

Arroyo v New York City Transit Auth.
2012 NY Slip Op 32980(U)
December 17, 2012
Sup Ct, Richmond County
Docket Number: 101880/09
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:101880/09
Motion No.:005**

GLORIA ARROYO, DAWN ROSA and ALICE PEREZ

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY,
MTA BUS COMPANY and MICHAEL FRAGAPANE,**

Defendants

The following items were considered in the review of the following motion to amend a prior decision.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Affirmation in Partial Support	2
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

By decision and order dated October 23, 2012 this court granted summary judgment on the issue of liability. However, this final order contradicted the analysis contained in the discussion section of the decision and order. Consequently, the New York City Transit Authority's motion to amend the decision and order dated October 23, 2012 to reflect the analysis conducted by the court is granted without opposition. The amended decision follows.

The Plaintiff, Gloria Arroyo, moves for an order granting her summary judgment dismissing the defendants' counterclaim. She also moves to dismiss the cross-claims of plaintiffs Dawn Rosa and Alice Perez claiming she did not breach any duty owed to the co-plaintiffs or defendants. Moreover, Arroyo asserts that the co-plaintiffs did not sustain a serious injury, as that term is defined by Insurance Law §5102(d).

The defendants, New York City Transit Authority, Metropolitan Transportation Authority,

MTA Bus Company and Michael Fragapane (“Defendants”) oppose plaintiff Arroyo’s motion and further move for an order granting them summary judgment dismissing the complaint of all of the plaintiffs because the plaintiffs failed to allege that they sustained a serious injury under Insurance Law §5102(d). The MTA also moves to dismiss the complaint against it on the grounds that it is a wrong party defendant.

Arroyo’s motion is denied in its entirety. The defendants’ motion for summary judgment for failure to sustain a serious injury is denied; and the motion to dismiss the MTA is granted.

On July 31, 2008, an automobile owned by Rosalie Rodriguez and operated by Gloria Arroyo (“Arroyo”) was struck in the rear by a New York City Transit Authority (“NYCTA”) bus driven by Michael Fragapane (“Fragapane”) near the intersection of Hylan Boulevard and Lincoln Avenue in Staten Island, New York. Plaintiff Alice Perez (“Perez”) was seated in the passenger’s side front seat and plaintiff Dawn Rosa (“Rosa”) was seated in the passenger’s side rear seat of the automobile. The impact caused Arroyo to collide with a third non-party automobile. In their complaint, plaintiffs each allege individual injuries caused by the defendants. Additionally, plaintiffs Perez and Rosa filed a cross-claim against Arroyo claiming her negligent conduct in operating the automobile contributed to the accident. The parties separately moved for summary judgment.

In support of the motion that Fragapane was the sole proximate cause for the occurrence of the accident, Arroyo submitted the deposition transcripts from the examination before trial (“EBT”) of Rosa, Perez, Fragapane and Arroyo, along with other documentary evidence.

Rosa testified at her EBT taken on July 9, 2010, that Arroyo’s automobile was stopped for approximately five seconds at the time of the accident. In response to counsel’s question, Rosa stated that she was unsure if another automobile cut off Arroyo, but it was her belief that another automobile veered into Arroyo’s lane before the accident.

Perez testified at her EBT on July 9, 2010, that the automobile was moving slowly at the time of the accident. During the examination, Perez responded that another automobile veered into the middle lane in front of Arroyo right before the accident occurred.

Arroyo also testified at an EBT on the same day that prior to the accident she was three to four car lengths from the traffic light at the intersection of Hylan Boulevard and Lincoln Avenue. She testified that she did not come to a sudden stop, and that her automobile was stopped for approximately three seconds prior to impact. Her testimony shows that she was unable to remember if the traffic light ever changed to red prior to her stop. In response to questions regarding being cut off, Arroyo stated she was not cut off, but could not be certain. She also testified that she did not see the bus until the collision.

