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| <b>Rivera v Gonzalez</b>                                                                                                                                                                                                       |
| 2021 NY Slip Op 33097(U)                                                                                                                                                                                                       |
| December 12, 2021                                                                                                                                                                                                              |
| Supreme Court, Queens County                                                                                                                                                                                                   |
| Docket Number: Index No. 704055/2019                                                                                                                                                                                           |
| Judge: Ulysses B. Leverett                                                                                                                                                                                                     |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

MARIA I. RIVERA and MARIA AUGUSTA  
GUAMAN SERRANO

Plaintiffs,

-against-

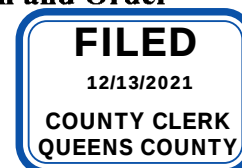
JOSE M. GONZALEZ and RIGO LIMO-AUTO CORP.,

Defendants.

Index No.: 704055//2019

Motion Seq. No. 002

**Decision and Order**



Present: **HONORABLE ULYSSES B. LEVERET:**

Papers Numbered

|                                             |          |
|---------------------------------------------|----------|
| Notice of Motion-Affirmation-Exhibits.....  | EF-11-26 |
| Affirmation In Opposition-Exhibits.....     | EF-43    |
| Notice of Cross Motion-Exhibits-Memo.....   | EF-32-39 |
| Reply Affirmation/Motion.....               | EF-41-42 |
| Affirmation in Opposition/Cross Motion..... | EF-43-44 |

Upon the foregoing papers, it is ordered that defendants Jose M. Gonzalez and Rigo Limo-Auto Corp's motion for an order pursuant to CPLR § 3212 for summary judgment in favor of defendant, and dismissing the complaint of plaintiffs Maria I. Rivera and Maria Augusta Guaman Serrano on the grounds that plaintiffs have failed to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (d) is denied. Plaintiffs' cross motion for an order granting partial summary judgment on the issue of liability against defendants and scheduling the matter for an inquest on damages is granted.

Plaintiffs Maria I. Rivera and Maria Augusta Guaman Serrano seek to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on June 18, 2018 on 110-35 Horace Harding Expressway, County of Queens, State of New York.

Plaintiffs Maria Rivera and Maria Augusta Guaman Serrano assert that on June 18, 2018, they were passengers seated in the rear of a motor vehicle driven by plaintiff Maria Rivera's husband, Herman Rivera. Plaintiffs state that the vehicle was stopped waiting to make a turn into a gas station when suddenly and without warning, it was struck in the rear by a vehicle owned by defendant Rigo Limo-Auto Corp. and operated by defendant Jose M. Gonzalez. Plaintiff Rivera alleges that as a result of the accident, she sustained injuries to her neck, back and right shoulder. Plaintiff Serrano alleges that she sustained injuries to her neck, back and left shoulder.

Insurance Law § 5102 (d) defines a "serious injury" as "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 permanent nature which prevents the injured from performing substantially all of the material acts, which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment."

Defendants alleges that plaintiffs have not suffered a serious injury within the meaning of the No Fault Law. In support of the motion, defendants submitted an orthopedic evaluation dated January 25, 2021 of plaintiff Rivera by Dr. Salvatore Corso, an orthopedic surgeon, who performed an independent orthopedic evaluation of plaintiff Rivera on 10/13/2020 using a goniometer. Dr. Corso reports that the examination of plaintiff Rivera's cervical spine range of motion revealed flexion to 50 degrees (normal 50 degrees), extension to 60 degrees (normal 60 degrees), right/left lateral bending 45 degrees (normal 45 degrees), right/left rotation to 80 degrees (normal 80 degrees). Dr. Corso states that examination of the cervical spine revealed no paracervical tenderness, no spasm or atrophy of the cervical musculature.

Plaintiff Rivera's lumbar spine range of motion examination revealed forward flexion 60 degrees (normal 60 degrees), extension to 25 degrees (normal 25 degrees), right/left rotation to 25 degrees (normal 25 degrees). There was tenderness over the right and left paralumbar. No spasm noted.

