

**Collins v Rashid**

2010 NY Slip Op 32923(U)

October 4, 2010

Sup Ct, NY County

Docket Number: 109514/2009

Judge: George J. Silver

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

PRESENT: Hon. George J. Silver, Justice

PART 22

ERIN COLLINS

INDEX NO. 109514/2009

vs.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

SAADINI RACHID and FIRST TIME TAXI INC.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion to/for SUMMARY JUDGMENT

Notice of Motion/Order to Show Cause — Affidavits— Exhibits 1

Answering Affidavits/Cross Motion — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**  
Papers Numbered  
OCT 05 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident, Saadini Rachid and First Time Taxi Inc. (hereinafter referred to as Defendants) moves for summary judgment pursuant to CPLR §3212 to dismiss Erin Collin's (hereinafter referred to as Plaintiff) personal injury action. Defendants' summary judgment motion is based on the grounds that Plaintiff did not sustain a "serious injury" as defined by New York Insurance Law §5102(d). Plaintiff, by cross-motion, moves for summary judgment pursuant to CPLR §3212 on liability and damages.

The alleged accident occurred on November 25, 2008 at approximately 12:00 pm when Defendant taxi was traveling on East 84<sup>th</sup> Street near the Madison Avenue intersection. Plaintiff testifies in her affidavit that she was crossing the crosswalk at that intersection when the accident occurred. Plaintiff alleges that she was lawfully crossing the street with a pedestrian signal in her favor and this is when Defendant turned left onto Madison, allegedly hitting Plaintiff. Plaintiff was taken to New York Presbyterian Hospital and an MRI was taken.

*Serious Injury and Summary Judgment Standard*

Defendant argues that summary judgment is warranted because Plaintiff has failed to show that the alleged automobile accident resulted in a "serious injury." Under New York Insurance Law §5104, there is no right of recovery for non-economic loss in motor vehicle accidents, except in cases involving serious injury, as defined by CPLR §5102(d). The purpose behind §5102(d) was to weed out frivolous claims and to only allow recovery for serious injuries. (*Myles v Riley*, 897 NYS2d 671 [1<sup>st</sup> Dept 2009], citing *Toure v Avis Rent A car Systems, Inc.*, 98 NY2d 345 [2002].) Serious injury, as statutorily defined, includes 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

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  SETTLE/SUBMIT ORDER/JUDG.

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

body organ or member; significant limitation of use of a body function or system; or 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. (CPLR §5102(d)). The serious injury categories of death, dismemberment, significant disfigurement, fracture, and loss of fetus are not applicable. Although Plaintiff's Bill of Particulars alleges a "probable rib fracture," Plaintiff offers no evidence of a fracture in her affidavit or medical expert report; therefore, the category of fracture is not discussed. Defendants argue that Plaintiff has failed to show that Plaintiff has obtained a "serious injury" under categories 6-9 of CPLR §5102(d).

In order to show that a plaintiff's injuries do not meet the threshold requirement of CPLR §5102(d), a defendant can rely on "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1<sup>st</sup> Dept 2000]). Once the defendant has met the initial burden, the burden is shifted to the plaintiff to show that there are triable issues of fact as to the existence of a serious injury within the purview of CPLR § 5102 (*Id.* at 84, see *Bent v Jackson*, 15 AD3d 46 [1<sup>st</sup> Dept 2005]). The plaintiff must rebut the defendant's burden through the use of objective evidence establishing an injury. (*Id.*) "To recover damages for non-economic loss related to personal injury allegedly sustained in a motor vehicle accident, the plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is "serious" within the meaning of Insurance Law § 5102(d), but also that the injury was causally related to the accident." (*Diaz v. Anasco* 38 AD3d 295, 295-296 [1<sup>st</sup> Dept 2007], *Valentin v Pomilla*, 59 AD3d 184, 186 [1<sup>st</sup> Dept 2009]).

#### *Serious Injury Discussion*

Plaintiff's Verified Bill of Particulars sets out the alleged injuries sustained as a result of the accident. The injuries alleged include left knee complete tear of the medial collateral ligament (grade 3) and partial or full thickness tear of medial meniscus with large joint effusion and edema; premaxillary tissue swelling, probable right rib fracture, abrasion to the right cheek; contusion, bruising, swelling of the left thigh; a head contusion with loss of consciousness and partial memory loss; and injury and damage to the nerves, tendons, ligaments, tissues, fascia and soft and cartiginous parts surrounding the injured areas.

