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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

LORI RILEY, as Administratrix of the ESTATE OF ELSIE STOKES, Deceased,

Plaintiff,

-against-

EVAN M. GLICKSMAN, EDWARD N. GLICKSMAN, MARY C. RILEY and SEAN M. BROWN,

Defendants.

Motion Sequence #2
Submitted January 24, 2008

INDEX NO: 9841/05

The following papers were read on this motion:

Notice of Motion.....1
Affirmation in Partial Support and Partial Opposition to Co-defendants Motion.....2
Reply Affirmation in Support of Motion.....3
Plaintiff's Affirmation In Opposition.....4
Reply Affirmation to Plaintiff's Opposition.....5

Requested Relief

Counsel for defendants, EVAN M. GLICKSMAN and EDWARD N. GLICKSMAN, move for an order, pursuant to CPLR §3212, granting them summary judgment dismissing the complaint of the plaintiff, LORI RILEY, as Administratrix of the Estate of ELSIE STOKES, deceased, on the grounds that: (1) they did not in any way contribute to the happening of the accident; and, (2) the injuries alleged by the plaintiff do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d) and that plaintiff's claims

for non-economic loss are, therefore, barred under Insurance Law §5104(a). Counsel for plaintiff opposes the motion, which is determined as follows:

Background

This action stems from a motor vehicle accident that occurred on May 11, 2005 at the intersection of South Franklin Avenue and Martin Luther King (MLK) Drive in the Village of Hempstead, New York. Said intersection is a "T" intersection with South Franklin Avenue, a four (4) lane road with two (2) lanes in each direction running North and South, and MLK Drive, an East/West road ending at South Franklin Avenue where travelers must either turn left or right on to South Franklin Avenue. Plaintiff's decedent, ELSIE STOKES, was a passenger in a 1991 Lexus owned by defendant, SEAN M. BROWN, and operated by ELSIE's daughter, defendant MARY C. RILEY. At the time of the accident, RILEY was in the process of making a left turn from MLK Drive into the Northbound lane of South Franklin Avenue, when a motor vehicle, specifically a 1998 Nissan owned by co-defendant, EDWARD N. GLICKSMAN, and operated by EVAN M. GLICKSMAN, collided. The only traffic control device at the subject intersection was a stop sign situated on MLK Drive.

At his deposition, defendant, EVAN GLICKSMAN, testified that he was traveling in the right lane of the two (2) Southbound lanes on South Franklin Avenue when he came to a stop at a traffic light, one block North of the accident, at the intersection of South Franklin Avenue and Graham Avenue. He stated that, while stopped at the red light, he noticed the RILEY vehicle, in which plaintiff was traveling, stopped at the stop sign on MLK Drive. He stated that, once the light turned green in his favor at the intersection of S. Franklin Avenue and Graham Avenue, he switched lanes from the right lane to the left lane heading South on South Franklin Avenue, and that the reason he changed lanes was

because the RILEY vehicle had entered the intersection and was occupying "about a quarter to a half of the right lane" on South Franklin Avenue.

At her deposition, MARY RILEY testified that she was traveling East on MLK Drive when she came to a stop at the stop sign at the subject intersection. She stated that she intended to make a left turn onto South Franklin Avenue, heading North, and looked both ways at the traffic on South Franklin Avenue and saw a red traffic light for the vehicles traveling south on South Franklin Avenue, at the intersection with Graham Avenue. She testified that she did not observe any vehicles coming from her left, and after waiting for a vehicle heading North to pass her from her right, she looked again to her left to verify that there were no motor vehicles headed towards her from the North, and then proceeded to make a left turn into the Northbound lane of South Franklin Avenue. The collision occurred as the front bumper of RILEY's motor vehicle had just passed the double lines separating the Northbound lanes from the Southbound lanes of South Franklin Avenue.

According to EVAN GLICKSMAN, he was no more than "50 feet" from the subject intersection when co-defendant, MARY RILEY, "cut across" traffic to make her left hand turn. It is EVAN GLICKSMAN's position that his vehicle had the right of way and that he was entitled to anticipate that other vehicles would obey traffic laws which required them to yield. Counsel for the GLICKSMANS argues that they have demonstrated their entitlement to judgment as a matter of law by establishing that plaintiff violated Vehicle and Traffic Law §§1141 and 1163 by making a left turn into the path of defendants' vehicle without yielding the right of way and under circumstances when the turn could not be made with reasonable safety.

