

**Holmes v Perez**

2011 NY Slip Op 30685(U)

March 15, 2011

Supreme Court, Suffolk County

Docket Number: 08-38347

Judge: Arthur G. Pitts

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**ORDERED** that the cross motion (003) by defendants Marcial Paula and Yuris M. Paula for summary judgment dismissing the complaint is granted to the extent that the allegations by plaintiff Holmes as asserted against them are dismissed; and it is further

**ORDERED** that the cross motion (004) by defendants Louis A. Romano and Hermon E. Swezey Company for summary judgment dismissing the complaint is granted to the extent that the allegations by plaintiff Holmes as asserted against them are dismissed.

In this negligence action, plaintiffs Christopher Holmes and Karen Lunsford allege that they sustained personal injuries in a multiple motor vehicle accident on July 23, 2007. The accident occurred in the intersection of Station Road and Atlantic Avenue in the Town of Brookhaven. Plaintiffs were passengers on a public transportation bus owned by defendant County of Suffolk and operated by defendant Ali Abdul Perez (“the County defendants”) which was proceeding southbound on Station Road. A vehicle owned by defendant Marcial Paula and operated by defendant Yuris M. Paula (“the Paula defendants”) proceeding eastbound on Atlantic Avenue allegedly struck a minibus owned by defendant Hermon E. Swezey Company and operated by defendant Louis A. Romano (“the Swezey defendants”) which was proceeding northbound on Station Road. The Swezey vehicle then spun across the street and struck the County bus, causing injuries to plaintiffs.

The County defendants now move for summary judgment on the grounds that they did not proximately cause the plaintiffs’ injuries, and that plaintiffs did not sustain serious injuries. The Paula defendants cross-move for summary judgment on the ground that plaintiffs did not sustain serious injuries. The Swezey defendants cross-move for summary judgment on the grounds that they did not proximately cause plaintiffs’ injuries and that plaintiffs did not sustain serious injuries.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*Stewart Title Insurance Co., Inc. v Equitable Land Servs.*, 207 AD2d 880, 616 NYS2d 650 [2d Dept 1994]), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). A person operating her vehicle on a street governed by a stop sign, is required not only to stop, but to yield to vehicles on the intersecting thoroughfare operating with the right-of-way (*see*, Vehicle and Traffic Law § 1142[a]). The defendant also is required to see the oncoming traffic through the proper use of her senses (*see*, *Goemans v County of Suffolk*, 57 AD3d 478, 479, 868 NYS2d 753 [2d Dept 2008]; *Hull v Spagnoli*, 44 AD3d 1007, 844 NYS2d 416 [2d Dept 2007]).

In support of their motion and cross motion for partial summary judgment on the issue of liability, the County defendants and the Swezey defendants submit, *inter alia*, the pleadings, and the deposition testimonies of the plaintiffs, Ali Abdul Perez, Louis Romano, and Yuris Paula. Plaintiff Holmes testified that he was a passenger on the County bus on the date of the accident. He recalled the impact with the left

side of the bus and that he fell out of his seat and hit his head on a pole. He did not recall how the accident occurred. Plaintiff Lunsford testified that she was also a passenger on the County bus on the date of the accident. She stated that she was not paying attention to the traffic. She was sitting on the left side of the bus and felt a heavy impact at the time of the collision which caused injury to her left side after she hit the back of the seat in front of her and fell to the floor.

Defendant Perez testified that he was the operator of the County bus on the date of the accident. He denied any mechanical problems with the bus at that time. He stated the accident occurred after he made a right turn from Brookhaven Street onto Station Road heading south. He was traveling at approximately 15 to 20 miles per hour. As he reached the intersection with Atlantic, he slowed to approximately 10 miles per hour to wait for traffic ahead and the conditions were rainy and wet. Although he had no traffic control devices at the corner, he stopped the bus at the corner of Station Road and Atlantic Avenue. He stated that the bus was stopped at the corner at the time of impact. He looked both ways and to the left he saw a vehicle stop. Then he looked to the right and saw a white car speed across the intersection. He observed the front of the white car strike a minibus on its driver's side which was in the northbound lane of Station Road. The minibus spun around three times and struck the County bus in the left side. He did not observe the minibus until it was headed toward the County bus. The impact was heavy, and he kept his right foot on the brake. After impact he applied the emergency brake.