In support of their motion, Defendants submit the affirmed expert reports of Board Certified Orthopedic surgeon, Dr. Lisa Nason, M.D. and Board Certified Neurologist, Dr. Kuldeep K. Sachdev, M.D. Dr. Nason performed an orthopedic evaluation of Plaintiff on January 4, 2010. Dr. Nason found no evidence of tenderness or palpation, or pain upon compression or deep inspiration, when examining Plaintiff's chest and ribs. Dr. Nason concluded that the rib injury was healed. Dr. Nason found no tenderness or palpation along the medial or lateral ligaments, or the medial or lateral joint lines. No deformity or atrophy was found. A McMurray test was performed, which was negative. The Lachman test was also performed and found negative. Dr. Nason found no gross joint effusion or ligament stability. The range of motion of left knee was normal (140 extension, 140 being normal; and 0 flexion, 0 being normal). Dr. Nason concluded that the left knee sprain had been resolved.

Dr. Sachdev conducted a neurological evaluation of Plaintiff on January 1, 2010. Dr. Sachdev used light finger pressure to test palpation. The range of motion was tested by using a goniometer. The examination of Plaintiff's head was normocephalic, no tenderness or deformity. Testing of the cervical spine, showed no vertebral tenderness, or no paravertebral muscle tenderness or spasm over the right or left side. Also, there was no tenderness over the right or left

trapezius muscles. The foraminal compression and valalva maneuver were negative. When examining the range of motion of the neck, Dr. Sachdev found the flexion normal (45 degrees, 45 normal) and extension normal (45 degrees, 45 normal). The left lateral flexion (45 degrees, 45 normal) and right/left lateral rotation (80 degrees, 80 normal). The thoracic spine was found to have no tenderness or spasm. The lumbar spine upon palpation showed no tenderness or spasm. The range of motion for the lumbar spine showed flexion at 90 degrees (90 normal), extension 25 degrees (25 normal), right and left lateral flexion 25 degrees (25 normal) and right and left lateral rotation 30 degrees (30 normal). The Supine Straight Leg-Raise Test was found to be 90 degrees on both sides, with 90 normal. The Sitting Straight Leg-Raising Test was at 90 degrees on both sides, with 90 degrees normal. The motor examination showed no atrophy or fasciculation. The muscle tone was normal in all four extremities. Functional muscle testing showed muscle strength in 5/5 in all four extremities. Tinel's Sign and Phalen's Sign were all negative bilaterally. Deep tendon reflexes were symmetrical and 2+ in all four extremities. The plantar responses were flexor bilaterally. Finger-to nose and heel-to-shin tests were normal bilaterally. Dr. Sachdev noted that plaintiff had a normal gait and required no crutches. The Romberg's Test was found negative. No localization was found on the Weber's Test. The Valsala Maneuver was also negative. Dr. Sachdev concluded that Plaintiff's head contusion was resolved and Plaintiff had a normal neurological exam. Dr. Sachdev did not examine Plaintiff's knee.

Defendants argue that Dr. Nason's report revealed that Plaintiff had a normal orthopedic exam and Dr. Sachdev's report revealed that Plaintiff had a normal neurological exam; as such there was no continuing or permanent disability. Defendants' expert reports of Dr. Nason and Dr. Sachdev satisfied defendants' initial burden to make a prima facie showing of Plaintiff's lack of serious injury. (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 350 [2002], *Cruz v Lugo*, 67 AD3d 495, 496 [1<sup>st</sup> Dept 2009]).

The burden now switches to Plaintiff to show a serious injury within CPLR § 5012(d), and that the serious injury is casually related to the accident in question. Plaintiff's burden can be met through the evidence of an expert's nonconclusory opinion linking the injury to the accident. (*Diaz v. Anasco*, 38 AD3d 295, 295-296 [1<sup>st</sup> Dept 2007]).

#### *Plaintiff's Experts' Report*

Plaintiff submits the expert affirmation of Dr. Gilbert. In addition to the expert affirmation, Plaintiff relies on certified medical records from New York Presbyterian Hospital which include an MRI report of Plaintiff's left knee which was reviewed by Plaintiff's expert, Dr. Gilbert. Plaintiff also submits as evidence a police report and affidavit. Plaintiff's self-serving testimony is not entitled to great weight. (*Zoldas v Louise Cab Corp*, 108 AD2d 378, 383 [1<sup>st</sup> Dept 1985]).

