Santana v Ozuna
2013 NY Slip Op 33988(U)
June 11, 2013
Supreme Court, Bronx County
Docket Number: 308326/10
Judge: Mary Ann Brigantti-Hughes
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[* 1] FILED Jun 20 2013 Bronx County Clerk

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

Present: Hon. Mary Ann Brigantti-Hughes

X

VICTOR A. SANTANA,

DECISION/ORDER

Plaintiff,

-against-

Index No.: 308326/10

PASCUAL OZUNA, AUGUSTO REYES, and
BAILEY RADIO CAR & LIMOUSINE CORP.,

Defendants.

X

The following papers numbered 1 to 8 read on the below motion noticed on October 15, 2012 and duly submitted on the Part IA15 Motion calendar of **March 21, 2013**:

Papers Submitted	Numbered
Defs' Affirmation in support of motion, exhibits	1,2
Pl.'s cross-motion, exhibits	3,4
Defs.' Affirmation in reply, exhibits	5,6
Def.'s Affirmation in opposition	7
Pl.'s Aff. In Reply	8

In an action arising out of an alleged motor vehicle accident, defendants Pascual Ozuna and Augusto Reyes (collectively "Defendants") move for summary judgment, dismissing the complaint of the plaintiff Victor Santana ("Plaintiff") for failing to satisfy the "serious injury" threshold requirement of New York Insurance Law §5102(d). Plaintiff opposes the motion and cross-moves for summary judgment against Defendants on the issue of liability.

I. Background

This matter arose from an alleged motor vehicle accident that occurred on May 20, 2010. At deposition, Plaintiff testified that he was stopped on the southbound Cross-Bronx Expressway near the Jerome Avenue exit when his vehicle was struck in the rear-passenger side by Defendants' vehicle.

According to his verified bill of particulars, as a result of this accident, Plaintiff sustained, among other injuries, broad-based posterior cervical disc herniations at C4-C5 and C5-C6, and a parasagittal left-sided posterior herniation at L4-L5. At his examination before trial, Plaintiff testified that he was confined to his home for two weeks following the accident, and confined to his bed for approximately 1 ½ weeks.

Defendants now move for summary judgment, asserting that Plaintiff cannot meet the "serious injury" threshold requirement of New York Insurance Law §5102(d).

II. Standard of Review

"[T]he proponent of a summary judgment motion 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). There is no requirement that the proof for said motion be submitted in affidavit form, rather, the requirement is that the evidence proffered be in admissible form. (*Muniz v. Bacchus*, 282 A.D.2d 387 [1st Dept. 2001]). Accordingly, affirmations from attorneys having no personal knowledge of the facts are not evidence and offer nothing more than hearsay. (*Reuben Israelson v. Sidney Rubin*, 20 A.D.2d 668 [2nd Dept. 1964]; *Erin Federico v. City of Mechanicville*, 141 A.D.2d 1002 [3rd Dept. 1988]).

Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. (*Knepka v. Tallman*, 278 A.D.2d 811 [4th Dept. 2000]).

If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738,[1993]; *Bronx County Public Adm'r v. New York City Housing Authority*, 182 A.D.2d 517 [1st Dept. 1992]).

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III. Applicable Law and Analysis

1. Defendants' Serious Injury Motion

Where a plaintiff is claiming serious injury arising from "permanent consequential limitation of use of a body organ, member, function or system" or "significant limitation of use of a body function or system" the determination of whether the limitation is "significant" or "consequential" relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose, and use of the body part. *Pommells v. Perez*, 4 N.Y.3d 566 (2005); *Toure v. Avis Rent-A-Car Systems, Inc.*, 98 N.Y.2d 345 (2002). Thus, to establish a claim under either of these categories, a plaintiff must submit medical proof containing objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitation to the normal function, purpose, and use of the affected body organ, member, function or system. *Toure, supra.* See also *Guzman v. Paul Michael Management*, 266 A.D.2d 508 (2nd Dept. 1999). Expert medical evidence in the form of physician assessments must be supported by objective medical evidence such as MRI reports, CT scan reports and observations during examination. *Toure, supra.*

