Miller v Suffolk County Police Dept.

2012 NY Slip Op 30226(U)

January 13, 2012

Sup Ct, Suffolk County

Docket Number: 06-5044

Judge: Denise F. Molia

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SHORT FORM ORDER

COPY

INDEX No. 06-5044
CAL No. 11-01486MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 7-29-11 (#007)
MOTION DATE 7-28-11 (#008)
ADJ. DATE 10-28-11
Mot. Seq. # 007 - MD
008 - MD

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DERRICK MILLER, an infant by his mother and natural guardian, SERINA M. TRENT and SERINA M. TRENT, individually, JAZMIN BARBER, an infant by her mother and natural guardian RAASHEEN BETHEA and RAASHEEN BETHEA, individually, TERRELL MITCHELL, JAROD HERRING, MONET ARIOL, an infant by her mother, SAKEEMA HOWARD and RANIESHA WILKINS, infants by their mother and natural guardian, RONDAYA HOWARD, and RONDAYA HOWARD, individually.

Plaintiff,

- against -

SUFFOLK COUNTY POLICE DEPARTMENT, SUFFOLK COUNTY SHERIFF DEPARTMENT, TOWN OF ISLIP POLICE DEPARTMENT, TOWN OF ISLIP, POLICE OFFICER LOLA QUESADA, P.L. HENDERSON A/K/A PHIL HENDERSON and LEONDRA BRAY,

Defendants

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SIBEN & SIBEN, LLP
Attorney for Plaintiffs Miller
90 East Main Street
Bay Shore, New York 11706

BONGIORNO LAW FIRM, PLLC
Attorney for Plaintiffs Barber
250 Mineola Blvd
Mineola, New York 11501

THE COCHRAN FIRM
Attorney for Plaintiff Mitchell, Herring, Ariol, Rose and Howard
233 Broadway, 5th Floor
New York, New York 10279

BAXTER, SMITH, SHAPIRO, P.C.
Attorney for Defendants P.L. Henderson
99 North Broadway
Hicksville, New York 11801

Upon the following papers numbered 1 to 146 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 63; 64 - 88 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 89 - 127; 128 - 135; 136 - 137; 138 - 139; 140 - 141 ; Replying Affidavits and supporting papers 142 - 143; 144 - 145 ; Other memorandum of law, 146 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

RST

ORDERED that the motion (#007) by defendant P.L. Henderson and defendant Leondra Bray and the motion (#008) by defendant Suffolk County and defendant Lola Quesada are consolidated for purposes of this determination; and it is

ORDERED that the motion (#007) by defendant Henderson and defendant Bray for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain serious injuries within the meaning of Insurance Law §5102 (d) is denied; and it is further

ORDERED that the motion (#008) by defendant Suffolk County and defendant Quesada for summary judgment dismissing the complaint is denied.

This is an action to recover damages for serious injuries allegedly sustained by plaintiffs as the result of a motor vehicle accident that occurred at the intersection of Grand Boulevard and Alkier Street in the Town of Islip on September 24, 2005. Plaintiffs Derrick Miller, Jazmin Barber, Terrell Mitchell, Jarod Herring, Monet Ariol, Sakeema Howard and Raniesha Wilkins were riding as passengers in the vehicle operated by defendant Henderson and owned by Leondra Bay when it collided with a police vehicle operated by Suffolk County Police Officer Lola Quesada. The events precipitating this lawsuit and the parties' legal claims are detailed in prior orders issued by this Court and will not be repeated herein, as the parties' familiarity with the same is assumed.

The bill of particulars alleges that plaintiff Ariol sustained various injuries, including cervical, lumbar and thoracic sprain and strain. The bill of particulars alleges that plaintiff Sakeema Howard sustained various injuries, including cervical, lumbar and thoracic sprain and strain, lumbosacral sprain, lumbar disc protrusions, and lumbar radicular syndrome. The bill of particulars alleges that plaintiff Raniesha Wilkins sustained various injuries, including cervical, lumbar and thoracic sprain and strain, cervical disc displacement, and left shoulder sprains. The bill of particulars alleges that plaintiff Derrick Miller sustained various injuries, including cervical, lumbar and thoracic spine sprain, left shoulder sprain, and brachial neuritis and radiculitis. The bill of particulars alleges that plaintiff Terrell Mitchell sustained various injuries, including disc bulge at levels L5-S1 and C5-C6, cervical, lumbar and thoracic sprain and strain, and cervical and lumbar myofascitis.

