

**Abraham v Dynamite Floors, Inc.**

2011 NY Slip Op 30131(U)

January 12, 2011

Sup Ct, Nassau County

Docket Number: 600327/09

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 3

MOI

Present: HON. UTE WOLFF LALLY  
Justice

SUSAN K. ABRAHAM and CHACKO K.  
ABRAHAM,

Motion Sequence #1  
Submitted November 15, 2010

Plaintiffs,

-against-

INDEX NO: 600327/09

DYNAMITE FLOORS, INC. and  
RODRIGO R. FERREIRA,

Defendants.

The following papers were read on this motion:

Notice of Motion and Affs.....	1-5
Affs in Opposition.....	6-9
Affs in Reply.....	10&11
Memorandum of law.....	12&12a

This motion by plaintiffs for an order pursuant to CPLR 3212, granting partial summary judgment in favor of plaintiffs as to the issue of liability only, for an order pursuant to CPLR 3211[b] and CPLR 3212, dismissing the defendants' first, second, third, fourth, seventh and eighth affirmative defenses, for an order pursuant to CPLR 3212, determining that plaintiff, Susan K. Abraham, sustained a serious injury as defined by Insurance Law §5102[d] and required by Insurance law § 5104(a) is disposed of as follows:

This is an action to recover money damages for serious personal injuries allegedly sustained by plaintiff Susan K. Abraham as the result of the alleged negligence of the defendants, which arises from an automobile accident which occurred on March 13, 2008 in the vicinity of Kalda Lane and Merrick Avenue, East Meadow, Town of Hempstead, County of Nassau, State of New York. It is alleged that on said date, the vehicle operated by the plaintiff was struck by the van operated by defendant, Rodrigo Ferreira, and owned by defendant, Dynamite Floors, Inc. The plaintiff claims that as a consequence thereof she has sustained serious injuries as defined in Article 51 of the Insurance Law and which fall within the following enumerated categories; a fracture; a significant limitation of use of a body function or system, and; 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 [hereinafter the 90/180 category].

In support of so much of this motion which seeks partial summary judgment as to the issue of liability, the plaintiffs contend that the evidence as proffered herein indisputably demonstrates that defendant, Rodrigo Ferreira, ran a red light thus causing the subject accident. Movant relies, *inter alia*, upon the deposition testimony of the plaintiff, who testified that after being stopped at a red light at the intersection of Kalda Lane and Merrick Avenue, the light turned green after which she proceeded into the intersection whereupon her vehicle was struck by the van being operated by defendant, Rodrigo Ferreira. Movant also relies upon the annexed affidavit of Veronica Cisneros, sworn to the 7<sup>th</sup> day of May, 2009, who witnessed the subject occurrence. Ms. Cisneros avers that on the day of the

subject accident she “was driving [her] car on Merrick Boulevard approaching Kalda Lane in East Meadow, New York, when [she] witnessed an accident between a van and another car”. She further avers that as she approached the intersection “the traffic light turned from green to yellow” and that “when the light became yellow, the van increased its speed”. Ms. Cisneros states that “before the van reached the intersection, the traffic light had turned from yellow to red” and that she “saw the van disregard the red light and drive through the intersection while the light was red”. She further states that as the plaintiff’s vehicle “was making a left-hand turn from Kalda Lane on to Merrick Avenue \* \* \* the van crashed into her after running the red light”.

In addition to the foregoing, movant submits the examination before trial transcript of defendant, Rodrigo R. Ferreira, who testified that he did not know the color of the traffic light prior to the subject accident. This portion of the plaintiff’s motion is not opposed by the defendants.

The failure of a motorist to stop at a red light constitutes negligence as a matter of law (*Sheehan v Marshall*, 9 AD3d 403; *see also White v Clyburn*, 284 Ad2d 328). Further, a driver with the right of way is entitled to anticipate that other motorists will obey the vehicle and traffic law and will yield the right of way (*Melendez v County of Nassau*, 56 AD3d 736; *Maliza v Puerto-Rican Transp. Corp.*, 50 AD3d 650; *McCain v Larosa*, 41 AD3d 792; *Dileo v Barreca*, 16 AD3d 366).