When a defendant seeks summary judgment alleging that a plaintiff does not meet the threshold required to maintain a lawsuit, the burden is on the defendant to first establish that plaintiff's injuries are not serious. *Franchini v. Plameri*, 1 N.Y.3d 536 (2003); *Brown v. Achy*, 9 A.D.3d 30 (1st Dept. 2004). To meet their burden, defendants' medical evidence must not be conclusory and must be based on objective testing. *See Nix v. Xiang*, 19 A.D.3d 227 (1st Dept. 2005). With regard to range-of-motion issues, defendant's medical doctor is required to specify the degree of plaintiff's range of motion and what constitutes normal range of motion. *Webb v. Johnson*, 13 A.D.3d 54 (1st Dept. 2004). Where defendant's medical expert finds restricted range-of-motion, and a doctor believes they are self-imposed, the doctor must explain the reasons for the restricted range of motion and why the same are not related to the accident. *Style v. Joseph*, 32 A.D.3d 212 (1st Dept. 2006).

Once defendant meets the burden of prima facie entitlement to summary judgment, such

relief is warranted unless plaintiff can establish the existence of a serious injury through competent evidence. Plaintiff must, of course, establish that the injuries alleged were the result of the accident claimed and that the limitations alleged are the result of those injuries. *Noble v. Ackerman*, 252 A.D.2d 392 (1st Dept. 1998). Plaintiff's evidence must be objective, contemporaneous with the accident, showing qualitative evidence of what restrictions, if any, plaintiff was afflicted with. *Blackmon v. Dinstuhl*, 27 A.D.3d 241 (1st Dept. 2006). A medical expert's opinion establishing a serious injury which is based solely on plaintiff's subjective complaints will not be credited and will not preclude summary judgment in favor of defendant. *Zoldas v. Louise Cab Corporation*, 108 A.D.2d 378 (1985). In order to be sufficient to establish a prima facie case of serious injury, the medical affirmation or affidavit proffered must contain medical findings, which are based on the physician's own examination, tests and observations and review of the record rather than manifesting only the plaintiff's subjective complaints. *Bent v. Jackson*, 15 A.D.2d 46 (1st Dept. 2005); *Thompson v. Abassi*, 15 A.D.3d 95 (1st Dept. 2005).

If a defendant fails to carry the burden of rebutting prima facie a plaintiff's serious injury claim, the sufficiency of a plaintiff's opposition papers need not be considered. *See Pommells v. Perez*, 4 N.Y.3d 566 (2005), *see also Tchjevskaia v. Chase*, 15 A.D.3d 389 (2nd Dept. 2005)(plaintiff's opposition papers need not be considered where, despite its ultimate conclusion that plaintiff did not sustain serious injury, affidavit of defendant's examining orthopedist disclosed recorded limitations of plaintiff's range of motion).

Assuming the Court has competent, admissible, but conflicting medical evidence and or affidavits on the issue of serious injury, summary judgment is usually not warranted. *Cassagnol v. Williamsburg Plaza Taxi*, 234 A.D.2d 208 (1st Dept.1996). Conflicting medical evidence on the issue of the permanency and significance of a plaintiff's injuries warrant denial of summary judgment. *Noble v. Ackerman*, 252 A.D.2d 392 (1st Dept.1998). A physician's affirmed statement, which is the equivalent of a sworn statement, is competent evidence. *CPLR* 2106. Further, the First Department has held that unsworn MRI reports, nerve conduction studies and other unsworn medical reports are properly before the court when they are specifically referred to in a physician's affirmation or chiropractor's affidavit. *Byong Yol Yi v. Canela*, 70 A.D.3d 584 (1st Dept. 2010).

