

Roper v Razumovsky
2010 NY Slip Op 31898(U)
July 7, 2010
Supreme Court, New York County
Docket Number: 403888/2006
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN, Justice

PART 21

AYANA S. ROPER and KARISSA E. ROPER,

INDEX NO. 403888/06

Plaintiffs,

- v -

MOTION DATE 4/26/10

MOTION SEQ. NO. 001

VLADIMIR RAZUMOVSKY, NEW YORK CITY
TRANSIT AUTHORITY, ANN-MARIE N. JOSEPH
and ALOMAL BARTHOLOWMEW,

MOTION CAL. NO. 120

Defendants.

The following papers, numbered 1 to 11 were read on this motion for summary judgment; cross motion for summary judgment


	Papers Numbered
Notice of Motion— Affirmation — Exhibits A-H	<u>1-2</u>
Notice of Cross Motion— Answering Affirmation — Exhibits A [Affidavit], B	<u>3-5</u>
Affirmation In Opposition— Exhibits A [Affidavit], B [Affirmation], C [Affirmation], D [Affirmation]	<u>6-10</u>
Affirmation in Partial Support—Exhibits A-C	<u>11</u>

FILED
JUL 16 2010
NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion for summary judgment by defendants Ann-Marie N. Joseph and Alomal Bartholowmew and plaintiffs' cross motion for summary judgment are decided in accordance with the annexed memorandum decision and order.

Dated: 7/7/10
New York, New York


_____, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER/JUDG.

FOR THE MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

-----X
AYANA S. ROPER and KARISSA E. ROPER,

Plaintiffs,

Index No. 403888/2006

- against -

VLADIMIR RAZUMOVSKY, NEW YORK CITY TRANSIT
AUTHORITY, ANN-MARIE N. JOSEPH and ALOMAL
BARTHOLOWMEW,

Decision and Order

Defendants.

-----X

HON. MICHAEL D. STALLMAN, J.:

FILED
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NEW YORK
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In this action, plaintiffs allege that, on July 10, 2005, at approximately 5 p.m., the vehicle in which they were passengers was struck by a vehicle owned by defendant New York City Transit Authority (Transit) and operated by defendant Vladimir Razumovsky. The vehicle in which plaintiffs were passengers was undisputedly operated by defendant Ann-Marie N. Joseph and allegedly owned by defendant Alomal Bartholowmew. According to plaintiffs, Joseph's vehicle was in the far right eastbound lane on Canal Street, near the intersection of Lafayette Street, and Joseph's vehicle was stopped in the lane due to construction.

Plaintiffs allege that they sustained serious injuries, as defined in Insurance Law § 5102 (d).

According to the bill of particulars, Ayana Roper sustained bulging discs at L5-S1 and at C4-C5 and C5-C6, with cervical and lumbar radiculopathy as a result of the accident. Mariano Affirm., Ex F. Karissa Roper allegedly sustained a bulging disc at L5-S1, and a bulging disc at L4-L5 deforming the thecal sac, with cervical and lumbar radiculopathy.

Defendants Joseph and Bartholowmew move for summary judgment dismissing the complaint as against them, on the grounds that plaintiffs did not suffer a serious injury, as defined

in Insurance Law § 5102 (d), and that Joseph and Bartholomew were not the proximate cause of the accident. Plaintiffs oppose Joseph and Bartholomew's motion, and they cross-move for summary judgment in their favor against all defendants. Transit supports Joseph and Bartholomew's motion only on the ground that plaintiffs did not suffer a serious injury.

DISCUSSION

On the issue of serious injury, defendants have not established a prima facie case that Ayana Roper did not suffer a serious injury. In support of their motion, defendants submit the affirmed report of Paul Miller, M.D., an orthopedic surgeon, who examined Ayana Roper on April 20, 2009. Mariano Affirm., Ex G. However, "[t]he defendant cannot satisfy that burden if it presents the affirmation of a doctor which recites that the plaintiff has normal ranges of motion in the affected body parts but does not specify the objective tests performed to arrive at that conclusion." *Linton v Nawaz*, 62 AD3d 434, 438-439 (1st Dept 2009). Dr. Miller's report does not specify the objective tests performed with respect to his findings of a normal range of motion. Because defendants did not meet their burden of establishing that Ayana Roper did not suffer a physical limitation, the Court does not reach plaintiffs' arguments in opposition as to this claim. *Nix v Yang Gao Xiang*, 19 AD3d 227 (1st Dept 2005).

Defendants have not established a prima facie case that Karissa Roper did not suffer a permanent consequential limitation of use of a body organ or member, or a significant limitation of use of a body function or system. Dr. Zimmerman's affirmed report indicated that Karissa Roper had a normal range of motion in her cervical and lumbar spine, and found no evidence of lumbar radiculopathy. Contrary to plaintiffs' contention, it appears that Dr. Zimmerman did address the findings of Karissa Roper's lumbar bulging discs, because he stated, "Bulging disc [*sic*] have no

clinical significance.” Mariano Affirm., Ex G. In any event,

“the mere fact that defendants' expert did not address findings in diagnostic and operative reports indicating that plaintiff had a herniated disc does not mean that defendants failed to meet their initial burden. A herniated disc, by itself, is insufficient to constitute a ‘serious injury’; rather, to constitute such an injury, a herniated disc must be accompanied by objective evidence of the extent of alleged physical limitations resulting from the herniated disc.”

Onishi v. N & B Taxi, Inc., 51 AD3d 594, 595 (1st Dept 2008).

