

**Silvestre v Amato**

2015 NY Slip Op 31671(U)

March 12, 2015

Supreme Court, Westchester County

Docket Number: 70352/2012

Judge: Francesca E. Connolly

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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
LINDA M. SILVESTRE and ANTHONY SILVESTRE,

Plaintiffs,

-against-

DECISION and ORDER  
Sequence Nos. 1 & 2  
Index No. 70352/2012

JOANNA M. AMATO,

Defendant.

-----X  
CONNOLLY, J.

The following papers were considered in connection with the defendant's motion for summary judgment dismissing the complaint and the plaintiff's cross motion for summary judgment on the issue of liability:

Defendant's notice of motion, affirmation, exhibits A-G	1-9
Plaintiff's notice of motion, affirmation, exhibits A-E	10-16
Plaintiff's affirmation in opposition, exhibits A-L	17-29
Defendant's reply affirmation, exhibit	30-31

The plaintiffs commenced this action to recover damages for personal injuries allegedly sustained by the plaintiff Linda M Silvestre (hereinafter Silvestre) in connection with a rear-end motor vehicle collision that occurred on January 10, 2012 near the intersection of Central Avenue and Old Army Road in Greenburgh, New York.

The defendants now move for summary judgment on the ground that Silvestre has not sustained a "serious injury" as defined within Insurance Law § 5102 (d). The plaintiffs oppose the motion. The plaintiffs separately move for summary judgment on the issue of liability, which the defendant does not oppose.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The plaintiff's motion for summary judgment on the issue of liability

The plaintiffs move for summary judgment on the issue of liability and rely upon, among other things, Silvestre's examination before trial.

In her examination before trial, Silvestre testified that on January 10, 2012 she was driving her vehicle on Central Park Avenue near its intersection with Old Army Road in Greenburgh, New York. She was in the left lane when she noticed that traffic in the right lane was slowing down. She proceeded to slow down to approximately five to ten miles per hour and looked in her rear view mirror, noticing the defendant's vehicle and estimating that it was five to six car lengths behind her. The defendant's vehicle then came into contact with her vehicle's rear, propelling her vehicle forward.

Based upon the foregoing, the plaintiffs contend that they have demonstrated prima facie entitlement to summary judgment on the issue of liability by showing that Silvestre's vehicle was struck in the rear by the defendant.

#### The defendant's motion for summary judgment

The defendant moves for summary judgment dismissing the complaint on the ground that Silvestre did not sustain a serious a serious injury within the meaning of Insurance Law § 5102 (d), and relies upon, among other things, Silvestre's bill of particulars, Silvestre's examination before trial, and the affirmed medical reports of Dr. Stanley Sprecher, Dr. Richard N. Weinstein, and Dr. Naunihal Singh.

Silvestre's bill of particulars alleges that she sustained, among other injuries, the following permanent personal injuries in connection with the January 2012 accident: 1) acute traumatic sprain of the cervical spine with paraspinal muscle spasms, stiffness and pain, with decreased range of motion in flexion and rotation and tenseness of the right trapezius; 2) right paracentral disc herniation with mass effect on the cervical cord at the C4-5 level; 3) central disc herniation at C5-6; 4) right paracentral disc herniation with mass effect on the cervical cord at the C4-5 level; 5) bilateral foraminal stenosis at C4-5; 6) cervical radiculitis with radiation intrascapularly and down the right arm and into the dorsum of the forearm with numbness into the right hand; 7) lumbosacral sprain with decreased range of motion on flexion and rotation of the lumbar spine; 8) posterior annular tear at L5-S1; 9) lumbar radiculitis; 10) bilateral sciatica; 11) weakness of the left lower extremity; 12) post-concussion syndrome; 13) cerebral concussion manifested by dizziness, blurred vision and headaches; 14) post-traumatic vertigo; and 15) chest wall sprain.

In her examination before trial, Silvestre testified that she told the police at the accident scene that her left side felt tingly, and that she wanted to go home. She declined an ambulance, drove home, and laid down for the remainder of the day.