It appears that, as a result of the collision, the driver side front and passenger doors of RILEY's vehicle were damaged. According to an eyewitness, Nassau County Police Officer Christopher G. Tangney, he observed the GLICKSMAN vehicle traveling Southbound on South Franklin Avenue at 72 mph where the posted speed limit in the area was 30 mph. Defendant, EVAN GLICKSMAN, admitted at his deposition that, before entering the intersection, he was traveling in excess of the posted 30 mph speed limit. A speeding ticket was issued by Officer Tangney to defendant, EVAN GLICKSMAN, at the accident scene for a violation of Vehicle and Traffic Law ("VTL") §1180.

Although EVAN GLICKSMAN testified that he could not recall the intensity of the impact, as a result of the collision his vehicle's airbag deployed, and his car moved from the left lane to the corner of South Franklin Avenue and MLK Drive. Due to the impact, the RILEY vehicle was pushed and collided with another vehicle parked on the west side of Franklin Street which caused that vehicle to strike another parked vehicle.

At the time of the accident, plaintiff's decedent, ELSIE STOKES, was a rear seat passenger in the RILEY vehicle. In her bill of particulars, ELSIE STOKES claimed that, as a result of this accident, she sustained, *inter alia*, a complex scalp laceration 11 cm in length requiring 60 sutures, a full thickness laceration of the scalp of 10 cm with avulsion, an open grade I distal tibia fracture, a closed distal fibula fracture, a comminuted (spiral) fracture of the distal tibia extending into the metaphysis, a transverse fracture of the distal fibula, right foot drop, cellulitis (right ankle), a large hematoma, scarring and sensory changes, disc herniations at the L3-4, L4-5, L5-S1 levels, reduced lumbar range of motions, disc protrusion and bulging at the C2-3, C3-4 and C4-5 levels and cervical radiculopathy (*Motion in Chief, Exhibit "E", Verified Bill of Particulars*, ¶5).

In addition, it is claimed that as a result of the injuries sustained in this accident, the plaintiff's decedent, ELSIE STOKES, suffered diminished strength in the lower extremity and left sided weakness, which caused her to fall to the floor of her apartment, on August 7, 2005, and sustain additional injuries, including a comminuted fracture of the distal right tibia extending into the metaphysis and a transverse fracture of the distal right fibula. It is also claimed that the plaintiff's decedent, ELSIE STOKES, died on March 1, 2006, secondary to a pulmonary artery thromboembolism in both of her main pulmonary arteries, that resulted from complications which arose following her sustaining the injuries to her right ankle.

Counsel for the defendants contends that, as a result of the accident, plaintiff suffered nothing more than a deep laceration to the forehead. He states that, based on the medical evidence uncovered during discovery, plaintiff suffered from an extensive prior medical history at the time of the accident, including a stroke in 2001, pneumonia in 2004, diabetes from 1982, arthritis from 2002, migraine headaches from 1982, severe asthma since birth, a heart attack in 1989, kidney disease and respiratory failure in 2004 and high blood pressure since 1975, as well as liver problems and lung disorders. Counsel points out that plaintiff's alleged broken leg occurred approximately three (3) months after the accident, when plaintiff "tripped over her own legs", and it is clear that the broken leg is wholly unrelated to the automobile accident. Although plaintiff alleges that decedent's passing is related to the broken leg, counsel for defendants states that there is no medical evidence to support such contention and urges that plaintiff's death, some nine (9) months after the accident, is not causally related to the accident. It is counsel's position that the laceration to plaintiff's forehead does not amount to a serious injury, and the complaint and

all cross-claims against the GLICKSMAN defendants should be dismissed.

Due to the death of ELSIE STOKES, on March 1, 2006, her deposition scheduled for March 14, 2006 was never held. Thus, any testimony that she may have offered concerning her observations of the events surrounding the motor vehicle accident and the nature and severity of her injuries and medical conditions, both prior and subsequent to the May 11, 2005 accident, were never memorialized. By Short Form Order of this Court, dated October 6, 2006, a wrongful death action was added to plaintiff's complaint. On the instant motion, the GLICKSMAN defendants seek summary dismissal of plaintiff's negligence and serious injury claims.