Fragapane testified at an EBT taken on July 13, 2010, that he switched from the right lane into the middle lane of Hylan Boulevard behind Arroyo because there was a parked automobile in the right lane. He testified that he was approximately 25 to 30 feet behind Arroyo when he moved from the right lane into the middle lane. Fragapane further stated that Arroyo “jammed” on her brakes immediately after he moved into the middle lane. He was unable to stop in time and made contact with Arroyo. He testified that the reason Arroyo came to a stop was because two cars in front of Arroyo were also forced to brake because a bus pulled out of a bus stop ahead of them. He stated that the light was green at the time of the accident.

Plaintiffs’ submitted a Bill of Particulars in which they allege the following injuries:

Plaintiff, Gloria Arroyo: cervical sprain/strain; L4-5 and L5-S1 posterior disc bulges; lumbosacral sprain/strain; right shoulder sprain/strain; headaches; limitations and restrictions of motion, function and use of the injured parts of the body; loss of quality and enjoyment of life.

Plaintiff, Dawn Rosa: cervical sprain/strain; lumbosacral sprain/strain; limitations and restrictions of motion, function and use of the injured parts of the body; loss of quality and enjoyment of life.

Plaintiff, Alice Perez: cervical sprain/strain; lumbosacral sprain/strain; headaches; limitations and restrictions of motion, function and use of the injured parts of the body; loss of quality and enjoyment of life.

The court will take the motions in turn first addressing liability then the threshold requirement for a serious injury, as that term is defined by Insurance Law §5102(d). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.¹ To grant summary judgment, a movant must clearly demonstrate that no material triable issue of fact is present.² Summary judgment should only be granted where the moving party has presented sufficient evidence to demonstrate an absence of material issues of fact and then only if moving party meets this burden and the non-moving party fails to establish the existence of material fact which require a trial.³ The key to summary judgment is issue finding not issue determination.⁴

Plaintiff Arroyo Motion for Summary Judgment on Liability

Plaintiff Arroyo moves to dismiss on the ground that she was not the proximate cause of the accident and is not liable to the plaintiffs Rosa and Perez. A rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability against the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision.⁵ When a driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle and to exercise reasonable care to avoid colliding with the other

¹ *Ortiz v. Varsity Holdings, LLC.*, 18 N.Y.3d 335 [2011].

² *Rebecchi v. Whitmore*, 172 A.D.2d 600 [2nd Dept. 1991].

³ *Vega v. Restani Construction Corp.*, 18 N.Y.3d 499 [2012].

⁴ *Paulin v. Needham*, 28 A.D.3d 531 [2nd Dept. 2006]

⁵ *Argiro v. Norfolk Contract Carrier, Inc.*, 275 A.D.2d 384 [2d Dept 2000].

vehicle.⁶ As a general matter, the operator of a motor vehicle has a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident.⁷

A driver also has the duty to not stop suddenly or slow down without proper signaling in order to avoid a collision.⁸ However, a defendant's bare claim that plaintiff's vehicle abruptly slowed down or stopped, without more specific facts, is insufficient to raise a triable issue of fact as to whether the plaintiff driver was negligent.⁹ A court should deny a summary judgment motion when it is faced with conflicting evidence surrounding the circumstances of the accident, including whether the driver's automobile came to a sudden, unexplained stop contributed to the accident.¹⁰

Here, the parties present conflicting evidence as to the events that occurred on the date of the accident namely whether Arroyo came to a unexplained sudden stop, whether the automobile was stopped at impact and whether Arroyo or Fragapane saw what should have been seen. While Arroyo claims that she did not breach a duty owed to the plaintiffs and did not contribute to the accident, the testimony taken before trial of Perez and Fragapane present material issues of facts. Perez testified that the automobile was moving when the accident occurred while Fragapane testified that the automobile "jammed" on its brakes bringing it to a sudden stop and that this was caused by two breaking cars in front of Arroyo. Although Arroyo testified that she did not bring her automobile to a sudden stop, she could not explain the reason for such a stop. In her deposition, Arroyo claimed, as was supported by Rosa, that the automobile was at a complete stop for approximately three seconds prior to impact.