Silvestre first felt pain while lying down at home after the accident, experiencing dizziness and pain radiating down her left side, lower back, leg and neck. On January 11, 2012, Silvestre saw Dr. William Unis, an orthopedist, who examined her and referred her to Dr. Dousmanis, a neurologist. Dr. Dousmanis ordered Silvestre a brain MRI, based upon which she was diagnosed with post-concussion syndrome. Dr. Dousmanis prescribed her nortriptyline, an anti-dizziness medication. He later prescribed venlafaxine and a soft-collar neck brace.

Dr. Unis ordered MRIs for Silvestre's neck and back, which revealed disc herniations in her cervical and lumbar spines. Dr. Unis prescribed pain medication and physical therapy, which Silvestre attended three days per week from the end of January until June of 2012, and again from August 2013 through October 2013. She also received chiropractic treatments approximately two times per week for two months in the spring of 2013. She has also treated with Dr. Unis approximately 12 times since the accident, and has seen Dr. Dousmanis approximately 10-12 times. Silvestre stopped attending physical therapy in June of 2012.

On the morning of July 14, 2013 Silvestre suffered a fall while she was standing in her driveway. She lost consciousness and remained on the ground for about 30 minutes until she was able to crawl inside. Her husband brought her for an MRI, which indicated that she had a 40 percent fracture of her L2 vertebra. She was prescribed a back brace, which she wore until October of 2013. She also saw Dr. Unis, who prescribed pain medication. She missed approximately six months of work between July and December of 2013. She used a cane for three months after the fall.

Silvestre fell again in August 2013 while attempting to exit the passenger side of her husband's vehicle when her back stiffened up.

Every day since the January 2012 accident Silvestre has experienced neck and lower back pain, she has difficulty walking because of pain in her left leg, and has felt like her head is in a vice. She also feels dizzy a couple of times a week, and wears compression shirts to ease the pain in her back. While she was involved in a motor vehicle accident in 1987, from which she suffered a herniated disc, she neither experienced any lower back or neck injuries, dizziness, nor had she sustained a concussion prior to the accident. In addition, she has less energy than she did prior to the accident, does not walk as much, needs help with household chores, does not go out as much, no longer gardens, has not been on a vacation since before the accident, does not cook as often, is more forgetful, and can no longer have a glass of wine with dinner. When driving, she has to rely more heavily on her side and rearview mirrors because she has trouble turning her neck.

In his affirmed medical report, Dr. Sprecher states that he reviewed MRI scans of Silvestre's cervical spine taken on February 7, 2012, and of her lumbar spine taken on February 24, 2012. Dr. Sprecher opines that both MRIs are consistent with a long-standing, chronic degenerative process unrelated to the January 2012 accident. He further opines that there is no definitive MRI evidence of any post-traumatic abnormalities in connection with the January 2012 accident.

In a second affirmed medical report, Dr. Sprecher compares radiographs and MRIs taken of Silvestre's cervical and lumbar spines after her July 2013 fall with the MRI scan of her lumbar spine taken on February 24, 2012. Dr. Sprecher opines that Silvestre experienced an endplate compression fracture at her L2 vertebra as a result of the July 2013 fall. He further opines that all other lumbar disc spaces show no significant change from February 2012, and that the scans are most consistent with a chronic degenerative process that predates and is unrelated to the January 2012 accident.

In his affirmed medical report, Dr. Richard N. Weinstein states that he performed an

examination of Silvestre at the defendant's request on May 28, 2014. In his report, Dr. Weinstein opines that Silvestre has normal range of motion in her cervical spine, with positive paraspinal and trapezius tenderness on the left and right. He further opines that a thoracolumbar exam of Silvestre demonstrates a range of motion of 60 degrees of flexion (normal 90), 20 degrees of extension (normal 30), 20 degrees of right and left rotation (normal 30), and 20 degrees of right and left lateral rotation (normal 30). Based upon these examinations and a review of Silvestre's medical records, Dr. Weinstein opines that his examinations of Silvestre's cervical and lumbar spine demonstrate minimal findings, that she can continue to work with no restrictions, that her prognosis is good, and that there is no further need for orthopedic treatment or physical therapy.

