

Ramos v Simmons

2016 NY Slip Op 30244(U)

January 4, 2016

Supreme Court, Bronx County

Docket Number: 303232/12

Judge: Howard H. Sherman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.



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

-----x

Alexandra Ramos and Onaney Polanco ,

Index No. 303232/12

Plaintiffs,

-against-

DECISION/ORDER

**Trumain Abindigo Simmons, Audra Wilson, and
Edwin R. Ramos ,**

Defendants

Howard H. Sherman

-----x

J.S.C.

Facts and Procedural Background

Plaintiffs seek damages for injuries allegedly sustained on April 24, 2011 in a four-vehicle collision that occurred on the northbound Bruckner Expressway at or near Wilkinson Avenue, Bronx, New York.

The Note of Issue was filed on July 11, 2014 .

Motions

- 1) Defendants Truman Abindigo Simmons ("Simmons") and Audra Wilson ("Wilson") move for summary judgment dismissing the complaint on the grounds that plaintiffs do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102(d).
- 2) Defendant Ramos moves for summary judgment on the issue of liability dismissing the complaint and any and all cross-claims on the grounds that the co-defendant Simmons' culpable conduct in striking the rear of the Ramos' vehicle was the sole proximate cause of plaintiffs' injuries.

Plaintiffs cross-move for an award of summary judgment against defendants Simmons and Wilson on the issue of liability.

Those issues raised in the motion of defendants Simmons/Wilson to vacate the Note of Issue and Certificate of Readiness were resolved by the decision and order of this court (Douglas, J.) , dated November 7, 2014, and will not be addressed here.

The motions and cross-motion are consolidated for purposes of disposition .

Threshold

Plaintiff **Alexandra Ramos** (“ Ramos ”) alleges that as a result of the motor vehicle accident she sustained *inter alia*, a tear of the distal supraspinatus tendon , and type 1 SLAP lesion of the glenohumeral of the **right shoulder** requiring arthroscopic decompression and glenohumeral debridement , and diffuse posterior bulging discs at **C3-4 and C5-6** , and diffuse posterior bulging discs at **L4-5, and L5-S1** , the latter extending into the epidural fat abutting the thecal sac and bilateral nerve roots, with restrictions of the range of motion of each of the affected areas [Verified Bill of Particulars ¶ 9].

It is further alleged that plaintiff was confined to bed for approximately one week following the accident and one week following the shoulder surgery in January 2012 . [Id. 10].

Plaintiff **Onaney Polanco** (“ Polanco ”) alleges that she sustained *inter alia*, an accident-related bony impingement and type 1 SLAP lesion of the glenohumeral joint of

the **left shoulder** requiring surgical intervention, and a bony impingement of the **right shoulder** ; central posterior bulging disc at **C3-4**, and diffuse posterior bulging disc at **L4-5** and **L5-S1** , with restrictions of the range of motion of these affected areas [Verified Bill of Particulars ¶ 9].

It is further alleged that Polanco was confined to bed for approximately one week following the accident and for one week after the January 2012 surgery [Id. ¶ 10].

The injuries sustained by both plaintiffs are alleged to be permanent and to qualify as serious injuries as defined as: 1) a permanent consequential limitation of use of a body organ or member; and/or 2) a significant limitation of use of a body function or system[Id. 21]. In support of their motion, defendants come forward with the affirmed reports of recent independent medical evaluations conducted by Jean-Robert Desrouleaux, a board-certified neurologist, and Lisa Nason, M.D., a board-certified orthopedist, and with respect to plaintiff Ramos, the affirmed report of Bert R. Heyliger, M.D., a board-certified radiologist. The motion is also supported by copies of the transcripts of plaintiffs' examinations before trial.

Independent Medical Evaluations

Ramos

Plaintiff presented for the 09/23/13 **neurological** examination with complaints of neck, right shoulder, and lower back pain .

For purposes of his evaluation, Dr. Desrouleaux reviewed reports of MRI studies of the right shoulder and lumbar spine conducted in May 2011.

Upon examination of mental status, the cranial nerve, and deep tendon reflexes and motor bulk, tone, and strength, and negative findings upon Phalen's and Tinel's, and Kernig's and Patrick's tests, and Straight Leg Raising, bilaterally, and observation of the absence of tenderness or of spasm of the cervical, thoracic, and lumbar spine, Dr. Desrouleaux concluded that plaintiff exhibited no neurological disability or permanent impairment due to the accident.