Defendant Henderson and defendant Bray now move for summary judgment dismissing the complaint and all cross claims against them on the ground that plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Defendants' submissions in support of their motion include, among other things, copies of the pleadings, various medical records of Raniesha Wilkins, Derrick Miller, Monet Ariol, Sakeema Howard, Terrell Mitchell, transcripts of their deposition testimony, and affirmed medical reports of Dr. Arthur Bernhang.

Plaintiffs oppose the motion, arguing that the medical proof submitted by defendants fail to demonstrate prima facie that plaintiffs did not suffer a serious injury. In opposition, plaintiffs submit, among other things, transcripts of their deposition testimony and their affidavits and various medical records regarding their treatment.

Defendant Suffolk County and defendant Police Officer Lola Quesada move for summary judgment dismissing the complaint against them on the ground that plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), and that Officer Quesada did not operate her police vehicle with "reckless disregard" as defined by Vehicle and Traffic Law § 1104. Defendants adopt the arguments and evidence concerning the serious injury issue contained in codefendants Henderson and Bray's summary judgment motion. As for the issue of their lack of "reckless disregard," defendants submit copies of the pleadings, a copy of the police accident report and a transcript of the deposition testimony of defendant Quesada. The Court notes that the statements contained in the uncertified copies of the MV-104 Police Report constitute impermissible hearsay and, therefore, are inadmissible (*see* ***Holloman v City of New York***, 74 AD3d 750, 904 NYS2d 79 [2d Dept 2010]; ***Bates v Yasin***, 13 AD3d 474, 788 NYS2d 397 [2d Dept 2004]; ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]). Further, even if these reports qualified as business records, no foundation was laid for their admissibility (*see* CPLR 4518[a]).

Plaintiff Miller opposes this motion, arguing that an issue of fact exists as to whether Officer Quesada operated her police vehicle with reckless disregard. In opposition, he submits, among other things, a transcript of his deposition testimony, an excerpt of the deposition testimony of defendant Henderson, various medical records regarding his treatment, and a photograph of himself. Plaintiff Jazmin Barber and codefendants Henderson and Bray also oppose the motion by defendants Suffolk County and Quesada.

Insurance Law § 5102 (d) defines "serious injury" as "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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*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]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***,

supra; ***Pagano v Kingsbury***, *supra*; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Dr. Bernhang states in his medical report that a range of motion examination of Raniesha Wilkens' cervical spine revealed extension to 40 degrees (average 55 degrees), flexion to 40 degrees (average 55 degrees), lateral flexion to the left to 35 degrees and to the right 45 degrees (average 45 degrees), and rotation to the left 20 degrees and to the right 40 degrees (average 80 degrees). It states that when plaintiff Wilkens is distracted, she moves her neck without apparent restriction. It further states that range of motion testing of her shoulders revealed that left and right active shoulder abduction is 145 degrees (average 170 degrees), left and right forward flexion to 140 degrees (average 180 degrees), and left and right external rotation to 100 degrees (average 60 degrees). Dr. Bernhang's report states that "dorsolumbar expansion with her knees extended is 9" (4" or greater being average)," lateral flexion to 25 degrees (average 20 degrees) and extension to 35 degrees (average 30 degrees). It also states that passive range of motion of the left shoulder revealed a "click," but that it did not appear to be painful. Dr. Bernhang states that while plaintiff Wilkens claims to have a fracture in her left shoulder, there is no radiographic evidence to support the claim.

