Sumarriva v Zuckerman
2020 NY Slip Op 35718(U)
September 28, 2020
Supreme Court, Queens County
Docket Number: Index No. 714726/2018
Judge: Chereé A. Buggs

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

Index No. 714726/2018

JUANA SUMARRIVA and CHRISTINA CAMACHO,

Plaintiffs,

-against-

RICHARD ZUCKERMAN, EDGAR ZUMBA and CLAUDIO ZUMBA,

Defendants.

Motion
Date: September 9, 2020

Motion Cal. No.: **31 and 32**

Motion Sequence No.: **2 and 3**

The following efile papers numbered 21-41 and 53-59 submitted and considered on this motion sequence number two by defendant RICHARD ZUCKERMAN (hereinafter referred to as "Zuckerman") seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 3212 granting summary judgment finding Zuckerman is not liable for the accident and pursuant to CPLR 3025 allowing Zuckerman leave to assert an affirmative defense and the efile papers numbered 42-52 and 60-69 submitted and considered on this motion sequence number three by defendants EDGAR ZUMBA and CLAUDIO ZUMBA (collectively referred to as " Zumba") finding the plaintiff CHRISTINA CAMACHO (hereinafter referred to as "Camacho") failed to reach the serious injury threshold pursuant to NY Insurance Law §§ 5102 and 5104 both seeking such other and further relief as this Court deems just and proper.

	Papers Numbered
Motion Sequence #2	
Notice of Motion- Affirmation- Exhibits.....	EF 21-41
Affirmation in Opp- Exhibits.....	EF 53-55
Affirmation in Opp.....	EF 56
Stip to Adjourn.....	EF 57
Reply Affirmation.....	EF 58-59
Motion Sequence #3	
Notice of Motion-Affirmation- Exhibits.....	EF 42-52
Affirmation in Opp- Exhibits.....	EF 60-65
Reply- Exhibits.....	EF 66-69

This is a negligence action arising out of a vehicle collision that occurred on the northbound lane of New York Route 22 in Amenia, New York on August 24, 2018 at 9:40 PM. Zuckerman and Zumba were traveling in the Northbound lane. Defendant Edgar Zumba attempted to complete a U-turn in front of the Zuckerman vehicle and a collision occurred. Both plaintiff's were traveling in the Zumba vehicle.

Zuckerman contends the collision occurred within an instant and there was no time to react.

Q: Okay. When you were able to see during these five car lengths, did you see this other vehicle in front of you?
A: It wasn't in front of me. It had gone off on the shoulder until it darted.
Q: So you actually saw the vehicle with which you had your accident go onto the shoulder before it darted out in front?
MR. WELDEN: That isn't what he said.
A: That isn't what I said.
MR WELDEN: It's a mischaracterization of his testimony.
Noting my objection for the record.
Q: How did you know that it was pulled over to the shoulder?
A: Because I knew from – I knew that – I know that in two ways. I didn't know at the time but I know that now in two ways. One is Mr. Zumba immediately after the accident told me that he was making a U-turn.
Q: Okay.
A: And two, based upon where his vehicle was, which was directly perpendicular – directly perpendicular to where – the way I was driving, he could not have gotten into that position unless he had been on the shoulder.
Q: Okay. Let's talk about position of the vehicle for a second.
A: Sure.
Q: All right. Now, the area where he was making a U-turn, was there any space there allowed for people to make U-turns?
A: No.
Q: It's just a solid double-yellow line?
A: That's correct.
(Pages 20-21 lines 7-25 and 2-18)

Q: Is there a reason why you didn't turn your vehicle to the right and go into the shoulder area to avoid the impact?
A: There wasn't any time to swerve.
Q: At what rate of speed was your vehicle moving at the moment of impact?
A: I've answered that several times. I said about 45 miles per hour.
(Page 35-36 lines 25 and 2-8)

Summary Judgment

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp*., 3 NY2d 395, 404 [1957]; *see also Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. 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" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *see Schmitt v Medford Kidney Center,* 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

In support of his motion Zuckerman points to *Javier Criollo v Maggies Paratransit Corp. et al.,* 155 AD3d 683, 684 (2d Dept 2017) where the court held plaintiff established prima facie entitlement to judgment as a matter of law. Plaintiff established he was traveling with the right of way where the defendant who was stopped to the right of plaintiff in a merging or parking lane suddenly attempted a U-turn in front of plaintiff, striking plaintiff's vehicle (*id*). Defendant agreed that a split second passed between the time that he moved and the collision. The court held "'A driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision'" (*id* citing *Yelder v Walters,* 64 AD3d 762, 764 [2d Dept 2009]).