Upon **orthopedic** examination conducted a week later, and a review of the MRI reports of the right shoulder and lumbar spine, Dr. Nason concluded that there was no objective evidence of disability or residual effects. The findings upon objective testing included full range of motion¹ of the cervical and lumbosacral spine, and of the right shoulder as quantified and compared to normal readings, and normal findings upon muscle and reflex testing, as well as upon Hawkins and Impingement signs, and the absence of tenderness and spasm upon palpation of the spine and right shoulder. Dr. Nason concluded that the right shoulder had healed post-arthroscopy, and that the cervical and lumbar sprain/strain had resolved. She also noted that the report of the right shoulder MRI reflected pre-existing degenerative changes.

¹ Range of motion was measured with a goniometer according to AMA Guidelines, 5th Edition.

Dr. Heyliger conducted a **radiological** review of the contemporaneous diagnostic films of the lumbar spine and right shoulder.

He concluded that the 05/25/11 MRI of the **lumbar** spine was a "normal study", with vertebral bodies demonstrating normal height , alignment and marrow signal characteristics, without evidence of disc desiccation or herniation , or annular bulges, or paravertebral soft tissue masses.

The MRI of the **right shoulder** dated 05/13/11 was found to be "unremarkable" , with no evidence of joint effusion, or impingement syndrome. The tendons of the supraspinatus were concluded to be intact.

Polanco

Plaintiff presented for the 09/23/13 **neurological** examination with complaints of headaches, neck, left shoulder and lower back pain.

For purposes of his evaluation, Dr. Desrouleaux reviewed no medical reports.

Plaintiff's head was found to be normocephalic, and upon examination of the mental status, the cranial nerve , including visual fields, and deep tendon reflexes and motor bulk, tone, and strength, and negative findings upon Phalen's and Tinel's ,and Kernig's and Patrick's tests, and Straight Leg Raising , bilaterally, and observation of the absence of tenderness or of spasm of the cervical, thoracic, and lumbar spine, Dr.

Desrouleaux concluded that plaintiff exhibited no neurological disability or permanent impairment due to the accident.

Upon **orthopedic** examination, Dr. Nason concluded that there was no objective evidence of disability or residual effects. The findings upon objective testing included full range of motion² of the cervical and lumbosacral spine, and of the left shoulder as quantified and compared to normal readings, and normal findings upon muscle and reflex testing, as well as upon Hawkins and Impingement signs, and the absence of tenderness and spasm upon palpation of the spine and right shoulder. Dr. Nason opined that the left shoulder had healed post-arthroscopy, and the cervical and lumbar sprain/strain had resolved.

Deposition Testimony

Alexandra Ramos testified that she was a front seat passenger in a van being driven by her husband when the vehicle, which had been proceeding in stop-and-go traffic, and was hit in the rear, and simultaneously struck the back of a pick-up truck in front of it, and the first of the impacts caused her body to move forward and then back [RAMOS EBT: 24-41;83-85]. She was rendered unconscious for about a minute, [42-43], and was taken by ambulance to Jacobi Hospital where she presented with complaints of pain in her back and right shoulder, and of an inability to move her neck [49-54]. She was examined and pain

² Range of motion was measured with a goniometer according to AMA Guidelines, 5th Edition.

medication dispensed and prescribed . She was confined to home for approximately two weeks after the accident [80-81], and three weeks later, she commenced thrice-weekly treatments at a Bronx medical clinic with her sister, the co-plaintiff [59]. Treatment included physical therapy for her shoulder and her back, and acupuncture, and a “general doctor” on three occasions, and chiropractic treatments [62-66]. Plaintiff could not recall either the date³ or the location of the clinic where her surgery was performed [70], however, she recalled that the name of the surgeon with whom she consulted on one occasion prior to surgery [71], and twice after [72]. She received no further medical treatment for her accident-related injuries, nor was she ever instructed by a physician that she could no longer work [91].

Onaney Polanco testified that she felt one heavy impact to the rear of the van, and her body moved forward and she hit the upper part of the seat in front, and then she moved backwards [28-29]. She was driven to the hospital by Edwin Ramos where they waited for her sister [33-34].

