

**Mendez v Fiyakola**

2013 NY Slip Op 33792(U)

July 1, 2013

Supreme Court, Bronx County

Docket Number: 306815/2011

Judge: Mary Ann Brigantti-Hughes

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

Present: Hon. Mary Ann Brigantti-Hughes

X

ERVIN MENDEZ,

Plaintiff,

-against-

**DECISION/ORDER**

Index No.: 306815/2011

JACOB FIYAKOLA and ADOM RENTAL  
TRANSPORTATION, INC.,

Defendants.

X

The following papers numbered 1 to 5 read on the below motion noticed on October 12, 2012 and duly submitted on the Part IA15 Motion calendar of **March 1, 2013**:

<u>Papers Submitted</u>	<u>Numbered</u>
Defs' Affirmation in support of motion, exhibits	1,2
Pl.'s Aff. In Opposition, exhibits	3,4
Defs.' reply affirmation	5

Upon the foregoing papers, the defendants Jacob Fiyakola and Adom Rental Transportation, Inc. (collectively "Defendants") seek an Order pursuant to CPLR § 3212 dismissing complaint of the plaintiff Ervin Mendez ("Plaintiff") on the grounds that the injuries claimed do not satisfy the "serious injury" threshold requirement of New York Insurance Law § 5102(d) and for such other and further relief as this Court may deem just and proper.

I. Background and Party Submission

The instant matter seeks recovery of monetary damages for personal injuries allegedly sustained by Plaintiff as a result of a motor vehicle accident which allegedly occurred on February 21, 2011 at White Plains Road and Cross Bronx Expressway, Bronx, New York

Plaintiff alleges in his verified bill of particulars that as a result of the aforementioned motor vehicle accident he sustained the following injuries: (1) Broad based posterior disc bulges

at C3-C4, C6-C7, C7-T1; (2) Focal left paracentral disc herniation at C4-C5; (3) Right paracentral disc herniation at C5-C6; (4) Broad based midline disc herniation at L5-S1; (5) Bilateral carpal tunnel syndrome.

Plaintiff does not allege in his bill of particulars whether he was confined to his bed and home for any period of time due to the accident. Furthermore, it should be noted that the Plaintiff fails to allege in his bill of particulars that he suffered a "serious injury" as defined by New York Insurance Law § 5102(d) or even more specifically any statutory category of "serious injury" as defined New York Insurance Law § 5102(d).

In support of the instant motion, the Defendants rely on, *inter alia*, (1) The affirmed MRI report from Dr. Audrey Eisenstadt regarding Plaintiff's cervical spine MRI conducted on March 22, 2011 approximately one month after the accident in the case at bar; (2) The affirmed report from Dr. Audrey Eisenstadt regarding Plaintiff's lumbar spine MRI conducted on April 6, 2011 approximately a month and a half after the accident in the case at bar; (3) The affirmed independent neurological medical examination (hereinafter "IME") report from Dr. Jean-Robert Desrouleaux conducted August 6, 2012; and (4) The transcript of Plaintiff's examination before trial (hereinafter "EBT").

In her report as to Plaintiff's cervical spine, Dr. Eistenstadt notes that, on April 6, 2011 approximately a month and a half after the accident in the case at bar, the MRI reveals "extensive degenerative disease centered at the most common level for arthritis to occur, the C5-C6 intervertebral disc level. The bony and intervertebral disc changes predate the incident and could not have developed in the one-month time interval between the examination and incident of [February 21, 2011]." She also states that the disc degeneration is "greater than six months in origin and is further indication that the disc protrusion at the C5-C6 level has a long standing degenerative etiology". Lastly, she also states that the drying out of disc material seen in the study "is greater than three months in development and could not have occurred in the short time interval between the examination and the incident"

Regarding the lumbar spine MRI, Dr. Eistenstadt states in her conclusion that the review of the MRI examination performed one and a half months following the incident reveals

“degenerative changes in the lumbar spine which could not have developed in the short time interval between examination and incident”. She states that there are osteophyte formations at L1-2, ‘a bony productive change, greater than six months in origin and clearly predating the incident”. Dessication at the L5-S1, drying out of the disc material, “is greater than three months in development and could not have occurred in the short time interval between examination and injury”. She goes on the state that the MRI revealed disc bulging, but that disc bulging is not “a traumatic process”; instead it is “degenerative in origin”.

Defendants also submit the affirmed neurological IME report from Dr. Desrouleaux, conducted on August 6, 2012. The report states that Plaintiff stated that he was unemployed at the time of the accident, or at the time of the IME. Dr. Desrouleaux’s IME report states that an examination of Plaintiff’s neck, thoracic spine, and lumbar revealed he has full ranges of motion in those areas, and all tests were negative. It should be noted that Dr. Desrouleaux’s report states that he used a goniometer for all range of motion measurements and the normal ranges of motion were based on pages 596-598 of the AMA guides to the Evaluation of Permanent Impairment, Fifth Edition .

