

Portela v City of New York

2007 NY Slip Op 32485(U)

August 7, 2007

Supreme Court, New York County

Docket Number: 0101805/2003

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **ALICE SCHLESINGER**

PART **1** **Aug 10**

Index Number : 101805/2003

PORTELA, RAFAEL

vs

CITY OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

AUG 13 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: AUG 07 2007

Alice Schlesinger
ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
RAFAEL PORTELA,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.
-----X

SCHLESINGER, J.

Index No. 101805/03
Motion Seq. No. 002

FILED
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On March 15, 2007, the jury hearing this case returned a verdict in favor of the plaintiff, Rafael Portela. Specifically, a unanimous panel found that the Police Department of the City of New York, via its officers, had committed a battery against Mr. Portela by the use of excessive force when entering his apartment and subduing him on December 31, 2001 [question 1(a)].

Further, the jury found that the battery was a substantial factor in causing Mr. Portela injury [question 1(b)].¹ The jury then awarded the plaintiff \$250,000 for past pain and suffering, \$500,000 for 30 years of future pain and suffering (the plaintiff at the time of trial was 49) (questions 5 & 6), \$40,000 for past medical expenses (question 7), and \$20,000 for 30 years of future medical expenses (question 8).

I now have a motion brought by the defendant pursuant to CPLR §4404 to either award judgment in its favor notwithstanding the verdict or to grant a new trial. Counsel argues in the first instance that the evidence was legally insufficient to have permitted the jury to find that the police officers here used excessive force. I disagree and will discuss

¹In light of these findings, the jury properly did not answer questions 2 through 4 related to negligence.

[* 3]

why shortly. Alternatively, counsel argues that the City is entitled to a new trial, and though this request is addressed to both liability and damages, the argument put forth in this regard deals exclusively with the issue of damages. As to this point, I do agree that the defense is entitled to a new trial because it is impossible to say that the award was not, at least in part, based on documents not admitted into evidence but implicitly relied upon. Specifically, this relates to the two MRI's ordered by Dr. Goldenberg, plaintiff's treating physician and witness at trial.

The type and extent of the injuries that Mr. Portela suffered at the hands of the police were very much an issue in the case. In fact, the defense, on its case, called two "IME" doctors, Dr. Maria Audrie DeJesus, a neurologist, and Dr. Joseph Leon Paul, an orthopedic surgeon, to testify about their examinations of the plaintiff (conducted on the same day) and their assessment of his condition. Dr. DeJesus, whose exam took about 10 minutes and who reviewed none of the plaintiff's records (not needing to, she said), made no significant findings, except for a cervical sprain. She found no nerve root impingement, no atrophy, normal reflexes and full range of motion. Dr. Paul examined Mr. Portela's cervical spine, lumbar spine and right shoulder. He also had reviewed no records. He too found nothing abnormal. These witnesses were produced in an attempt at challenging the testimony and conclusions of Dr. Joyce Goldenberg, Mr. Portela's treating physician who had begun seeing the plaintiff on March 12, 2002, two and one-half months after the incident. Mr. Portela had been referred for physical therapy by Dr. Aric Hausknecht, a neurologist.

Dr. Goldenberg, board certified in physical medicine and rehabilitation, testified that she took a history from the plaintiff, which included a series of complaints, and then

[* 4]

conducted a physical examination. The complaints were centered around Mr. Portela's neck, right shoulder and arm. The doctor's initial diagnosis was a cervical sprain with tightness and spasm and limitation of motion in the neck region and an internal derangement of the shoulder. She started Mr. Portela on a physical therapy program. Also on that first visit, Dr. Goldenberg ordered further diagnostic studies for Mr. Portela, specifically MRI examinations of his right shoulder and cervical spine. Mr. Portela had the cervical spine MRI on March 15, 2002 and the shoulder MRI on May 23, 2002, both at Lenox Hill Radiology.

It is the use of the information on these MRI's that creates the situation which the defense focuses on in its motion. Dr. Goldenberg received the reports from these tests and made them part of her office records. However, it appears that she never actually saw the films, and the films were never subpoenaed or produced in court. Further, the reports were never offered in evidence by the plaintiff. Based on the above set of facts, defense counsel, citing *Wagman v. Bradshaw*, 292 AD2d 84 (2nd Dep't 2001), argues that it was error for this Court to have permitted Dr. Goldenberg to refer to the conclusions found in the reports since they constituted impermissible hearsay.

Over continuing objection by defense counsel at trial, which this Court overruled, Dr. Goldenberg was allowed to testify that she had discussed with the plaintiff the results of the reports and the significance of the findings, as well as the treatment plaintiff would need. Further, Dr. Goldenberg gave her opinion at trial as to her refined diagnosis of Mr. Portela's cervical condition, based on her physical examination and "the results of the

diagnostic tests" (T 347)². It was, she stated, a cervical disc herniation at C6-C7, which was later connected to the events of December 31, 2001. The doctor then described at length, using a model, what a disc herniation is. Again, Dr. Goldenberg stated that the plaintiff's symptoms and her findings correlated with the results of the MRI's and led to a particular treatment plan to deal with the disc injury (T 357).

As to the shoulder, the findings were such that Dr. Goldenberg referred Mr. Portela to a board certified orthopedist "because he sustained a tear in the shoulder", in the rotator cuff (T 358). There was testimony at the trial that Mr. Portela underwent shoulder surgery on July 25, 2002 by a Dr. Struhl at the Hospital for Joint Disease, and those records were admitted into evidence without objection. Dr. Goldenberg last saw Mr. Portela on April 25, 2003. She believed he had reached what she called a "maximum medical improvement" after approximately 50 visits with her for therapy (T 366).

Dr. Goldenberg's diagnosis regarding both neck and shoulder was that neither had returned to normal, though there had been slight areas of improvement in each. Both injuries, she opined, had been caused by the Police on December 31. She testified that the disc herniation was permanent. She stated that Mr. Portela's next step in relieving the pain in his neck would be via epidural steroid injections, at an estimated cost of \$9,000 for a series of three of these injections. She also predicted that with regard to the neck and shoulder, Mr. Portela would probably develop an accelerated form of traumatic arthritis (T 378). Dr. Goldenberg concluded her testimony by placing her bill of \$17,375 in evidence, over objection, a bill that, at the time of trial, was still unpaid.

² "T" refers to the pages in the trial transcript.

On redirect examination, reference was again made by this treating physician/witness to findings on an MRI, in response to a question about when someone first feels symptoms of a herniated disc. This testimony was elicited to counter suggestions made during cross-examination that the claimed injuries had been fabricated. During cross-examination, Dr. Goldenberg had been confronted with hospital records from Metropolitan Hospital, where the plaintiff had been taken immediately after the incident. Those records showed no complaints of pain in the neck or shoulder. Dr. Goldenberg said that the nature of the condition is such that the patient does not feel it right away and that is why an MRI of the cervical spine is not done right after an injury.

We don't get the true effect of what you see on an MRI with relationship to a herniation until several weeks after. And that's why the protocol is to perform an MRI several weeks after an injury (T 415).

As stated earlier, the two sets of MRI films were never produced or put before the jury. Nor were the reports, prepared by doctors not testifying, ever proffered or admitted into evidence. And while Dr. Goldenberg, Mr. Portela's treating physician and the doctor ordering the MRI's, did not explicitly state what was in the reports, it was clearly implicit in her testimony that the reports showed a herniated disc at C6-C7 and a torn rotator cuff in the right shoulder.

Dr. Goldenberg was obviously a well-informed, well-credentialed doctor who made a credible witness on Mr. Portela's behalf on the issue of causation and damages. Indeed, the jury awarded even more than counsel recommended during his summation. Counsel had suggested an award of \$200,000 for past pain and suffering, but the jury awarded \$250,000. For future pain and suffering, counsel had suggested \$350,000, but the jury

awarded \$500,000. Thus, it seems apparent that the fact finders not only found the plaintiff credible as to the events of December 31, 2001, but as to the extent of his injuries and their permanent effect on his life, they found his doctor credible when she opined that Mr. Portela suffered from permanent injuries, a herniated disc and a torn rotator cuff, the latter repaired to some extent with surgery, but still affecting him adversely.

All of my research into this evidentiary issue indicates that Dr. Goldenberg should not have been able to communicate to the jury the results of the inadmissible MRI reports without first having admitted the films into evidence. The films arguably could have been interpreted by her to the jury, assuming she had the expertise to do that. But it was unfair to communicate the results of the hearsay reports without giving the jury the primary documents, the films, which the defense would have been able to use to cross-examine the witness regarding her reliance on their content and her diagnosis.

There are certain exceptions to the rule explicitly laid out in *Wagman (supra)* citing *Hambusch v NYC Transit Authority*, 63 NY2d 723. However, they do not apply here. Those exceptions are that an expert may rely on inadmissible out-of-court material if the material is of a kind accepted in the profession as reliable as a basis in forming a professional opinion. 292 AD2d at 85. But this exception deals with *Frye* issues and whether the tests in the first instance are reliable and accepted in the scientific community. Certainly, MRI's are reliable and accepted in the scientific community.

