

**Tabares v Vargas**

2009 NY Slip Op 31345(U)

May 15, 2009

Suprme Court, New York County

Docket Number: 016279/07

Judge: Daniel Martin

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DANIEL MARTIN**  
**Acting Supreme Court Justice**

**TRIAL/IAS, PART 30**  
**NASSAU COUNTY**

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**MARTHA TABARES and LUIS VARGAS.**

**Plaintiffs.**

*- against -*

**Sequence No.: 001, 002 & 003**  
**Index No.: 016279/07**

**SANDRA VARGAS and ESTELLE WEISS.**

**Defendants.**

**The following named papers have been read on this motion:**

	<b>Papers Numbered</b>
<b>Notice of Motion and Affidavits Annexed</b>	<b>X</b>
<b>Notice of Cross-Motions and Affidavits Annexed</b>	<b>X</b>
<b>Answering Affidavits</b>	<b>X</b>
<b>Replying Affidavits</b>	<b>X</b>

In a personal injury action stemming from a motor vehicle accident, the defendant Sandra Vargas moves (mot. Seq #1) for summary judgment on the grounds that the record shows she is free from any negligence which caused the accident in question. The defendant Estelle Weiss moves for summary judgment (mot seq. #2) against the plaintiff Luis Vargas on the grounds that said plaintiff did not sustain a serious injury. The defendant Sandra Vargas by separate cross-motion moves for summary judgment (mot seq. #3) dismissing the complaint of the plaintiffs Luis Vargas on the grounds that the plaintiff did not sustain a serious injury. Each of the respective application is opposed by the plaintiffs. For the reasons stated herein, motion #1 is granted and motion #2 and cross-motion #3 are denied.

The facts are as follows: On June 21, 2007 the plaintiff, Martha Tabares was a passenger in a car driven by the defendant Sandra Vargas which was involved in an accident with a vehicle driven by the defendant Estelle Weiss. The record clearly shows that the Weiss vehicle made a left turn into a gas station. The entranceway to the gas station in question was located several feet in front of the intersection of Westbury Avenue and Glen Cove Road. A collision ensued. The moving defendant Vargas contends that based on these facts she had the right of way and the defendant Weiss is solely responsible for the accident in question. The defendant Weiss contends that the defendant Vargas failed to see the apparent danger and respond in time to avoid the collision and that a trier of fact might apportion some degree of culpability upon defendant

Vargas, thereby precluding summary judgment.

There are cases that arguably might appear, at first blush, to be inconsistent and would support both positions. However, a closer scrutiny demonstrates that the seemingly contradictory decisions are merely applying consistent application of summary judgment principles to differing factual circumstances. On a motion for summary judgment, the movant has the burden of establishing entitlement to judgment as a matter of law by virtue of an absence of any potential issues of fact. Alvarez v. Propsect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923; Walden Woods Homeowner's Ass. v. Friedman, 36 A.D.3d 691, 828 N.Y.S.2d 188; Corrigan v. Spring Lake Building Corp., 23 A.D.3d 604, 804 N.Y.S.2d 412. Once that burden is met, the burden shifts to the opposing party to demonstrate that genuine issues of fact exist. See, Zolin v. Rosyln Synogue, 154 A.D.2d 369, 545 N.Y.S.2d 846. That burden cannot be satisfied by surmise conjecture or supposition. Shaw v. Time-Life Records, 38 N.Y.2d 201, 379 N.Y.S.2d 390; Morales v. Coram Materials Corp., 51 A.D.3d 86, 853 N.Y.S.2d 611.

The defendant Weiss asserts that the failure of the Defendant Vargas to see and react to what should have been observed creates a question of fact requiring the jury to apportion liability. In support of that proposition she refers the court to Batal v. Associated Universities Inc., 293 A.D.2d 558. However, that case was a jury trial where facts were developed which showed that while the defendant had failed to yield the right of way, the plaintiff was traveling at an excessive speed and in the wrong lane. The appellate division reversed a defendant's verdict indicating that the jury could find multiple causes for the accident. Similarly, in Schiskie v. Ferran also relied upon by the defendant Weiss, a defendant's verdict was affirmed despite proof that the plaintiff had the right of way where the jury heard testimony that the plaintiff proceeded into the intersection when the ability to ascertain whether such action could be safely undertaken was totally obstructed. More recently, and more on point is the case Lopez v. Reyes-Flores, 52 A.D.3d 785, 861 N.Y.S.2d 389 where a defendant's motion was denied predicated in the deficiencies of the movant's proof as to the cause of an intersection accident. Of similar import is Gray v. Dembeck, 48 A.D.3d 748, 853 N.Y.S.2d 155 where the court noted that facts were established that the driver with the right of way also may have contributed to the injuries to his passengers by specific affirmative acts of potential negligence.