Dr. Desrouleaux further opines that Plaintiff’s “alleged injur[ies] to the cervical, thoracic and lumbar spine [are] resolved”. He states that “no further neurological treatment is indicated” and no “permanence or residual effect is anticipated in the claimant’s condition”. He states that Plaintiff is able to function “in his pre-accident capacity and carry out his work duty and day to day activities without neurological restriction”.

Lastly, Defendants submit the transcript of Plaintiff’s EBT conducted on December 20, 2011 . Pertinently, Plaintiff testified that three to four years prior to the EBT he was involved in a prior accident in which he hurt his back. He commenced a law suit regarding the prior accident and the matter was eventually settled . Plaintiff testified that due to the accident in the case at bar, he was confined to his home and bed for a week. He was not employed on the date of the accident and was last employed on November 2010.

In opposition, Plaintiff has provided the following pertinent exhibits: (1) the affirmed report of Dr. Emil Stracar dated July 20, 2011; (2) the affirmed MRI cervical spine report from

Dr. John Athas, dated March 22, 2011; (3) the affirmed MRI lumbar spine report from Dr. John Athas, dated April 6, 2011; (4) the medical records from Stracar Medical Services; (5) the medical records from Urban Well Accupuncture; (6) the medical records from Sweetwater Chiropractic, P.C.; (7) the uncertified medical records from Jacobi Medical Center; (8) Plaintiff's affidavit.

Dr. Stracar's report states that the Plaintiff first sought his medical attention in regard to the accident in the case at bar on February 22, 2011. At the initial examination, Plaintiff's chief complaints were headaches, dizziness, cervical pain radiating to both upper extremities, right shoulder and hand weakness, and lumbosacral pain radiating to both lower extremities. Examination of the cervical spine revealed muscle spasm, decreased range of motion and a positive Spurling-Compression test bilaterally. The initial examination of the thoracic spine revealed spasms and decreased range of motion. The initial examination of the lumbar spine revealed muscle spasms and tenderness, decreased range of motion and positive straight leg rasing test. Dr. Stracar's initial impression of the Plaintiff was "[s]tatus-post cervical, thoracic and lumbosacral sprain" with a chest contusion. Dr. Stracar states in his report that after the examination he immediately started the Plaintiff on a physical therapy program.

The follow up examinations on March 17, 2011, April 5, 2011, May 3, 2011, June 2, 2011 revealed the cervical spine again with muscle spasm, decreased range of motion and a positive Spurling-Compression test bilaterally. The examination of the thoracic spine again revealed spasms and decreased range of motion. Also the examination of the lumbar spine again revealed muscle spasms and tenderness, decreased range of motion and positive bilateral straight leg rasing test. The June 14, 2011 examination revealed the cervical spine again with muscle spasm, decreased range of motion and a positive Spurling-Compression test bilaterally and the lumbar spine examination again revealed muscle spasms and tenderness, decreased range of motion and positive bilateral straight leg rasing test. Dr. Stracar states in his report regarding the June 14, 2011 examination that Plaintiff "had reached maximum benefit from physical therapy and will be discharged today".

Dr. Stracar states in his report that the trauma to the cervical and lumbar spine were

caused by the accident. He goes on to state that “[i]n spite of ongoing physical therapy and chiropractic program lasting approximately [five] months...no full recovery was noted and the patient contributed to demonstrate signs and symptoms of residual inflammatory pathology to the muscular and supportive structures of the cervical and lumbosacral spine... [and] [t]hese changes may be permanent in nature...” Dr. Stracar also states that Plaintiff has “partial disability” and that it “may be permanent”. Lastly he states that “[b]ased upon the history given by the Plaintiff and the above objective findings...it may be stated with a reasonable degree of medical certainty that the accident on February 21, 2011 was the direct component producing cause of [Plaintiff’s injuries]”.

Plaintiff also submits the affirmed MRI cervical spine report from Dr. John Athas, dated March 22, 2011, and his affirmed MRI lumbar spine report dated April 6, 2011. Regarding the cervical spine, Dr. Athas reports that the MRI revealed C3-C4 posterior disc bulge; C4-C5 focal left paracentral disc herniation; C5-C6 right paracentral disc herniation; C6-C7 broad based posterior disc bulge, and C7-T1 broad based posterior disc bulge. Regarding the lumbar spine, Dr. Athas states that the MRI revealed a L5-S1 broad-based midline disc herniation.

