

**Jackson v Nolasco**

2010 NY Slip Op 31814(U)

July 14, 2010

Sup Ct, Suffolk County

Docket Number: 08-21879

Judge: Joseph C. Pastorella

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HC

INDEX No. 08-21879

CAL. No. 09-01931-MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 34 - SUFFOLK COUNTY

COF

**PRESENT:**

Hon. JOSEPH C. PASTORESSA  
Supreme Court

Mot. Seq. # 001 - MG  
# 002 - XMotD

-----X	
LISA O. JACKSON and NAKIA MOTEN,	:
	:
	:
Plaintiffs,	:
	:
	:
- against -	:
	:
AMANDA Y. NOLASCO and ABEL NOLASCO,	:
	:
	:
Defendants.	:
-----X	

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Upon the following papers numbered 1 to \_\_\_ read on this motion and cross-motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers 17 - 29; Answering Affidavits and supporting papers 10 - 14; 30 - 34; Replying Affidavits and supporting papers 15 - 16; 35 - 36; Other 37 - 38 (Response Affirmation); (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by the plaintiff/counterclaim defendant, Lisa O. Jackson, for an order pursuant to CPLR 3212 granting summary judgment in her favor dismissing the counterclaim is granted; and it is further

**ORDERED** that this cross-motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint on the ground that the plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is determined herein.

This is an action to recover damages for injuries allegedly sustained by the plaintiffs on December 19, 2007 when a vehicle owned and operated by the then 42 year old plaintiff Lisa O. Jackson

(Jackson) in which her then 23 year old daughter, the plaintiff Nakia Moten (Moten), was a front seat passenger was struck in the rear by a vehicle owned by the defendant Abel Nolasco and operated by his wife, the defendant Amanda Y. Nolasco (Nolasco), at or near the intersection of northbound Commack Road and Delaware Avenue in Brentwood, New York. In their answer, the defendants assert a counterclaim against Jackson for contribution and/or indemnification in the event that the defendants are held liable for damages to the plaintiff passenger Moten. In reply to the counterclaim, Jackson demands judgment dismissing the counterclaim.

By their bill of particulars, the plaintiffs allege that as a result of the subject accident they sustained serious injuries. They allege that the plaintiff Jackson sustained C5-6 disc herniation; C6-7 disc herniation protruding into the lateral recess and compressing the thecal sac; disc bulge at L4-5; disc bulge at L5-S1 with indentation of the spinal canal and mass effect on the nerve roots; and cervical and lumbar radiculopathy. In addition, they allege that the plaintiff Moten sustained a disc herniation at L5-S1 with ventral canal encroachment; loss of normal cervical lordosis; thoracic sprain and strain; and cervical sprain and strain. The plaintiffs also allege that following said accident, the plaintiff Jackson was confined to the hospital on one occasion and that both plaintiffs were confined to bed and home for one week. At the time of the subject accident, the plaintiff Jackson was employed as a case worker at Good Samaritan Hospital in West Islip, New York and the plaintiff Moten was employed as a clerical worker at Office Team in Hauppauge, New York. The plaintiffs claim that they were incapacitated from their respective employment for approximately seven days.

The plaintiff/counterclaim defendant, Jackson, now moves for summary judgment in her favor dismissing the counterclaim on the ground that she did not breach any duty and that defendants' negligence was the sole proximate cause of said accident inasmuch as defendants' vehicle struck plaintiffs' nearly stopped vehicle in the rear.

In opposition to the motion, the defendants contend that there is a conflict between the testimony of the parties as to events just prior to the accident's occurrence inasmuch as the defendants claim that the plaintiffs' vehicle came to a sudden stop rather than a gradual stop and that this conflict raises an issue of fact as to the credibility of the parties.