Thus, the Court finds that the plaintiffs have demonstrated their entitlement to judgement as matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320; *Zuckerman v City of New York*, 49 NY2d 557). The movant has demonstrated that the defendant was

negligent as a matter of law by driving through a red light and in failing to yield the right of way to the plaintiff (*Sheehan v Marshall, supra; Melendez v County of Nassau, supra; Maliza v Puerto-Rican Transp. Corp., supra*). Therefore, so much of the plaintiffs' motion, which seeks an order granting summary judgment in their favor as to the issue of the defendants' liability only is hereby granted.

That portion of the plaintiffs' motion which seeks an order granting summary judgment in their favor finding that Mrs. Abraham has suffered a serious injury as defined in Insurance Law § 5102(d) is denied.

In support thereof, while the plaintiff limits the proof to the 90/180 category arguing the plaintiff need only prove one category of injury to be entitled to demonstrate at trial that all the injuries resulted from the subject accident, movant proffers copies of Mrs. Abraham's certified hospital records, as well as an affirmation from Dr. Jagga Alluri M.D., the plaintiff's treating neurologist.

Dr. Alluri first examined the plaintiff on March 22, 2008, at which time he noted that as a result of the collision she had "suffered injuries to her left wrist, left thumb and the distal phalanx of her left hand", as well as "to her head, neck and back". Dr. Alluri further states that his initial examination "revealed spasms of the cervical and thoracic paraspinal muscles, as well as the lumbar paraspinal muscles". Subsequent to the initial evaluation, the plaintiff was again re-examined by Dr. Alluri on 4/5/08, 4/22/08 and 6/7/08 respectively. In the interim, on 5/19/08 and again on 6/9/08, Dr. Alluri authored two separate "Work Excuse" Notes. With respect to the note dated 5/19/08, Dr. Alluri stated that the plaintiff was "totally disabled to work" and that the plaintiff should not return to work "while her symptoms, pain and medications were impairing and/or interfering with her duties as a

registered nurse". As to the note dated 6/9/08, Dr. Alluri again reiterated that the plaintiff was "totally disabled" as "she continued to suffer from post traumatic headaches with spasm of the cervical, thoracic and lumbar paraspinal muscles". The plaintiff was ultimately cleared to return to work on July 7, 2008.

Dr. Alluri ultimately concluded "within a reasonable degree of medical certainty that Ms. Abraham suffered injuries in her automobile collision that prevented her from returning to work". Dr. Alluri reached said conclusion "based upon the nature and extent of her injuries, the type of medical treatment Ms. Abraham was receiving and the nature of her occupation".

In order to establish the existence of an injury which falls within the 90/180 category, it is incumbent upon the plaintiff to provide "sufficient objective medical evidence" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357), which establishes the existence of "a medically determined injury or impairment of a non-permanent nature". In the instant matter, other than the straight leg raising test, Dr. Alluri has failed to set forth the objective tests upon which his conclusions were based and relies principally, and impermissibly, upon the plaintiff's subjective complaints when rendering his medical opinion. The Court notes that in relation to the first of the two above referenced Work Excuse Notes, Dr. Alluri stated that he "advised Ms. Abraham not to return to work while her symptoms, pain and medications were impairing and/or interfering with her duties as a registered nurse". Here, Dr. Alluri's admonition that the plaintiff not return to work was based upon the plaintiff's own assessment as to whether or not her symptoms were impairing her work abilities and not upon a verified infirmity, the nature and degree of which was measured by objective testing.

