

**Freeman v Volare Cab Corp.**

2014 NY Slip Op 30418(U)

February 19, 2014

Supreme Court, New York County

Docket Number: 112325/11

Judge: Arlene P. Bluth

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FILED ON 2/21/2014

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH  
Justice

PART 22

Index Number : 112325/2011  
FREEMAN, CAMILLE  
vs.  
VOLARE CAB  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 3, were read on this motion to/for SJ - serious injury

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 2

Replying Affidavits \_\_\_\_\_ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER

**FILED**

FEB 21 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 2/19/14

  
\_\_\_\_\_  
HON. ARLENE P. BLUTH, J.S.C.

- MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):
1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NY  
COUNTY OF NEW YORK: PART 22  
Camille Freeman

Index No.: 112325/11  
Motion Seq 01

*Plaintiff,*

*-against-*

Volare Cab Corp. and Harjit Singh,  
*Defendants.*

## DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendants' motion for summary judgment dismissing this action on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) is granted, and the action is dismissed.

In this action, plaintiff alleges that on November 9, 2010 she sustained personal injuries at the intersection of 31<sup>st</sup> Street and Park Avenue South in Manhattan when a vehicle owned by the State of New York<sup>1</sup> made contact with her foot after it was struck by defendants' vehicle (see aff. in opp. to motion, para. 10). She also claims neck and back injuries.

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Rodriguez v Goldstein*, 182 AD2d 396 [1992]). Such evidence includes "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1<sup>st</sup> Dept 2003], quoting *Grossman v Wright*, 268 AD2d 79, 84 [1<sup>st</sup> Dept 2000]). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert

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<sup>1</sup>Plaintiff sued the State of New York in the Court of Claims (exh A to moving papers).

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affidavits indicating that plaintiff's injury was caused by a pre-existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818 [1<sup>st</sup> Dept 2010], citing *Pommells v Perez*, 4 NY3d 566 [2005]). In order to establish prima facie entitlement to summary judgment under the 90/180 category of the statute, a defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident (*Elias v Mahlah*, 2009 NY Slip Op 43 [1<sup>st</sup> Dept]). However, a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*id.*).

Once the defendant meets his or her initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury (*see Shinn*, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Further, where the defendant has established a pre-existing condition, the plaintiff's expert must address causation (*see Valentin v Pomilla*, 59 AD3d 184 [1<sup>st</sup> Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1<sup>st</sup> Dept 2006]).

In her verified bill of particulars, plaintiff claims lumbar and cervical spine injuries, and a right foot laceration and scarring (exh B to moving papers, para. 11).

Defendants made a prima facie showing that the plaintiff did not sustain a permanent

consequential or significant limitation by offering the affirmed reports of their neurologist Dr. Singh (exh C) who examined plaintiff on August 6, 2012 and found normal ranges of motion in plaintiff's cervical and lumbar spine. Defendants also submit the affirmed report of their plastic surgeon Dr. Bromley (exh E), who examined plaintiff on August 6, 2012 and identified an area of skin thickening (½ cm x ½ cm) on her right foot near the MT joint. Dr. Bromley stated that the scar does not interfere with plaintiff's work or prevent her from participating in any activities of daily living; he attached a photo to his affirmed report.

Additionally, defendants submit the February 15, 2011 affirmed report of their radiologist Dr. Eisenstadt (exh D) who reviewed plaintiff's lumbar MRI film taken three months after the subject accident, her cervical x-ray taken one day after the accident and a cervical MRI film taken one month after the accident. Dr. Eisenstadt found disc bulging in the lumbar film which she attributed to degenerative changes at L3-4 and L4-5, noting the absence of annular tears and/or osseous abnormality which would indicate traumatic injury. As for plaintiff's cervical spine, Dr. Eisenstadt stated:

(R)evue of the radiographs performed one day following the incident and an MRI scan performed one month following the incident reveals cervical straightening, which shows improvement between the two examinations. Cervical straightening is most frequently related to patient position and comfort and its inconsistent appearance on two serial studies strongly indicates comfort for the examination as the etiology. Adequate movement in flexion and extension is seen on the radiographs performed one day following the incident indicating the lack of any significant muscle spasm as etiology. On the MRI scan, disc dessication is seen at the C4-5 and C5-6 intervertebral disc levels. Disc dessication is a drying out of disc material. It could not have developed in less than three months' time and therefore predates the 11/09/10 incident.....(T) here are no acute post-traumatic osseous, ligamentous or intervertebral disc changes seen casually related to the 11/09/10 incident.

Finally, defendants met their initial burden with respect to plaintiff's 90/180-day claim by submitting plaintiff's testimony that she was out of work one week after the subject accident

(exh F, T at 36).

Based on the foregoing, defendants have satisfied their burden of establishing prima facie that plaintiff did not suffer a serious injury, and the burden shifts to plaintiff to raise a triable factual question.

In her opposition, plaintiff annexes a certified copy of the Bellevue Hospital Center Emergency Room Record (exh C) which indicates that she arrived at the emergency room (on foot) complaining of an abrasion to her right foot, reported no other injury to any area of her body, had an x-ray of her foot taken (no fracture), was prescribed Tylenol and Keflex and given an ace bandage. On defendants' copy of the Bellevue records (exh G, p. 2), the attending physician noted, inter alia, no evidence of trauma in plaintiff's head, neck and back, no CVAT (costovertebral angle tenderness), and full ROM (range of motion); this portion of the ER record was cut off on the copy of the Bellevue records submitted (with a certification) by plaintiff (also exh C). Apart from annexing these records, plaintiff does not submit any additional medical evidence about the abrasion or resulting scar on her foot except for the no-fault doctor's report (exh I) that it was healed when he examined her 3 months after the accident; thus, she has failed to raise an issue of fact as to whether plaintiff sustained a significant limitation, permanent consequential limitation or significant disfigurement of her right foot as a result of this accident. *See Brackenbury v Franklin*, 93 AD3d 423, 939 NYS2d 63 (1<sup>st</sup> Dept 2012).

