

**Peralta v American United Transp., Inc.**

2016 NY Slip Op 33157(U)

February 23, 2016

Supreme Court, Bronx County

Docket Number: Index No. 20025/2013E

Judge: Robert T. Johnson

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 12**

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**ROSA ARIAS PERALTA,**

**Plaintiff,**

**-against-**

**AMERICAN UNITED TRANSPORTATION, INC.,  
WARLIN J. DELACRUZ and ANASTACIO MARTINEZ**

**Defendants.**

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**DECISION AND ORDER**

**Index No. 20025/2013E**

**The following papers, numbered 1-4 were considered on this motion for summary judgment:**

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion and annexed Exhibits and Affidavits.....	1
Answering Affidavits and Exhibits.....	2, 3
Replying Affidavits.....	4

**Upon the foregoing papers, it is ordered that this motion for summary judgment is denied in part.**

Plaintiff commenced this action to recover damages for personal injuries she allegedly sustained in connection with a motor vehicle accident on August 8, 2010, in front of 2437 Boston Road, Bronx, New York (the "Accident"). At the time of the Accident, plaintiff was sitting in the right rear passenger seat of a vehicle owned and operated by co-defendant Anastacio Martinez ("defendant Martinez"), when his vehicle collided with a vehicle owned by co-defendant American United Transportation, Inc. and operated by co-defendant Warlin J. Delacruz (collectively "defendants").

Defendants move for an order for summary judgment pursuant CPLR §3212, dismissing plaintiff's complaint and all cross-claims on the issue of liability<sup>1</sup>, or in the alternative, granting summary judgment in favor of defendants and dismissing plaintiff's complaint for failure to meet the serious injury threshold required by Insurance Law §5104(a) and §5102(d). Defendants argue that they were not negligent as a matter of law as it is undisputed that at the time of the Accident, defendant Martinez was making an illegal U-turn in violation of Vehicle and Traffic Law §1130(1), §1160(d) and §1162, thereby creating an irrefutable inference of negligence on the part of defendant Martinez.

Alternatively, defendants assert that plaintiff's injuries do not meet the threshold standard of serious injury pursuant to Insurance Law §5102(d). Specifically, defendants contend that plaintiff has no objective limitations or other indications of any residual loss of function related to this Accident. Defendants further contend that plaintiff was not prevented from performing substantially all of her usual and customary activities under the 90/180 days category.

Plaintiff opposes the motion claiming that defendants fail to meet their initial burden of demonstrating the absence of any material issues of fact as to whether the Accident resulted in part to any of defendants' failure to exercise due care, such as driving at an excessive speed or by failing to observe defendant Martinez's vehicle. Plaintiff further claims that defendants are precluded from testifying at trial pursuant to an Order, dated July 28, 2014, by Justice Laura Douglas, which precluded defendants from testifying at trial unless defendants appeared for a deposition within 60 days of the Order<sup>2</sup>. Accordingly, plaintiff argues that defendants' attorney

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<sup>1</sup> As the matter has been discontinued against defendant Martinez pursuant to a stipulation dated December 24, 2014, the portion of defendants' motion to dismiss all cross claims is deemed moot.

<sup>2</sup> It is uncontroverted that defendants did not appear for the deposition.

affirmation is not sufficient evidence to satisfy their prima facie burden showing of entitlement to judgment as a matter of law on the issue of liability.

Plaintiff also opposes the motion arguing that she has suffered a serious injury under the sixth to ninth categories of Insurance Law §5102(d): 6) permanent loss of use of a body organ, member, function or system; 7) permanent consequential limitation of use of a body organ or member; 8) significant limitation of use of a body function or system; or 9) a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment. Specifically, plaintiff alleges that as a result of her injuries, she underwent a long period of medical care and physical therapy, she could not work on a permanent basis due to pain and limitations in her right shoulder and lower back, and, despite having surgery performed on her right shoulder, her shoulder remains a major disability.

Defendant Martinez also opposes defendants' motion for summary judgment on the issue of liability. Defendant Martinez avers that material issues of fact exist as to whether defendants used reasonable care to avoid hitting his car.

It is well settled that the proponent of a summary judgment motion must make a prima facie case showing of entitlement to judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). To satisfy this initial burden, it is not enough merely to point to gaps in the opponent's proof, but the movant must "tender evidence that it was not negligent" (*Bryan v. 250 Church Assoc.*, 60 AD3d 578, 578 [1<sup>st</sup> Dept. 2009]).

Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). “In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (*Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1<sup>st</sup> Dept. 1992], citing *Assaf v. Ropog Cab Corp.*, 153 AD2d 520, 521 [1<sup>st</sup> Dept. 1989]). The court’s role is “issue-finding, rather than issue determination” (*Sillman .v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal quotations omitted]).

#### Liability

Generally, summary judgment in negligence cases is rarely granted since “[t]he 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” (Siegel, Practice Commentaries, McKinney’s Cons Laws of NY Book 7B, CPLR C3212:8, p.430). Defendants fail to satisfy their initial burden of making a prima facie showing of entitlement to judgment as a matter of law on the issue of liability. In support of their motion, defendants submit, *inter alia*, the police accident report, the deposition testimonies of defendant Martinez and plaintiff, the affirmed reports of Dr. Mark Decker, defendants’ expert radiologist, the affirmed report of Dr. Alan Crystal, defendants’ expert orthopedist, the arthrogram report of plaintiff’s right shoulder, the MRI report of plaintiff’s lumbar spine, and the surgical report from plaintiff’s shoulder surgery.

Here, defendants’ own submissions raise issues of material fact as to defendants’ comparative negligence in failing to either see defendant Martinez’s vehicle as it was making the U-turn, or having seen defendant Martinez’s vehicle, failing to use reasonable care to avoid the

collision. Both defendant Martinez and plaintiff testified that they did not see defendants' vehicle before the collision, nor did they hear any horns or screeching of tires from defendants' vehicle prior to the accident. Even if defendant Martinez violated Vehicle and Traffic Law §1130(1), §1160(d) and §1162, defendants did not establish, as a matter of law, that defendants are free from comparative negligence (*See Antaki v. Mateo*, 100 AD3d 579 [2d Dept. 2012]). Since defendants did not meet their initial burden, it is not necessary to consider the sufficiency of plaintiff's or defendant Martinez's submissions in opposition (*See Singer v. Gae Limo Corp.*, 91 AD3d 526 [1<sup>st</sup> Dept. 2012]). Accordingly, this branch of defendants' motion for summary judgment is denied.

#### Serious Injury

In opposition to defendants' motion for summary judgment, plaintiff proffers, *inter alia*, the medical records from Bronx-Lebanon Hospital, the affirmed report of her orthopedic surgeon, Dr. Eial Faierman, the medical reports and deposition testimony of plaintiff's pain management physician, Dr. Brian Haftel, and the Social Security Administration decision on plaintiff's disability claim. Plaintiff alleges that as a result of the Accident, she has sustained serious injuries pursuant to the sixth through ninth categories as defined by Insurance Law §5102(d).<sup>3</sup> With respect to the sixth category of permanent loss of use, defendants' submissions satisfy the initial burden of establishing entitlement to judgment as a matter of law. It is settled law that "to qualify as a serious injury within the meaning of the statute, 'permanent loss of use' must be total" (*Oberly v. Bangs Ambulance, Inc.*, 96 NY2d 295, 299 [2001]). In this instant matter, plaintiff fails to raise an issue of fact that she suffered "total" loss of use of either her

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<sup>3</sup> Plaintiff does not allege serious injury pursuant to death, loss of fetus, fracture or dismemberment.

shoulder or her lumbar spine. Therefore, this portion of defendants' motion for summary judgment is granted.

Similarly, defendants have also made their prima facie showing of entitlement to judgment pursuant to permanent consequential limitation and significant limitation of use with respect to plaintiff's lumbar spine, thereby shifting the burden to plaintiff to establish the existence of issues of material fact. Dr. Decker found "no evidence to suggest a traumatic injury was sustained," and that there was degenerative central disc herniation. Dr. Crystal found negative results in the straight leg raising test in both the supine and sitting positions. Dr. Crystal further found that plaintiff's lumbar spine MRI revealed definite signs of degeneration and that there was no causal relationship between plaintiff's injuries and the Accident.

To demonstrate permanent consequential limitation or a significant limitation of use, plaintiff must present medical evidence that contain objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's current limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see Toure v. Avis Rent A Car Sys. Inc.*, 98 NY2d at 350). Plaintiff has done that here. Plaintiff's submissions demonstrate restrictions in the range of motion in her lumbar spine as well as positive bilateral supine and seated straight leg raise test four years later. Moreover, Dr. Faierman opined that the injuries to plaintiff's lumbar spine are causally related to the Accident and that the continued limitations in the range of motion in her lumbar spine are indicative that these injuries are permanent. Accordingly, considered in a light most favorable to plaintiff, this evidence is sufficient to survive that portion of defendants' motion for summary judgment alleging that plaintiff did not suffer serious injury to her lumbar spine pursuant to the permanent consequential limitation or significant limitation of use categories.