Plaintiff Rivera's right shoulder range of motion of forward elevation to 180 degrees (normal 180 degrees), extension 60 degrees (normal 60 degrees), abduction 180 degrees (180 degrees normal), external rotation 90 degrees (normal 90 degrees), internal rotation 80 degrees (normal 80 degrees). Swelling, heat and effusion were not seen. Erythema and crepitus were not present.

Dr. Corso opines that plaintiff Rivera did not sustain any significant or permanent injury as a result of the subject motor vehicle. There are no objective clinical findings indicative of a present disability, and functional impairment, which prevents plaintiff from engaging in her usual activities including work, school and hobbies.

Defendants submitted an orthopedic evaluation dated January 25, 2021 of plaintiff Serrano by Dr. Salvatore Corso, an orthopedic surgeon, who performed an independent orthopedic evaluation of plaintiff Serrano on 10/13/2020 using a goniometer. Dr. Corso reports that the examination of plaintiff Serrano's cervical spine range of motion revealed forward flexion to 50 degrees (normal 50 degrees), extension to 60 degrees (normal 60 degrees), right/left lateral bending 45 degrees (normal 45 degrees), right/left rotation to 80 degrees (normal 80 degrees). Dr. Corso states that range of motion elicits pain for plaintiff. No atrophy of the cervical musculature.

Plaintiff Serrano's lumbar spine range of motion examination revealed forward flexion 60 degrees (normal 60 degrees), extension to 25 degrees (normal 25 degrees), right/left rotation to 25 degrees (normal 25 degrees). Range of motion elicits pain for plaintiff. The lumbosacral spine demonstrates midline paralumbar tenderness. No spasm noted.

Plaintiff Serrano's left shoulder range of motion of forward elevation to 150 degrees (normal 180 degrees), extension 60 degrees (normal 60 degrees), abduction 180 degrees (180 degrees normal), external rotation 90 degrees (normal 90 degrees), internal rotation 70 degrees (normal 80 degrees). Swelling, heat and effusion were not seen. Erythema and crepitus were not present.

Dr. Corso opines that plaintiff Serrano did not sustain any significant or permanent injury as a result of the subject motor vehicle. There are no objective clinical findings indicative of a present disability, and functional impairment, which prevents plaintiff from engaging in her usual activities including work, school and hobbies.

When defendant has established that plaintiff's injuries are not serious within the meaning of No-Fault Law, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. See *Jin v Reilly*, 296 AD 2d 373 (2002).

Plaintiffs in opposition to defendants' motion for summary judgment asserts that plaintiff Rivera sustained serious personal injuries to her right shoulder, cervical spine and lumbar spine requiring spine injections and injections to her right shoulder and plaintiff Serrano sustained serious personal injuries to her left shoulder, cervical spine and lumbar spine, requiring left shoulder surgery. Plaintiff submitted a sworn affirmation dated May 17, 2021 by Dr. Mark S. McMahon, a board certified orthopedic surgeon who examined plaintiff Rivera and reviewed plaintiff's medical records relating to the subject accident. Dr. McMahon's examination of plaintiff Rivera's cervical spine range of motion by use of a goniometer revealed flexion to 30 degrees (normal 50 degrees), extension to 60 degrees (normal 60 degrees), left bending 35 degrees with pain (normal 45 degrees), right bending 35 degrees (normal 40 degrees). Plaintiff is non-tender to palpation and sensation is intact on her upper extremities.

Plaintiff Rivera's lumbar spine range of motion examination found flexion 85 degrees with pain (normal 90 degrees), extension to 10 degrees with pain (normal 20 degrees), left bending 25 degrees with pain (normal 25 degrees) right bending 15 degrees with pain (normal 25). Plaintiff Rivera has decreased sensation to light touch on her left lower extremity

Plaintiff Rivera's right shoulder examination revealed elevation 150 degrees with pain (normal 180 degrees), internal rotation to T12 (normal T10), external rotation 70 degrees with pain (normal 70 degrees). Plaintiff is tender to palpation.