About a month later, she and her sister started treating at a Bronx medical facility, where she presented with complaints of pain in both shoulders and her middle and lower back [37-38]. She received treatment for about four months [39], and was referred to Dr. Ehrlich for surgery on the left shoulder [43]. After the surgery, she had physical

³ 01/19/12

therapy for a month [47].

Plaintiff testified that she was confined to home for more than one month after the accident, and for about fifteen days after the surgery, however, she also testified that her initial confinement lasted for more than seven months [56], and then, that she didn't "remember exactly and you ask me if it was more than six months and I said that I don't know and you keep asking me." [56:19-22]. After further inquiry, she concluded that she "would say that 15 days on the first after the therapy was one month I would say two months total." [57:22-24].

Discussion and Conclusions

Alexandra Ramos

Upon review of the moving papers incorporating the findings upon recent examinations, including full ranges of motion of the cervical and lumbar spine and of the right shoulder, as well as the findings of the defendants' radiologist as to the lack of pathology in the contemporaneous films of the right shoulder precluding a finding of a causal connection to the subsequent surgical intervention, it is submitted that defendants have demonstrated as a matter of law that plaintiff did not sustain a serious injury in either category asserted. In light of this showing, it is incumbent upon the plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that she did sustain a "serious" injury as a result of the instant accident, or that there are

questions of fact as to whether she sustained such an accident-related injury(see, Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002] at 350, 774 N.E.2d 1197, Charley v. Goss, 54 AD3d 569, 863 N.Y.S.2d 205 [2nd Dept., 2008]). Plaintiff has done so.

In opposition , plaintiff comes forward with the affirmation of Daniel W. Wilen, M.D., who examined Ramos on January 15, 2015, and for purposes of his evaluation , reviewed the contemporaneous medical records and diagnostic films. ⁴

Based upon the examination and a review of the contemporaneous records, Dr. Wilen opines to a reasonable degree of medical certainty that as a result of the motor vehicle accident, plaintiff was caused to sustain *inter alia* , a tear of the supraspinatus tendon and type 1 SLAP lesion of the glenohumeral joint of the right shoulder causing her to undergo arthroscopic surgery during which the tear was confirmed and repaired . In addition , upon his recent examination , the right shoulder was found to have limitations of the range of motion in several planes. Dr. Wilen also found restrictions in range of motion of the lumbosacral spine, and of several planes of the cervical spine that he causally relates to the bulging discs evidenced in the respective MRI studies, and to the underlying accident. He opines to a reasonable degree of medical certainty that “plaintiff

⁴The copies of the contemporaneous records of the treating clinic are neither sworn nor affirmed, but certified , and as a result , they cannot be considered for purposes of diagnosis and treatment, however they are considered to establish contemporaneous treatment for the accident-related injuries . The reports of the MRI studies of the right shoulder and lumbosacral spine , though neither sworn nor affirmed are properly before the court as having been relied upon by defendants' radiologist (see, Amamedi v. Archibala, 70 A.D.3d 449, 895 N.Y.S.2d 42 [1st Dept. 2010]).

will continue to suffer pain and discomfort with significant permanent functional residual disability with respect to the right shoulder , as well as her lumbosacral and cervical spine.”

Onaney Polanco

Upon a review of the moving papers, including the reports of the recent examinations concluding the absence of orthopedic and neurological deficits upon a series of objective tests, it is the finding of this court that defendants have met their burden to prove as a matter of law that plaintiff did not sustain a permanent consequential limitation of use of plaintiff’s left shoulder , or cervical and lumbar spine . However, it is the further finding of this court that defendants have failed to prove as a matter of law the lack of a serious injury under the "significant limitation of use" category for the period between the accident and the left shoulder surgery eight months later (see, Vasquez v Almanzar, 107 AD3d 538, 539-540, 967 N.Y.S.2d 361 [1st Dept 2013]; Thomas v NYLL Mgt. Ltd., 110 AD3d 613, 973 N.Y.S.2d 625 [1st Dept. 2013]). While defendants have demonstrated as a matter of law, the lack of post-surgery deficits precluding an issue of fact of a permanent injury, they have not make a dispositive showing that the asserted injury was not causally-related to the accident, or that by its duration in addition to its extent and degree, and until it surgical repair, it did not constitute a “significant limitation of use “ of plaintiff’s left shoulder (see, Vasquez, supra at 529-540).