Zuckerman also submits the report of accident reconstruction expert John McManus, P.E. ("John"). John reviewed the pleadings, Bill of Particulars, Police Accident Report, deposition transcripts of the parties along with marked exhibits, photographs, diagrams and documents

exchanged in discovery. Additionally, John conducted a site inspection of the location. John described the site of the accident as follows: two way road divided by a double-yellow line, one lane of travel in each direction, the shoulder is situated to the right of the northbound lane and the area is dark with no lights illuminating the roadway. The northbound shoulder has a brake in the guiderail to its right and a cut out for vehicles to turn into, at its widest point it measures approx. 50 feet, the northbound shoulder averages 5- 5.5 feet in width and each travel lane (north and southbound) measures about 11.5 to 12 feet. The speed limit on this road is 55 mph.

According to John, in consideration of the lengths and widths of both vehicles, while Zuckerman was traveling below the posted speed limit, Zumba had to first turn his vehicle to the right of the northbound lane into the shoulder and the cut out area in order to initiate the U-turn far ahead of Zuckerman. According to John, during this time the Zumba car would have been out of view for Zuckerman, Zuckerman's headlights were the only light source coupled with heavily branched trees, foliage and shrubs to his right covering significant portions of the cut out area. Therefore, the Zumba vehicle would not have been visible until it crossed back onto the northbound shoulder and into the travel lane. However, according to John, at this point the Zumba vehicle would have been presenting its left side which would not have provided much as far as illumination for oncoming vehicles such as Zuckerman's. John opined "it is my professional opinion within a reasonable degree of expert certainty that the defendant's Mr. Zuckerman's, conduct at the time of the accident on August 24, 2018 conformed with all good and accepted standards of vehicle operation.""Therefore, it is my opinion with the same degree of accident reconstruction and engineering certainty, that it was the U-turning driver's lack of reasonable care and absence of caution in violation of the statutory standards of care that solely and exclusively caused this accident".

Zuckerman has established prima facie entitlement to judgment as a matter of law. The burden now shifts to the opposing parties to raise a triable issue of fact.

In opposition, Zumba argues Zuckerman breached his duty to observe the Zumba vehicle ahead of him in a timely manner. Furthermore, Zumba argues and provides expert testimony to suggest that the medications that Zuckerman consumed may have impaired his driving ability by impeding his concentration and reaction time.

Zumba testified as follows:
Q: Did you also move your vehicle to the right in order to make a U-turn?
MR. RUBIN: Objection to the form.
A: It was a little bit, but there was not that space to do that.
Q: Did you move your vehicle to the right outside of the moving lane before you began to make a U-Turn?
A: No.
(Page 19-20 lines 16-25 and 11)

Zumba further testified Zuckerman had "zero lights". (page 34 line 2)

Zuckerman testified as follows:
Q: Did you have your headlights on?
A: Yes
Q:The location where the accident happened, was there anything illuminating the roadway?
A: No
Q: Was your vehicle equipped with automatic lights on, lights off?
A: Yes.
Q: Okay. When you got into the vehicle, did you turn the lights on or did they go on automatically? Something else?
A: I probably had it on automatic lights but I don't remember. There's no question that the lights were on though.
MR. RUBIN: Let us move to strike that as non-responsive.
(Page 7 lines 7-23)

There are issues of fact. Zumba argues Zuckerman contributed to the happening of the accident by failing to turn his headlights on, thereby making it less possible for him to observe the Zumba vehicle and vice versa. Alternatively, Zuckerman's allegation that Zumba's vehicle made a right into the shoulder before attempting the U-Turn could be the sole cause of the accident.

This Court will now address motion sequence number three.

Serious Injury

Zumba, asserts that Christina did not incur a "serious injury" as defined under NY Insurance Law §5102 (d) which reads as follows:

> " '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."

