

Ferrer v Wishimori

2014 NY Slip Op 30717(U)

March 21, 2014

Sup Ct, New York County

Docket Number: 102965/11

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. ARLENE P. BLUTH

PRESENT: _____
Justice

PART 22

— Index Number : 102965/2011
FERRER, JOSHUA E.
vs.
WISHIMORI, LEO
SEQUENCE NUMBER : 001
PARTIAL SUMMARY

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

MAR 25 2014

COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.

HON. ARLENE P. BLUTH

Dated: 3/21/14

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

FILED

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

Index No.: 102965/11
Mot. Seq. 001

MAR 25 2014

COUNTY CLERK'S OFFICE
NEW YORK

Joshua Ferrer, Raymond Gonzalez, William
Cabrera and Daniel Gonzalez, a minor by his
father Raymond Gonzalez,

Plaintiffs,

-against-

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Leo Wishimori,

Defendant.

Defendant's motion for summary judgment dismissing the claims of plaintiffs Joshua Ferrer, William Cabrera and Daniel Gonzalez on the ground that they each failed to satisfy the serious injury threshold as defined by Insurance Law §5102(d) is granted only to the extent that the 90/180-day claims of all these plaintiffs are dismissed; the motion is otherwise denied.

In this July 29, 2010 accident, defendant's vehicle hit plaintiffs' vehicle in the rear. Plaintiff Ferrer was the driver; plaintiffs William Cabrera and Daniel Gonzalez were passengers. Defendant has not moved to dismiss the claims of plaintiff Raymond Gonzalez.

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 [1st Dept 2003], *quoting Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert 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 [1st 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 [1st 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 [1st Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]).

Plaintiff Joshua Ferrer

In his bill of particulars, Ferrer alleges that he sustained lumbar disc herniations, cervical radiculopathy and injuries to both knees (exh G to moving papers, para. 3)

In support of his motion, defendant submits the affirmed report of Dr. Israel (exh H), who examined Ferrer on November 29, 2011, found full ranges of motion in all examined body parts

* 4]
and stated that plaintiff had resolved sprains of his cervical, thoracic and lumbar spine, and both knees.

Defendant also cites to Ferrer's deposition testimony wherein he stated that he was not confined to either bed or home after the subject accident and that he worked as a freelance tattoo artist on a daily basis since the accident (exh H, T at 9-15, 78-79).

Based on the foregoing, defendant has satisfied his burden of establishing prima facie that plaintiff Ferrer did not suffer a serious injury, and the burden shifts to Ferrer to raise a triable factual question.

In opposition, Ferrer has submitted the affirmed report of Dr. Perez (exh E to opp), who first examined him a few days after the accident and noted pain and restrictions on various range of motion testing. Although no precise measurements are set forth in the report, the Court of Appeals in *Perl* rejected a rule that would make contemporaneous quantitative measurements a prerequisite to recovery (*Perl v Meher* 18 NY3d 208 at 218). He concludes that Ferrer is totally disabled and that "(i)f the events described above are correct then the symptoms described are causally related to the accident of July 29, 2010" (p. 5).

Additionally, Ferrer submitted the affidavit of his chiropractor (exh F) who saw Ferrer a few days after the accident, and set forth his quantitative findings of considerable range of motion restrictions in many planes of his cervical and lumbar spine¹. He re-examined Ferrer most recently on January 26, 2013 and once again set forth his findings of numerous range of motion

¹Despite his claim in the reply that the chiropractor's affidavit did not set forth any objective methods which he used to measure range of motion, defendant attached the chiropractor's office records for each plaintiff to his moving papers (exhs N,S,X) which contains references to "instrumental measurements" of range of motion testing.

restrictions in many planes of his cervical and lumbar spine. He concludes that because Ferrer was asymptomatic before the accident, his restrictions are a direct result of the accident. Finally, the chiropractor stated that he stopped treating Ferrer on September 30, 2010 at which time Ferrer reached maximum medical benefit from the treatment he had been providing.

Defendant's orthopedist affirms that Ferrer's sprains have resolved and Ferrer's treating chiropractor swears that (1) Ferrer had significant deficits, a few days after the accident and more recently, and (2) that there was a direct causal relationship between his current condition and the subject accident. Thus, Ferrer raised a triable issue of fact as to his claimed spinal injuries, and the jury must decide which expert to believe. *See Diaz v Guzman*, __ NYS2d __ 2014 WL 861809 (1st Dept 2014)].

Because Ferrer raised a triable issue with respect to his spinal injuries, the Court need not determine whether his other claimed injuries (left knee) met the threshold. *See Lee v Cornell University*, 112 AD3d 466, 976 NYS2d 85 (1st Dept 2013). However, because defendant demonstrated that Ferrer did not satisfy the 90/180-category of serious injury and Ferrer did not present any evidence sufficient to raise an issue of fact as to that category, his 90/180-day claim is dismissed. *See Arena v Guaman*, 98 AD3d 461, 949 NYS2d 688 (1st Dept 2012).

Plaintiff William Cabrera

In his bill of particulars, Cabrera alleges that he sustained thoracic disc herniations, L5 pars fractures and cervical radiculopathy (exh G to moving papers, para. 3).

In support of his motion, defendant submits the affirmed report of Dr. Israel (exh H), who examined Cabrera on January 25, 2012, found full ranges of motion in his cervical, thoracic and

lumbar spine, and determined that Cabrera's back sprains had resolved.

Defendant also cites to Cabrera's deposition testimony wherein he stated that he had not worked since 2008, was confined to bed a few times a week in the two months following the accident but curiously stated that he was not confined to home for any time after the accident (exh P, T at 5-8, 63-64).

Based on the foregoing, defendant has satisfied his burden of establishing prima facie that Cabrera did not suffer a serious injury, and the burden shifts to Cabrera to raise a triable factual question.

In opposition, Cabrera submits the affidavit of his chiropractor (exh H) who saw Cabrera a few days after the accident, and set forth his quantitative findings of considerable range of motion restrictions in many planes of his cervical and lumbar spine. He re-examined Cabrera most recently on January 12, 2013 and once again set forth his findings of numerous range of motion restrictions in many planes of his cervical and lumbar spine. He concludes that because Cabrera was asymptomatic before the accident, his restrictions are a direct result of the accident. Finally, the chiropractor stated that he stopped treating Cabrera on September 30, 2010 at which time Cabrera reached maximum medical benefit from the treatment he had been providing.

Defendant's orthopedist affirms that Cabrera's sprains have resolved and Cabrera's treating chiropractor's swears that (1) Cabrera had significant range of motion deficits, a few days after the accident and more recently, and (2) that there was a direct causal relationship between his current condition and the subject accident. Thus, Cabrera raised a triable issue of fact as to his claimed spinal injuries, and the jury must decide which expert to believe. *See Diaz v Guzman*, __ NYS2d __ 2014 WL 861809 (1st Dept 2014)]. However, because defendant

demonstrated that Cabrera did not satisfy the 90/180-category of serious injury and Cabrera did not present any evidence sufficient to raise an issue of fact as to that category, his 90/180-day claim is dismissed. *See Arena v Guaman*, 98 AD3d 461, 949 NYS2d 688 (1st Dept 2012).

Plaintiff Daniel Gonzalez

In his bill of particulars, Gonzalez alleges that he sustained lumbar stenosis, right shoulder impingement and cervical radiculopathy (exh G to moving papers, para. 3)

In support of his motion, defendant submits the affirmed report of Dr. Israel (exh H), who examined Gonzalez on November 29, 2011, found full ranges of motion in cervical, thoracic and lumbar spine and right shoulder and stated that plaintiff had resolved sprains of all these body parts.

Defendant also cites to Gonzalez's deposition testimony wherein he stated that missed one week of summer school after the accident but still passed the course, did not miss any time from school in the fall and was not confined to bed or home after the accident (exh U, T at 10-13, 69).

Based on the foregoing, defendant has satisfied his burden of establishing prima facie that Gonzalez did not suffer a serious injury, and the burden shifts to Gonzalez to raise a triable factual question.

In opposition, Cabrera submits the affidavit of his chiropractor (exh H) who saw Cabrera a few days after the accident, and set forth his quantitative findings of considerable range of motion restrictions in many planes of his cervical and lumbar spine. He re-examined Cabrera most recently on January 12, 2013 and once again set forth his findings of numerous range of

motion restrictions in many planes of his cervical and lumbar spine. He concludes that because Cabrera was asymptomatic before the accident, his restrictions are a direct result of the accident. Finally, the chiropractor stated that he stopped treating Gonzalez on March 7, 2011 at which time Gonzalez reached maximum medical benefit from the treatment he had been providing.

Defendant's orthopedist affirms that Gonzalez's sprains have resolved and Gonzalez's treating chiropractor's swears that (1) Gonzalez significant range of motion deficits, a few days after the accident and more recently, and (2) that there was a direct causal relationship between his current condition and the subject accident. Thus, Gonzalez raised a triable issue of fact as to his claimed spinal injuries, and the jury must decide which expert to believe. *See Diaz v Guzman*, __ NYS2d __ 2014 WL 861809 (1st Dept 2014)].

Because Gonzalez raised a triable issue with respect to his spinal injuries, the Court need not determine whether his other claimed injuries (right shoulder) met the threshold. *See Lee v Cornell University*, 112 AD3d 466, 976 NYS2d 85 (1st Dept 2013). However, because defendant demonstrated that Gonzalez did not satisfy the 90/180-category of serious injury and Gonzalez did not present any evidence sufficient to raise an issue of fact as to that category, his 90/180-day claim is dismissed. *See Arena v Guaman*, 98 AD3d 461, 949 NYS2d 688 (1st Dept 2012).

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing the claims of plaintiffs Joshua Ferrer, William Cabrera and Daniel Gonzalez on the ground that they failed to

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satisfy the serious injury threshold as defined by Insurance Law §5102(d) is granted only to the extent that the 90/180 day claims of all these plaintiffs are dismissed; the motion is otherwise denied.

This is the Decision and Order of the Court.

Dated: March 21, 2014
New York, New York



HON. ARLENE P. BLUTH, JSC

FILED

MAR 25 2014

COUNTY CLERK'S OFFICE
NEW YORK