With respect to her claimed lumbar and cervical injuries, plaintiff submits Dr. Milbauer's affirmation (exh F), wherein he affirms that the findings of his 12/9/10 report of plaintiff's cervical MRI, of disc protrusions/herniations and some straightening of the cervical lordosis, were true and accurate. He does not opine about causation, and does not contradict or even

mention Dr. Eisenstadt's findings; nor does he state that the films show any trauma or causally connect any of the findings to the accident. Also part of exh F is Dr. Tobin's affirmation wherein he affirms the findings of his 2/15/11 report of plaintiff's lumbar MRI, specifically, a moderate extruded disc herniation on the right L3 nerve root. He does not opine about causation, and does not contradict or even mention Dr. Eisenstadt's findings; nor does he state that the films show any trauma or causally connect any of the findings to the accident.

In his January 3, 2013 affirmed narrative report (exh E), Dr. Lattuga summarizes his findings from plaintiff's 12/3/10, 12/11/11 and 12/14/12 visits. As for causation, he simply notes in passing "(p)atient has been symptomatic since the accident and was asymptomatic before". He does not contradict or address Dr. Eisenstadt's finding of degenerative changes and the lack of evidence of trauma in her neck and back. He does not state that he read any of plaintiff's films; instead he improperly relies on the unaffirmed reports of the radiologists who read plaintiff's cervical MRI 12/09/10 and a thoracic spine MRI report of 12/09/10 (not submitted). *See Malupa v Oppong*, 106 AD3d 538, 966 NYS2d 9 (1st Dept 2013) (when plaintiff's treating physician recites the findings in the unaffirmed reports, the affirmation may not be used to "bootstrap" the unaffirmed reports).

Plaintiff also refers to a February 25, 2011 affirmed report of a no-fault doctor, Dr. Rubinshteyn (exh I), to establish that plaintiff sustained a serious injury as a result of the subject accident. In his report, Dr. Rubinshteyn found that no physical therapy or orthopedic treatment was necessary for plaintiff's neck, middle back or right foot; he merely authorized 8 physical therapy sessions for plaintiff's lumbar spine, three months after the accident. While plaintiff claims this establishes an issue of fact as to causation, this Court disagrees. Dr. Rubinshteyn did not review the Bellevue emergency room records, did not review plaintiff's lumbar films and

there is no indication he saw Dr. Eisenstadt's report of February 15, 2011 (10 days before his report). Thus, his statement that it "appears that [plaintiff's] original reported injuries are causally related to the accident on November 9, 2010" is unsupported and conclusory. Moreover, at his examination he found only a 10 degree restriction in one plane of plaintiff's lumbar spine and that it was due to a sprain; this does not raise a triable issue of fact as to whether plaintiff sustained a serious injury. *See Phillips v Tolnep Limo Inc.*, 99 AD3d 534, 534, 951 NYS.2d 870 (1st Dept 2012) (plaintiff's physician's measurement of a minor limitation in one plane of range of motion was deficient in raising a triable of fact as to whether plaintiff sustained a serious injury; such finding does not amount to a serious, or important, limitation of the use within the meaning of the insurance law).

The balance of the unaffirmed medical exhibits were not considered by the Court. Exhibit E, "certified" records from the medical office of Yaffe, Ruden and Associates, Exhibit G, "certified" records of Sports Physical Therapy of New York, P.C., and Exhibit H, "certified" records of Sports Medicine at Chelsea (where plaintiff reported that she herniated a disc in her lower back when she bent over to wash her face) were not considered because they are not in proper form. "Only hospital records, and not physician office records, are admissible by certification (see CPLR 4518 [c]; 2306 [a]; Matter of Damon J., 144 AD2d 467 [1988])." *Bronstein-Becher v. Becher* 25 A.D.3d 796, 809 NYS2d 140 (2d Dept 2006).

None of plaintiff's doctors accounted for the Emergency Room doctor's findings of normal range of motion in her back and neck, and none of them addressed Dr. Eisenstadt's detailed explanation of why the films evidenced degenerative changes in the cervical and lumbar spine, and not a traumatic injury. Because Dr. Lattuga did not say one word to address Dr.

Eisenstadt's findings of degeneration, his finding of causation is conclusory; therefore, his affirmation fails to raise a triable factual question. *See Soho v Konate*, 85 AD3d 522, 523, 925 NYS2d 456, 457 (1<sup>st</sup> Dept 2011). Plaintiff cannot simply ignore findings of degeneration. "In response, plaintiff's expert failed to satisfactorily rebut this conclusion, neglecting even to mention, let alone explain, why he ruled out degenerative changes, thus rendering his opinion speculative". *Lopez v American United Transp., Inc.* 66 AD3d 407, 886 NYS2d 157, 158 (1<sup>st</sup> Dept. 2009).

Finally, plaintiff does not dispute her deposition testimony and verified bill of particulars in which she stated that she returned to work approximately a week after the accident, and has not submitted any competent medical evidence demonstrating she was unable to perform substantially all of her normal activities for at least 90 of the first 180 days as a result of the accident. *See Elias v Mahlah*, 58 AD3d 434, 435, 870 NYS2d 318, 320 (1<sup>st</sup> Dept 2009).

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing this action on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) is granted, and this action is dismissed.

This is the Decision and Order of the Court.

Dated: February 19, 2014  
New York, New York

  
ARLENE P. BLUTH, JSC

**FILED**

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