The more significant exception is that the specific evidence presented has itself been established to be reliable. *Hambusch* interpreted that reliability factor as coming from a witness subject to full cross-examination at the trial. That witness would not be Dr.

Goldenberg, as plaintiff's counsel argues, but rather the radiologist who interpreted the MRI's and prepared the accompanying reports.

In *Wagman*, a treating chiropractor ordered MRI scans of the plaintiff's back. He never saw the films but did see the report and testified that he had relied upon it in making his diagnosis of small central herniations. The only real difference between that situation and ours is that there, the witness explicitly noted the results in the report and here, Dr. Goldenberg implicitly noted them. I do not see that as a material difference.

Therefore, since this evidence was admitted over objection and the issue properly preserved by defendant, and since I find that in all likelihood the evidence was material to the jury's calculation on damages, I find that the City is entitled to a new trial solely on damages. At that time, the films can be obtained and produced at trial so that hearsay evidence will no longer be an issue.

However, as to the liability of the City for battery, I believe that the evidence is clear that the police officers involved in this incident used excessive force. In other words, the evidence supporting the jury's unanimous finding met the standard of "objective reasonableness" discussed in *Ostrander v. State of New York*, 289 AD2d 463 (2nd Dep't 2001) and *Koeiman v. City of New York*, 36 AD3d 451 (1st Dep't 2007), two cases cited by the defense.

What happened here, in summary form, was that the police responded to a 911 call on New Year's Eve, 2001, from Mr. Portela's former companion and mother of his children, Marina Fabres. The two had not lived together for many years. Ms. Fabres told the 911 operator that Mr. Portela had threatened to cut her with a knife. The threat had allegedly been made in the plaintiff's apartment (I say "allegedly" because the complainant, after

Portela was arrested, never appeared in criminal court, leading to a dismissal of the charges, and never appeared to testify at the civil trial). The police arrived soon after and spoke to Ms. Fabres, who was outside the building unharmed. Then, within six minutes of their arrival, the police broke down Mr. Portela's door, entered the apartment, and tackled and subdued him in such a way as to cause him what he testified to were serious and permanent injuries. There was no testimony from any of the officers at the scene, despite many contradictions as to precisely what happened, where people were and who did what, that Mr. Portela ever threatened them or was a danger to anyone. The rationale given for having kicked in the steel apartment door, which fell hard on Mr. Portela's face, was that he had not opened the door quickly enough in response to police demands that he do that.

The door had a closed metal chain on it when Mr. Portela opened it to see who was at his door and what they wanted. One of the officers then stuck his foot in the door to prevent it from being closed. Unfortunately, that also prevented the plaintiff from closing the door to unhook the chain so as to unlock the door.

Further, the plaintiff produced a witness, Walter Signorelli, a high-ranking Police Officer with the City for much of his 31 years on the force. He was qualified to give opinions as an expert in the field of police procedure and practices without objection, and testified that in so many ways the police here had acted precipitously, inappropriately, and not in accord with authorized police procedures. For example, Signorelli stated that there was no indication of any type of emergency requiring the police to forcibly enter Mr. Portela's home within minutes of their arrival (T 586). He added that there was no reason to jump on him after entry (T 587-88).

The defense presented no expert to testify that the police had acted properly and with appropriate force. It should also be noted, as counsel points out, that Officer Gino Leo (Gazzola) who was at the scene and filled out a "Domestic Incident Report" entered into evidence as a defense exhibit, had answered "NO" to the question: "If arrest made, did perp. resist?"

No explanations of any kind were made to Mr. Portela in the short time the police were at his door, and no opportunity was given to him to give his side of the story or open the door of his own free will.

Certainly, the jury had more than enough evidence in the form of testimony from the plaintiff, his son who was present throughout, and on the contradictory testimony of the police, as well as the plaintiff's police expert, to conclude that the officers had used excessive force and committed a battery against Mr. Portela causing him to sustain injury.

Accordingly, it is hereby

ORDERED that defendant's motion is granted to the extent of vacating the jury's award of damages, and the matter is remanded for a new trial on damages; and it is further

ORDERED that counsel for both parties shall appear before this Court in Room 222 on Wednesday, September 19, 2007 at 9:30 a.m. to select a new trial date and retrieve their exhibits.

Dated: August 7, 2007

AUG 07 2007

Alice Schlesinger
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