⁶ *Filippazzo v. Santiago*, 277 A.D.2d 419 [2nd Dept. 2000].

⁷ *Balducci v. Velasquez*, 92 A.D.3d 626 [2nd Dept. 2012].

⁸ *Hauswirth v. Transcare New York, Inc.*, 97 A.D.3d 792 [2nd Dept. 2012].

⁹ *Lundy v. Llatin*, 51 A.D.3d 877 [2nd Dept. 2008].

¹⁰ *Martinez v. Mendon Leasing Corp.*, 295 A.D.2d 408 [2nd Dept. 2002].

Since, the parties have demonstrated a triable issue of fact as to the liability of Arroyo and/or the defendants, this Court finds it necessary to deny plaintiff's motion for summary judgment dismissing the counterclaim of defendants and the causes of action of co-plaintiffs regarding the liability of Arroyo. This Court also denies defendants' motion for the same reasons.

Plaintiff Arroyo and Defendants Motion for Summary Judgment on Threshold

Arroyo and the defendants seek summary judgment against Rosa and Perez's causes of actions because they did not suffer a serious injury under Insurance Law §5102(d). Defendants also seek summary judgment to dismiss the complaint of Rosa, Perez and Arroyo because their injuries do not meet the threshold requirement under the law.

A party 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. Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations.¹¹ The burden, in other words, shifts to plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury.¹² The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient.¹³ When there is conflicting medical evidence on the issues of whether a plaintiff sustained a serious injury within the meaning of Insurance Law §5102 (d) and whether the injury was causally related to the accident, the matter should be submitted to the

¹¹ *Kordana v. Pomellito*, 121 A.D.2d 783 [3rd Dept. 1986], appeal dismissed, 68 NY2d 848.

¹² *Gaddy v. Eyler*, 79 N.Y.2d 955 [1992]; *Grossman v. Wright* 268 AD2d 79 [2nd Dept 2000].

¹³ *Id.*

jury.¹⁴

In support of her motion for summary judgment on the threshold issue, Arroyo submitted counsel's affirmation, medical reports and the EBT transcripts of Rosa and Perez. Defendants rely upon the medical reports provided by Arroyo in support of their motion against Rosa and Perez.

Dawn Rosa

On August 18, 2010, Joseph Y. Margulies, M.D., an orthopedic surgeon, conducted an independent medical evaluation of Rosa. Based on the examination, Dr. Margulies concluded that Rosa displayed no functional disability and that both her complaints of cervical sprain and a right shoulder contusion were resolved although he noted minimal scoliosis. He determined visually against external pre-measured marks based on AMA guidelines that Rosa displayed a normal range of motion in her cervical spine, shoulders and lumbar spine. There was a negative foraminal compression test and no trapezius muscle tenderness.

Julio Westerband, M.D., an orthopedic surgeon, examined Rosa on November 11, 2008 and found mild tenderness to palpation of the C4-C5 on the right paracervical muscles and right trapezius. Additionally, he stated a normal range of motion in her cervical spine. In his opinion, there is a probable causal relationship between the accident and Rosa's alleged injuries.