Defendant Romano testified that he was employed by Hermon Swezey Bus Company on the date of the accident. He operated the minibus. He stated that the accident occurred in the intersection. He saw the County bus on the south side of Station Road was stopped at the intersection. Romano was two car lengths from the intersection when he observed the County bus. When the accident occurred three-quarters of his minibus was in the intersection. The minibus was struck by the white vehicle behind the left rear tire. After impact, he spun around and the rear of the minibus struck a telephone pole. Then an instant later, the right side of the minibus struck the left side of the County bus. He did not hear screeching tires or blowing horns prior to the accident.

Defendant Paula testified that she was operating a white blazer on the date of the accident. She was taking a friend home and the friend was directing her. She was traveling eastbound on Atlantic Avenue at approximately 20 miles per hour. She stopped at the stop sign at Atlantic Avenue and Station Road briefly, and about five seconds later looked from side to side. She conceded that she did not stop completely. She looked to the right and saw no cars approaching. She looked to the left and saw no cars approaching. She then proceeded through the intersection. She felt the front of the blazer strike the small minibus in the northbound lane of Station Road. She states she saw the minibus only seconds before the accident. It was a light impact and her vehicle remained stationary in the middle of the intersection. She observed the minibus move and strike the County bus. She did not notice whether the County bus was stopped or moving at impact with the minibus.

There is no dispute that the County bus was stopped at the time of impact by the Swezey minibus, the Court finds that the County defendants have met their prima facie burden of demonstrating that they did not proximately cause the accident (*Winegrad v New York Univ. Med. Ctr., supra*). In opposition, plaintiffs failed to raise issues of fact.

As to the cross motions by the remaining defendants, under the doctrine of comparative negligence, “a driver who lawfully enters an intersection \* \* \* may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection” (*Mateiasevici v Daccordo*, 34 AD3d 651, 825 NYS2d 502 [2d Dept 2006]; *Romano v 202 Corp.*, 305 AD2d 576, 759 NYS2d 365 [2d Dept 2003]; *Siegel v Sweeney*, 266 AD2d 200, 202, 697 NYS2d 317 [2d Dept 1999]; see also, *Bodner v Greenwald*, 296 AD2d 564, 745 NYS2d 711 [2d Dept 2002]). Here, that Paula allegedly “ran” the stop sign would not preclude a finding, as a matter of law, that negligent conduct by Romano contributed to the accident (see, *Hernandez v Bestway Beer & Soda Distrib.*, 301 AD2d 381, 753 NYS2d 467 [1<sup>st</sup> Dept 2003]). Notably, “[t]here can be more than one proximate cause of an accident” and “the issue of comparative negligence is generally a question for the jury to decide” (*Todd v Godek*, 71 AD3d 872, 895 NYS2d 861 [2010]; see also, *Topalis v Zwolski*, 76 AD3d 524, 525, 906 NYS2d 317 [2d Dept 2010]; *Kim v Acosta*, 72 AD3d 648, 897 NYS2d 721 [2d Dept 2010]; *Cox v Nunez*, 23 AD3d 427, 805 NYS2d 604 [2d Dept 2005]). Thus, the remaining defendants have failed to demonstrate their prima facie entitlement to judgment as a matter of law. It is therefore, unnecessary to determine the sufficiency of plaintiffs’ opposition (*Volpetti v Yoon Kap*, 28 AD3d 750, 814 NYS2d 236 [2d Dept 2006]; *Mullen v Lauffer*, 31 AD3d 402, 820 NYS2d 61 [2d Dept 2006]; *Coscia v 938 Trading Corp.*, 283 AD2d 538, 725 NYS2d 349 [2d Dept 2001]).

Turning to the motion and cross motions for summary judgment on the grounds that plaintiffs did not sustain serious injuries, under Insurance Law § 5102 (d), “serious injury” means “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.”

A defendant can establish that the plaintiff’s injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim (*Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]). Once defendant has met the burden, the burden shifts to the plaintiff to demonstrate with competent proof that he sustained a serious injury within the meaning of the No-Fault Insurance Law (*Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). 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]).

In support of their motion and cross motions for summary judgment on the issue of whether plaintiffs sustained serious injuries, defendants submit, *inter alia*, the bill of particulars, the plaintiffs’ deposition testimonies, and affirmed reports by S. Farkas, M.D. Plaintiff Holmes alleges in the bill of particulars that he sustained the following injuries: a disc bulge and annular tear at L4/5, lumbar sprain, aggravation and/or exacerbation of degenerative disc disease of the lumbar spine, thoracic spine sprain, and post traumatic

headaches. He was confined to his bed and home for one month. He testified that as a result of the accident, his doctor advised him not to work, and excused him from his job at a temp agency after the accident. He subsequently obtained social security disability. After the accident, he was taken to Brookhaven Memorial Hospital emergency room complaining of a headache, left leg pain and back pain. He received treatment at the Shirley Health Clinic for approximately one month and received physical therapy. He was given a cane and a back brace which he used for four months. He also received a heat and stimulation machine for home use. As a result of the accident, he is unable to walk for long periods of time, shop, or stand or sit for long periods.