Plaintiff also submits a stack of treatment records that were certified as business records, and uncertified medical records from Jacobi Medical Center. Although uncertified hospital records may be considered in opposition to a motion for summary judgment, such proof cannot be the sole basis for the court's determination. See, *Rubencamp v Arrow Exterminating Co., Inc.*, 79 A.D.3d 509, 510 (1<sup>st</sup> Dept. 2010) citing *Clemmer v. Drah Cab Corp.*, 74 A.D.3d 660, 661 (1<sup>st</sup> Dept. 2010). The hospital records reveal that the Plaintiff was treated and released. However, the CT-scan report of the cervical spine conducted in Jacobi Hospital states that the findings revealed “multilevel degenerative changes most severe at C5-C6”.

Lastly, Plaintiff submits an affidavit where he states that he discontinued his treatment with Dr. Stracar because his “no fault benefits ended” and was not “financially able to continue treatment”. In addition he states that he did not have medical insurance that would cover physical therapy. He also states that as a result of the accident in the case at bar he was bedridden for one week and confined to his home for two weeks.

## II. Applicable Law and Analysis

Defendants have made a prima facie showing that Plaintiff did not sustain a permanent consequential or significant limitation to his cervical and lumbar spine by offering the affirmed neurological IME report of Dr. Desrouleaux, who found objectively determined normal ranges of motion in Plaintiff's cervical, thoracic and lumbar spine (see, *Oberly v. Bangs Ambulance Inc.*, 96 N.Y.2d 295 [2001]; *Ramos v Rodriguez*, 93 AD3d 473, 474 [1<sup>st</sup> Dept. 2012]). Moreover, Defendants made a prima facie showing that Plaintiff did not sustain a serious injury as a result of the accident in the case at bar by proffering the affirmation of Dr. Eistenstadt's affirmed lumbar spine and cervical spine MRI report in which she found degenerative disc disease and no posttraumatic abnormality (see *McIntosh v Sisters Servants of Mary*, 105 A.D.3d 672 [1<sup>st</sup> Dept. 2013]; *Barhak v L. Almanzar-Cespedes*, 101 A.D.3d 564 [1<sup>st</sup> Dept. 2012]).

Defendants have also made his prima facie showing with respect to Plaintiff's 90/180 claim, by submitting Plaintiff's EBT transcript that showed the Plaintiff was not employed at the time of the accident, and was only confined to bed and home for a week after the accident (see, *Arenas v. Guaman*, 98 A.D.3d 461, [1<sup>st</sup> Dept. 2012]).

In opposition, Plaintiff failed to raise a triable issue of fact as to the existence of a serious injury under the "permanent consequential limitation" category, as he did not submit objective evidence of permanent limitations based on a recent examination of his cervical and lumbar spine (see *Vasquez v Almanzar*, 2013 NY Slip Op 4561 [1<sup>st</sup> Dept. 2013]; citing *Zambrana v Timothy*, 95 A.D.3d 422 [1<sup>st</sup> Dept. 2012]).

Moreover, Plaintiff's medical expert failed to address or rebut/refute the finding of Dr. Eistenstadt that Plaintiff suffered from a pre-existing degenerative condition. Thus, Plaintiff failed to raise a triable issue of fact under either the "permanent consequential limitation" or "significant limitation" category. See, *Vasquez v Almanzar*, *supra*; see also, *Rampersaud v Eljamali*, 100 A.D.3d 508, [1<sup>st</sup> Dept. 2012]; *Porter v Bajana*, 82 A.D.3d 488 [1<sup>st</sup> Dept. 2011]; *Jimenez v. Polanco*, 88 A.D.3d 604 [1<sup>st</sup> Dept. 2011]).

As to the 90/180 day claim, Plaintiff has failed to rebut Defendants' prima facie case by not offering any evidence showing that he was restricted from performing substantially all of the material acts that constituted his usual and customary daily activities for 90 days during the 180

days following the accident (see, *Bailey v Islam*, 99 A.D.3d 633, 634 [1<sup>st</sup> Dept. 2012];  
*Fernandez v Niamou*, 65 A.D.3d 935, 936 [1<sup>st</sup> Dept. 2009]).

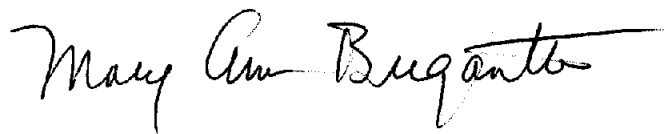
III. Conclusion

Accordingly, it is hereby

**ORDERED**, that Defendant's motion for an Order pursuant to CLPR § 3212 granting  
summary judgment pursuant to New York Insurance Law § 5102(d) is hereby **granted**

This constitutes the Decision and Order of this Court.

Dated: July 1, 2013



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