In light of this determination, the court will next consider whether in opposition to defendants' prima facie showing with regard to the "permanent consequential" limitation of use category, plaintiff has come forward with sufficient probative medical evidence to raise an issue of fact that she sustained a serious injury in this category. It is submitted that she has, upon a consideration of Dr. Wilen's affirmation that incorporates recent findings of quantified limitations in the range of motion of the left shoulder, and the right, as well as restrictions in several planes of the lumbar spine, and in every plane of the cervical spine, causally related by that physician to the motor vehicle accident of April 24, 2011.

Liability

While summary judgment is "is rarely granted in negligence cases since the very question of whether a defendant's conduct amounts to negligence is inherently a question for the trier of fact in all but the most egregious instances (*Wilson v. Sponable*, 81 AD2d 1, 5; *Siegel*, *Practice Commentaries*, McKinney's Cons Laws of NY Book 7B, CPLR C3212:8,p. 430) " *Johannsdottir v. Kohn*, 90 AD2d 842, 456 NYS2d 86 [2d Dept. Dept. 1982], such a motion will be granted "where the facts clearly point to the negligence of one party without any fault or culpable conduct by the other party." (*Morowitz v. Naughton*, 150 AD2d 536, 541 N.Y.S.2d 122 [2d Dept. 1989]; see also,; *Spence v. Lake Service Station, Inc.*, 13 AD 3d 276, 788 N.Y.S.2d 337 [1st Dept. 2004]).

It is also settled that a rear end collision with a stopped or stopping vehicle establishes a prima facie case of negligence against the rearmost driver (see, Woodley v. Ramirez, 25 AD3d 451, 810 NYS2d 125 [1st Dept. 2006], as the "rule is that a driver must maintain a safe distance between his vehicle and the one in front of him" (Johnson v. Phillips, 261 AD2d 269,271, 690 NYS2d 545 [1st Dept. 1999]; see also, Vehicle and Traffic Law § 1129 [a]), and in the case of a rear-end collision, summary judgment on liability would properly lie unless the driver of the following vehicle presents a nonnegligent explanation for the accident, or a nonnegligent reason for his failure to maintain a safe distance between his car and the lead car (see, Woodley v. Ramirez, supra at 452). In addition, as here, in the circumstances of a chain reaction collision, the rear-most driver bears the rebuttable presumption of responsibility (Mustafaj v. Driscoll, 5 AD 3d 138 , 773 NYS2d 26 [1st Dept. 2004]; Ferguson v. Honda Lease Trust, 34 AD3d 356, 826 NYS2d 10 [1st Dept. 2006]; Morales v. Morales, 55 A.D.3d 306, 864 N.Y.S.2d 30 [1st Dept. 2008]).

Upon consideration of the deposition testimony of plaintiffs and that of their driver, Edwin R. Ramos, as well as that of Ester Elouise Marston-Wilkie,⁵ the driver of the vehicle directly behind which the Ramos vehicle was traveling, and that of the driver of the rearmost vehicle, Abindigo Simmons, it is the finding of this court that the movants have demonstrated as a matter of law that the sole proximate cause of the series of chain -

⁵ The claims against Marston-Wilkie and her husband, the registered owner of the vehicle , have been discontinued with prejudice .

collisions was the failure of defendant Simmons to maintain a safe distance between his vehicle and the Ramos vehicle to avoid hitting it when caused to stop in traffic conditions acknowledged by Simmons to be "bumper to bumper."

In opposition, Simmons fails to come forward with any evidence to raise a material issue of fact of a non-negligent explanation for the collision, or for the failure to maintain a safe distance behind the Ramos vehicle.

Accordingly, it is

ORDERED that the motion of defendants ~~Ramos~~ and ~~Polanco~~ for summary judgment is denied, and it is further

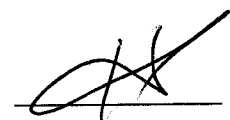
SIMMONS WILSON AS

ORDERED that the motion of defendant Ramos for summary judgment dismissing the claims and any and all cross-claims or counterclaims as asserted against him be and hereby is granted, and it is

ORDERED that the cross-motion of plaintiffs for summary judgment on the issue of liability as against defendants Simmons and Wilson be and hereby is granted.

This shall constitute the decision and order of this court.

Dated: January 4, 2016


Howard H. Sherman