In his affirmed medical report, Dr. Naunihal Singh states that he performed a neurological examination of Silvestre on June 4, 2014, at which time he found no tenderness upon palpation of Silvestre's cervical spine, paravertebral muscles, or trapezius muscles. Dr. Singh also determined that the plaintiff had normal range of movement in her neck, with the exception of her right and left lateral rotation, which was 70 degrees (80 degrees normal). Dr. Singh also examined Silvestre's thoracic and lumbar spines as well as her shoulder joints, and found no tenderness upon palpation and normal range of motion. Based upon his examinations, Dr. Singh further opines that the plaintiff's cervical and lumbar spine sprain/strain and post-traumatic tension headaches are causally related to the January 2012 accident, but that there is no need for further treatment.

Based upon the foregoing, the defendant contends that the plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102 (d).

#### The plaintiffs' opposition

The plaintiff opposes the motion and relies upon, among other things, Silvestre's supplemental bill of particulars, an affirmation sworn to by Dr. William Unis, and Silvestre's affidavit.

In her supplemental bill of particulars, Silvestre alleges that she sustained a compression fracture of her L2 vertebra in connection with her July 2013 fall.

In his affirmation, Dr. Unis opines that Silvestre sustained herniated cervical and lumbar discs, cervical and lumbosacral radiculitis, an annular tear at the L5-S1 level and a concussion, and that these injuries are causally related to the January 2012 accident. Further, insofar as Silvestre continued to experience dizziness and difficulty walking as a result of the concussion she sustained in connection with the January 2012 accident, Dr. Unis opines that Silvestre's July 2013 fall and the compression fracture she sustained at her L2 vertebrae are causally related to the January 2012 accident. Dr. Unis further opines that when he began treating the defendant for injuries sustained in connection with the January 2012 accident, she had no complaints or symptoms in connection with the 1987 accident. Based upon the foregoing, Dr. Unis opines that Silvestre's injuries are of a permanent, consequential nature and constitute a permanent and consequential limitation of use and a significant impairment of the use of bodily functions referable to her neck and back.

In her affidavit, Silvestre avers that she saw Dr. Unis on January 13, 2012, and complained of feeling light-headed while moving her neck and sensitivity to trigger points at both of her trapezii. On January 16, 2012 Silvestre treated with Dr. Dousmanis, at which time she complained of persistent pressure in her left head and pain all over her body, especially in the neck and lower back, which were accompanied by periods of dizziness, disorientation, vertigo, fogginess, and fatigue. She stopped receiving physical therapy in August 2012 because she did not feel that it was improving her condition.

Based upon the foregoing, the plaintiffs contend that the defendant has not demonstrated its prima facie entitlement to summary judgment. They argue that the reports of Dr. Sprecher and Dr. Singh are contradictory, as Dr. Singh opines that Silvestre's cervical and lumbar sprains/strains are causally related to the January 2012 accident, while Dr. Sprecher opines that Silvestre's disc herniation is due to long-standing chronic degenerative processes at C4-5 and C5-6. The plaintiffs further argue that the defendant fails to rebut the claim that Silvestre suffered a fracture as a result of her July 2013 fall, and thus failed to establish prima facie entitlement to summary judgment. The plaintiffs also argue that any gaps in Silvestre's treatment are not fatal to their serious injury claim.

The plaintiffs also contend that they have submitted proof that Silvestre sustained a fracture which, when viewed in the light most favorable to them, raises triable issues of fact concerning whether Silvestre sustained a serious injury. The plaintiffs also argue that Dr. Unis' affirmation and the plaintiff's deposition and affidavit demonstrate that the plaintiff sustained serious injuries in connection with the January 2012 accident in connection with her cervical and lumbar spines.

#### The defendant's reply

In reply, the defendant contends, among other things, that the Court should not consider the plaintiffs' opposition papers, arguing that the plaintiffs submitted their opposition late, and further that the plaintiffs failed to demonstrate a causal relationship between Silvestre's January 2012 accident and her July 2013 fall.

