

**Fuentes v Board of Educ. Yonkers City Sch. Dist.**

2021 NY Slip Op 33504(U)

October 20, 2021

Supreme Court, Westchester County

Docket Number: Index No. 53638/2019

Judge: Terry Jane Ruderman

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This opinion is uncorrected and not selected for official publication.

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  
YESENIA S. FUENTES,

Plaintiff,

DECISION and ORDER

-against-

Motion Sequence Nos. 1 & 2  
Index No. 53638/2019

BOARD OF EDUCATION YONKERS CITY  
SCHOOL DISTRICT, PJETER DEDVUKAJ and the  
CITY OF YONKERS,

Defendants.

-----X  
RUDERMAN, J.

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

| <u>Papers - Sequence 1</u>  | <u>Numbered</u> |
|---|-----------------|
| Plaintiff's Notice of Motion, Affirmation, Exhibits 1 - 5                                 | 1               |
| Defendants' Affirmation in Opposition   | 2               |
| Reply Affirmation   | 3               |
| <u>- Sequence 2</u>   |                 |
| Defendants' Notice of Motion, Affirmation, Exhibits A - I,<br>Statement of Material Facts | 4               |
| Plaintiff's Affirmation in Opposition, Exhibits 1 - 11                                    | 5               |
| Reply Affirmation   | 6               |

This action was commenced by the filing of a summons and verified complaint on March 7, 2019, based on the claim that on May 2, 2018, on Vark Street in the City of Yonkers, the vehicle plaintiff was driving was negligently rear-ended by a vehicle driven by defendant Pjeter Dedvukaj and owned by defendants Board of Education of the Yonkers City School

District and the City of Yonkers. Discovery has been completed and a note of issue filed.

Plaintiff's motion for summary judgment on the issue of defendants' liability relies on her own deposition testimony, that of defendant driver Dedvukaj, and a copy of the police accident report. The police report recounted Dedvukaj's assertion to the officer that plaintiff's vehicle stopped short, which caused him to rear-end her vehicle, and plaintiff's statement that she was stopped in traffic when she was rear-ended by defendant's vehicle, which in turn caused her vehicle to rear end a vehicle that was stopped in front of her. Plaintiff's deposition testimony repeated that assertion. Defendant added, at his deposition, that plaintiff first stopped short when she struck the vehicle in front of her, and then his vehicle struck hers.

Defendants' opposition to plaintiff's motion begins with an objection to reliance on the uncertified copy of the police report – although defendant also submitted an uncertified copy in support of their motion. They also argue that issues of fact are presented due to conflicting testimony, namely defendant driver's claim that the plaintiff struck the car in front of her before he crashed his car into the rear of the plaintiff's car.

Defendants' motion initially contends that the City of Yonkers is an improper party to this action, and that therefore the complaint should be dismissed as against it. As to the rest of the defendants, it is argued that plaintiff failed to sustain a "serious injury" as defined by Article 51 of the Insurance Law. They observe that plaintiff did not report any injuries at the scene, and that she acknowledged at her deposition that she missed a total of approximately five weeks of work in the months following the accident, but otherwise returned to work full time. She performed all her ordinary activities of daily life, except for her ability to carry heavy items and to run. They note that the objectively determined injuries consist of disc bulges, and cite the

report of their orthopedist, Dr. Richard Weinstein, who concluded that the lumbar and cervical sprains caused by the accident are nearly completely resolved, and that her left shoulder sprain is completely resolved. They also rely on the report of their neurosurgeon Dr. Saran Rosner, who reported that “MRI imaging of [plaintiff’s] cervical, thoracic and lumbar spine does not reveal evidence of acute traumatic injury generally and specifically does not show compression of the spinal cord or its exiting nerve roots at any level,” and assessed plaintiff’s persistent complaints of “hyperextension/hyperflexion sprain/strain conditions” as without sound anatomic or physiologic explanation in the absence of radiographic evidence of injury. Further, he asserted that the “electrophysiologic evaluations of her upper and lower extremities were either normal or demonstrated abnormalities which did not correlate with any of her clinical symptoms or radiologic findings, and therefore, carry little significance.”