Jackson testified at her deposition that prior to the subject accident she had just entered Commack Road and that the traffic was medium to heavy, there were vehicles ahead of her in the single lane, and she had slowed down to a near stop, about five miles per hour. Jackson and her daughter both testified that their vehicle had slowed down because the vehicle in front of their vehicle was slowing down and that they heard the screeching of a vehicle from behind and immediately thereafter their vehicle was struck in the rear with a heavy impact causing it to move forward and hit the vehicle in front of them. The defendant Nolasco testified at her deposition that she had just made a right turn from the grocery store parking lot onto Commack Road and was on Commack Road for approximately 30 seconds when she saw the plaintiffs' vehicle stop suddenly in front of her to allow a vehicle to enter in front of the plaintiffs' vehicle. In addition, Nolasco testified that she attempted to avoid hitting the plaintiffs' vehicle by braking but her vehicle nevertheless hit the plaintiffs' vehicle and her air bags deployed. Both Jackson and Nolasco testified that at the time of the subject accident the weather was clear and the roads were dry.

Jackson v Nolasco  
Index No. 08-21879  
Page No. 3

Here, the plaintiff/counterclaim defendant, Jackson, established her entitlement to summary judgment as a matter of law on the issue of liability by submitting the deposition testimony of the plaintiffs indicating that the plaintiffs' vehicle was coming to a stop behind the vehicle in front of them when it was struck in the rear by the defendants' vehicle (see, **Staton v Ilic**, 69 AD3d 606, 606-607; **Jumandeo v Franks**, 56 AD3d 614). A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle, and imposes a duty on the operator of the moving vehicle to come forward with an adequate non-negligent explanation for the accident (see, **Arias v Rosario**, 52 AD3d 551). While two differing scenarios are suggested by the defendants as indicia that an issue of fact exists warranting the denial of summary judgment, neither alternative, if conclusively established, would result in any liability upon Jackson (see generally, **Mankiewicz v Excellent**, 25 AD3d 591, 592). The claim of defendant Nolasco that Jackson made a "short stop" to allow a vehicle to enter the lane was insufficient to raise a triable issue of fact (see, **Harrington v Kern**, 52 AD3d 473, 473; **Johnston v Spoto**, 47 AD3d 888, 889; see also, **Mallen v Su**, 67 AD3d 974, 975). Vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her vehicle and the vehicle ahead (see, Vehicle & Traffic Law § 1129; **Shamah v Richmond County Ambulance Serv., Inc.**, 279 AD2d 564, 565). Therefore, Jackson is entitled to summary judgment dismissing the counterclaim asserted against her (see, **Argiro v Norfolk Contract Carrier, Inc.**, 275 AD2d 384).

The defendants now cross-move for summary judgment dismissing the complaint on the ground that the plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (see, **Gaddy v Eyler**, 79 NY2d 955; **Akhtar v Santos**, 57 AD3d 593). The defendant may satisfy this burden by submitting the plaintiff's own deposition testimony and the affirmed medical report of the defendant's own examining physician (see, **Moore v Edison**, 25 AD3d 672; **Farozes v Kamran**, 22 AD3d 458). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see, **Winegrad v New York Univ. Med. Ctr.**, 64 NY2d 851, 853; **Boone v New York City Trans. Auth.**, 263 AD2d 463).

By their opposition papers to the cross-motion, the plaintiffs inform the Court that the claims of the plaintiff Jackson were recently settled. In their reply to the cross-motion, the defendants also indicate said settlement and request that the portion of the cross-motion seeking summary judgment dismissing the cause of action on behalf of the plaintiff Jackson be withdrawn. Therefore, that portion of the cross-motion for summary judgment dismissing the cause of action on behalf of the plaintiff Jackson is hereby withdrawn.

With respect to the plaintiff Moten, the defendants failed to meet their prima facie burden of showing that the plaintiff Moten did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (see, **Frey v Fedorciuc**, 36 AD3d 587). The defendants submitted the affirmed report dated July 2, 2009 of their examining orthopedic surgeon who examined

