Katanov v County of Nassau

2010 NY Slip Op 33497(U)

December 8, 2010

Supreme Court, Nassau County

Docket Number: 6024/09

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

BELLA KATANOV,

Plaintiff,

- against -

COUNTY OF NASSAU, NASSAU COUNTY POLICE DEPARTMENT and POLICE OFFICER BLANSHAN,

Defendants.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 6024/09

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	1
Answering Affidavits	2
Replying Affidavits	3
Briefs: Plaintiff's / Petitioner's	
Defendant's / Respondent's	

The defendants move pursuant to CPLR 3212 for summary judgment because no reckless disregard claim can be substantiated, and the plaintiff fails to demonstrate "serious injury" as defined by New York State Insurance Law § 5102 (d). The defendants allege the vehicle was in an emergency operation pursuant to Vehicle and Traffic Law §§ 1104 and 114-b, so the police officer operator is afforded a qualified privilege to disregard ordinary rules regarding driving, but not in a reckless manner. The plaintiff opposes this motion, and claims there are material issues of fact regarding whether the officer was on an emergency call and whether the officer acted recklessly. The plaintiff also contends the defense failed to meet the burden of demonstrating the absence of any material issue of fact about "serious injury," and "serious injury" has been shown the plaintiff. The defense replies the plaintiff fails to show material issues of fact regarding "serious injury" and liability.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion. The underlying personal injury action arises from a October 21, 2008 morning motor vehicle accident with a pedestrian, walking to work, hit in a private parking lot of an assisted living facility at 51 Great Neck Road, Great Neck Plaza, in the Town of North Hempstead, County of Nassau. The plaintiff pedestrian testified at a hearing pursuant to General Municipal Law § 50 (h) on February 25, 2009 and at a November 19, 2009 deposition, and the defendant police officer testified at a deposition on January 25, 2010. The plaintiff testified she saw the police car prior to the accident; was hit from the back of the right knee; and "saw everything white' when the accident occurred; and fell to the ground. While the officer testified he responded to an emergency call of a woman needing medical assistance at Atria Great Neck assisted living facility near the accident site from a fall and in serious pain, but he was obstructed briefly by a pillar in the vehicle. The officer also testified he drove the police vehicle into the parking lot at "maybe two miles an hour" with his foot on the brake pedal; and never heard any contact between the vehicle and the plaintiff, but rendered assistance to the plaintiff calling for an ambulance and additional police assistance to the accident scene.

The State Court of Appeals held:

> Drivers of emergency vehicles have a primary obligation to respond quickly to preserve life and property and to enforce the criminal laws. Consequently, in recognition of these drivers' special needs, the Legislature enacted Vehicle and Traffic Law § 1104, which qualifiedly exempts them from certain traffic laws when they are "involved in an emergency operation." At issue in this appeal are the meaning and effect of the statute's provisions for civil liability in the event of an accident (Vehicle and Traffic Law § 1104 [e]). Consistent with its language and purpose, we hold that Vehicle and Traffic Law § 1104 (e) precludes the imposition of liability for otherwise privileged conduct except where the conduct rises to the level of recklessness.

Saarinen v. Kerr, 84 N.Y.2d 494, 497, 620 N.Y.S.2d 297 [1994].

This State's highest Court stated:

> This standard demands more than a showing of a lack of "due care under the circumstances"--the showing typically associated with ordinary negligence claims. It requires evidence that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow" and has done so with conscious indifference to the outcome (Prosser and Keeton, Torts § 34, at 213 [5th ed]; see, Restatement [Second] of Torts § 500).

Saarinen v. Kerr, 84 N.Y.2d, supra, at 501.

This Court determines the defense has presented evidence, as a matter of law, there is no material

issue of fact regarding whether the officer's action transgressed the limits of the statutory qualified privilege. In opposition, the plaintiff fails to present evidence which shows the officer's action was reckless (***see Powell v. City of Mount Vernon***, 228 A.D.2d 572, 644 N.Y.S.2d 766 [2nd Dept, 1996].

> Insurance Law § 5102 (d) provides:
> "Serious injury" means 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.

The State Court of Appeals held: "In order to prove "serious injury" under the 90-out-of-180-day rule, plaintiff must prove that she was " curtailed from performing [her] usual activities to a great extent rather than some slight curtailment [citation omitted]" (***Gaddy v. Eyler***, 79 N.Y.2d 955, 958, 582 N.Y.S.2d 990 [1992]. This plaintiff testified, at the February 25, 2009 General Municipal Law § 50 (h) hearing, she returned to work a week after the October 21, 2008 accident, and testified, at the November 19, 2009 deposition, she was unsure how much work time she missed adding "[a] couple of weeks for sure. The day after I didn't go." The plaintiff also testified, at that deposition, she worked two or three days a week from November 2008 to March 2009, when the plaintiff had the first knee surgery. The plaintiff testified, at the General Municipal Law § 50 (h) hearing, wrist bleeding stopped at North Shore University Hospital where no fractures were found, no bandages were applied, and the plaintiff only treatment was pain medication. This Court determines the defense has presented evidence, as a matter of law, there is no material issue of fact regarding "serious injury" under the 90-out-of-180-day rule. In opposition, the plaintiff fails to present evidence to show a medically determined injury or impairment of a non-permanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute the plaintiff's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the October 21, 2008 accident.

