability is properly denied. See Myers v. Fir Cab Corp., 64 NY2d 806; Fleming v. Graham, 34 AD3d 525, 526, revd. on other grounds 10 N.Y.3d 296; Nicklas v. Tedlen Realty Corp.; 305 AD2d 385, 386 (internal citations omitted).

Defendants' motion for summary judgment on the grounds that plaintiff ROSEMARIE ALLEN failed to demonstrate a serious injury within the meaning of Insurance Law 5102(d) [Motion Seq. No. 002]

Insurance Law 5102(d) provides that a "serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function of system; or (9) a medically determined

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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" (numbered by the Court). The Court's consideration in this action is confined to whether plaintiff's injuries constitute a permanent consequential limitation of use of a body organ or member (7), a significant limitation of use of a body function or system (8), or a medically determined injury which prevented her from performing all of the material acts constituting her usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of their motion for summary judgment, defendants submit (i) an affirmed report of examination, dated October 11, 2011, of orthopedist Arnold M. Illman, MD, covering an examination performed on that date [Defendants' Exh. H]; (ii) an affirmed report of neurologist Richard Lechtenberg, MD, dated November 13, 2011, covering an examination performed on November 9, 2011 [Defendants' Exhibit I]; (iii) an unaffirmed report of radiologist John Himelfarb, MD, dated September 8, 2010, covering an MRI of plaintiff's right should [Defendants' Exh. F]; (iv) portions of plaintiff's medical records covering a motor vehicle accident in 2005; and (v) plaintiff's deposition transcript, dated September 9, 2011. The Court notes that although unaffirmed, the Court can consider the MRI report of plaintiff's radiologist Dr. Himelfarb submitted in support of defendants' motion for summary judgment. See Kearse v. NYC Transit Authority, 16 AD3d 45; Pagano v. Kingsbury, 182 AD2d 268.

The Court finds that defendants do not provide the showing necessary to make out a prima facie case that plaintiff did not suffer from a serious injury as defined by Insurance Law 5102(d). Although Dr. Illman found normal range of motion in plaintiff's cervical and thoracic/lumbosacral spines, Dr. Illman noted significant limitations in range of motion in plaintiff's shoulder (without specifying which shoulder). See generally Wedderburn v. Simmons, 95 AD3D 1304; Caracciolo v. Elmont Fire District, 94 AD3d 799; Jones v. Anderson, 93 AD3d 640; Katanov v. County of Nassau, 91 AD3d 723; Scott v. Gresio, 90 AD3d 736, 737; Jones v. Hampton, 89 AD3d 1065. Dr. Illman made the following range of motion findings with respect to plaintiff's shoulder: "130 degrees of anterior flexion (normal 160

degrees), 120 degrees of abduction (normal 160 degrees), slight loss of internal rotation (normal 90 degrees)."

Dr. Illman diagnosed "cervical and thoracolumbosacral sprain, derangement of the right shoulder and multiple herniated discs [of the] cervical spine and pre-existing spondylolysis by report." Dr. Illman concluded that "based on the history and records reviewed, the sprain/strain of the neck and back and right shoulder derangement are

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causally related to the accident of 4/29/10". However, Dr. Illman also seemingly opined that the range of motion deficits found in plaintiff's shoulder, were caused by a prior accident. The Court finds that Dr. Illman's conclusions that plaintiff "has residual orthopedic findings relative to her right shoulder and no residuals relative to her neck and back" and that "there were pre-existing changes in the diagnostic reports of her neck, back and shoulder" (again without specifying which shoulder), to be insufficient explanations for the deficits in range of motion noted in plaintiff's shoulder. See Luigi v. Avis Cab Co, Inc., 2012 WL 2125960 (the opinion by defendant's physician that the injuries were not causally related was "too equivocal to satisfy the defendant's prima facie burden of demonstrating that such injuries were not caused by a traumatic event"). Dr. Illman failed to provide competent medical evidence to support such assertion of lack of causation. Wedderburn, 95 AD3d at 1305; Cues v. Tavarone, 85 AD3d 846. "A preexisting condition does not foreclose a finding that the injuries were causally related to the accident." Rodgers v. Duffy, 95 AD3d 864, 866. The Court notes that defendants also fail to submit competent medical evidence to support counsel's assertion that MRIs taken in 2005 and 2010 reveal that the injuries plaintiff sustained in the 2010 Accident have been ongoing and unresolved since the 2005 motor vehicle accident.

Dr. Lechtenberg noted that deficits in several range of motion measurements of plaintiff's cervical and lumbar spines, and shoulders were a result of "voluntary restricted excursions" and that "incidental movements [of these areas] revealed [l]argely normal range[s] of motion." The Court finds that Dr. Lechtenberg has failed to support with objective medical evidence the basis for his conclusion that the restrictions he observed were voluntary. The Court notes that Dr. Lechtenberg's opinion that incidental movements were 'largely' normal is entirely conclusory. See generally Williams v. Fava Cab Corp., 90 AD3d 912; Artis v. Lucas, 84 AD3d 845; Iannello v. Vazquez, 78 AD3d 1121; Granovskiy v. Zarbaliyev, 78 AD3d 656; Quiceno v. Mendoza, 72 AD3d 669; Chun Ok Kim v. Orourke, 70 AD3d 995; Bengaly v. Singh, 68 AD3d 1030. See also Perl v. Meher, 18 NY 3d 208, 219.

In fact, the evidence submitted, including reports by Dr. Illman, plaintiff's deposition testimony and prior medical records "actually demonstrate[e] the existence of a triable issue of fact as to causation." Kearney v. Garrett, 92 AD3d 725, 726

On the basis of the foregoing, the Court finds that defendants have failed to make a prima facie demonstration that plaintiff ROSEMARIE ALLEN did not sustain a serious injury within the meaning of Insurance Law 5102(d). Accordingly, it is unnecessary for the Court to consider whether plaintiff's opposition is sufficient to raise a triable issue of fact. See Luigi v. Avis Cab Co., Inc., 2012 WL 2125960; Wedderburn, 95 AD3D at

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1305; Jackson v. Draz, 94 AD3d 1057; Jones, 93 AD3d at 641; Granovskiy, 78 AD3d at 657.

Based on the foregoing, it is

ORDERED, that the motion by plaintiff for partial summary judgment pursuant to CPLR 3212 on the issue of liability is denied; and it is further

ORDERED, that the motion by defendants LUIS RIVERA and JOSE R. DIAZ for summary judgment pursuant to CPLR 3212 dismissing the complaint of plaintiff ROSEMARIE ALLEN on grounds that plaintiff failed to sustain a "serious injury" within the meaning of Insurance Law 5102(d) is denied.

This constitutes the Order of the Court.