Defendants' Submissions

On March 14, 2012, Plaintiff submitted to an independent medical examination performed by an orthopedist Dr. Robert Israel. In his sworn report, Dr. Israel states that he reviewed Plaintiff's medical records, including MRI film of the right shoulder, left knee, and spine. Using a goiniometer, Dr. Israel conducted range-of-motion tests of Plaintiff's cervical, lumbar spine, right shoulder, and right knee and found no limitations. Under "impressions," Dr. Israel found that Plaintiff had "resolved" sprains of the cervical and lumbar spine, right shoulder and right knee. He opined that Plaintiff was not disabiled as a result of this accident and is capable of full work activities. On March 8, 2012, Plaintiff submitted to an independent medical examination performed by a neurologist, Dr. Daniel Feuer. Dr. Feuer submits a sworn report, where he also conducted range-of-motion examination of Plaintiff and found no restrictions. All other objective examinations were either negative or normal. Based on a reasonable degree of clinical certainty, Dr. Feuer opined that Plaintiff does not have any objective neurological disability or neurological permanency.

Plaintiff's Opposition

Plaintiff opposes the motion, and cross-moves for summary judgment on the issue of liability. With respect to the "serious injury" motion, Plaintiff argues that Defendants have not met their initial burden. Regarding Plaintiff's "90/180" allegations, Plaintiff argues that the Defendants' physicians only examined him some 22 months after the date of the accident, and therefore they cannot establish that Plaintiff has not sustained a "non-permanent impairment" claim.

Plaintiff also argues that there is an issue of fact as to whether he has suffered a serious injury. Plaintiff submits certified medical records from Bronx-Lebanon Hospital on the date of the accident which include X-ray results. A cervical spine X-ray revealed C5-6 disc space narrowing endplate spurs and mild retrolisthesis. An x-ray of the lumbar spine revealed L5-S1 retrolisthesis and narrowing of the L4-L5 disc space. Plaintiff then presented to a chiropractor, Glenn Whitney, D.C. Plaintiff submits certified records from Dr. Whitney's treatment, which

indicate that Plaintiff underwent physical therapy consistently until December 6, 2010. The records contain range-of-motion examination results, which reveal restrictions in the cervical spine upon flexion, extension, right and left lateral flexion, and right and left rotation. Plaintiff also exhibited restrictions in the dorsolumbar spine at flexion, extension, right and left lateral flexion, and right and left rotation. Plaintiff submits a sworn "final narrative report" of Dr. Rafael Delacruz Gomez, who states that he examined Plaintiff from June 2, 2010 through December 6, 2010. He notes that Plaintiff had significant restrictions in the cervical and lumbar spine upon computerized examination on 6/7/2010. Dr. Gomez also examined Plaintiff's cervical spine MRI, that revealed broad-based posterior herniations of the C4-C5 and C5-C6 levels and spinal cord compression. Plaintiff's lumbar spine MRI revealed parasagittal left-sided posterior herniation of L4-L5. It should be noted that an MRI of Plaintiff's right shoulder and left knee MRIs revealed no discernible MRI abnormalies. Nerve conduction studies for the upper and lower extremities, however, revealed, *inter alia*, evidence of cervical and lumbosacral radiculopathy. Dr. Gomez opined that the May 20, 2010 accident was the cause of Plaintiff's injuries. He further opined that the injuries and limitations to Plaintiff's cervical and lumbar spine are permanent in nature.