the plaintiff Moten on said date and performed range of motion testing by goniometer of the cervical spine and thoracolumbosacral spine. The examining orthopedic surgeon's findings for the cervical spine were flexion and extension of 60 degrees (normal 45-70 degrees); left and right lateral bending in the 45 degree range (normal up to 46 +/-6.5); and rotational motion to the right and left in the 80 degree range (normal up to 78 +/-15). Regarding the thoracolumbosacral spine, the examining orthopedic surgeon reported flexion to 90 degrees (normal up to 66 +/-15); hyperextension to 30 degrees (normal up to 33 +/-5.5); right and left lateral bending to 25 degrees (normal up to 29 +/-6.6); and left and right rotational motion to 30 degrees (normal up to 30 degrees). The normal range of motion measurements with variable ranges that the defendants' examining orthopedic surgeon provided left this Court to speculate under what circumstances those variable ranges occur (see, **Powell v Alade**, 31 AD3d 523). Among the examining orthopedic surgeon's other findings were negative results for the Compression test, Spurling test and Percussion test and maintenance of normal lordotic curvature. He diagnosed status post motor vehicle accident, cervical and thoracolumbosacral spine strain, resolved, and opined that the plaintiff Moten had sustained mild soft tissue injuries that had resolved uneventfully within weeks after the subject accident. The defendants also submitted the affirmed report dated May 26, 2009 of their examining radiologist who reviewed the plaintiff's lumbosacral spine MRI that had been performed in February 2008 and opined that it showed a L5-S1 central and right sided disc herniation effacing the epidural fat that was associated with underlying degenerative changes which was suggestive of a chronic condition.

Inasmuch as the defendants failed to meet their prima facie burden with respect to the claims of the plaintiff Moten, it is unnecessary to consider whether the opposition papers were sufficient to raise a triable issue of fact (see, **McMillian v Naparano**, 61 AD3d 943; **Yong Deok Lee v Singh**, 56 AD3d 662).

In any event, in opposition to the cross-motion, the plaintiff Moten raised a triable issue of fact as to whether she sustained a "serious injury" to her lumbosacral spine under the significant limitation or permanent consequential limitation of use categories of Insurance Law § 5102 (d) as a result of the subject accident (see, **Peter v Palencia**, 67 AD3d 660). The plaintiff's treating chiropractor indicated in his affidavit dated November 12, 2009 that he had conducted contemporaneous and recent examinations of the plaintiff's lumbar spine, on December 27, 2007 and October 30, 2009, respectively, that revealed significant limitations in range of motion testing results of the plaintiff's lumbar spine (see, **Casiano v Zedan**, 66 AD3d 730). In addition, the affirmed reports from February 2008 of the plaintiff's neuroradiologist indicated that the plaintiff's cervical spine MRI showed a loss of normal cervical lordosis that was likely related to muscle spasm and pain and that the plaintiff's lumbosacral spine MRI showed a disc herniation at L5-S1, slightly eccentric toward the right, with ventral canal encroachment. Although the defendants' examining radiologist opined that the plaintiff's L5-S1 disc herniation was related to degenerative changes and chronic in nature, the plaintiff's treating chiropractor opined that it was the direct result of trauma caused by the subject accident inasmuch as the plaintiff was asymptomatic prior to the accident. Said conflicting medical opinions concerning the etiology of the injuries to the lumbar regions of the plaintiff's spine were sufficient to raise a triable issue of fact (see, **Gaviria v Alvarado**, 65 AD3d 567, 568-569). The plaintiff's treating chiropractor's conclusion that the plaintiff sustained a significant limitation of use of her lumbar spine and that her injuries were permanent was also sufficient to raise a triable issue of fact as to whether the plaintiff sustained a

Jackson v Nolasco  
Index No. 08-21879  
Page No. 5

“serious injury” under the significant limitation of use or the permanent consequential limitation of use categories of Insurance Law § 5102 (d) as a result of the subject accident (see, **Casiano v Zedan**, supra; **Gonzalez v MTA Bus Co.**, 63 AD3d 999).

Accordingly, the motion for summary judgment dismissing the counterclaim is granted and the remaining portion of the cross-motion for summary judgment dismissing the claims of the plaintiff Moten on the ground that she did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is denied.

Dated: July 14, 2010



HON. JOSEPH C. PASTORESSA

FINAL DISPOSITION     NON-FINAL DISPOSITION