The Law

Summary judgment is the procedural equivalent of a trial (*Capelin Assoc. Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A. 1974]). It is a drastic remedy that will only be granted when the proponent establishes that there are no triable issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [C.A.1986]). Once the party seeking summary judgment has made a *prima facie* showing of entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact, or demonstrate an acceptable excuse for its failure to do so (*Alvarez v Prospect Hosp., supra; Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 557, 404 NE2d 718 [C.A.1980]). Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient (*Zuckerman v City of New York, supra*).

It is noted at the outset that plaintiff claims that a lesser burden of proof is applicable in the case at bar under the *Noseworthy* doctrine. Counsel for plaintiff argues that,

because this case involves a fatality, plaintiff should not be held to as high a degree of proof as other litigants and is entitled to every favorable inference which can be drawn from the evidence (*Noseworthy v New York*, 298 NY 76, 80 NE2d 744 [C.A. 1948]). The "*Noseworthy* Rule" is based on the rationale that the decedent is not available to describe the occurrence and ,thus, it is unfair to permit the defendant with knowledge to benefit from this advantage. However, in the case at bar, the information about the accident was not exclusively vested with the decedent, as defendant, MARY RILEY, was a passenger in the same vehicle as the decedent and, therefore, plaintiff has available to her the same information as the decedent may have provided regarding the happening of the accident. As such, the Court cannot afford the plaintiff with any favorable inferences under the *Noseworthy* Doctrine.

As to Liability

In support of their motion for summary judgment, the GLICKSMANS argue that RILEY's disregard of the stop sign and her failure to obey was the sole proximate cause of the accident. Defendants contend that RILEY's disregard of VTL §1141, and the fact that EVAN GLICKSMAN had the right of way, entitles them to judgment, as a matter of law, because under the circumstances, they were entitled to assume that plaintiff would observe the rules of the road and obey the stop sign, which required her to yield the right of way.

While the manner of the accident's occurrence is controverted, the parties do not dispute that the defendant, MARY RILEY, came to a stop sign at the subject intersection. Indeed, there is evidence that RILEY did stop at the stop sign and then proceeded to make her left turn while the traffic light at Graham Avenue and South Franklin Avenue was still red. Defendants have presented no evidence that MARY RILEY did not lawfully enter the

intersection and the Court rejects the GLICKMANS' argument that RILEY failed to obey the stop sign.

Additionally, the Court finds that the GLICKMANS reliance on VTL §1141 is also misplaced. VTL §1141 provides as follows:

> The driver of a vehicle intending to turn to the left within an intersection. . . shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard.

In the case at bar, the approaching vehicle was not coming from the "opposite direction" because MLK Drive ended at the subject intersection. However, assuming *arguendo* that VTL §1141 is applicable to the facts herein, the record before us confirms that RILEY yielded the right of way to a vehicle heading northbound of South Franklin Avenue, that was in the intersection and constituted an immediate hazard, before completing the left turn onto northbound South Franklin Avenue. No evidence has been presented that the GLICKSMAN vehicle was in the intersection or so close as to constitute an immediate hazard. Moreover, VTL §1140(a) imposes an obligation on a vehicle approaching an intersection, that it must yield to a vehicle that has already entered that intersection from a different highway. The evidence presented reflects that EVAN GLICKSMAN changed lanes on South Franklin Avenue, from the right to the left southbound lane, to avoid the RILEY vehicle that had entered the intersection and was apparently occupying "about a quarter to a half of the right lane". The evidence presented also reflects that GLICKSMAN was ticketed for driving 72 mph in a 30 mph zone on South Franklin Avenue. It is the judgment of the Court that questions of fact abound as to whether, GLICKSMAN breached his duty to avoid an accident with RILEY's vehicle that

had already entered the intersection, or whether RILEY, faced with a stop sign at the "T" intersection, breached her duty to yield the right of way to the GLICKSMAN vehicle. These questions of fact are for a jury to determine and the Court concludes that defendants have not established their right to judgment as a matter of law on the issue of liability.