In opposition to Defendants' motion for summary judgment and in support of Plaintiff's cross-motion for summary judgment, Plaintiff submits the affirmation of Plaintiff's treating Orthopedist, Dr. Marvin S. Gilbert. Dr. Gilbert first saw Plaintiff on December 9, 2008. Dr. Gilbert reviewed Plaintiff's MRI and stated that it showed a complete tear of the medial collateral ligament proximally off the femur and showed a medial capsular tear. Dr. Gilbert suggested that Plaintiff might need surgery in the future and open the brace to allow 60 degrees flexion, and that Plaintiff start a physical therapy program. On January 13, 2010 Plaintiff was reevaluated, and Dr. Gilbert said she had an increased flexion to 100 degrees. The range of motion had increased from 10 to 95, she was still tender and sore. The diagnosis of Plaintiff was still a complete tear of the medial collateral ligament. Plaintiff was re-evaluated on February 4,

2009. Plaintiff had an increased range of motion from 5 to 135 degrees. Plaintiff was continuing physical therapy. On March 3, 2009 Plaintiff saw Dr. Gilbert for a fourth evaluation at that time Plaintiff's range of motion was 0 to 135 degrees. Dr. Gilbert advised Plaintiff to continue her home exercise program and continue riding a bike. Plaintiff was continuing her physical therapy and strengthening exercises. The last evaluation of Plaintiff was on March 29, 2010. Plaintiff's range of motion was 5 to 105 degrees. Dr. Gilbert performed a McMurray Test and a click was heard. Dr. Gilbert noted in the report that Plaintiff was doing her home exercise programs; however, Dr. Gilbert mentions that there was swelling of the knee but no quadriceps atrophy showing that Plaintiff had done quadriceps exercises. Lastly, Dr. Gilbert notes that the tear of the medial collateral ligament has been healed and Plaintiff has good motion. But on reviewing the MRI, Dr. Gilbert stated Plaintiff had a tear of her medial meniscus. Plaintiff has problems with buckling of the knee and may require arthroscopic surgery on her knee. Dr. Gilbert states that Plaintiff's injuries are casually related to the accident.

#### *Permanent Loss of Use*

Under the permanent loss of use of a body organ, member, function or system category of CPLR § 5102(d), Plaintiff must establish that not only a permanent loss of use exists but that there is a total loss of use. (*Oberly v Bangs Ambulance, Inc.*, 96 NYS2d 295, 727 NYS2d 378 [2001].) Plaintiff has not shown through her affidavit or through expert reports that a permanent and total loss of use of her knee or any other body organ, member, or function exists. Therefore, Defendants' motion for summary judgment is granted as to the permanent loss claim under CPLR §5102(d).

#### *Permanent Consequential Limitation & Significant Limitation*

The permanent consequential limitation and significant limitation categories require that Plaintiff submit medical proof which contains "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Gorden v Tibulcio*, 50 AD3d 460 [1<sup>st</sup> Dept 2008] quoting *John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]). Plaintiff needs to establish that more than "a mild, minor, or slight limitation of use" exists. (*Licari v Elliott*, 57 NY2d 230, 236 [1982]). Plaintiff relies on Dr. Gilbert's expert report, in which Dr. Gilbert had reviewed the MRI and examined Plaintiff on five occasions. Although Dr. Gilbert states which objective tests were performed, Dr. Gilbert fails to compare the limited range of motion to the normal range. (*Milazzo v Gsener*, 33 AD3d 317, 318 [1<sup>st</sup> Dept 2006]). Even though Plaintiff's expert did not compare the limited range of motion to the normal in previous exams, the most current evaluation of Plaintiff found that Plaintiff's tear of the medial collateral ligament is healed and that Plaintiff has regained good motion. Plaintiff has not rebutted defendants' expert who found a normal range of motion in the knee. Also, Plaintiff's expert did not give a sufficient description of the qualitative nature of limits of Plaintiff's knee based on the normal function. (*Id.*) Plaintiff's expert just vaguely mentions that Plaintiff has problems with the knee buckling, walking up stairs and walking, and increased pain during activities. Also, Plaintiff's expert notes that Plaintiff's original MRI had a tear of the medial meniscus, but a qualitative assessment was not given. Since there is no limited range of motion or qualitative assessment, compared to the normal range of motion or function, Plaintiff has failed to demonstrate an issue of fact regarding the permanent consequential and significant limitation categories of CPLR § 5102(d). Therefore, Defendants' motion for summary judgment as to the categories of permanent consequential limitation and significant limitation is granted.

