

**Santiago v Gonzalez**

2011 NY Slip Op 30590(U)

March 1, 2011

Sup Ct, Suffolk County

Docket Number: 07-38997

Judge: Peter H. Mayer

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SHORT FORM ORDER

INDEX No. 07-38997  
CAL No. 10-00955MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 10-20-10 (#001)  
MOTION DATE 9-29-10 (#002)  
ADJ. DATE 11-17-10  
Mot. Seq. # 001 - MG  
# 002 - MG; CASEDISP

-----X  
CARLOS D. SANTIAGO, :  
 :  
 :  
 Plaintiff, :  
 :  
 :  
 -against- :  
 :  
 :  
 EDGAR A. GONZALEZ, WILSON BRITO, :  
 GEORGE MORALES and JUAN F. MORALES, :  
 :  
 Defendants. :  
-----X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants George Morales and Juan F. Morales, dated September 3, 2010, and supporting papers (2) Notice of Motion/Order to Show Cause by the defendant Edgar A. Gonzales, dated September 3, 2010, supporting papers; (3) Affirmation in Opposition by the plaintiff, dated October 25, 2010, and supporting papers; (4) Reply Affirmation by the defendants George Morales and Juan F. Morales, dated November 3, 2010, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that the motion by defendants George Morales and Juan Morales seeking summary judgment dismissing plaintiff's complaint and the motion by defendants Edgar Gonzalez and Wilson Brito seeking summary judgment dismissing plaintiff's complaint hereby are consolidated for the purposes of this determination; and it is

**ORDERED** that the motion by defendants George Morales and Juan Morales seeking summary judgment dismissing plaintiff's complaint is granted; and it is further

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**ORDERED** that the motion by defendants Edgar Gonzalez and Wilson Brito seeking summary judgment dismissing plaintiff's complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Carlos Santiago as a result of a motor vehicle accident that occurred at the intersection of Atlantic Avenue and Station Road in the Town of Brookhaven, New York on August 5, 2007. The accident allegedly occurred when the vehicle operated by defendant Wilson Brito and owned by defendant Edgar Gonzalez (hereinafter collectively referred to as "Gonzalez") struck the rear quarter panel of the passenger side of the vehicle owned by defendant Juan Morales and operated by defendant George Morales (hereinafter collectively referred to as "Morales") while it was traveling through the aforementioned intersection. As a result of the impact between the vehicles, the Morales vehicle struck another vehicle stopped at stop sign on the westbound side of Atlantic Avenue. Plaintiff, at the time of the accident, was a front seat passenger in the Morales vehicle. By his bill of particulars, plaintiff alleges that he sustained various personal injuries as a result of the subject accident, including herniated discs at levels C5-C6 and levels L5-S1; disc bulges at levels C3 through T1; cervical and lumbosacral radiculopathy; cervical spine sprain; head contusion; left ankle sprain; and right knee first degree burns. Plaintiff alleges that at the time of the accident he was employed as a pre-school teacher at the Young Men's Christian Association ("YMCA"), and that he was incapacitated from his employment as a result of the injuries he sustained in the accident for approximately two days immediately following the accident.

Morales moves for summary judgment on the basis that the injuries plaintiff allegedly sustained as a result of the accident do not come within the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, Morales submits a copy of the pleadings, a copy of plaintiff's deposition transcript, and the sworn medical reports of Dr. Jay Nathan and Dr. Alan Greenfield. At Morales's request, Dr. Nathan conducted an independent orthopedic examination of plaintiff on October 12, 2009. At Morales's request, Dr. Greenfield performed an independent radiological review of the magnetic resonance images ("MRI") films of plaintiff's cervical and lumbar spines on October 1, 2009. Gonzalez also moves for summary judgment on the basis that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). In support of the motion, Gonzalez relies on the same evidence as Morales in their motion for summary judgment. Plaintiff opposes the motions on the ground that defendants Morales and Gonzalez have failed to demonstrate that his injuries do not meet the serious injury threshold of Insurance Law § 5102(d). Alternatively, plaintiff asserts that as a result of the accident he sustained injuries within the "limitation of uses" category and the "90/180 days" category. In opposition to the motions, plaintiff submits his own affidavit, unsworn copies of his medical records, a copy of the police motor vehicle accident report, copies of photographs of the Gonzalez vehicle, the affidavit of Dr. Philip Maglione, and the sworn MRI report of Dr. Ronald Wagner.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries (*Dufel v Green*, 84 NY2d 795, 622 NYS2d 900 [1995]; see also *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (see *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Porcano v Lehman*, 255 AD2d 430, 680 NYS2d 590 [1988]; *Nolan v Ford*, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [1984]).

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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 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.”

A defendant seeking summary judgment on the ground that a plaintiff’s negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a “serious injury” (*see Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant’s own witnesses, “those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports” to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [1992]). A defendant may also establish entitlement to summary judgment using the plaintiff’s deposition testimony and medical reports and records prepared by the plaintiff’s own physicians (*see Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2001]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [1997]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [1994]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for “serious injury” under New York’s No-Fault Insurance Law (*see Dufel v Green*, *supra*; *Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [2003]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [1992]). However, if a defendant does not establish a prima facie case that the plaintiff’s injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff’s opposition papers (*see Burns v Stranger*, 31 AD3d 360, 819 NYS2d 60 [2006]; *Rich-Wing v Baboolal*, 18 AD3d 726, 795 NYS2d 706 [2005]; *see generally, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Based upon the adduced evidence, Morales and Gonzalez have demonstrated, prima facie, their entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident (*see Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, *supra*; *Thomas v Weeks*, 61 AD3d 961, 878 NYS2d 182 [2009]). Dr. Nathan states in his report, in pertinent part, that an examination of plaintiff’s cervical spine reveals that he exhibits flexion of 45 degrees (normal is 45 degrees), extension of 45 degrees (normal is 45 degrees), right and left lateral flexion of 45 degrees (normal is 45 degrees), and right and left rotation of 80 degrees (normal is 80 degrees). The report states that an examination of plaintiff’s thoracolumbar spine reveals that he exhibits flexion of 90 degrees (normal is 90 degrees), extension, right and left lateral flexion of 30 degrees (normal is 30 degrees), and right and left rotation of 30 degrees (normal is 30 degrees). The report states that an examination of plaintiff’s right and left knees reveal that he has full ranges of motion in those areas, and there is no visible scar on the right knee or tenderness. It states that he has full range of motion in his ankles and shoulders and there is no tenderness, swelling, erythema or effusion. Dr. Nathan opines that the cervical, lumbar, and left ankle sprains, and the right knee burn that

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plaintiff sustained as a result of the accident have all resolved without any permanency, and that plaintiff is able to return to his pre-loss activities without restrictions.

In addition, Dr. Greenfield clearly states, after reviewing plaintiff's MRIs of his cervical and lumbar spines that plaintiff suffers from degenerative disc disease and dehydration, "along with diminished disc height, degenerative disc bulging, and osteophytic ridge/disc, [which] are all clearly longstanding and unrelated to the [subject] accident." Furthermore, reference to plaintiff's own deposition testimony sufficiently refuted the limitation of uses categories of injury (*see Colon v Tavares*, 60 AD3d 419, 873 NYS2d 637 [2009]; *Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664, 852 NYS2d 287 [2008]) and the 90/180 days category under Insurance Law § 5102(d) (*see Jack v Acapulco Car Serv., Inc.*, 63 AD3d 1526, 897 NYS2d 648 [2010]; *Bleszcz v Hiscock*, 69 AD3d 639, 894 NYS2d 481 [2010]; *Nguyen v Abdel-Hamed*, 61 AD3d 429, 877 NYS2d 26 [2009]; *Kuchero v Tabachnikov*, 54 AD3d 729, 864 NYS2d 459 [2008]).

Therefore, the burden shifted to plaintiff to come forward with competent admissible medical evidence based on objective findings, sufficient to raise a triable issue of fact that he sustained a serious injury as a result of the accident. A plaintiff alleging an injury within the limitations of uses categories must present either objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration in order to prove the extent or degree of physical limitation he or she sustained (*see Magid v Lincoln Servs. Corp.*, 60 AD3d 1008, 877 NYS2d 127 [2009]; *Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2006]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2005]). A sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part may also suffice (*see Toure v Avis Rent A Car Systems, Inc.*, *supra*; *Dufel v Green*, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

In opposition to defendants Gonzalez and Morales's prima facie showing, plaintiff has failed to raise a triable issue of fact showing that he did sustain an injury within the limitation of uses category or the 90/180 days category of serious injury as a result of the subject accident (*see Licari v Elliott*, *supra*; *Jack v Acapulco Car Serv., Inc.*, *supra*; *Bleszcz v Hiscock*, *supra*; *Nguyen v Abdel-Hamed*, *supra*; *Ali v Khan*, 50 AD3d 454, 857 NYS2d 71 [2008]; *Luckey v Bauch*, 17 AD3d 411, 792 NYS2d 624 [2005]). Plaintiff has proffered insufficient medical evidence to demonstrate that he sustained an injury within the limitation of use categories (*see Licari v Elliott*, *supra*; *Ali v Khan*, 50 AD3d 454, 857 NYS2d 71 [2008]), or within the 90/180 category (*see Jack v Acapulco Car Serv., Inc.*, 63 AD3d 1526, 897 NYS2d 648 [2010]; *Bleszcz v Hiscock*, 69 AD3d 639, 894 NYS2d 481 [2010]; *Nguyen v Abdel-Hamed*, 61 AD3d 429, 877 NYS2d 26 [2009]; *Kuchero v Tabachnikov*, 54 AD3d 729, 864 NYS2d 459 [2008]; *Sainte-Aime v Ho*, 274 AD2d 569, 712 NYS2d 133 [2000]). The term "significant" limitation must be construed as more than a minor limitation of use (*see Licari v Elliott*, *supra*; *Leschen v Kollarits*, 144 AD2d 122, 534 NYS2d 233 [1988]; *Gootz v Kelly*, 140 AD2d 874, 528 NYS2d 446 [1988]).

Plaintiff, in opposition, primarily relies upon the affidavit of Dr. Maglione, who attests that he

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began treating plaintiff on September 14, 2007 and that he reexamined plaintiff on October 1, 2010. Dr. Maglione states that plaintiff's prognosis is poor, that his condition is chronic, and that he will continue to experience "an increase in future acute exacerbations which will depend on his activity as the condition progresses along a more chronic course." However, inasmuch as Dr. Maglione's affidavit states what plaintiff's range of motion findings were when he examined him on October 1, 2010, Dr. Maglione fails to demonstrate that plaintiff showed a significant limitation of motion in his cervical and lumbar regions contemporaneous with the subject accident (*see Stevens v Sampson*, 72 AD3d 793, 898 NYS2d 657 [2010]; *Keith v Duval*, 71 AD3d 1093, 898 NYS2d 184 [2010]; *Rivera v Bushwick Ridgewood Prop. Inc.*, 63 AD3d 712, 880 NYS2d 149 [2009]). Moreover, plaintiff failed to address Gonzalez and Morales's proof that he suffers from pre-existing degenerative disc disease in the areas where he alleges his injuries occurred. Where a defendant presents evidence of a pre-existing condition, it is incumbent upon the plaintiff to present proof to address the defendant's lack of causation (*see Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Sky v Tabs*, 57 AD3d 235, 868 NYS2d 648 [2008]; *Ciordia v Luchian*, 54 AD3d 708, 864 NYS2d 74 [2008]; *Luciano v Luchsinger*, 46 AD3d 634, 847 NYS2d 622 [2007]; *Carter v Full Serv., Inc.*, 29 AD3d 342, 815 NYS2d 41 [2006]; *Flores v Leslie*, 27 AD3d 220, 810 NYS2d 464 [2006]; *Giraldo v Mandanici*, 24 AD3d 419, 805 NYS2d 124 [2005]). Contrary to plaintiff's assertion, his self-serving affidavit fails to raise a triable issue of fact as to whether he sustained a serious injury within the meaning of Insurance Law § 5102(d) since there was no objective medical evidence to support it (*see Laguerre v Chavarria*, 41 AD3d 437, 837 NYS2d 716 [2007]; *Davis v New York City Trans. Auth.*, 294 AD2d 531, 742 NYS2d 658 [2002]). Accordingly, defendants Gonzalez and Morales' motions for summary judgment are granted.

Dated: 3/1/11

  
PETER H. MAYER, J.S.C.