A common thread in the cases denying summary relief to those who merely prove a failure to yield the right of way is the recognition that there may be more than one proximate cause of an action. NY PJI 2:71. Sheehan v. City of New York, 40 N.Y.2d 496, 387 N.Y.S.2d 92; Forte v. Albany, 279 N.Y. 416. Thus, where the defendant alleges that the accident was caused by the plaintiff, the record must be such that the court can conclude that the sole cause of the action was due to the negligence of the plaintiff. See, Jaramillo v. Torres, 60 A.D.3d 734, 875 N.Y.S.2d 197; Gorelick v. Laidlaw Transit Inc., 50 A.D.3d 739, 856 N.Y.S.2d 197, Agati v. Wandel, 49 A.D.3d 572, 854 N.Y.S.2d 445, Ishak v. Guzman, 123d 409, 784 N.Y.S.2d 600; McGraw v. Ranieri, 202 A.D.2d 725, 608 N.Y.S.2d 577.

Applying these principles to the instant facts leads the court to conclude that through the submission of the depositions of the parties, the defendant Vargas established that, she had the right of way, the defendant made an illegal left turn without being cognizant of traffic conditions,

and that the defendant Vargas was operating her vehicle in a non-negligent manner, while through no fault of her own her ability to observe the plaintiff was obstructed by other traffic. These Facts are sufficient to meet the defendant Vargas' *prima facie* burden. See, Jaramillo v. Torres, supra; Gorelick v. Laidlaw Transit Inc., supra. Agati v. Wandel, supra. In this instance the movant established not only the negligence of another actor, but also established that the movant was free from any negligent conduct. Thus, the sole question remaining is whether the defendant Weiss raised an issue of fact. The court concludes that the bare conclusionary assertion by Weiss' counsel that the proper use of Vargas' senses would have allowed her to observe the Weiss vehicle and to thereby avoid the Weiss vehicle has no evidentiary support in the record, and does not identify any affirmative potential negligence of the movant upon which a trier of fact might reasonably conclude would be a concurrent cause of the accident. See, McGraw v. Ranieri, 202 A.D.2d 725, 608 N.Y.S.2d 577. Accordingly, the defendant Vargas' motion for summary judgment (mot seq #1) is granted.

In so far as the defendant Weiss has alleged that the plaintiffs did not suffer a serious injury (mot seq #2), the court notes that while the motion referred to the plaintiffs in the plural, the proof submitted referred solely to the plaintiff Tabares and will be treated as such. In support of her motion for summary judgment, the defendant Weiss relies on the deposition testimony of the plaintiff Tabares which indicates that she was unemployed and that the failure to resume her normal routine within the 90/180 grounds alleged was her inability to interact with the children or do her household work routines, a circumstance which the movant maintains demonstrates an absence of a 90/180 limitation. The defendant Weiss also submits the reports of an orthopedist Dr. Katz whose report indicated that pursuant to the tests administered and based on established norms, the plaintiff Tabares had no significant impairment or limitation of function. That report indicated that any abnormalities indicated by the MRI was a result of degenerative changes. Also, submitted is the report of Dr. DeJesus which was of similar import as to the lack of any indicia of a serious injury causally related to the accident in question.

In opposition to all three applications, the plaintiff claims that in two of the applications neither moving defendant submitted a copy of all the pleadings, noting that defendant Vargas failed to include the answer of Weiss and that defendant Weiss failed to include the answer of defendant Vargas. More substantively, the plaintiff has submitted doctors reports of Dr. Robert Diamond-radiologist (August 7, 2007), Dr. Richard Parker- orthopedist (March 9, 2009), Dr. James Liguori-neurologist (March 18, 2009). Reference is made to visits and reports on February 13, 2008, and October 16, 2008, but not attached, and Dr. Peter Swerz- chiropractor June 22, 2007, Dr. Steven Shoum -October 3, 2007, Dr. Iadevaio October 17, 2007, November 14, 2007, November 28, 2007. The last two doctors provided pain relief via needle injections. Based on these submissions, the plaintiff claims that she suffered serious injuries attributable to the accident in question, and has suffered numerous injuries including, *inter alia*, a torn rotator cuff and consequent major restrictions in range of motion.

Based on the forgoing, the court concludes that the defendants Weiss and Vargas have met their *prima facie* burdens and have demonstrated that an absence of a serious injury attributable to the subject accident. The plaintiff's procedural argument is devoid of merit, as each movant submitted the pleading served upon them and all pleadings related to their

respective claims, and it is conceded that the court had before it all the pleadings served in this action.

However, as to the remaining issues, the court concludes that the plaintiff's proof raises an issue of fact as to whether a the plaintiff sustained a serious injury. Factual issues exists as to whether the injuries in question were caused by the accident and whether there were serious injuries as to the damaged rotator cuff which when included with other claimed injuries significantly reduced the plaintiffs range of motion so as to substantially limit a bodily function. Nelms v. Khokar, 12 A.D.3d 426, 784 N.Y.S.2d 583.

Accordingly, motion #2, is denied solely in that it has been rendered moot by the determination of motion #1. Motion #3 is denied.

So Ordered.

  
A.J.S.C.

**Dated:** May 15, 2009

**ENTERED**

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