#### *90/180 Claim*

A defendant can establish the nonexistence of a serious injury under the 90/180 category

of Insurance Law §5102(d) by citing to evidence, such as plaintiff's own testimony, demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting his usual and customary daily activities for the prescribed period (*see Copeland v Kasalica*, 6 AD3d 253, 254 [1st Dept 2004]). Further, Plaintiff's injuries must restrict her from performing "substantially all" of her daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff testified that she had to use crutches for approximately four months and that she missed about three weeks of work. She also alleges curtailment of several of her activities including biking and snow boarding as a result of the accident. However, Plaintiff has not sufficiently shown that her curtailment of these activities was medically determined (*see Antonio v Gear Trans Corp.*, 2009 NY Slip Op 6370 [treating physician's statements that they were "medically disabled," and were to refrain from any work or activities that caused pain were too general to raise the inference that plaintiff's confinement to bed and home was medically required]; *see Gorden v Tibulcio*, 50 AD3d 460, 463, 855 N.Y.S.2d 515 [2008]).

#### *Gap in Treatment Argument*

Defendants argue that Plaintiff has an unexplained gap in treatment, March 12, 2009 through March 29, 2010 and that Plaintiff's expert Dr. Gilbert's affirmation is insufficient to meet Plaintiff's burden of proof on the motion. A plaintiff alleging serious injury who terminates therapeutic measures must offer a reasonable explanation for the termination of treatment. (*DeLeon v Ross*, 44 AD3d 545 [1st Dept 2007]; *Pommells v Perez*, 4 NY3d 566, 574 [2005]). When Plaintiff was examined on March 12, 2009, Dr. Gilbert's report states that Plaintiff was continuing physical therapy and taking part in strength training exercises. At that time Dr. Gilbert told Plaintiff to continue her home exercise program and to continue cycling. Then Dr. Gilbert's report notes that when Plaintiff was examined on March 29, 2010, Plaintiff was doing her home exercise program and cycling. However, Dr. Gilbert's report states that there was no quadriceps atrophy to indicate Plaintiff had continued her quadriceps exercise. In addition to Dr. Gilbert's report, which states that Plaintiff was doing her home exercise therapy (and possible not the quadriceps exercise) from March 12, 2009 to March 29, 2010, Plaintiff testifies in her sworn affidavit that she still follows her home exercise therapy. Plaintiff's testimony which states she was continuing home therapy supported by Dr. Gilbert's affirmation sufficiently fills the unexplained gap in medical treatment.

#### *Plaintiff's Liability Motion*

Plaintiff testifies in her sworn affidavit that she was lawfully walking in the marked crosswalk, with a pedestrian walk signal, when the alleged accident occurred. Plaintiff has shown that she is entitled to summary judgment as a matter of law on the issue of liability. Even if this Court were to find that Defendants properly rebutted Plaintiff's prima facie case by showing that there are triable issues of facts present, Plaintiff would still be entitled to summary judgment because Plaintiff is not required to show lack of comparative fault. A recent decision by the Appellate Division, First Department, has established that a plaintiff is no longer required to show lack of comparative fault to be entitled to summary judgment. (*Tselebis v Ryder Truck Rental, Inc.*, 2010 NY Slip Op 1442 [1<sup>st</sup> Dept]). In *Tselebis v Ryder*, the Court stated "it is not plaintiff's burden to establish defendant's negligence as the sole proximate cause of [plaintiff's] injuries in order to make a prima facie case of negligence." (*Id.* at 200). Instead, the plaintiff only has to make a prima facie case by showing that "defendant's negligence was a substantial cause of the events which produced the injury." (*Id.*, quoting *Derdiarian v Felix Construction Corp.*, 51 NY2d 308, 315 [1980]). The Appellate Division, First Department essentially held that prior decisions which suggest that a plaintiff has to be free from comparative negligence to prevail on

a motion for summary judgment are incompatible with CPLR §1411 (*Id.*). Therefore, Plaintiff's summary judgment motion on liability is granted and the matter is to be set down for a trial on damages which is to encompass the issues of Plaintiff's culpable conduct and the extent to which his recovery should be diminished in proportion thereto (*Id.*)

*It is hereby*

ORDERED that Defendants' motion for summary judgment under New York Insurance Law §5102(d) is granted, and the Plaintiff's complaint is dismissed in its entirety as against said Defendants with costs and disbursements to said Defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said Defendants; and it is further

ORDERED that Defendants are to serve a copy of this order, with Notice of Entry upon all parties, within 30 days.

This constitutes the decision and order of the court.

Dated: October 4, 2010  
New York, New York

George J. Silver, J.S.C.  
George J. Silver, J.S.C.  
GEORGE J. SILVER

**FILED**  
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