Dr. McMahon's diagnosis is that plaintiff Rivera's right shoulder has impingement, supraspinatus partial thickness tearing along both bursal and articular surfaces, bursitis and a tear of the superior glenoid labrum. Plaintiff Rivera's lumbar spine range of motion examination found flexion 85 degrees with pain (normal 90 degrees), extension to 10 degrees with pain (normal 20 degrees), left bending 25 degrees with pain (normal 25 degrees) right bending 15 degrees with pain (normal 25). Plaintiff Rivera has decreased sensation to light touch on her left lower extremity

Plaintiff Rivera's right shoulder examination revealed elevation 150 degrees with pain (normal 180 degrees), internal rotation to T12 (normal T10), external rotation 70 degrees with pain (normal 70 degrees). Plaintiff is tender to palpation.

Dr. McMahon's diagnosis is that plaintiff Rivera's right shoulder has impingement, supraspinatus partial thickness tearing along both bursal and articular surfaces, bursitis and a tear of the superior glenoid labrum. Cervical spine C3-4, C4-5 and C5-6 small broad based, central disc herniations with mild compression and mild impingement upon the ventral cerebrospinal fluid space and C5-6 radiculopathy. Lumbar spine Grade 1 Spondylolisthesis, L4-5 rolled broad based disc bulge, resulting in mild flattening of the ventral thecal sac with mild narrowing of the neural foramina bilaterally.

Dr. McMahon states that plaintiff Rivera's injuries are permanent, causally related to the subject accident and that her condition interferes with her quality of life and her activities of daily living.

Dr. McMahon states that plaintiff Rivera's injuries are permanent, causally related to the subject accident and that her condition interferes with her quality of life and her activities of daily living.

Plaintiff Serrano submitted a sworn affirmation dated May 17, 2021 by Dr. Mark S. McMahon, a board certified orthopedic surgeon who examined plaintiff Serrano and reviewed plaintiff's medical records relating to the subject accident. Dr. McMahon's examination of plaintiff Serrano's cervical spine range of motion by use of a goniometer revealed flexion to 50 degrees (normal 50 degrees), extension to 40 degrees with pain (normal 60 degrees), left bending 40 degrees with pain (normal 40 degrees), right bending 40 degrees with pain (normal 40 degrees). Plaintiff is tender to palpation and sensation is intact on her upper extremities.

Plaintiff Serrano's lumbar spine range of motion examination found flexion 65 degrees with pain (normal 90 degrees), extension to 10 degrees with pain (normal 20 degrees), left bending 25 degrees (normal 25 degrees) right bending 25 degrees (normal 25). Non tender to palpation. Sensation was intact on her upper extremities.

Plaintiff Serrano's left shoulder examination revealed healed arthroscopic portals. Elevation 165 degrees with pain (normal 180 degrees), internal rotation to L2 with pain (normal T10), external rotation 70 degrees with pain (normal 70 degrees). Plaintiff is non tender to palpation.

Dr. McMahon's diagnosis is that plaintiff Serrano's left shoulder has marrow edema from a bone contusion involving the distal clavicle, labral and biceps tears with bursitis and synovitis. Cervical spine C3-4 small broad based, central disc herniations with mild compression and impingement upon the ventral cerebrospinal fluid space. C4-5-small broad based, central disc herniations with mild compression and impingement upon the ventral cerebrospinal fluid space. Lumbar spine L5-S1 small shallow broad based central disc herniation, resulting in mild compression and impingement upon the ventral thecal sac. L4-5 small shallow broad based central disc herniation, resulting in mild compression and impingement upon the ventral thecal sac with mild narrowing of the neural foramina bilaterally

Dr. McMahon states that plaintiff Serrano's injuries are permanent, causally related to the subject accident and that her condition interferes with her quality of life and her activities of daily living. Plaintiff Serrano is currently only to work part time as a result of her injuries.