Plaintiff submits the sworn report of Negin Gohari, D.O., a physiatrist, who examined Plaintiff on December 20, 2012. Dr. Gohari examined Plaintiff's cervical spine, and found flexion to 40 degrees (50 normal), extension to 40 degrees (60 normal), rotation to 55 degrees (80 normal) to the right, and 45 degrees (80 normal) to the left, along with side bending to 25 degrees (50 normal) bilaterally. Upon examination of the lumbar spine, Plaintiff revealed forward flexion to 75 degrees (90 normal), extension to 20 degrees (30 normal), rotation to 30 degrees (45 normal) bilaterally, and side bending to 20 degrees (25 normal), bilaterally. Dr. Gohari recommended a physical therapy regimen and follow up MRIs. He opined that Plaintiff is partially disabled. Plaintiff's opposition papers also include a January 4, 2013 report from a Dr. Sebastian Lattuga, however the probative value of this report is questionable since it states that Plaintiff's accident occurred on "5/1/2011." Plaintiff also submits his own affidavit, wherein he states that he underwent physical therapy for his injuries from May 21, 2010 through December 2010. He stopped treatment "in large part" because his insurance benefits had been

cut off. He also was informed by Dr. Gomez that he had achieved "maximum medical benefit" from the conservative care.

Discussion

In this matter, while Defendants may have satisfactorily carried their burden of proving entitlement to judgment as a matter of law, in light of the above admissible evidence, Plaintiff has demonstrated an issue of fact as to whether he suffered a permanent serious injury in accordance with New York Insurance Law §5102(d). "Where conflicting medical evidence is offered on the issue of whether a plaintiffs injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury." *Noble v. Ackerman* , 252 A.D.2d 392 (1st Dept. 1998), *LaMasa v. Bachman* , 56 A.D.3d 340 (1st Dept. 2008). In this matter, there are issues of fact and credibility raised that cannot be resolved on a motion for summary judgment. *Bradley v. Soundview Healthcenter* , 4 A.D.3d 194 (1 st Dept. 2004); *Lewis v. Capalbo* , 280 A.D.2d 257, 258-260, 720 N.Y.S.2d 455 [2001]).

Plaintiff has submitted sufficient evidence in admissible form to raise a triable issue of fact as to whether his cervical and lumbar spine injuries were "serious" by providing objective medical evidence that he had restrictions soon after the accident, and recently upon a 2012 examination (*See Winters v Cruz*, 2011 NY Slip Op 8671 [1st Dept. 2011]). In reply, on the "serious injury" issue, Defendants argue that this Court cannot consider the unsworn records from Eastchester Precision Medical, P.C., from Cross Bronx Chiropractic, or from Bronx Mega Care Medical. Even without the various chiropractic records, however, Dr. Gomez' sworn report sufficiently sets forth Plaintiff's range of motion restrictions contemporaneous with the accident. Defendants also argue that Dr. Gomez improperly relies on unsworn MRI exam results. However, Dr. Gomez's sworn report is admissible, since it is also based upon his own examination of Plaintiff, as well as the sworn lumbar spine MRI report from Dr. Jacques Romano. The unsworn MRI reports, therefore, are not the only evidence submitted by Plaintiff in opposition to the motion (*Rivera v. Super Star Leasing, Inc.*, 57 A.D.3d 288 [1st Dept. 2008], *cf. Clemmer v. Drah Cab Corp.*, 74 A.D.3d 660 [1st Dept. 2010]). Moreover, the fact that Plaintiff's medical experts employed different standards in calculating his range-of-motion

limitations does not render their findings invalid. Plaintiff also addressed the apparent gap in treatment by "asserting in [his] affidavit that she stopped receiving treatment for her injuries when her no-fault insurance benefits were cut off ." *Bonilla v Abdullah*, 90 A.D.3d 466, 468 (1st Dept. 2011).

While it appears that alleged injuries to the knee and shoulder are not sufficiently "serious," Defendants did not demonstrate that they were not causally related to this accident, and they remain a subject of this lawsuit. Because Plaintiff has raised a triable issue of fact as to the serious nature of his spinal injuries, he is also entitled to recover for all other injuries causally related to the accident, including those not meeting the serious injury threshold (*Perez-Hernandez v. M. Marte Auto Corp.*, 104 A.D.3d 489 [1st Dept. 2013][internal citations omitted]). Accordingly, that branch of Defendants' motion seeking dismissal of Plaintiff's claims that he has suffered a permanent, serious injury, is denied.