As to Derrick Miller, Dr. Bernhang's medical report states that range of motion testing of his cervical spine revealed extension to 60 degrees (average 55 degrees), flexion to 60 degrees (average 55 degrees), lateral flexion to the left and right to 55 degrees (average 45 degrees), and rotation to the left and right to 75 degrees (average 80 degrees). Range of motion testing of Miller's shoulders revealed left shoulder abduction to 90 degrees and right shoulder abduction to 180 degrees (average 170 degrees), left shoulder forward flexion to 150 degrees and right shoulder forward flexion to 170 degrees (average 180 degrees), and that motion above this level is accompanied by an audible "pop." The testing also revealed left and right shoulder external rotation to 90 degrees (average 60 degrees), internal rotation to 90 degrees (average 80 degrees). A positive apprehension test on abduction in external rotation also was noted. Dr. Bernhang opines that there is no causal relationship of the subluxation of Mr. Miller's left shoulder with the subject car accident, as the medical records do not indicate anything other than a strain or sprain. He concludes that the subluxation or instability of the left shoulder appears to be developmental rather than of traumatic origin.

As to Monet Ariol, Dr. Bernhang states in his medical report that range of motion testing of her cervical spine revealed extension to 50 degrees (average 55 degrees), flexion to 40 degrees (average 55 degrees), lateral flexion to the left and right to 50 degrees (average 45 degrees), and rotation to the left to 15 degrees and to the right to 30 degrees (average 80 degrees). Dr. Bernhang notes that since the majority of cervical rotation occurs at level C1-C2, which he asserts is rarely injured due to motor vehicle accidents, this lack of cervical rotation would appear to indicate lack of participation by Ms. Ariol. The report states that dorsolumbar expansion with the knees extended is 8 ½" (4" or greater being average), and that the straight-leg test while sitting is completely normal. It further states that passive straight-leg raising while supine is actively resisted at 20 degrees (average 55 degrees), which is inconsistent as the sitting straight-leg raising test is normal and the pelvis had not yet moved. Dr. Bernhang opines that pelvic roll is reported positive at 30 degrees, which is also inconsistent as Ms. Ariol had just been sitting with her hips and knees flexed to 90 degrees.

As to Sakeema Howard, Dr. Bernhang's medical report states that range of motion testing of her cervical spine revealed extension to 10 degrees (average 55 degrees), flexion to 30 degrees (average 55 degrees), lateral flexion to 20 degrees (average 45 degrees), and rotation to the left to 55 degrees and to the right to 30 degrees (average 80 degrees). Dr. Bernhang notes that when Ms. Howard is lying prone, she is able to rotate her head 90 degrees in both directions. Range of motion testing of her shoulders revealed abduction to 160 degrees (average 170 degrees), forward flexion to 110 degrees (average 180 degrees), and external rotation to 100 degrees (average 60 degrees). It states that examination of her lumbar spine reveals increased lumbar lordosis and developmental sway back. It further states that dorsolumbar expansion with her knees extended is 8 ½" (4" or greater being average), lateral flexion to 30 degrees (average 20 degrees), and lateral extension to 35 degrees (average 30 degrees). Dr. Bernhang opines that while Ms. Howard presents with extensive subjective complaints and restrictions during the examination, the complaints and restrictions are not substantiated by and do not correlate with objective findings. He concludes that there is no causally related restrictions preventing her from performing her normal daily living activities.

As to Terrell Mitchell, Dr. Bernhang's medical report states that an examination revealed dorsolumbar expansion with the knees extended is 4" (4" or greater being average), lateral flexion and extension is normal. It states that sitting, straight-leg raising is completely normal, but lying supine, straight-leg raising is actively resisted at 10 degrees to the left and 30 degrees to the right (average 55 degrees). Dr. Bernhang opines that the restriction is inconsistent, as the pelvis had not moved and the sitting straight-leg raising test was normal. It states that range of motion testing of Mitchell's cervical spine revealed extension to 40 degrees (average 55 degrees), flexion to 20 degrees (average 55 degrees), and rotation to the left to 15 degrees and to the right to 10 degrees (average 80 degrees). Dr. Bernhang states that since the majority of cervical rotation occurs at level C1-C2, which allegedly is rarely injured in motor vehicle accidents, this lack of cervical rotation would appear to indicate lack of participation by Mitchell. Further, range of motion testing of Mitchell's shoulders revealed left shoulder abduction to 65 degrees and right shoulder abduction to 90 degrees (average 170 degrees), left forward flexion to 75 degrees and right shoulder forward flexion to 95 degrees (average 180 degrees), and external rotation to 90 degrees (average 60 degrees). Dr. Bernhang opines that Mitchell actively resists shoulder abduction and forward flexion, since the findings of his examination are inconsistent with the findings of an examination conducted by Dr. Trimba on November 22, 2005, who found full range of motion in the extremities. Dr. Bernhang concludes that while Mr. Mitchell presents with extensive subjective complaints and restrictions during the examination, the complaints and restrictions are not substantiated by and do not correlate with objective findings.