In response, plaintiff offers the affirmation and medical records of Dr. Michael Daras, a neurologist who treated plaintiff after the accident. He reports that plaintiff saw her primary care physician the day after the accident, presenting with complaints of headaches, neck pain radiating to the left arm accompanied by paresthesia, and lower back pain, and was prescribed muscle relaxants. He found at his first examination of plaintiff two weeks after the accident that she had a severely limited range of motion with spasm and tenderness of the paraspinal muscles in the cervical spine, and spasm and tenderness of the paraspinal muscles in the thoracic spine; in subsequent examinations in the months that followed, he continued to find decreased ranges of motion of the cervical and lumbar spine. He prescribed MRIs of the shoulders and spine and an SSEP/NCV study of the upper extremities, which were conducted in May 2019, and found that the results revealed a variety of injuries. He continued to perform regular examinations on

plaintiff thereafter, and his impressions and opinions have remained the same: her left shoulder, cervical spine, and lumbar spine can no longer move naturally through the full range of motion without causing pain, thereby limiting their normal use and causing other difficulties, resulting in significant limitations and permanent consequential limitations to her left shoulder, cervical spine, and lumbar spine.

Plaintiff also submits the affirmation and medical records of orthopedist Dr. Louis C. Rose, who has examined plaintiff regularly, beginning on August 21, 2019. He performed tests on plaintiff which yielded positive results for injury to her left shoulder, which injuries have persisted and not resolved to date. He concludes that plaintiff sustained causally related significant limitations and permanent consequential limitations to her left shoulder.

#### Discussion

##### Sequence 1

Initially, plaintiff may not rely on the submitted uncertified copy of the police report to establish the manner in which the accident occurred, since it consists of multiple layers of hearsay. An uncertified police report is inadmissible (*see Yassin v Blackman*, 188 AD3d 62 [2d Dept 2020]). Additionally, “[f]acts stated in a police report that are hearsay are not admissible unless they constitute an exception to the hearsay rule” (*Country-Wide Ins. Co. v Lobello*, 186 AD3d 1213, 1215 [2d Dept 2020]). But, where the police report is uncertified, even a party's admission, which satisfies an exception to the hearsay rule, is inadmissible (*Yassin v Blackman*, 188 AD3d at 65).

The parties' deposition testimony provides a basis for determining plaintiff's motion. Analysis begins with the rule that “[a] rear-end collision with a stopped or stopping vehicle

creates a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision" (*Klopchin v Masri*, 45 AD3d 737, 737 [2d Dept 2007]).

While a sudden or unexplained stop by the lead vehicle may constitute a non-negligent explanation under some circumstances, here, importantly, defendant Dedvukaj acknowledged at his deposition that the traffic on Vark Street was stop-and-go. In stop-and-go traffic, by definition, vehicles come to frequent stops; "vehicle 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" (*Le Grand v Silberstein*, 123 AD3d 773, 774 [2d Dept 2014], quoting *Shamah v Richmond County Ambulance Serv.*, 279 AD2d 564, 565 [2d Dept 2001]). Under the circumstances, based on defendant's own testimony, the parties' disagreement about whether plaintiff hit the car in front of her before or after defendant hit her is irrelevant to this dispute. Either way, plaintiff came to a stop in stop-and-go traffic, and defendant's failure to stop before hitting plaintiff's vehicle was negligent; irrespective of any fault as between plaintiff and the vehicle in front of her, he has not stated a non-negligent explanation for his rear-end collision with plaintiff's vehicle.

#### Sequence 2

Initially, plaintiff does not oppose that branch of defendants' motion which seeks dismissal of the complaint insofar as asserted against the City of Yonkers, on the ground that the City was not an owner of the vehicle.

On their motion for summary judgment dismissing the complaint, defendants begin by

observing that the categories of “serious injury” cited in plaintiff’s bill of particulars include “permanent loss” and the 90/180 category, as well as the “permanent consequential limitation” and “significant limitation” categories, but that there is no basis for her claims under the “permanent loss” and 90/180 categories. Defendants satisfied their initial burden regarding the 90/180-day category with plaintiff’s acknowledgment that she returned to work within a few weeks of the accident (*see e.g. John v Linden*, 124 AD3d 598, 599 [2d Dept 2015]; *Marin v Ieni*, 108 AD3d 656, 657 [2d Dept 2013]), and plaintiff, in opposition, has not offered admissible evidence establishing that substantially all of her daily activities were curtailed (*see Frier v Teague*, 288 AD2d at 179). Nor is there any suggestion that plaintiff’s claimed injury can fall into the “permanent loss” category – which requires a plaintiff to demonstrate a total loss of use of a body organ, member, function or system (*see Oberly v Bangs Ambulance*, 96 NY2d 295 [2001]).