The Second Department held: "The court has the duty in the first instance to decide whether a plaintiff has established a prima facie case of serious injury within the meaning of Insurance Law § 5102 (d) (***see, Licari v. Elliott***, 57 NY2d 230, 237) (McLiverty v. Urban, 131 A.D.2d 449, 516 N.Y.S.2d 235 [2nd Dept, 1987]. The nursing notes from the Emergency Room

at North Shore University Hospital on October 21, 2008, where the plaintiff was taken immediately following this incident show the EMS attendant reported the plaintiff was struck by a slow moving police car in the parking lot, and the plaintiff told medical staff "she believes the car struck her right knee and she fell on her left side." while the plaintiff's deposition testimony was, "I went high up in the air. I end up on both knees and both wrists. I punched myself." The nursing notes also state the plaintiff denied any bad injury or loss of consciousness, and the plaintiff's testimony, at the General Municipal Law § 50 (h) hearing, is she believed she lost consciousness for a few seconds, but on March 22, 2010 told Jerrold M. Gorki, M.D., the defense board certified orthopedic surgeon who also examined the plaintiff on May 4, 2009, she lost consciousness. The nursing notes further show the plaintiff complained of neck and back pain, and had "minor abrasion of the left wrist, knees intact, no swelling, no bruising, and no deformity; denies numbness/tingling in legs, moving all extremities." Dr. Gorki opined, after examining the plaintiff and performing range of motion tests, there was "no causally related objective findings in the neck or the back or for that matter in either of her wrists...There are no focal, motor or sensory deficits in the upper or the lower extremity." Barry C. Cooper, DDS, FACD, FICD, a defense expert, examined the plaintiff on February 22, 2009 2010 regarding the plaintiff's claims of mouth and teeth injuries from the October 21, 2008 accident resulting in discomfort to the mouth, sleeping difficulties, headaches and dizziness. Dr. Cooper opined there were no objective signs nor symptoms of a temporomandibular muscle or joint disorder or any dental injury related to the October 21, 2008 accident. Dr. Cooper found, with a reasonable degree of dental certainty, the plaintiff's crowded lower anterior teeth pre-existed the October 21, 2008 accident, and were not adversely affected by it. Jeffrey Warhit, M.D., a board certified radiologist, examined the plaintiff's MRI records on January 25, 2010 and March 23, 2010 regarding the plaintiff's claims of knee, back and wrist injuries. Dr. Warhit opined there is no evidence of a traumatic injury to either knee, the either wrist, the lumbar spine nor the cervical spine.

In opposition, the plaintiff presents the papers not in admissible form, from David N. Lischutz, M.D., Integrated Neurological Associates, PLLC, and Richard A. Heiden, M.D., Kissena Medical Imaging, but an affirmation from Maxim Tyorkin, M.D., an orthopedic surgeon, who examined the plaintiff and performed range of motion tests on April 28, 2010, regarding the October 21, 2008 accident. Dr. Tyorkin opined, within a reasonable degree of medical certainty, the October 21, 2008 accident was the competent producing cause of the injuries sustained by the plaintiff needing further treatment. Dr. Tyorkin also opined the nature of the plaintiff's injuries are permanent, and the plaintiff had marked pain with significant loss of function, restrictions in

motion limiting the plaintiff's in performing daily activities. Dr. Tyorkin found the injuries similar to those received in sports, and degenerative arthritis is more likely to occur in seriously injured knees adding the plaintiff is predisposed to post-traumatic arthritis. The plaintiff claims her knees buckled on January 1, 2009, when she held a boiling hot cup of water resulting in second degree burns and scarring which the plaintiff attributes to the October 21, 2008 accident. Dr. Tyorkin's affirmation is insufficient to raise a triable issue of fact because Dr. Tyorkin fails to address the defense experts' findings which concluded the plaintiff's injuries and range-of-motion limitations in her knees could be related to a congenital patellofemoral mal-alignment, degenerative changes at the L1-L2, L2-L3 and L5-S1 levels with intervertebral disc spending narrowing, anterior and posterior osteophyte and desiccation of the intervertebral disc at those levels, and the plaintiff's crowded lower anterior teeth pre-existed the October 21, 2008 accident, and were not adversely affected by it. This failure rendered speculative Dr. Tyorkin's conclusion that the plaintiff's injuries and loss of motion he noted were caused by the subject accident. The plaintiff fails to present evidence to show "serious injury" as defined by New York State Insurance Law § 5102 (d) (***see Nieves v. Michael***, 73 A.D.3d 716, 901 N.Y.S.2d 100 [2nd Dept, 2010].

Accordingly, the motion is granted.

So ordered.

Dated: **December 8, 2010**

ENTER:

J. S. C.

FINAL DISPOSITION

ENTERED
DEC 15 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE