

**Alvarez v Yaneht**

2007 NY Slip Op 34056(U)

December 11, 2007

Supreme Court, Suffolk County

Docket Number: 0012340/2005

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. EMILY PINES  
Justice of the Supreme Court

MOTION DATE 7-10-07  
ADJ. DATE 8-29-07  
Mot. Seq. # 001 - MD

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RITA BONILLA ALVAREZ,	:	CANNON & ACOSTA, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	1923 New York Avenue
	:	Huntington Station, New York 11746
- against -	:	
	:	LEWIS JOHS AVALLONE AVILES, LLP
BIERA YANEHT and JOSE MARQUEZ,	:	Attorneys for Defendants
	:	425 Broad Hollow Road, Suite 400
Defendants.	:	Melville, New York 11747
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Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers 11-22; Replying Affidavits and supporting papers 23-24; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by defendants Biera Yaneht and Jose Marquez for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint as against them on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Rita Bonilla Alvarez, on January 11, 2005, when her vehicle was struck by a vehicle owned by defendant Jose Marquez and operated by defendant Biera Yaneht, on Washington Avenue at or near its intersection with Jackson Avenue, Town of Islip, County of Suffolk, State of New York. By her complaint, plaintiff alleges a first cause of action on her own behalf to recover damages for serious injuries that she sustained as defined by Insurance Law § 5102 (d), and a second cause of action for property damage allegedly sustained as a result of the within accident.

By way of the verified bill of particulars, plaintiff, Rita Bonilla Alvarez, alleges that as a result of the subject accident she sustained injuries including a tear of the lateral meniscus at the anterior horn/meniscal body junction of her left knee; patella alta of the left knee; patella plicae of the left knee; supraspinatus impingement of the left shoulder; subacromial-subdeltoid bursitis of the left shoulder;

lumbar scoliosis, cervical scoliosis; and lumbar radiculitis.

Defendants Yaneht and Marquez now move for summary judgment dismissing the complaint as against them on the grounds that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d). In support of the motion, defendants have submitted, *inter alia*, the summons and verified complaint; their answer; a copy of plaintiff’s verified bill of particulars; an unsigned copy of the transcript of the examination before trial of Rita Bonilla Alvarez; the affirmed report dated June 27, 2005 of Peter Ross, M.D. who performed an independent radiology review consisting of two exhibits, and the affirmed report of Edward M. Weiland, M.D., dated September 26, 2006 pursuant to an independent neurologic consultation.

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.”

In order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (*see, Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

It is for the court to determine in the first instance whether a prima facie showing of “serious injury” has been made out (*see, Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant “to present evidence, in competent form, showing that the plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1<sup>st</sup> Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

Dr. Weiland sets forth in his report of September 26, 2006, that he saw Rita Bonilla Alvarez for a neurologic consultation on that date. His history reveals she was involved in a motor vehicle accident on

January 11, 2005 wherein she sustained a rapid deceleration injury and subsequent blunt trauma from a left sided impact wherein she struck her head, lost consciousness for a brief period of time, and suffered neck, mid thoracic and lower back pain radiating more prevalently to the left side of her body to include the left shoulder, left hip, left arm and left lower extremity, as well as a laceration to the left lateral chest wall which required several sutures to close the wound. He sets forth that she was initially seen at Southside Hospital emergency department, then followed up for a course of physical therapy, acupuncture and chiropractic treatment with Dr. Martin for approximately nine months. She underwent x-ray studies, MRI evaluations and multiple nerve tests.

Physical examination by Dr. Weiland indicates findings of full range of motion of the neck, shoulders, extremities and the lower torso. He found cervical spine range of motion to be 60 degrees on flexion and extension (normal 60 degrees), 70 degrees on right and left lateral rotation (normal 70 degrees), 40 degrees right and left lateral flexion (normal 40 degrees). Lumbar spine examination revealed 80 degrees flexion (normal 80 degrees), 30 degrees extension ( normal 30 degrees), 40 degrees right and left lateral flexion (normal 40 degrees). Light palpation over the cervical, thoracic and lumbar paraspinous regions produced subjective complaints of pain, with no associated muscle spasm or soft tissue swelling. No joint crepitus or effusions were noted with range of motion of either the left shoulder or left hip. Shoulder examination revealed 50 degrees abduction (normal 50 degrees), 90 degrees internal and external rotation (normal 90 degrees), with no evidence of scapular winging, no vertebral body percussion tenderness or paraspinal muscle spasm appreciated. He stated there were no clinical signs of any compressive neuropathy noted in either the upper or lower extremities and no focal atrophic changes or other atypical motor movements were identified.

Dr. Weiland states he can see no reason why the claimant should not be able to perform activities of daily living and seek employment without restrictions from a neurological perspective and finds there is no primary neurologic disability at present as it relates to injuries reportedly occurring on January 11, 2005. His impression was that of resolved cervical, thoracic, and lumbar sprains, and multiple contusions.

Dr. Peter Ross sets forth in his report of June 27, 2005 that his review of the MRI examination of Rita Alvarez's left knee performed on February 16, 2005 shows no evidence of a Grade III signal meniscal tear in the medial and lateral menisci. He further states the patella shows mild degenerative productive changes along its posterior margin and along the medial and lateral femoral tibial compartments; physiological appearing red marrow changes involving the distal femoral shaft for which he recommends correlation combined with plain radiographs. He also noted a small medial extracapsular Bakers cyst. Dr. Ross indicates the MRI of the left knee shows no evidence of Grade III signal-meniscal tears in the medial or lateral menisci, soft tissue injuries to the tendons or ligaments, or fractures or bone bruises which were caused by the accident which occurred on January 11, 2005.

Dr. Peter Ross also reviewed the MRI of February 16, 2005 of plaintiff's left shoulder and opined that there is a Type II acromion with mild hypertrophic changes at the acromioclavicular joint space with resultant mild impingement upon the underlying supraspinatus muscle, with no evidence of rotator cuff tear, musculo-tendinous retraction, abnormal tendinosis changes, nor the presence of abnormal fluid collections in or about the joint space. He did state he found physiological appearing red marrow

changes involving the humeral neck and the proximal shaft and recommends clinical correlation combined with plain radiographs. It is Dr. Ross' opinion that the Type II acromion is congenital in nature, and states that the bony productive changes and resultant impingement are all pre-existing to the accident and could not have been produced in the one month and five days following the accident.

Plaintiff testified at her deposition that following the accident she immediately experienced pain in her left knee which hit the dashboard, pain in her chest which hit the steering wheel when her car got pushed in, pain in her left shoulder, neck, and stomach. She was seen at Southside Hospital emergency department. Follow up care was with Dr. Martin from whom she received physical therapy for seven months. For the first month or month and a half, she attended physical therapy six days a week, then for about a month and a half to two months, she attended physical therapy four days a week. She attended physical therapy three days a week for about four months and once a week for about a month. She also saw Dr. Durant for about four months. She stated Dr. Durant recommended surgery to her left knee because of a problem with the bone. He also ordered various MRI's and tests "with needles." For about a month and a half after the accident, she stated she could not cook, and to walk, she had to hold onto to either the sofa or something as she had pain in her knee. She testified she presently cannot go up steps, and whenever she bends her knee, she feels like she is going to fall. She has difficulty going down steps due to pain in the left knee and she has to hold onto something. She cannot run, jump, and play in the park with her daughters, anymore. She stated she still has pain in the left leg and cannot walk as much as she used to. She states that she still cannot comb her hair with her left arm because of the pain. Because she cannot lift her left arm, she is unable to lift and needs help. She has to ask her daughters when they come home from school or her neighbors for help. Other chores take longer for her to do because she can only do them with one hand and it is more difficult. She cannot mow the lawn anymore and has to pay someone to do that. She also testified she has been having difficulty seeing with her left eye since the accident, and had to have a surgery on her left breast to remove a small mass which she said her doctor told her was caused by the accident. However, this eye problem and the surgery to her breast have not been pleaded in the bill of particulars.

Based upon the foregoing, it is determined that defendants have demonstrated *prima facie* entitlement to summary judgment on the issue of serious injury.

In opposing this motion, plaintiff has submitted, *inter alia*, an attorney's affirmation; a copy of the report of the independent orthopedic evaluation performed by Dr. Yan Sun, dated September 26, 2006; sworn affirmation of radiologist Dr. Michele Rubin, M.D. certifying the MRI studies of the cervical and lumbar spine of March 7, 2005, and the left knee and left shoulder of February 16, 2005; report of Nicholas Martin, D.C. dated August 14, 2007, and the report of Christopher Durant, M.D. dated August 15, 2007.

Dr. Yan Sun performed an independent orthopedic examination of plaintiff on September 26, 2006 at defendants' request. He noted a 2 cm laceration scar on plaintiff's left breast. Examination of plaintiff's cervical spine revealed tenderness of the paraspinals and deep tendon reflexes of 2/4 of the left and right biceps, triceps and BR. He quantified range of motion findings for extension and flexion, left and right lateral rotation, all stated to be normal. Examination of the left shoulder revealed extension and flexion of 90 degrees out of a normal of 180 degrees, with the remainder of left and right

abduction, adduction, external rotation and internal rotation quantified as normal. Extension and flexion of plaintiff's lumbar spine were quantified as normal. Left and right deep tendon reflexes of the patellar tendon and achilles tendon were noted to be 2/4. Examination of plaintiff's left knee revealed tenderness at the joint line. The quadriceps active test was noted to be 30 degrees (ACL) and 90 degrees (PCL), however, the normal was not set forth. Range of motion and extension were noted to have quantified normal findings. Dr. Yan Sun set forth in his report that there is a causal relationship if the history is correct and that plaintiff has reached her medical endpoint. He states his impression is that of a sprain of the left shoulder, lumbar spine and left knee, and laceration of the left breast. He states there is no need for further physical therapy or diagnostic testing, household help or transportation services, and that she is capable of performing activities of daily living.

Dr. Rubin has certified the findings of plaintiff's MRI films of the cervical spine and lumbosacral spine of March 7, 2005 and the MRI's of the left knee and the left shoulder of February 16, 2005. The left knee MRI revealed a peripheral tear of the lateral meniscus at the anterior horn/meniscal body junction; multilobular vs. multiple synovial cysts of the posteromedial popliteal space; and patella alta which may be associated with patellar instability and/or chondromalacia patellae, probable chronic retinacular injury and patellar plicae. Her review of the MRI of plaintiff's left shoulder revealed the acromial undersurface is straight to mildly concave. She states the acromioclavicular joint indents the superior surface of the supraspinatus muscle which is compatible with supraspinatus impingement syndrome, and to please correlate clinically. She also diagnosed a subacromial-subdeltoid bursitis. Dr. Rubin's impression of the MRI of the cervical spine was that of cervical scoliosis and loss of the normal cervical lordosis, likely related to muscle spasm/pain. As to the MRI of the lumbosacral spine, her impression was that of lumbar scoliosis which may be related to muscle spasm/pain.

Dr. Martin set forth his findings of his examination of plaintiff on January 17, 2005, six days after the accident occurred. He quantified the range of motion studies of plaintiff's cervical spine, 0 degrees cervical flexion (normal 60 degrees), 0 degrees extension (normal 40 degrees), 0 degrees on right and left rotation (normal 80 degrees), 0 degrees right and left lateral flexion (normal 40 degrees). Lumbar spine examination revealed 0 degrees flexion (normal 30 degrees), 0 degrees extension (normal 30 degrees), 0 degrees left and right rotation (normal 30 degrees), 0 degrees right and left lateral flexion (normal 20 degrees).

When Dr. Martin again examined Ms. Alvarez on March 16, 2005, cervical flexion was restricted at 50 degrees (normal 60 degrees), extension was restricted to 40 degrees (normal 50 degrees), left rotation was 70 degrees and right rotation was 60 degrees (normal 80 degrees), right lateral flexion was restricted to 30 degrees (normal 40 degrees). Examination of her lumbar spine revealed extension was restricted to 15 degrees (normal 30 degrees), left rotation was 25 degrees and right rotation was 20 degrees (normal 30 degrees), and left lateral flexion was 15 degrees and right lateral flexion was 10 degrees (normal 20 degrees). Muscle spasms were noted in the cervical musculature.

Reexamination of plaintiff by Dr. Martin on June 16, 2007 revealed cervical flexion limited to 40 degrees (normal 60 degrees), extension limited to 30 degrees (normal 50 degrees), left rotation limited to 60 degrees and right rotation limited to 50 degrees (normal 80 degrees), left lateral flexion limited to 30 degrees and right lateral flexion limited to 20 degrees (normal 40 degrees). He stated she remained

positive in the cervical spine with the Compression Test. As to the lumbar spine, he stated she remained positive with Kemps Test on both the left and right side. Lumbar range of motion for flexion was limited to 60 degrees (normal 90 degrees), extension limited to 20 degrees (normal 30 degrees), left rotation limited at 15 degrees and right rotation 20 degrees (normal 30 degrees), left lateral flexion limited at 10 degrees and right lateral flexion limited at 15 degrees (normal 20 degrees). Muscle spasms were noted in the lumbar musculature.

Dr. Martin sets forth that Ms. Alvarez has a cervical and lumbar sprain with diagnostically confirmed loss of range of cervical lordosis and a positive EMG. Dr. Martin further states that given that is now almost two and a half years following the motor vehicle accident, it is his opinion that her injuries are permanent. He states she was asymptomatic prior to the accident and that the trauma she sustained to her body in the accident of January 11, 2005 caused her injuries. He further states that degeneration is not playing any part in continuing symptomatology based upon her clinical presentation.

Dr. Christopher Durant affirms he is a board certified orthopedic surgeon and examined Rita Bonilla Alvarez on January 27, 2005 after her accident. He found limited motion in her left shoulder upon examination, and low back pain with forward flexion, and pain in the anterior aspect of her left knee associated with ambulation and flexion. She was unable to do the Heel Walk and Toe Walk tests. Range of motion testing of the left shoulder revealed she was only able to forward flex to 90 degrees (180 degrees normal). He also stated she had tenderness in her left shoulder associated with a positive impingement sign at about 120 degrees of forward flexion. Her left knee flexion was 110 degrees and painful. He diagnosed her as having a cervical spine sprain/strain, lumbosacral spine sprain/strain, left shoulder derangement and impingement, left hip contusion and left knee internal derangement. It is Dr. Durant's opinion that Ms. Alvarez's left shoulder impingement and left knee tear were the direct result of the motor vehicle accident of January 11, 2005. He further stated that she has full range of motion in her right shoulder and right knee and if the injuries were degenerative in nature, she would be exhibiting some sign of degeneration in her right shoulder and right knee. He states that the diffuse tenderness in the left knee and the positive impingement sign in the left shoulder are all consistent with trauma related injury.

Based upon the foregoing submissions in support of plaintiff's opposition to defendants' motion, it is determined that plaintiff has raised material, triable issues of fact which preclude summary judgment on the issue of whether plaintiff sustained a serious injury within the meaning of Insurance law §5102(d).

Defendants did not submit the report of their examining orthopedist, Dr. Yan Sun, but plaintiff did submit the same in opposing defendants' motion. Dr. Sun Yun, despite a finding of limitation of the left shoulder on flexion of 90 degrees (normal 180 degrees), failed to comment on this negative result in his report, raising a factual issue. Nor does he comment on or explain the findings of left and right patellar tendon and achilles tendon deep tendon reflexes of 2/4, or right and left biceps, triceps and BR deep tendon reflexes of 2/4.

Both Dr. Martin and Dr. Durant raised factual issues as well concerning their findings of decreased range of motion findings as set forth above. They both additionally opined that these injuries

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were caused by the accident of January 11, 2005.

Dr. Dr. Michele Rubin raised factual issues concerning her interpretation of the findings upon MRI examinations of the lumbosacral and cervical spine films, and the left knee and shoulder films as set forth above, wherein she has interpreted the films as showing a peripheral tear of the lateral meniscus and multilobular vs. multiple synovial cysts of the posteromedial popliteal space of the left knee and supraspinatus impingement related to the acromioclavicular arch and subacromial subdeltoid bursitis of the left shoulder. This raises factual issues with the report submitted by defendants' radiologist, Dr. Peter Ross, who stated there was no meniscal tear present in the medial or lateral menisci, and who also recommended clinical correlation combined with plain radiographs concerning the physiological appearing red marrow changes involving the distal femoral shaft.

Although both Dr. Ross and Dr. Rubin made the finding of the Type II acromion with mild hypertrophic changes at the acromioclavicular joint spaced with resultant mild impingement upon the underlying supraspinatus muscle, there appears to be a factual issue concerning causation. Dr. Ross opines in a conclusory opinion that the bony productive changes and resultant impingement are all pre-existing to the accident and could not have been produced in the one month five days following the accident. However, defendant's own examining orthopedist diagnosed a sprain to plaintiff's left shoulder and gives a causal relationship is the history is correct. Plaintiff's orthopedist, Dr. Durant, opined that Ms. Alvarez's left shoulder impingement and left knee tear were a direct result of the motor vehicle accident of January 11, 2005.

Accordingly, defendants' motion for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

Dated: 2/11/07

Emily Pines  
HON. EMILY PINES J.S.C.

         FINAL DISPOSITION      X   NON-FINAL DISPOSITION