

Alfaro v Santos

2014 NY Slip Op 33315(U)

February 18, 2014

Supreme Court, Bronx County

Docket Number: 308700/2011

Judge: Mary Ann Brigantti-Hughes

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**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15**

PRESENT: Honorable Mary Ann Brigantti-Hughes

-----X
ANABEL ALFARO,

Plaintiff,

-against-

DECISION / ORDER
Index No. 308700/2011

CLAUDIO SANTOS,

Defendant

-----X
The following papers numbered 1 to read on the below motions noticed on August 5, 2013 and September 27, 2013, and both duly submitted on the Part IA15 Motion calendar of **November 26, 2013:**

<u>Papers Submitted</u>	<u>Numbered</u>
Pl. Notice of Motion, Exhibits	1,2
Chavarria's Cross-Motion, Exhibits	3,4
Def.'s Notice of Motion, Exhibits	5,6
Def.'s Aff. In Opp.	7
Chavarria's Reply Aff.	8

Upon the foregoing papers, the plaintiff in Action #1, Anabel Alfaro ("Plaintiff") moves for summary judgment against defendant/third-party plaintiff Claudio Santos ("Defendant") and dismissing the third-party complaint against third-party defendant Jorge Chavarria ("Chavarria"). In response, third-party defendant Chiavarria cross-moves to dismiss the third-party complaint. Defendant opposes Plaintiff's motion, as well as Chavarria's cross-motion. Defendant Santos has separately filed a motion for summary judgment, dismissing the complaint for failure to meet the "serious injury" threshold as required by New York Insurance Law §5102. The Court has received no opposition papers to this motion, and by letter dated December 2, 2013, counsel for the movant confirmed that no opposition papers have been filed or received by any party in this matter. In the interest of judicial economy, the above motions are consolidated and disposed of in the following Decision and Order.

I. Background

This matter arises out of an alleged motor vehicle accident that occurred on October 26,

2009. Plaintiff Anabel Alfaro was a passenger in a motor vehicle being operated by her husband, third-party defendant Jorge Chavarria ("Chavarria"), traveling eastbound on 155th Street at or near its intersection with Edgecombe Avenue in New York, New York. At that time, a motor vehicle owned and operated by Defendant allegedly made sudden a left turn, causing a collision with Plaintiff's vehicle. At deposition, Defendant testified that he was operating his livery cab on Macomb's Dam Bridge traveling westbound towards the intersection with Edgecombe Avenue. Approximately one car-length away the intersection, Defendant's rear-seat passenger fare told him to make a left turn onto Edgecombe Avenue. He could not recall if the road lanes were level, but testified he did not see any eastbound traffic when he began to make his left turn. While making the turn, Plaintiff's vehicle that was traveling in the opposite direction impacted the passenger side of Defendant's vehicle. Defendant testified that he did not see Plaintiff's vehicle prior to contact. Defendant specifically testified that he was aware it was not legal or proper to make the left turn at that intersection. Still, he made the turn at that location because his fare had asked him to do so. He activated his left-turn signal approximately one car-length from the intersection. Defendant believed Plaintiff's vehicle was speeding prior to the collision. He later testified, however, that he never saw Plaintiff's vehicle before impact, and never told anyone else that the other vehicle was speeding before the accident.

Plaintiff also submits the police accident report in support of the motion. This uncertified report, however, must be disregarded since it was made by a non-eyewitness officer that contains hearsay statements of the parties regarding the ultimate issues of fact (*Quinones v. New England Motor Freight, Inc.*, 80 A.D.3d 514, 515 [1st Dept. 2011], citing *Figueroa v. Luna*, 281 A.D.2d 204, 205 [1st Dept. 2001]).

Plaintiff argues that, as an innocent passenger, she is entitled to summary judgment on the issue of liability.

Third-party defendant Chavarria cross-moves for summary judgment, dismissing third-party plaintiff Santos' complaint. Chavarria argues that he cannot be comparatively negligent in this matter, since Defendant admitted at deposition that he made a sudden and illegal left-hand turn, without stopping, and never yielded the right of way to Chavarria, in violation of Vehicle and Traffic Law. Defendant testified that Plaintiff's vehicle impacted the passenger side of his

four-door vehicle, at both doors. He denied telling police that the other vehicle was speeding, and admitted to not seeing Chavarria's vehicle before impact. Defendant's passenger, Mayra Tatis ("Tatis") testified that she could not approximately the speed of Chavarria's vehicle. Defendant testified that prior to making the left turn, he looked for opposing traffic, could see two blocks and didn't see any vehicles. He admitted that he did not see Chavarria's vehicle until the moment of the crash. Chavarria testified that he was traveling the speed limit, approximately 25 miles per hour, before the accident. He testified that the time from when he first saw Santos' vehicle start to turn, and when the impact occurred, was "more or less" a "second." He attempted to apply the brake before impact, but "didn't have time" as the impact "happened very quickly."

In light of the foregoing, third-party defendant Chavarria argues that it is entitled to summary judgment, dismissing the third-party complaint.