With regard to the “permanent consequential limitation” and the “significant limitation” categories, defendants bear the initial burden on this motion of establishing, *prima facie*, the lack of a serious injury resulting from the accident (*see Smith v Matinale*, 58 AD3d 829 [2d Dept 2009]). Such a claim requires “some objective proof of a plaintiff’s injury,” which may be substantiated “through an expert’s designation of a numeric percentage of a plaintiff’s loss of range of motion, i.e., quantitatively (*McEachin v City of New York*, 137 AD3d 753, 756 [2d Dept 2016], citing *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352 [2002] and *Perl v Meher*, 18 NY3d 208, 216 [2011]). The mere fact that an MRI reveals the presence of soft tissue injury such as bulging or herniated discs is insufficient in itself to establish serious injury (*see Kearse v New York City Tr. Auth.*, 16 AD3d 45, 46 [2d Dept 2005]). For a triable issue of fact to be

presented where the plaintiff sustained such a soft tissue injury, the plaintiff must submit objective medical evidence that the injury was causally related to the subject accident and that objective findings, such as a decreased range of motion, support a claim that the injury caused a permanent or significant impairment or limitation of use or function of that body part (*see Clervoix v Edwards*, 10 AD3d 626, 627 [2d Dept 2004]).

Defendants have satisfied their prima facie burden based on their experts' assessments characterizing plaintiff's injuries as non-traumatic sprains to her cervical and lumbar spines, which were resolved or nearly resolved, leaving no disability. However, the evidentiary materials submitted by plaintiff, including the affirmations of plaintiff's treating physicians, and the medical records regarding her diagnosis and treatment, suffice to create questions of fact. Both Dr. Daras and Dr. Rose offer their opinions that plaintiff has sustained injury to her lumbar spine, cervical spine and left shoulder, supported by both MRIs and findings of ongoing limitations in her ranges of motion, based on objective testing.

The Court rejects defendants' challenges to plaintiff's proof. The one-year delay before plaintiff's treating physician ordered diagnostic imaging does not present grounds to invalidate her doctors' opinions or require their rejection as conclusory. As to unsworn medical records, since plaintiff's doctors have submitted affirmations summarizing and incorporating their own unsworn records, plaintiff's claims are sufficiently supported by admissible materials.

Defendants' reliance on *Vasquez v John Doe # 1* (73 AD3d 1033 [2d Dept 2010]) is misplaced. There, the affirmation of the plaintiff's doctor "clearly relied on the unsworn MRI reports authored by another physician" to arrive at his conclusions (*id.* at 1034). Here, it cannot be determined that plaintiff's medical experts and treating physicians merely relied on another

physician's unsworn assessment of the MRI films. In addition, defendants' experts did not dispute the findings that the MRIs showed bulging discs. In fact, Dr. Rosner acknowledged the bulging discs condition, although he suggested that those bulges represented a normal variant.

Issues of fact as to whether plaintiff sustained serious injury in the categories of permanent consequential limitations and significant limitations require the denial of summary judgment dismissing plaintiff's complaint, although it is appropriate to dismiss so much of the complaint as is predicated on the categories of serious injury that were initially raised but have not been supported by evidence – here, the 90/180 and “permanent loss” categories (*see Breland v Karnak Corp.*, 50 AD3d 613, 614 [2d Dept 2008]).

In view of the foregoing, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on the issue of defendants' liability is granted, and it is further

ORDERED that the branch of defendants' motion seeking dismissal of the complaint as against the City of Yonkers is granted, and it is further

ORDERED that the branch of defendants' motion seeking summary judgment dismissing the complaint is denied, except to the extent that plaintiff's serious injury claim based on the 90/180 and “permanent loss” categories of serious injury are dismissed, and it is further

ORDERED that the parties are directed to appear before the Settlement Conference Part of the Westchester County Supreme Court on a date and in a manner of which they will be notified by that Part.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
October 20, 2021

  
HON. TERRY JANE RUDERMAN, J.S.C.