Here, based upon the adduced evidence, defendant Henderson and defendant Leondra Bray failed to meet their prima facie burden demonstrating that plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Kim v Orourke***, 70 AD3d 995, 893 NYS2d 892 [2010]; ***Lopez v Nandan***, 304 AD2d 724, 757 NYS2d 782 [2d Dept 2003]). Defendants' examining orthopedist, Dr. Bernhang, who examined plaintiffs approximately five years after the subject accident, noted significant range of motion limitations during range of motion testing (*see* ***Britt v Bustamante***, 77 AD3d 781, 909 NYS2d 138 [2d Dept 2010]; ***Fields v Hildago***, 74 AD3d 740, 907 NYS2d 15 [2d Dept 2010];

Smith v Hartman, 73 AD3d 736, 899 NYS2d 648 [2d Dept 2010]). Although Dr. Bernhang opines that plaintiffs were voluntarily restricting their movements during the range of motion examinations, such findings raise credibility issues that cannot be resolved on a motion for summary judgment (*see* ***Washington v Delossantos***, 44 AD3d 748, 843 NYS2d 186 [2d Dept 2007]; ***Gonzales v Fiallo***, 47 AD3d 760, 849 NYS2d 182 [2d Dept 2008]). Furthermore, Dr. Bernhang failed to explain in his report the significance of certain findings made during plaintiffs' examinations, such as "dorsolumbar expansion with the knees extended"and that "lumbar spine reveals increased lumbar lordosis and developmental sway back" (*see* ***Buchanan v Celis***, 38 AD3d 819, 832 NYS2d 637 [2d Dept 2007]; ***Connors v Flaherty***, 32 AD3d 891, 822 NYS2d 555 [2d Dept 2006]). Inasmuch as defendants failed to establish their prima facie entitlement to judgment as a matter of law based on whether plaintiffs sustained a serious injury, it is unnecessary to consider whether plaintiffs' opposition papers were sufficient to raise a triable issue of fact on that matter (*see* ***Penoro v Firshing***, 70 AD3d 659, 897 NYS2d 110 [2d Dept 2010]; ***Umar v Ohrnberger***, 46 AD3d 543, 846 NYS2d 612 [2d Dept 2007]).

With regard to the branch of the motion by defendants Suffolk County and Officer Quesada pursuant to Vehicle and Traffic Law § 1104, a police officer operating an "authorized emergency vehicle" has a qualified privilege to disregard certain traffic laws during an emergency operation (*see* Vehicle and Traffic Law § 1104[b](1)-(4); ***Criscione v City of New York***, 97 NY2d 152, 736 NYS2d 656 [2001]; ***Szczerbiak v Pilat***, 90 NY2d 553, 664 NYS2d 252 [1997]; ***Saarinen v Kerr***, 84 NY2d 494, 620 NYS2d 297 [1994]; ***Carollo v Martino***, 58 AD3d 792, 873 NYS2d 102 [2d Dept 2009]). An officer's conduct during such an operation may not form the basis of liability to an injured third party unless the officer failed to exercise due regard for the safety of others or acted with a reckless disregard for the safety of others (*see* ***Szczerbiak v Pilat***, *supra*; ***Saarinen v Kerr***, *supra*; ***Gonyea v County of Saratoga***, 23 AD3d 790, 803 NYS2d 764 [3d Dept 2005]; ***Turini v County of Suffolk***, 8 AD3d 260, 778 NYS2d 66 [2d Dept 2004]). However, the privileges afforded by Vehicle and Traffic Law §1104 are circumscribed by subsection (e) of the statute, which provides that "the foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such protect the driver from the consequences of his reckless disregard for the safety of others" (Vehicle and Traffic Law §1104[e]; *see* ***Saarinen v Kerr***, *supra*). Thus, the choice of words in the statute regarding the operation of an emergency vehicle evinces a carefully calibrated standard such that to act with a reckless disregard in the operation of an emergency vehicle has been defined as acting with a general intentionality on the part of the wrongdoer or acting with a conscious indifference to the outcome where there is a known or obvious risk that makes it highly probable that harm will follow (*see* ***Campbell v City of Elmira***, 84 NY2d 505, 620 NYS2d 302 [1994]; ***Burrell v City of New York***, 49 AD3d 482, 853 NYS2d 598 [2d Dept 2008]; ***Puntarich v County of Suffolk***, 47 AD3d 785, 850 NYS2d 182 [2008]; ***Mulligan v City of New York***, 245 AD2d 277, 664 NYS2d 484 [1997]; ***Powell v City of Mount Vernon***, 228 AD2d 572, 644 NYS2d 766 [2d Dept 1996]). Therefore, "the reckless disregard standard" requires proof that the officer intentionally committed an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow" (***Badalamenti v City of New York***, 30 AD3d 452, 453, 817 NYS2d 134 [2d Dept 2006]; *see also* ***Daly v County of Westchester***, 63 AD3d 988, 882 NYS2d 209 [2d Dept 2009]), and acted with conscious indifference to the outcome (*see* ***Saarinen v Kerr***, *supra*).