Further, a plaintiff's expert may not rely upon the unsworn reports of other physicians (*Pagano v Kingsbury*, 182 AD2d 268; see also *Merisca v Alford*, 243 AD2d 613; *Friedman v U-Haul Truck Rental*, 216 AD2d 266). Here, a review of Dr. Alluri's report reveals that the opinions espoused by the plaintiff's treating neurologist appear to have been predicated, in part, upon an MRI done in relation to the plaintiff's lumbar spine. However, while plaintiff's expert clearly references said report and notes the findings thereof in his supporting affirmation, said report has not been provided to this Court for review and thus it is not possible to determine if same was in admissible form.

Finally, in his affirmation Dr. Alluri noted throughout that he observed spasms in the plaintiff's cervical, thoracic and lumbar paraspinal muscles. However, while "medical testimony concerning observations of a spasm can constitute objective evidence in support of a serious injury, the spasm must be objectively ascertained" (*Toure v Avis Rent A Car Sys.*, *supra* at 357). As noted above, Dr. Alluri again did not specify the objective tests he employed when making his observations.

Thus, based upon the foregoing, the Court finds that the plaintiffs have failed to demonstrate their entitlement to judgment as a matter of law and accordingly that branch of the application which seeks an order determining that Susan Abraham has sustained a serious injury is hereby denied.

The final branch of the plaintiffs' motion seeks dismissal of the defendants' first, second, third, fourth, seventh and eighth affirmative defenses. "A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" (CPLR §3211[b]; *Butler v Catinella*, 58 AD3d 145, 147-148). "Upon a motion

to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Id.* At 148, quoting *Federici v Metropolis Night Club, Inc.*, 48 AD3d 741 at 743).

As adduced from the defendants' Verified Answer, the First, Second and Third Affirmative Defenses each allege that the plaintiff failed to sustain a serious injury and thus her exclusive remedy is confined to the benefits afforded under Article 51 of the Insurance Law. Given the Court's holding above that the plaintiff has failed to demonstrate her entitlement to judgment as to the existence of a serious injury, that branch of the within application which seeks dismissal of the First, Second and Third Affirmative Defenses is hereby denied.

The Fourth Affirmative Defense alleges that the injuries sustained by the plaintiff resulted from her own negligence. Given this Court's within determination as to the issue of liability for the happening of the subject accident, the plaintiffs' application is granted and the defendants' Fourth Affirmative Defense is dismissed.

The Seventh Affirmative Defense alleges that the plaintiff herein was not wearing a seat belt and or shoulder harness and that said lack of use contributed to the injuries sustained by Mrs. Abraham. In the instant matter, the evidence, in the form of the plaintiff's deposition testimony, reveals that she was wearing a seatbelt at the time of the accident (*Olan v Farrell Lines*, 64 NY2d 1092; *Rockman v Brosnan*, 243 AD2d 695; *Desola v Mads, Inc.*, 213 AD2d 445). Said evidence is not contradicted by the defendants, who have not proffered any opposition to dismissal of this affirmative defense (*Id.*). Thus, that branch

of the plaintiffs' motion which seeks an order dismissing the defendants' Seventh Affirmative Defense is granted.

The Eight Affirmative Defense alleges that the plaintiffs' complaint, in whole or in part, fails to state a cause of action. In consideration of the Court's determination that the plaintiff failed to demonstrate her entitlement to judgment as to the existence of a serious injury, that branch of the plaintiffs' application which seeks dismissal of the Eighth Affirmative Defense is denied.

In conclusion, it is,

**ORDERED**, that the Plaintiffs' Motion for Summary Judgment as to the issue of the defendants' liability for the happening of the subject accident, is granted; and it is further,

**ORDERED**, that the Plaintiffs' Motion for summary judgment, for a determination that Mrs. Abraham has sustained a serious injury, is denied; and, it is further,

**ORDERED**, that the Plaintiffs' Motion for an order dismissing certain of the Defendants' Affirmative Defenses is granted as the those defenses denominated FOURTH and SEVENTH and denied as to those defenses denominated FIRST, SECOND, THIRD and EIGHTH.

All applications not specifically addressed herein are denied.

Dated: January 12, 2011

  
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UTE WOLFF LALLY, J.S.C.

**ENTERED**  
JAN 19 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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