Christina alleges injury to her right shoulder, right wrist, chest, head, lumbar and cervical spine. Christina alleges she was confined to bed intermittently for a few days and has been confined to home intermittently since the date of the accident.

In support of his motion, Zumba submitted independent medical examination reports from Dr. Matthew M. Chacko, a neurologist ("Dr. Chacko") and Dr. Richard Levitt, M.D., an orthopedic surgeon, ("Dr. Levitt").

Dr. Levitt performed an independent orthopedic examination of Christina on October 15, 2019. Dr. Levitt noted Christina has a prior injury to her back from fifteen years prior to the examination. Christina reported pain in her neck, mid-back, right shoulder, right elbow, right hip, right knee, right arm, right breast and head. Furthermore, Christina reported her level of pain as a 7 on a scale of 1-10, 10 being the worst. Also, that she experiences pain which radiates from her shoulders to her lower back, she experiences difficulty climbing steps but can walk three city blocks without much pain. Christina reported she can sit for thirty minutes without much pain, however, sitting too long causes her pain. Dr. Levitt performed a range of motion test using normal values in accordance with both the NYS WC guidelines and AMA guidelines. Dr. Levitt recorded the following deficits in Christina's range of motion.

Cervical Spine
Flexion: 40 degrees, normal 50 degrees;
Extension: 40 degrees, normal 60 degrees;
Right rotation: 40 degrees, normal 80 degrees;
Left rotation: 40 degrees, normal 80 degrees;
Right Lateral Flexion: 30 degrees, normal 45 degrees;
Left Lateral Flexion: 30 degrees, normal 45 degrees.

Lumbar Spine
Flexion: 40 degrees; normal 60 degrees;
Extension: 20 degrees, 25 degrees;
Right lateral bending: 20 degrees, 25degrees;
Left lateral bending: 20 degrees, 25 degrees.

Furthermore, Dr. Levitt found minimal paraspinal tenderness to superficial touch bilaterally at the lumbar spine.

Dr. Levitt concluded Christina's cervical, lumbar, right shoulder and right wrist sprains were resolved. According to Dr. Levitt, range of motion tests and tenderness are subjective. Dr. Levitt opined there is no evidence of disability.

Dr. Chacko did not find any deficits in his range of motion test on Christina's lumbar and cervical spine. During the straight leg raise Christina was able to lift 70 to 80 degrees (90 degrees normal) bilaterally and reported pain behind her thighs and back. Dr. Chacko found that the sprains and strains in Christina's lumbar and cervical spine were resolved. According to Dr. Chacko there was no muscle weakness, reflex assymetry or focal sensory changes. Furthermore, according to Dr. Chacko, there was no clinical finding of cervical or lumbar radiculopathy or myleopathy. Finally,

Christina has a history of headaches and the examination was not consistent with the presence of intracranial injury or cerebral dysfunction.

90/180

Zumba argues he does not have to address 90/180 because Christina's Bill of Particulars has not proved she had 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" (NY Insurance Law § 5102[d]).

This court disagrees in her Bill of Particulars Christina alleged she was confined to bed intermittently for a few days and has been confined to home intermittently since the date of the accident. Christina was retired at the time of the accident. She claims the frequency of her visits to the senior center has changed and she can no longer exercise while she is there. Christina claims she does not cook as often, therefore she buys dinner from the senior center. Furthermore, Zumba had access to the reports of Christina's physician Dr. Stephanie Bayner, M.D. ("Dr. Bayner") which make it clear that Dr. Bayner found Christina sustained a permanent medical impairment.

Zumba has failed to establish entitlement to judgment as a matter of law. Therefore it is,

ORDERED, that the branch of defendant Zuckerman's motion sequence number 2 seeking summary judgment is denied; and it is further,

ORDERED, that the branch of defendant Zuckerman's motion sequence number 2 seeking leave to assert an affirmative defense pursuant to CPLR 3025 is granted; and it is further,

ORDERED, Zuckerman shall file and serve his amended answer within twenty (20) days of the date of this Order entered with notice of entry; and it is further,

ORDERED, that defendant Zumba's motion sequence number 3 is denied.

The foregoing constitutes the decision and Order of this Court.

Dated: September 28, 2020

Hon. Cheree A. Buggs, JSC