Here, it has been established that Officer Quesada was operating an authorized emergency vehicle and engaged in an emergency operation when the subject collision happened (*see* Vehicle and Traffic Law §§ 101, 114(b), 1104(e); ***Criscione v City of New York***, *supra*; ***Daly v County of Westchester***, *supra*; ***Mulholland v Nabisco, Inc.***, 264 AD2d 411, 693 NYS2d 242 [2d Dept 1999]), and that her conduct did not rise to the level of reckless disregard for the safety of others (*see* ***Puntarich v County of Suffolk***, *supra*; ***Gonyea v County of Saratoga***, *supra*; ***Salzano v Korba***, 296 AD2d 393, 745 NYS2d 56 [2d Dept 2002]). Officer Quesada testified that she was responding to a "priority call" regarding a domestic situation when the subject accident occurred, and that the lights and sirens of the police vehicle were activated while she was driving on Alkier Street. She testified that when her vehicle approached the intersection of Alkier Street and Grand Boulevard, she stepped on the brake, slowed the vehicle down and looked to the right, but saw co-defendant Henderson's vehicle from her peripheral vision coming from the left side. She stated that the subject intersection was governed by a stop sign in both directions. Officer Quesada further testified that the front portion of her vehicle contacted with the front passenger-side of codefendants' vehicle.

However, in opposition, plaintiffs raise a triable issue of fact as to whether Officer Quesada acted with reckless disregard for the safety of others in the operation of her emergency vehicle at the time of the subject accident (*see* ***Badalamenti v City of New York***, *supra*; ***Lupole v Romano***, 307 AD2d 697, 762 NYS2d 838 [3d Dept 2003]; ***Gordon v County of Nassau***, 261 AD2d 359, 689 NYS2d 192 [2d Dept 1999]). While Officer Quesada testified that the lights and sirens of her vehicle were activated and that she slowed her vehicle down at the subject intersection, Miller testified that he did not see any police lights or hear sirens prior to the subject accident. Furthermore, codefendant Henderson testified that the vehicle Quesada was operating did not slow down as it approached the subject intersection, and that her vehicle struck the rear passenger side of his vehicle. Thus, questions of fact have been raised as to whether Officer Quesada had her emergency sirens and lights activated, and whether she operated her police vehicle in reckless disregard to the safety of others prior to entering the intersection (*see* ***Corallo v Martino***, 58 AD3d 792, 873 NYS2d 102 [2d Dept 2009]; ***Burrell v City of New York***, 49 AD3d 482, 853 NYS2d 598 [2d Dept 2008]; ***Baines v City of New York***, 269 AD2d 309, 703 NYS2d 463 [1st Dept 2000]). Accordingly, the motion for summary judgment by defendant Suffolk County and defendant Quesada is denied.

Dated: 1/13/12

Hon. Denise F. Molia
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**