With respect to the injuries plaintiff sustained to her right shoulder, defendants have not met their initial heavy burden of demonstrating as a matter of law that there is no issue of fact under permanent consequential limitation or a significant limitation of use. Dr. Decker's review of the MRI of plaintiff's right shoulder merely reveals that there is "AC joint arthropathy with no fracture." He does not opine as to whether or not there is evidence to suggest a traumatic injury or that the injuries are not causally related to the Accident. Additionally, Dr. Crystal's examination of plaintiff's right shoulder, four years after the Accident, reveal restrictions to her range of motion. Dr. Crystal's conclusion that there is no basis to causally relate the injuries to the Accident based on the fact that plaintiff did not have any right shoulder complaints three days after the Accident as well as the presence of degenerative changes is insufficient to establish entitlement to judgment as a matter of law. Accordingly, the burden does not shift to plaintiff and it is not necessary to consider the sufficiency of her evidence in opposition (*see Winegrad v. New York Uni. Med. Ctr*, 64 NY2d 851 [1985]).

However, even assuming arguendo defendants satisfied their burden of making a prima facie showing of entitlement, summary judgment would be precluded as plaintiff raises triable issues of fact. Dr. Faierman found continued limitations in the range of motion in plaintiff's right shoulder, four years after the accident and almost two years after her shoulder surgery. He also opined that her shoulder injuries are causally related to the Accident. Dr. Faierman further opined these injuries are permanent due to the fact that plaintiff continues to have "marked loss of motion and persistent residual pathology." "Although plaintiff's experts did not expressly address defendants' expert[s'] opinion[s] that the injuries were the result of degenerative changes, by relating the injuries to the Accident, plaintiff's physician raised material issues of fact" (*Williams v. Perez*, 92 AD3d 528, 529 [1st Dept. 2012]; *see also, Perl v. Meher*, 18 NY3d



208 [2011]). Additionally, plaintiff's medical records from Bronx-Lebanon Hospital five days after the Accident indicate that plaintiff suffered pain to her right shoulder as well as limitations in the range of motion.

Since summary judgment is considered a drastic remedy, it should not be granted where, as here, there is clearly the existence of a material issue of fact (*Krupp v Aetna Life and Casualty Co.*, 103 AD2d 252 [2d Dept 1984]). Furthermore, drawing all reasonable inferences in favor of plaintiff, defendants are not entitled to summary judgment as there is conflicting evidence.

With regard to whether plaintiff has sustained a serious injury under the 90/180 days category, plaintiff has presented evidence that raises a material issue of fact. Under the 90/180 days category, "plaintiff must present objective evidence of a medically determined injury or impairment of a non-permanent nature" (*Toure v. Avis Rent A Car Sys. Inc.*, 98 NY2d at 357). Plaintiff's submissions, including the Social Security Administration decision finding plaintiff disabled as of the date of the Accident, sufficiently establishes that there are triable issues of fact as to whether she was unable to engage in substantially all of her material and customary daily activities for 90 out of the first 180 days after the Accident (*see Coley v. DeLarosa*, 105 AD3d 527 [1<sup>st</sup> Dept 2013]; *Paulino v. Rodriguez*, 91 AD3d 559 [1<sup>st</sup> Dept. 2012]). Therefore, this portion of defendants' motion for summary judgment denied.

Accordingly, it is hereby ORDERED that defendants' motion for summary judgment on the issue of liability is denied; and it is further

ORDERED that the portion of defendants' motion for summary judgment pursuant to plaintiff's claim of permanent loss of use is granted; and it is further

ORDERED that the portion of defendants' motion for summary judgment pursuant to permanent consequential limitation of use or significant limitation of use is denied; and it is further

ORDERED that the portion of defendants' motion for summary judgment pursuant to plaintiff's 90/180 days claim is denied.

This reflects the decision and order of this court.

**Dated: February 23, 2016**

A handwritten signature in black ink, appearing to read "R.T. Johnson", is written above a horizontal line.

**Hon. Robert T. Johnson**