Defendant opposes both the motion and cross-motion for summary judgment. Santos argues, *inter alia*, that there is no admissible evidence that the left-turn he allegedly made was "illegal." Even though Defendant testified that he was not permitted to turn at that location, he also testified that there were no signs at the intersection indicating that cars could not turn onto that roadway. Defendant argues that there are issues of fact as to whether Chavarria operated his vehicle in a negligent manner, and saw what there was to be seen, before he impacted the Defendant's vehicle.

Defendant has separately moved to dismiss Plaintiff's complaint for failure to meet the "serious injury" threshold. As a result of this accident, Plaintiff alleged in her verified bill of particulars that she sustained the following injuries, among others: (1) traumatic cervical spine pain syndrome, (2) MRI of the cervical spine indicating central posterior disc herniations at C3-C4, C4-C5, and C5-C5, (3) traumatic cervical radiculitis, (4) burns to the face from air bag deployment, and (5) headaches of probable cervical origin.

In support of the motion, Defendant submits a sworn report from neurologist Marianna Golden. Dr. Golden examined Plaintiff on July 9, 2013. At the examination, Plaintiff complained of headaches, pain in the neck and lower back pain the radiated to the lower extremities, and pain in the knees. She stated that she missed one day of work following the

accident. Upon physical examination, Plaintiff revealed normal higher mental functions, motor examination, and reflexes. Sensory examination and cerebellar functions were normal. Dr. Golden ultimately diagnosed Plaintiff with a normal neurological examination with no evidence of an accident-related disability.

Defendant also submits the affirmed report of Dr. Benjamin Nachamie, an orthopedist who examined Plaintiff on July 9, 2013. Dr. Nachamie notes that Plaintiff was allegedly rendered unconscious for five minutes after this accident and had sustained an abrasion to her face as a result of airbag deployment. She was evaluated in a hospital emergency room and then discharged with facial ointment and instructions to rest. At the time of the examination, Plaintiff had complaints of headache, neck and lower back pain, radiating to the extremities, as well as pain in the knees. Upon physical examination, Plaintiff revealed full range of motion in the cervical and lumbar spine upon all movements. She had full muscle strength and all other objective orthopedic and neurological testing was either normal or negative. Plaintiff also had full range of motion in both shoulders, wrists/hands, and both knees. Dr. Nachamie diagnosed Plaintiff with a “resolved” cervical spine strain with no evidence of carpal tunnel syndrome. Defendants also include an affirmed radiological report from Dr. Jessica Berkowitz, who examined Plaintiff’s cervical spine MRI. Dr. Berkowitz concluded that there was evidence of “minimal” disc bulges and “a very small, very broad-based” central to left paracentral disc herniation.

Finally, Defendant submits Plaintiff’s deposition transcript, where she testified that she was not confined to her home following this accident and that she “always worked.”

II. Applicable Law and Analysis

This court will first address Defendant’s unopposed motion for summary judgment for failure to meet the “serious injury” threshold. In this matter, Defendants have satisfied their initial prima facie burden of showing that the Plaintiff did not suffer a serious injury within the “permanent consequential” or significant limitation” categories of New York Insurance Law §5102. (*Pommells v. Perez*, 4 N.Y.3d 566 [2005]; *Toure v. Avis Rent-A-Car Systems, Inc.*, 98

N.Y.2d 345 [2002]). The expert testimony outlined above establishes that Plaintiff have no objective evidence of serious injuries. Even though her medical records revealed some positive findings of bulges or a small herniation in the cervical spine, proof of a qualitative injury alone is insufficient to establish a serious injury within the meaning of Insurance Law (*Pommells, supra.*) Since Plaintiff has not opposed the motion, she has failed to raise a triable issue of fact.

Defendants have also met their burden of proof regarding Plaintiff's "90/180" claim, through her own verified bill of particulars and deposition testimony that she was not confined to bed or home, and only missed one day of work as a result of this accident (*Nelson v. Distant*, 308 A.D.2d 338, 340 [1st Dept. 2003]). Accordingly, Defendant is entitled to dismissal of these claims as well (*Jimenez v. Polanco*, 88 A.D.3d 604 [1st Dept. 2011]).

In light of the foregoing, the main action is dismissed for failure to meet the "serious injury" threshold. As a result, the Santos third-party complaint against Chavarria seeking contribution and indemnification is also dismissed (Carmondy N.Y. Prac. §19:133 [if the plaintiff fails to recover in the main action, there can be no recovery on the impleader suit]), and Plaintiff's motion for summary judgment on the issue of liability is denied as moot (*Mickens v. Khalid*, 62 A.D.3d 597 [1st Dept. 2009]).

III. Conclusion

Accordingly, it is hereby


ORDERED, that Defendant's motion for summary judgment is granted, and Plaintiff's complaint (Action #1) is dismissed with prejudice, and it is further,

ORDERED, that in light of the above dismissal of the main action, third-party defendant Chavarria's motion for summary judgment is granted and the third-party complaint (in Action #1) is dismissed with prejudice, and it is further,

ORDERED, that Plaintiff's motion for summary judgment on the issue of liability is denied as moot.

This constitutes the Decision and Order of this Court.

Dated: 2/18, 2014



Hon. Mary Ann Brigantti-Hughes, J.S.C.