Plaintiff Serrano submitted a May 10, 2021 affirmation from Dr. John T. Rigney, a board certified radiologist who read plaintiff's 8/9/2018 left shoulder MRI and found tearing of the superior glenoid labrum, marrow signal change involving the distal clavicle, the appearance of which is consistent with a bone contusion. Plaintiff Serrano's 8/11/2018 cervical and lumbar spine MRI was reviewed by Dr. Naiyer Imam, a board certified radiologist who states that the findings revealed mildly straightened cervical lordosis and C3-4 small broad based, central disc herniations.

Plaintiff Rivera submitted a March 18<sup>th</sup> 2021 affidavit from Sam Chang, licensed chiropractor who examined plaintiff's thoracic spine and found mild to moderate pain and joint restriction in upper thoracic region, moderate muscle spasms in the trapezius. Lumbar spine exam revealed restricted range of motion as well as moderate pain on lower lumbar region in flexion, lateral flexion, and rotation. Right shoulder exam revealed moderate muscle spasms and motion restriction in the supra-spinatus and bicipital tendon area. Sam Chang states that the subject

accident was the producing cause of plaintiff's injuries.

It is well established that the proponent of summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. See *Zuckerman v City of New York*, 49 NY 2d 557 (1980). Here, the affirmed medical reports of the parties' doctors directly contradict each other. Where parties offer conflicting medical evidence on the existence of a serious injury, the existence of such injury is a matter for a jury's determination. See *Cracchiolo v Omerza*, 87 AD 3d 674 (2011).

Plaintiffs cross move for partial summary judgment on the issue of liability against defendants and setting the matter down for an inquest on damage. Plaintiffs allege that their vehicle was struck in the rear as a result of defendants' negligence and that defendants are unable to provide any reasonable excuse for the rear end collision. Plaintiffs assert that defendants are the sole proximate cause of the subject accident.

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision. See *Kimyagarov v Nixon Taxi Corp., et al*, 45 A.D. 3d 736, 846 N.Y.S. 2d 309 (2007). If the operator of the moving vehicle cannot come forward with the evidence to rebut the inference of negligence, the occupants and owner of the stationary vehicle are entitled to summary judgment on the issue of liability. See *Piltser v Donna Lee Mgt Corp.*, 29 AD 3d 973, 816 NYS 2d 543 (2006).

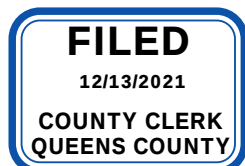
Vehicle and Traffic Law (VTL) § 1129 (a) provides that "the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway". Failure to do so constitutes negligence per se, entitling the plaintiff whose vehicle was rear-ended to summary judgment in the absence of an adequate non-negligent explanation. See *Comas-Bourne v City of New York*, 146 AD 3d 855 (2017).

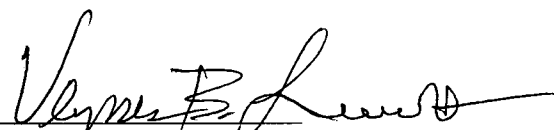
Here, defendants have not offered a sufficient non-negligent explanation for the rear end collision. The Court finds that plaintiffs have met their burden of establishing their prima facie entitlement to judgment on the issue of liability against defendants.

Accordingly, defendants Jose M. Gonzalez and Rigo Limo-Auto Corp's motion for an order pursuant to CPLR § 3212 for summary judgment in favor of defendant, and dismissing the complaint of plaintiffs Maria I. Rivera and Maria Augusta Guaman Serrano on the grounds that plaintiffs have failed to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (d) is denied. Plaintiffs' cross motion for an order granting partial summary judgment on the issue of liability against defendants, scheduling the matter for an inquest on damages is granted.

This is the decision and order of this Court.

Dated: December 12, 2021



  
Ulysses B. Leverett, JSC