Dr. Farkas avers that he performed an independent orthopedic examination of plaintiff Holmes on March 23, 2010. He measured plaintiff's range of motion in the lumbar spine and noted no limitations as compared to normal ranges. He also performed objective tests which were negative. He states that there could be causal relationship between plaintiff's original complaints and the reported accident of July 23, 2007. However, he found no orthopedic disability. The defendants met their prima facie burden by showing that plaintiff Holmes did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see, Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 N.Y.S.2d 865 [2002]; *Gaddy v Eycler, supra*).

In opposition, plaintiff Holmes failed to raise a triable issue of fact. He submits, *inter alia*, uncertified medical records from Brookhaven Memorial Hospital, certified records from Main Street Medical Care, certified records from New York Spine and Physical Therapy, and a sworn report by Gurmeet Dhillon, M.D. Unaffirmed or uncertified medical reports and records are inadmissible and will not be considered on a motion for summary judgment (*Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; CPLR §§ 2106; 4503). In addition, the Court also rejects the unsworn doctors' reports contained in the Main Street Medical Care records inasmuch as they may not be certified by the office manager for the purpose of verifying the contents of the report (CPLR 4518; *Hefte v Bellin*, 137 AD2d 406, 524 NYS2d 42 [1<sup>st</sup> Dept 1988]).

The Main Street Medical Care records reveal that plaintiff was treated from August 30, 2007 through March 2009. The New York Spine & Physical Therapy records reveal that plaintiff received treatment there until April 2008. Dr. Dhillon affirms that he performed a scan of the lumbar spine which reveals disc desiccation, concentric bulging of the disc, and annular tears at L4/5 without evidence of focal disc herniation or central spinal stenosis. However, plaintiff's submission, without a recent medical exam and/or contemporaneous medical evidence, leaves unanswered the question whether the claimed symptoms by plaintiff were caused by the subject accident (*see, Pommells v Perez*, 4 NY3d 566, 577, 797 NYS2d 380 [2005]; *Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]).

Plaintiff Lunsford alleges in the bill of particulars that she sustained a left shoulder sprain and contusion. She was confined to her bed and home for 23 days. She testified that she was transported to Brookhaven Memorial Hospital emergency room after the accident complaining of left arm and shoulder pains, and low back and hip pains. She received a sling and was released. She continues to receive physical therapy for the left shoulder and low back. She also presented to an orthopedic surgeon who administered injections to the shoulder. As a result of the accident, plaintiff states that she is no longer able to walk for long periods, shop, and play sports with her children.

Dr. Farkas avers that he performed an independent orthopedic examination of plaintiff Lunsford on March 23, 2010. He noted no limitations in motion in the lumbar spine as compared to normal ranges. However, he did observe limitations in motion in both shoulders, more in the left shoulder, as compared to normal ranges. He states that objective tests were negative. He states that there could be causal relationship between plaintiff's original complaints and the reported accident of July 23, 2007. However, he found no orthopedic disability.

Defendants failed to satisfy their prima facie burden by establishing that plaintiff Lunsford did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see, Joissaint v Starrett-1 Inc.*, 46 AD3d 622, 848 NYS2d 259 [2d Dept 2007]). The examining orthopedist identified significant limitations in the ranges of motion of the plaintiff's shoulders based upon his examination, which took place three years after the subject accident (*see, id.*). Since defendants failed to meet their initial burden of establishing a prima facie case that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident, the sufficiency of plaintiff's opposition papers need not be considered (*see, Paulino v Dedios*, 24 AD3d 741, 807 NYS2d 397 [2d Dept 2005]; *Birnbaum v Constanza*, 17 AD3d 304, 791 NYS2d 853 [2d Dept 2005]).

Accordingly, the motion for summary judgment dismissing the complaint by the County defendants is granted in its entirety. The cross motion for summary judgment by the Paula defendants is granted to the extent that plaintiff Holmes' allegations of serious injury are dismissed. The cross motion by the Swezey defendants is also granted to the extent that plaintiff Holmes' allegations are dismissed. Plaintiff Lunsford's claims against the County defendants, dismissed herein, are severed and the plaintiff's remaining claims against the Paula defendants and the Swezey defendants shall continue.

Dated: March 15, 2011

  
J.S.C.

     FINAL DISPOSITION      X   NON-FINAL DISPOSITION