

**Torres v Gamma Taxi Corp.**

2011 NY Slip Op 33998(U)

March 24, 2011

Sup Ct, Bronx County

Docket Number: 13962/07

Judge: Robert E. Torres

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - COUNTY OF BRONX

MAR 25 2011

PART 29

Case Disposed	<input checked="" type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:

TORRES, JOSE

Index No. 13962-2007

-against-

Hon. ROBERT E. TORRES

GAMMA TAXI CORP. AND KOFI BUSIA

Justice.

The following papers numbered 1 to \_\_\_\_\_ Read on this motion.

Noticed on 2-14-11 and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of 2/14/2011

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is granted

in accordance with the attached  
decision

Motion is Respectfully Referred to:  
Justice: \_\_\_\_\_  
Dated: \_\_\_\_\_

Dated: 3 29, 2011

Hon. [Signature]  
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

-----X  
JOSE TORRES,

Plaintiff,

-against-

**DECISION & ORDER**

Index No. 13962/07

GAMMA TAXI CORP. AND KOFI BUSIA,

Defendants.

-----X  
HON. ROBERT E. TORRES:

In this motor vehicle personal injury case, defendants seek to renew and reargue a previously decided summary judgment motion pursuant to CPLR §2221(e) on the grounds that newly discovered facts and evidence previously unavailable to defendants would change the prior determination. Having fully considered the papers submitted in support of and in opposition to the motion, the defendants' motion is granted.

Defendants previously moved for summary judgment arguing that the plaintiff did not meet the threshold requirement that he sustained a "serious injury" pursuant to Insurance Law § 5102(d). Defendants' prior motion was denied (Order of the Hon. Patricia Anne Williams, dated January 8, 2009). The Court held that plaintiff raised issues of fact as to whether the plaintiff sustained a "serious injury" and whether he had significant limitation for the 90 of the first 180 days post-accident. The instant motion involves the issue of whether the serious injuries alleged are causally related to the accident at issue, upon the revelation of new information. This matter has been referred to this Court and decided in accordance with CPLR 9002.

This action arises out of a claim by plaintiff to recover damages for bodily injuries allegedly sustained from a two-car motor vehicle collision between plaintiff's and defendants' vehicle. The subject accident occurred on July 18, 2005 at the intersection of West 27<sup>th</sup> Street and 11<sup>th</sup> Avenue

in Manhattan. Plaintiff alleges soft tissue neck and back injuries.

Initially, this Court grants defendants' application to renew. Under the circumstances of this case where the plaintiff's deposition testimony has been demonstrated to be, at best, misleading if not entirely false as to the issue of prior injuries, and since defendants "recently" became aware of this information, the motion to renew is granted.

The crux of plaintiff's injuries with regard to the accident at issue involve cervical and lumbar spine injuries. Upon reviewing the motion papers, plaintiff suffered related injuries as a result of two prior car accidents he was involved in, one on May 3, 1999 and the other on February 9, 2001.

As a result of a motor vehicle accident, plaintiff went to the emergency room at Lincoln Hospital on May 3, 1999. He had immediately developed headaches, neck, left knee and lumbar spine pain. He went for treatment at Fordham Medical & Pain Treatment on May 7, 1999. He had markedly decreased range of motion in his cervical and lumbar spine. He was rendered partially disabled and it was not definite when he could resume full unrestricted activities. Four months later, on September 13, 1999, plaintiff complained of headaches, neck and back stiffness, neck pain radiating to the left arm and shoulder and low back pain at Triboro Medical. He was diagnosed with cervical and lumbosacral radiculopathy, spine sprain and strain syndrome, central cervical and lumbosacral HNP and post-traumatic headaches. Plaintiff sought continuous physical therapy (over 80 times) as a result of the 1999 accident from May through October. Plaintiff also sought acupuncture and chiropractic treatment.

At an initial consultation on February 21, 2001 at Heights Medical Care, PC, plaintiff presented with cervical/neck pain, low back pain, left knee pain and headaches as a result of injuries sustained in an accident that took place on February 9, 2001. He was diagnosed with traumatic

cervical pain syndrome, traumatic low back pain syndrome, lumbar radiculopathy and left knee derangement. The report categorized the plaintiff as partially disabled. At a chiropractic examination on March 30, 2001 at Monument Chiropractic, plaintiff continued to complain of frequent cervical pain, frequent lower back pain, occasional headaches and intermittent knee pain. He was diagnosed with: cervical radiculitis, multiple cervical subluxations, cervical strain/sprain, lumbar subluxations, lumbar strain/sprain. The patient's prognosis was guarded. On July 19, 2001, he was still treating at Monument Chiropractic and continued to have cervical pain radiating to the left shoulder and arm, low back pain radiating to the left leg, thoracic pain radiating to the right and left rib area, headaches, left knee pain and left shoulder pain. His prognosis remained guarded.

Defendants contend that up until this case was put on the trial calendar, plaintiff denied any prior injuries to his neck and back. Defendants ultimately obtained information pertaining to the two prior accidents, which resulted in similar injuries and complaints. Since defendants were not privy to the information, admission or medical records regarding plaintiff's prior injuries, and have only recently had the opportunity to obtain the files concerning same, it is their position that the new evidence establishes that plaintiff did not sustain a "serious injury" causally related to the subject accident and any claimed injuries were caused by the 1999 and 2001 prior accidents.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 (1985). Once the moving party has demonstrated its

entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action. *See Zuckerman v. City of New York*, 49 NY2d at 562. When considering a motion for summary judgment, the court must view the evidence in the light most favorable to the party opposing the motion. *See Makaj v. Metropolitan Transport Authority*, 18 AD3d 625, 626 (2d Dep't 2005).

Additionally, given the nature of this litigation, plaintiff may only recover damages against defendants if plaintiff has sustained a "serious injury" causally related to the claimed accident. *See Insurance Law §§ 5102, 5104(a)*.

Based on the record, this court finds that defendants made a prima facie showing of their entitlement to judgment as a matter of law by demonstrating that plaintiff sustained injuries to his cervical and lumbar spine in two prior car accidents, in 1999 and 2001, very similar to the injuries claimed in the instant action. As such, it cannot be maintained that plaintiff's injuries were causally and solely related to the accident at issue.

Plaintiff fails to meet his burden in creating an issue of fact because he has not demonstrated that he sustained a serious injury causally related to the subject accident. In opposition, plaintiff sets forth that select radiology reports from the prior accidents reveal normal findings. However, he fails to address whether plaintiff's complaints and injuries, for which he required months of treatment and was labeled as "partially disabled," fully resolved at any time thereafter. Annexed in support of his opposition, is a report from plaintiff's treating physician post a subsequent neurologic visit, which includes a vague and conclusory statement that "[w]ith a reasonable degree of medical certainty, the motor vehicle accident of 7/18/05 is the substantial cause of his condition" (*See Exhibit A, Dr. Hausknecht's report, dated October 28, 2010 annexed to Plaintiff's Affirmation in Opposition*).

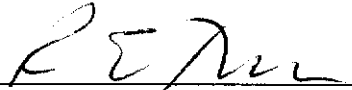
Without more, this alone is insufficient to raise an issue of fact.

Upon a full review of the submitted papers, this Court determines that defendants are entitled to summary judgment and plaintiff's claim is dismissed.

Accordingly, defendants' motion is granted.

This constitutes the decision and order of the court.

Dated: March 24, 2011  
Bronx, New York

  
Robert E. Torres, J.S.C.

**JUDGE ROBERT E. TORRES**