As to plaintiff's 90/180 day claim, however, he has failed to meet his burden that he was prevented from performing his usual and customary activities for 90 of the 180 days following the incident (*Nelson v. Distant* , 308 A.D.2d 338, 340 [1 st Dept. 2003]). Plaintiff testified that he was only confined to a bed for 1 ½ weeks, and confined to his home for two weeks following the accident (*see Martin v. Portexit* Corp. , 948 N.Y.S.2d 21 [1st Dept. 2012]; *Seck v. Balla* , 92 A.D.3d 543 [1st Dept. 2012]). Accordingly, that branch of Defendant's motion seeking dismissal of Plaintiff's "90/180" claim is granted.

2. *Plaintiff's Cross-Motion on issue of Liability*

Plaintiff cross-moves for summary judgment on the issue of liability. Defendants' initially argue that Plaintiff's cross-motion on the issue of liability is untimely. However, "an otherwise untimely cross-motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross-motion." (*Filannio v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 281 [1st Dept. 2006]). Plaintiff's cross-motion will therefore be considered on the merits.

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Plaintiff testified that at the time of the accident, he was stopped in heavy traffic on the southbound Cross Bronx Expressway while attempting to merge into the right lane. While Plaintiff was stopped, Defendants' vehicle struck his rear passenger side.

Plaintiff submits the police accident report drafted at the scene, but the uncertified report cannot be considered since it constitutes inadmissible hearsay, and Plaintiff has failed to lay a foundation for its admissibility (*Quinones v. New England Motor Freight, Inc.*, 80 A.D.3d 514, 515 [1st Dept. 2011], citing *Figueroa v. Luna*, 281 A.D.2d 204, 205 [1st Dept. 2001]). Plaintiff also notes that the moving Defendants herein have failed to appear for depositions, despite three previously-issued court orders.

In opposition to the cross-motion, Defendants' submit only an affirmation of counsel. The affirmation argues that there are factual issues that must preclude summary judgment.

"It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate non-negligent explanation for the accident." (*Cabrera v Rodriguez*, 72 A.D.3d 553 [1st Dept. 2010] *citing Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]; *Agramonte v City of New York*, 288 AD2d 75, 76 [1st Dept. 2001]; *see also Dattilo v Best Transp. Inc* 79 A.D.3d 432 [1st Dept. 2010]). However, "not every rear-end collision is the exclusive fault of the rearmost driver. The frontmost driver also has the duty not to stop suddenly or slow down without proper signaling so as to avoid a collision. Thus, where the frontmost driver also operates his vehicle in a negligent manner, the issue of comparative negligence is for a jury to decide." (*Gaeta v. Carter*, 6 A.D.3d 576, 577 [2nd Dept. 2004] [citations omitted]).

Here, Plaintiff's deposition testimony has established prima facie entitlement to summary judgment on the issue of liability, as it is undisputed that his vehicle was struck in the rear by Plaintiff's vehicle (see *Cabrera v Rodriguez, supra.*). The burden therefore shifts to Defendants to provide evidence of a nonnegligent explanation for the accident, or a nonnegligent reason for his failure to maintain a safe distance between his car and the lead car (*Mullen v. Rigor*, 8 A.D. 3D 104 [1st Dept. 2004] *citing Jean v Xu*, 288 A.D.2d 62, [1st Dept. 2001]; *Mitchell v Gonzalez*, 269 A.D.2d 250, 251 [1st Dept. 2000]). Defendants' have not provided such evidence, and in

fact, provide no admissible evidence from an individual with personal knowledge to rebut Plaintiff's version of the accident.

Plaintiff's cross-motion for summary judgment on the issue of Defendants' liability only is therefore granted.

The above constitutes the Decision and Order of this Court.

Dated: June 11, 2013

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