### DISCUSSION/ANALYSIS

#### The defendant's motion for summary judgment dismissing the complaint is denied.

The defendant failed to demonstrate prima facie entitlement to summary judgment, as the affirmed medical reports of Dr. Sprecher and Dr. Singh present contradictory proof as to whether Silvestre's cervical and lumbar spine conditions were caused by the January 2012 accident or a degenerative process (*see Julemis v Gates*, 281 AD2d 396, 396 [2d Dept 2001] ["The Supreme Court properly denied the defendant's cross motion. The defendant submitted contradictory proof as to whether the plaintiff's cervical spine condition was caused by the accident involving the defendant's vehicle, a degenerative disease, or a previous accident"]). In addition, the defendant's examining physician, Dr. Weinstein, presented contradictory evidence in his affirmed medical report, in which he opines that he made "minimal findings" based on his examination of Silvestre, but also presents

objectively-measured limitations in Silvestre's thoracolumbar range of motion (*see Grant v Parsons Coach, Ltd.*, 12 AD3d 484, 485 [2d Dept 2004] ["The conclusion of the defendants' examining physician that the plaintiff had no disability or impairment was directly contradicted by his report of the plaintiff's examination, which recorded objectively-measured limitations of range of motion of the plaintiff's cervical and lumbar spine and left shoulder"]).

Moreover, even if the defendant demonstrated its prima facie entitlement to summary judgment, the plaintiff raised a triable issue of fact with respect to whether the injuries Silvestre sustained in connection with the July 2013 fall were causally related to the January 2012 accident (*see Daliendo v Johnson*, 147 AD2d 312 [2d Dept 1989]). "When a person is injured by the negligence of another and, despite the exercise of ordinary and reasonable diligence in the treatment of the injuries, the individual is involved in another accident because of the injuries sustained in the first accident, the tort-feasor in the first accident is also responsible for the subsequent injuries" (*id.* at 318; *see New York Practice Guide: Negligence* § 22.05 ["a tortfeasor can be held liable for subsequent aggravation of the injuries inflicted on the party by the original tort. In such cases, the defendant's wrongful conduct causes the original injury but a subsequent injury occurs without another negligent act on the defendant's part"]).

In the instant matter, both Silvestre and the defendant presented proof in admissible form that Silvestre sustained a compression fracture of her L2 vertebra as a result of the July 2013 fall. Silvestre presented the affirmed medical report of Dr. Unis, an orthopedist who treated her after the fall, and the defendant presented Dr. Sprecher's second affirmed medical report, in which he opines that Silvestre sustained a fracture as a result of the July 2013 fall. Further, Dr. Unis opines that Silvestre's July 2013 fall was causally related to the January 2012 accident, and Silvestre averred that since the January 2012 accident she had been experiencing dizziness a couple of times a week. Based upon the foregoing proof, and assuming that the defendant had demonstrated prima facie entitlement to summary judgment, the plaintiff raised a triable issue of fact (*see Daliendo v Johnson*, 147 AD2d at 318 *see also Alexander v Gordon*, 95 AD3d 1245, 1246 [2d Dept 2012]; *Brouman v Gorokhovsky*, 89 AD3d 660, 660 [2d Dept 2011]).

The plaintiff's motion for summary judgment on the issue of liability is granted.

Silvestre demonstrated her prima facie entitlement to summary judgment by showing that her vehicle was coming to a stop when the defendant's vehicle came into contact with the rear of her vehicle (*see Abbott v Picture Cars East, Inc.*, 78 AD3d 869, 869 [2d Dept 2010] ["As a general rule, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rearmost vehicle, imposing a duty of explanation on that operator to excuse the collision either through a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or any other reasonable excuse"]; *Shamah v Richmond County Ambulance Serv.*, 279 AD2d 564, 565 [2d Dept 2001] ["[V]ehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead"]).

By not opposing the motion, the defendant failed to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Based upon the foregoing, it is hereby

ORDERED that the defendant's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the plaintiffs' motion for summary judgment on the issue of liability is granted; and it is further

ORDERED that the parties appear in the Settlement Conference Part on April 7, 2015 at 9:15 a.m., in room 1600 of the Westchester County Courthouse located at 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York, 10601; and it is further

ORDERED that all other relief requested and not decided herein is denied.

This constitutes the decision and order of the court.

Dated: White Plains, New York  
March 12, 2015

  
HON. FRANCESCA E. CONNOLLY, J.S.C.

TO: Levine & Slavit, PLLC  
Attorneys for the plaintiffs  
60 East 42<sup>nd</sup> Street, Suite 2101  
New York, NY 10165  
By NYSCEF

Russo & Toner, LLP  
Attorneys for the defendant  
333 Whitehall Street, 16<sup>th</sup> Floor  
New York, NY 10004  
By NYSCEF