In opposition to the motion, Rosa submitted medical reports from David H. Delman, M.D., a Diplomat of the American Board of Internal Medicine and Hamilton Medical Services. Rosa was examined on May 18, 2012 by Dr. Delman. Using a handheld goniometer, he performed a range of motion examination of Rosa's cervical spine and found a 10% loss in flexion, 25% loss in extension, 19% loss in rotation to the right, 19% loss in rotation to the left, 11% loss in bending to the right and 22% loss in bending to the left. He also noted that there was

¹⁴ *Ocasio v. Zorbas*, 14 A.D.3d 499 [2nd Dept. 2005].

pain in range of motion with tenderness and spasm of the cervical paraspinal musculature and upper trapezius muscles on the right. His assessment of Rosa was cervical spine sprain/strain/myofascial pain syndrome with persistent pain and spasms as well as trapezius sprain/strain with persistent pain and spasms. Due to his findings, Dr. Delman believed that the significant restrictions four years after the accident constituted a permanent loss. Furthermore, he believed there exists a causal link between her injuries and the accident.

Arroyo and defendants have met their initial burden of proof on the motion. The medical report of Dr. Margulies found Rosa's complaints to be resolved with minimal scoliosis and full range of motion while Dr. Westerband reported mild muscle spasms and tenderness. These mild damages do not rise to the level required by law as to be viewed as a serious injury.

Rosa, however, raised a material issue of fact as to whether she met the statutory definition of a serious injury. The medical reports of Dr. Delman demonstrated significant restrictions in range of motion for her cervical spine which he concluded were permanent in nature. These conflicting medical evaluations of Rosa is an issue to be resolved by the jury. Therefore, the motion for summary judgment to dismiss the claim against Rosa is denied.

Alice Perez

Dr. Margulies also performed an independent medical examination of Perez. His examination revealed that her left shoulder contusion was resolved and that there was no functional disability at the time of the examination. There were negative foraminal compression and Soto Hall tests of the cervical spine as well as no paravertebral spasm or tenderness. Despite pain related to the left trapezius, there were no objective findings. Tests revealed normal range of motion in shoulders. An examination of the lumbosacral spine revealed degenerative changes with decreases in all planes including flexion 80/90, extension 25/30, right and left lateral bending 25/30, and right and left rotation 25/30. All other tests of the lumbosacral spine including straight leg and Patrick's were negative.

Dr. Westerband performed an independent medical examination of Perez on November 3,

2008. He reported mild muscle spasm on the left paracervical muscles as well as mild tenderness to palpation over the C4-C5 paracervical muscles. There were no spasms or palpation in the thoracic or lumbar spine and range of motion was normal. He determined that there is evidence of a mild causally related orthopedic disability and that Perez should continue physical therapy.

In opposition to the motion, Perez submitted medical reports from Dr. Delman and Hamilton Medical Services. She was examined by Dr. Delman on May 18, 2012. Her complaints included reoccurring pain in her neck and left shoulder as well as weakness in the shoulder. A test of Perez's range of motion in her cervical spine revealed a 20% reduction in flexion, 25% reduction in extension, reduction of 38% in rotation to the right and 25% loss in rotation to the left as compared to normal ranges of motion published by among others the NYS Division of Disability Determination. A test of the left shoulder demonstrated a 36% loss in abduction and a 25% loss in rotation to the left. Based upon his examination, Dr. Delman determined these restrictions constituted a permanent loss. He also stated that there is a direct causal relationship between the injuries and the accident and suggested that a course of physical therapy would provide some benefit.

Arroyo and defendants have satisfied their burden in demonstrating that Perez did not sustain serious injuries. Dr. Margulies found her left shoulder contusion to be resolved and a minimal degenerative decrease in her range of motion. Dr. Westerband reported mild spasms and tenderness. Since the injuries sustained by Perez were as reported by Dr. Margulies and Dr. Westerband to be either resolved or mild, they do meet the standard of serious injury as defined in Insurance Law §5102(d).

Perez demonstrated a material issue of fact through the medical reports of Dr. Delman, which revealed a significant decrease in range of motion in her cervical spine and left shoulder. As there is a question of material fact regarding the extent of limitation in her range of motion, the motion for summary is denied. Since the evaluations of Rosa and Perez prepared by Hamilton Medical Services are neither certified nor affirmed by a medical doctor, this court will not

consider them.¹⁵

Defendants Motion for Summary Judgment on Threshold for Plaintiff Arroyo

In support of defendants' motion against Arroyo for her failure to prove that she sustained a serious injury, defendants submitted the medical reports of Joseph C. Elfenbein, M.D. and Maria Audrie DeJesus, M.D.