As to Serious Injury

With respect to "serious injury", the Court notes that, in her verified bill of particulars and further verified bill of particulars, the injuries allegedly sustained by ELSIE STOKES as a result of this accident fall within the following categories of serious injury:

> "death;"
>
> "a fracture;"
>
> "permanent consequential limitation of use of a body organ or member;"
>
> "significant limitation of use of a body function or system;" and,
>
> "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" (Insurance Law §5102[d])

In moving for summary judgment, defendants must make a *prima facie* showing that plaintiff did not sustain a "serious injury" with the meaning of the statute. Once this is established, the burden shifts to the plaintiff to come forward with evidence to overcome defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*Pommels v Perez*, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 [C.A. 2005]; *see also Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2nd Dept. 2000]).

Defendants are not required to disprove any category of serious injury which has not been properly pled by the plaintiff (*Melino v Lauster*, 195 AD2d 653, 599 NYS2d 713 [3rd

Dept. 1993], *affirmed* 82 NY2d 828 [1993]). Moreover, even pled categories of serious injury may be disproved by means other than the submission of medical evidence by a defendant, including plaintiff's own testimony and the submitted exhibits (*Cf. Michaelides v Martone*, 186 AD2d 544, 588 NYS2d 366 [2nd Dept. 1992]; *Covington v Cinnirella*, 146 AD2d 565, 536 NYS2d 514 [2nd Dept. 1989]).

In support of a claim that the plaintiff has not sustained a serious injury, defendants may rely either on the sworn statements of the defendants' examining physician or the unsworn reports of the plaintiff's examining physician (*see Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2nd Dept. 1992]). However, unlike movant's proof, unsworn reports of plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178, 588 NE2d 76 [C.A. 1991]).

In support of their motion for summary judgment, the GLICKSMAN defendants submit, *inter alia*, ELSIE STOKES verified bill of particulars and further verified bill of particulars, copies of her hospital records from Mercy Medical Center and Nassau University Medical Center, as well as additional medical records from her treating physicians and orthopedic surgeon from May 11, 2005 through November 9, 2005, an operative report dated May 11, 2005, and an autopsy report prepared by the Nassau University Pathology Department. In her bill of particulars, ELSIE STOKES stated that, as a result of the subject accident, she was substantially confined to home for a period of six (6) months and intermittently thereafter. She also stated that she was not employed at the time of her accident and was totally disabled.

Defendants submit that, because plaintiff's decedent expired prior to the defendants having had an opportunity to physically examine her, plaintiff has not satisfied the threshold requirements of Insurance Law §5102(d). The crux of defendants' argument is that there is no causal connection between ELSIE STOKES' broken leg, her death and the subject motor vehicle accident. Defendants also argue that, given the decedent's pre-existing medical conditions, plaintiff has failed to demonstrate that the decedent's injuries and ultimate death were causally related to the instant accident.

However, defendants have not offered the expert opinions of any physician who, upon having reviewed ELSIE STOKES' medical records could provide an opinion on causation. Defendants' attorney's interpretation of the medical records to reach his own conclusion, that the fall resulting from the fractured right ankle was unrelated to the May 11, 2005, is insufficient to shift the burden on this summary judgment motion. Moreover, any medical reports submitted as evidentiary proof must be sworn (*see Grasso v Angerami*, supra; *Williams v Hughes*, 256 AD2d 461, 682 NYS2d 401 [2nd Dept. 1998]; *Fernandez v Shields*, 223 AD2d 666 [2nd Dept. 1996]). Having failed to proffer competent evidence with regard to the threshold question, summary judgment must be denied, regardless of whether plaintiffs' proffered evidence is clearly deficient, or non-existent (*see, Ayotte v Gervasion,* 81 NY2d 862, 601 NYS2d 463, 619 NE2d 400 [C.A. 1993]).

The Court finds that defendants' reliance on the autopsy report, to assert that pulmonary artery thromboembolism was not caused by complications arising from the injuries sustained to ELSIE STOKES' right ankle, is also misplaced. A review of the autopsy report shows that it is silent on the question of what triggered the pulmonary embolism. It is the judgment of the Court that defendants failure to submit the opinion of

an expert in this regard is fatal to establishing a *prima facie* case.

Conclusion

Based on the foregoing, it is hereby

ORDERED, that defendants' motion for summary judgment dismissing the plaintiff's complaint is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: March 26, 2008

WILLIAM R. LaMARCA, J.S.C.

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