However, Dr. Zimmerman did not address the findings of posttraumatic lumbar radiculopathy diagnosed by Dr. Gashinkaya. Because Dr. Zimmerman did not address or attempt to distinguish the objective findings of Karissa Roper’s MRI, the EMG/NCV report, and the other evidence of serious injury, defendants have not met their prima facie burden that Karissa Roper did not suffer a serious injury, based on a permanent consequential limitation of use of a body organ or member, or on a significant limitation of use of a body function or system. *Beazer v Webster*, 70 AD3d 587 (1st Dept 2010).

However, defendants have established entitlement to summary judgment dismissing plaintiff Karissa Roper's 90/180-day claim, because Karissa Roper testified at her deposition that she missed “one day or a couple of days” from work after the accident. *See Alicea v Troy Trans, Inc.*, 60 AD3d 521 (1st Dept 2009).

Plaintiffs’ evidence in opposition is not sufficient to raise a triable issue of fact as to Karissa Roper’s 90/180 day claim. The reports of Ricardo Galdamez, M.D. and Liliya Yanovskaya, M.D. are neither affirmed nor sworn, and the report of Anatoliy Abakin, D.C. is unsworn. Moreover, neither Dr. Galdamez nor Dr. Yanovskaya stated that the limited range of motion that they observed (which was not quantified) curtailed substantially all of plaintiff’s usual activities. *See Gaddy v*

Eyler, 79 NY2d 955 (1992); *Frias v James*, 69 AD3d 466 (1st Dept 2010). Karissa Roper's sworn statement that she experiences pain, stiffness, discomfort at times when she sits for long periods of time, that she continues to have difficulty do not constitute the loss of "substantially all" of plaintiff's usual activities required to make a showing of serious injury. *Gibbs v Hee Hong*, 63 AD3d 559, 560 (1st Dept 2009).

Therefore, Karissa Roper's 90/180-day claim of serious injury is dismissed.

On the issue of negligence, Joseph and Bartholowmew have established prima facie entitlement to summary judgment dismissing the complaint as against them. Ayana Roper and Karissa Roper testified at their depositions that Joseph's vehicle was stopped in the right lane of traffic due to construction blocking the lane, and that the turn signal was on while they waited for traffic to clear. Mariano Affirm., Ex D at 13-15; Mariano Affirm., Ex E at 12-14. Razumovsky testified at his deposition that Joseph's vehicle was stopped for approximately one minute, and that he tried to pass the vehicle on the left by going into the middle lane. Mariano Affirm., Ex B, at 18-19. Razumovsky testified that he saw a car coming from behind him in the middle lane, decided it was too close for him, and he turned his wheel "a little bit" to the right, thereby striking Joseph's vehicle in the left side. *Id.* at 21-22. Razumovsky stated that Joseph's vehicle did not move from the stopped position until the time that the accident occurred. *Id.* at 21.

Vehicle and Traffic Law § 1122 (a) provides, in pertinent part: "The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle." Razumovksy's own deposition testimony establishes that he attempted to pass Joseph's vehicle without an adequate distance to clear Joseph's vehicle safely. Joseph established her

entitlement to judgment as a matter of law by demonstrating that she was lawfully operating her motor vehicle in the far right lane of Canal Street, when Razumovsky's vehicle entered into Joseph's lane of traffic and collided with her vehicle. See *Davidoff v Mullokandov*, 2010 WL 2309416, *2 (2d Dept 2010). Therefore, the complaint is severed and dismissed as against defendants Ann-Marie N. Joseph and Alomal Bartholowmew.

Turning to plaintiffs' cross motion, they are entitled to summary judgment as a matter of law as against Razumovsky and his employer, the New York City Transit Authority. As discussed above, Razumovsky attempted to pass Joseph's stopped vehicle on the left without adequate distance to clear Joseph's vehicle, and returned to the right lane before Razumovsky's vehicle had cleared Joseph's vehicle. This established a prima facie case of Razumovsky's negligence, which Razumovsky and the Transit Authority did not dispute. Therefore, plaintiffs are entitled to partial summary judgment in their favor as to liability only on the first and second causes of action of the complaint as against Razumovsky and his employer, the New York City Transit Authority.

In addition, plaintiffs, who were innocent passengers, have established entitlement to summary judgment dismissing the first affirmative defense (plaintiffs' alleged culpable conduct) of the answer of defendants Razumovsky and New York City Transit Authority. The Court notes that the second affirmative defense, the "seatbelt defense," is not a defense to liability, but rather "limited to the jury's determination of plaintiff's damages and in mitigation thereof." *Garcia v Tri-County Ambulette Serv.*, 282 AD2d 206, 207 (1st Dept 2001), citing *Spier v Barker*, 35 NY2d 444 (1974).

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendants Ann-Marie N. Joseph and

Alomal Bartholomew is granted, and the complaint is severed and dismissed as against these defendants, the cross claim by defendants Razumovsky and New York City Transit Authority against these defendants is severed and dismissed, and the Clerk is directed to enter judgment in these defendants' favor accordingly; and it is further

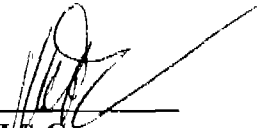
ORDERED that plaintiffs' motion for summary judgment is partially granted as to liability only on the first and second causes of action as against defendants Vladimir Razumovsky and New York City Transit Authority; and it is further

ORDERED that the first affirmative defense of plaintiff's culpable conduct in the answer of the answer of defendants Razumovsky and New York City Transit Authority is stricken, and the second affirmative defense (the "seatbelt" defense) in that answer is limited to the jury's determination of plaintiff's damages and in mitigation thereof; and it is further

ORDERED the remainder of the action shall continue.

Dated: July 7, 2010
New York, New York

ENTER:



J.S.C.

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