

**Alvarado v Ortiz**

2014 NY Slip Op 31451(U)

June 4, 2014

Supreme Court, New York County

Docket Number: 113139/2010

Judge: Frank P. Nervo

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: FRANK P. NERVO  
Justice

PART 62

Index Number : 113139/2010  
ALVARADO, JESSICA  
vs.  
ORTIZ, LUIS GILBERTO  
SEQUENCE NUMBER : 003  
SUMMARY JUDGMENT

INDEX NO. 113139/10  
MOTION DATE 4-10-14  
MOTION SEQ. NO. 003

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

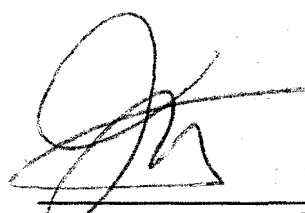
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *Consolidated for disposition with motion No. 004 and is decided pursuant to the accompanying decision and order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
JUN 05 2014  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/4/14

  
\_\_\_\_\_  
HON. FRANK P. NERVO, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : CIVIL TERM PART 62

-----X

JESSICA ALVARADO,

Plaintiff,

Index No.

**113139/2010**

DECISION & ORDER

-against-

LUIS GILBERTO ORTIZ, BEERCOT SHADAI MITCHELL,  
NEW YORK CITY POLICE DEPARTMENT and CITY OF  
NEW YORK,

Defendants.

**FILED**

JUN 05 2014

NEW YORK  
COUNTY CLERK'S OFFICE

FRANK P. NERVO, J:

Motion sequences 003 and 004 are consolidated for disposition in the following decision and order:

<u>The papers considered on this motion, with exhibits annexed:</u>	<u>Nos.</u>
Defendant Ortiz' Motion For Summary Judgment on Liability (7/10/2013)	1
Defendant Ortiz' Motion For Summary Judgment on threshold pursuant to Insurance Law 5102 (7/11/2013)	2
Plaintiff's Cross Motion for Summary Judgment on Liability and opposition to Ortiz' Motion For Summary Judgment (7/19/2013)	3
Defendant Ortiz' Opposition to Plaintiff's Cross Motion for Summary Judgment (8/09/2013)	4

Defendant City of New York Cross Motion for Summary Judgment on Threshold and Liability (10/11/2013)	5
Plaintiff's Opposition to Summary Judgment on Threshold and Cross Motion on Liability (12/06/2013)	6
Plaintiff's Supplemental Affirmation in Opposition providing "Newly Available Information and Documents." (12/13/2013)	7
Defendant Ortiz' Reply Affirmation (12/18/2013)	8
Defendant Ortiz' Reply Affirmation to Plaintiff's Supplemental Affirmation in Opposition (12/19/2013)	9
Plaintiff's "Sur-Reply" to Defendant Ortiz' Motion for Summary Judgment on Threshold (12/31/2013)	10
Defendant City Reply to Plaintiff's Opposition to City Cross Motion (01/15/2014)	11

Plaintiff's cause of action seeks damages as a result of personal injuries sustained in an automobile collision on November 18, 2009. Plaintiff was a passenger in the automobile owned by defendant City of New York and operated by defendant Mitchell (hereinafter the Mitchell vehicle), which was struck from behind by the vehicle operated and owned by defendant Ortiz. At the time of the collision, both plaintiff and defendant Mitchell were on duty New York City police officers engaged in retrieving a bullet proof vest from a police department shooting range.

Defendants move and cross-move for summary judgment on issues of liability and injury threshold pursuant to Insurance Law 5102. Defendants Mitchell and City of New York further argue that plaintiff is nonsuited pursuant to the General Municipal Law. Plaintiff cross-moves for judgment on liability. For the reasons hereinafter set forth all motions are denied with the exception of plaintiff's cross motion for judgment on liability.

**Defendants' motions for summary judgment on liability.**

Defendant Ortiz asserts that plaintiff, passenger of the Mitchell vehicle, testified at deposition that Mitchell failed to use her directional signal therefore all liability for the collision is properly allocated to Mitchell. In the alternative he argues that Mitchell's failure to signal a lane change created an emergency situation absolving him of any responsibility for the collision. Neither of these theories provide a basis for summary judgment in defendant Ortiz' favor.

The first theory merely raises questions of fact for determination at trial, addressing the manner in which the vehicles were operated; the second fails to set forth any cogent basis for injecting the emergency doctrine into this matter. Indeed, all cases relied upon by Ortiz establish emergency

situations arising as a result of vehicles being driven in the wrong direction on a highway.

Defendant Mitchell's motion for summary judgment is likewise denied as there remain questions of fact to be resolved with respect to her operation of her vehicle, including but not limited to questions of proper signaling and the manner and circumstances under which she changed lanes.

Plaintiff's cross-motion for summary judgment on liability.

Plaintiff's cross-motion for summary judgment on liability is granted as she was a passenger in defendant Mitchell's vehicle at the time of the collision. Neither defendant has raised any issue of comparative negligence on plaintiff's part. Judgment is awarded to plaintiff on negligence at this time, with apportionment of liability of defendants reserved to the time of trial.

Defendants' motions on "serious injury" grounds.

The motion and cross-motion to dismiss the complaint on the grounds that plaintiff did not suffer a "serious injury" as

defined by Insurance Law Section 5102(d) are both denied. The moving papers with respect to this branch of the motion are legally and factually insufficient to support this branch of the motion as they fail to eliminate all triable issues of fact with respect to the nature, extent and permanency of plaintiff's injuries. In any event, the court finds plaintiff submitted proof which raises triable issues of fact sufficient to preclude summary judgment on the seriousness of her injuries.

In response to these motions plaintiff submits affirmations of her treating physicians that establish in legally and factually sufficient detail, that plaintiff did in fact sustain a permanent loss of use of a body organ, member, function or system and/or a permanent consequential limitation of use of a body organ or member, her cervical spine.

Dr. Yong H. Kim, M.D., attests to significant and permanent restrictions in the range of motion of the plaintiff's cervical spine in all planes with reductions between 55% and 73% of normal. EMG/NCV test and MRI confirm these findings. Dr. Kim notes that his clinical examination of August 27, 2013, "revealed significant defect in cervical range of motion consisted and relatively unchanged from prior examination." Dr.

Kim determined these injuries are permanent and provides a prognosis of "further degeneration and exacerbation in her condition with pain and restriction of function," and that the plaintiff has reached "maximal medical improvement."

Plaintiff's treating physician and rehabilitation specialist Viktoriya Brener, M.D. in her affirmation of November 21, 2013 sets forth findings consistent with those of Dr. Kim, albeit further opining that any gaps in treatment are "not inconsistent with treatment of patients suffering from similar conditions," and that further treatment "would not be expected to cure [the plaintiff's] injury nor. . .eliminate the cause of [the plaintiff's] pain." Both doctors Kim and Brener causally relate plaintiff's injuries to this collision.

In a reply dated December 18, 2013, defendant Ortiz raises for the first time a purported issue of a gap in plaintiff's treatment and, further, that plaintiff's medical records demonstrate a subsequent injury. As this is new material submitted for the first time in a reply affirmation, the court may not consider it. (*Ritt v. Lenox Hill Hospital*, 182 A.D.2d 560.) In any event, the gap in treatment issue is conclusively resolved by the plaintiff's physician Viktoriya Brener, who sets

forth in her affirmation of November 21, 2013 that, "[T]here was a gap in treatment prior to Ms. Alvarado's most recent visit. This is not inconsistent with treatment of patients suffering from similar conditions...Further treatment may have provided some temporary relief of her pain but would not be expected to cure her injury nor could it eliminate the cause of her pain. In such cases, many patients choose to live with their restrictions and limitations rather than pursuing further and more aggressive procedures and the risks of increased disability associated with such other procedures. For these types of injuries, it is not unusual for patients to cease palliative methods." Further, any reference to a purported subsequent injury may well relate to the extent of plaintiff's damages but fail to extinguish all triable issues of fact on the issue of injuries plaintiff sustained as a result of the subject automobile collision.

Re: GML 205-a and 205-e

Defendant City neither moves nor cross-moves with respect to the application of General Municipal Law 205. Therefore, the argument is not before the court. Nevertheless, the court now determines that the statute is not a bar as a defense.

The "firefighter's rule," as this statute is colloquially referred to, precludes firefighters and police officers from recovering damages for injuries caused by negligence in the very situations that create the occasion for their services, in the absence of a statutory violation. The rule is applied to bar common-law negligence claims where the injury sustained is related to the particular dangers which police officers are expected to assume as part of their duties. The determinative factor in applying the firefighter rule's bar is whether the injury sustained is related to the particular dangers which police officers are expected to assume as part of their duties increasing the risk of the injury happening, and did not merely furnish the occasion for the injury. No view of the facts and circumstances surrounding the plaintiff's injuries sustained in the automobile collision of November 18, 2009 establish a basis for this bar. That is, riding as a passenger in a police vehicle for the sole purpose of retrieving a bullet-proof vest does not give rise to a particular danger a police officer is expected to assume as part of their duties, nor was plaintiff engaged in any specific police function that increased the risk of receiving the injuries complained of. Consequently, plaintiff's common-law negligence claims in this matter may properly proceed, and any motions seeking dismissal pursuant to the General Municipal Law are denied. (*Santangelo v. State of*

New York, 71 NY2d 393, Zanghi v Niagara Frontier Transp. Commn.,  
85 NY2d 423.)

The court further notes, were GML 205-a and 205-e applicable,  
plaintiff sets forth sufficient statutory violations by the  
operators of the respective vehicles to permit the continuation  
of the prosecution of this action.

ORDERED that the defendants' motions for summary judgment are  
denied; and it is further

ORDERED that the plaintiff's motion for summary judgment is  
granted; and it is further

ORDERED that damages and apportionment of liability among the  
defendants shall be reserved for, and determined at, trial.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

**FILED**

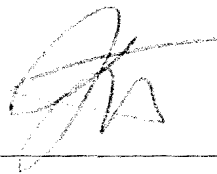
JUN 05 2014

New York, New York

ENTER:

**NEW YORK  
COUNTY CLERKS OFFICE**

June 4, 2014



Frank P. Nervo, J.S.C.