Dr. Elfenbein, an orthopedic surgeon, examined Arroyo on December 9, 2010 who complained of pain in her neck, lower back and right shoulder. He found normal range of motion, no spasms or palpation with all tests being negative with respect to Arroyo's cervical, thoracic and lumbar spine. While all tests of the right shoulder were negative, Dr. Elfenbein found minimal decrease of range of motion in extension. There was also a decreased range of motion in the left shoulder. His diagnosis was that cervical spine sprain/strain, thoracic spine sprain/strain, lumbar spine sprain/strain and right shoulder sprain/strain were resolved. His report stated that her injuries were not permanent.

Arroyo was also examined by Dr. DeJesus, a neurologist, on March 3, 2011. Dr. DeJesus reported no atrophy or deformity in Arroyo's upper and lower extremities and although, she found some tightness in the neck and lumbar spine, she did not find any pain or decrease in range of motion. Bilateral straight leg raise, Phalen's, Tinel's, Patrick's and Kernig's tests were negative. She concluded that no further treatment was required.

In opposition, Arroyo submitted a medical report of Dr. Delman who examined Arroyo on May 30, 2012. A test of her range of motion in her lumbar spine showed a loss of 44% in flexion, loss of 33% in extension, a loss of 25% in bending to the right and a loss of 50% in bending to the left. He also reported pain in range of motion as well as tenderness and spasm in the lumbar paraspinal musculature. A straight leg raise test was positive on the left more so than on the right. Based on his findings, Dr. Delman stated that these restrictions were permanent and that the

¹⁵ *Vasquez v. John Doe #1*, 73 A.D.3d 1033 [2nd Dept. 2010].

outlook for a full recovery was extremely poor. He recommended life-long physical therapy because the injuries are permanent.

Defendants made a prima facie case that Arroyo did not sustain a serious injury. They established that the injuries of Arroyo were not as a matter of law, a serious injury by presenting medical reports of both Dr. Elfenbein and Dr. DeJesus, who found that she exhibited a normal range of motion in her cervical, thoracic and lumbar spine with Dr. Elfenbein finding minimal decrease in her shoulders.

However, Arroyo raised an issue of material fact as to whether her injuries are serious as defined by law and were causally linked to the accident. The medical report of Dr. Delman showed not only a significant decrease in range of motion in her lumbar spine, but also associated pain. This is an issue for the jury to decide because the degree of her restrictions in her range of motion cited in the reports greatly differ. Therefore, the motion to dismiss is denied.

Defendants Motion to Dismiss the MTA

Defendants separately seeks to have the action dismissed against the Metropolitan Transportation Authority as a wrong party defendant. The MTA's functions do not involve the daily operations, maintenance and control of the facilities of the NYCTA, and accordingly, it may not be held liable for the conduct of employees of the NYCTA.¹⁶ Therefore, the motion seeking to dismiss the MTA is granted.

Accordingly, it is hereby:

ORDERED, that the New York City Transit Authority's motion to amend the decision and order dated October 23, 2012 is granted; and it is further

¹⁶ *Soto v. New York City Transit Authority*, 19 A.D.3d 579 [2nd Dept. 2005].

ORDERED, that plaintiff's motion for summary judgment on liability is denied; and it is further,

ORDERED, that defendants' motion for summary judgment on threshold is denied; and it is further,

ORDERED, that the Clerk shall enter judgment accordingly, and it is further,

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3rd Floor, on **January 16, 2013 at 9:30 a.m.** for a Pre-Trial Conference.

ENTER,

DATED: December 17, 2012

Joseph J. Maltese
Justice of the Supreme Court