

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ALLAN L. WINICK,

Justice

TRIAL/IAS, PART 10
NASSAU COUNTY

PETER GERBASI,

Plaintiff,

MOTION DATE: May 12, 2000
MOTION SEQUENCE: 001, 002, 003
004, 005

INDEX NO. 30562/97

-against-

ISABEL HERAN, JORGE A. AGUILAR, BOBBI
A. DAVID, SAMUEL LEVIN, CHRISTINA POPPER,
RAFAEL ESCOBAR, ANTHONY ANDREIVOLO,
JAMES VALENTI and CHRISTOPHER VALENTI,

Defendant(s).

The following papers read on this motion:

- Notice of Motion/ Order to Show Cause
- Answering Affidavits
- Replying Affidavits
- Briefs: Plaintiff's/Petitioner's
- Defendant's/Respondent's

Defendants Isabel Heran and Jorge A. Aguilar move for Summary Judgment claiming that the plaintiff, Peter Gerbasi, has failed to sustain a serious injury pursuant to § 5102(d) of the New York State Insurance Law. Defendants James Valenti, Christopher Valenti, Christina Popper, Raphael Escobar, Bobbi A. David, Samuel Levin, and Anthony Andreivolo cross-move to dismiss the complaint on the same grounds relying principally on defendants' Heran and Aguilar's papers. Defendants Levin and David further cross-

move to dismiss plaintiff's complaint on the ground that no negligence is attributable to them.

The present action arose out of a multi-car accident. Plaintiff claims that the accident was caused by the defendants' negligence.

Plaintiff did not request medical attention at the scene of the accident. He did not lose consciousness nor was he bleeding at the scene. He returned to work a few days after the accident. The day following the accident, plaintiff sought the services of his primary physician. A few days later he sought the care of an orthopedist who recommended physical therapy and exercise.

Plaintiff claims that he has suffered serious injuries. These injuries include a limitation of movement of the cervical and lumbar spine, spasm and tenderness to palpation of the lumbar paraspinal muscles, internal derangement of the cervical and lumbar spine.

Defendants Heran and Aquilar failed to provide this court with the report from Dr. John C. Killian's examination of the plaintiff despite the indication that it was included in their moving papers.

Therefore, the evidence tendered by all the defendants in support of the motion and cross-motion is insufficient to show that the plaintiff has not sustained a serious injury and defendants have not sustained their burden to do so. Summary Judgment is, therefore, denied on the motion and all cross-motions with respect to the claim of plaintiff's failure to sustain a serious injury, without prejudice to renewal.

Defendants Levin and David further claim that even if plaintiff sustained serious injuries as a result of the accident, such injuries cannot be attributed to them because there was no contact between the defendant's vehicle and the plaintiff's vehicle.

In support of this cross-motion, defendants have submitted deposition transcripts and an attorney's affirmation. Plaintiff Gerbasi stated in his deposition that the car driven by defendant Levin arrived at the scene of the accident just after the second impact and did not come into direct contact with the plaintiff's vehicle. Defendant Levin confirmed that the vehicle he was driving did not come in contact with plaintiff's vehicle. Thus, defendants David and Levin claim that the accident and alleged injuries were not caused by them.

The evidence tendered in support of the motion is sufficient to shift the burden to the plaintiff to explain the basis of his allegations.

In opposition to the defendants' cross-motion for Summary Judgment, plaintiff offers an affirmation in opposition and deposition transcripts. Defendant Levin, in his deposition testimony, stated that his vehicle made contact with a dark colored sedan. Plaintiff claims that this dark colored sedan was the blue Oldsmobile that ultimately impacted with plaintiff's vehicle. Thus, plaintiff claims that defendant Levin's alleged negligence may have caused the second impact between plaintiff's vehicle and the blue Oldsmobile.

Therefore, there is a question of fact as to whether defendant Levin negligently contributed to the accident that caused plaintiff's alleged injuries.

Summary Judgment is, therefore, denied on the cross-motion regarding liability.

This constitutes the order of the court.

Dated: June 22, 2000

A handwritten signature in cursive script, reading "Allan L. Winick", written in black ink. The signature is written over a horizontal line.

Allan L. Winick J.S.C.