

**Aviles v Bermejo**

2014 NY Slip Op 30722(U)

March 21, 2014

Sup Ct, New York County

Docket Number: 114452/11

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

HON. ARLENE P. BLUTH

Index Number : 114452/2011

AVILES, JUAN

vs

BERMEJO, HERIBERTO

Sequence Number : 001

SUMMARY JUDGMENT

PART 22

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

MAR 25 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/21/14

[Signature], J.S.C.  
HON. ARLENE P. BLUTH

- 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

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

FILED

MAR 25 2014

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

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Index No.: 114452/11  
Motion Seq 01

COUNTY CLERK'S OFFICE  
NEW YORK

Juan Aviles,

*Plaintiff,*

*-against-*

Heriberto Bermejo,

*Defendant.*

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**DECISION/ORDER**

HON. ARLENE P. BLUTH, JSC

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 the action is hereby dismissed.

In this action, plaintiff alleges that on January 19, 2009 he sustained personal injuries when he was involved in an accident with a vehicle, owned and operated by defendant.

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 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 his verified bill of particulars, plaintiff claims he sustained lumbar and cervical disc bulges and "gross motor deficits within the upper limb on the left" (exh D to motion papers, para. 6).

In support of his motion, defendant submits, inter alia, the affirmed report of Dr. Berman, an orthopedist who examined plaintiff on October 11, 2012, reviewed the MRIs of plaintiff's cervical and lumbar spine taken a few days after the accident and stated that those films showed degenerative bulges (exh H to moving papers).

Additionally, defendant met his initial burden with respect to plaintiff's 90/180-day claim by submitting plaintiff's deposition testimony wherein he stated that he was confined to bed/home for only three weeks after the accident (exh G at 60).

In opposition, plaintiff submits the Bellevue Emergency Room records and the affirmed report of Dr. Villafuerte, a pain management specialist, who examined plaintiff shortly after the accident, and treated him several times thereafter, most recently on June 6, 2013. Dr. Villafuerte found restrictions in plaintiff's range of motion in some planes of his cervical and lumbar spine on 1/26/09 and 5/6/13, noting that plaintiff had injured his back in a prior motor vehicle accident eight months earlier in May 2008 "but his pain had improved prior to [the subject accident]" (aff., para. 3). Dr. Villafuerte did not indicate that plaintiff was pain-free shortly before the accident; thus, his conclusion that this accident, not the prior accident, caused plaintiff's range of motion restrictions, is unsupported and conclusory.

Additionally, because Dr. Villafuerte did not say one word to address Dr. Berman's findings of degenerative changes in plaintiff's spine (cervical and lumbar bulges), Dr. Villafuerte has not set forth a basis for his conclusion that plaintiff's conditions were caused by the subject accident. Therefore, as pointed out by defendant's reply, Dr. Villafuerte's affirmation, the only doctor's affirmation submitted by plaintiff, fails to raise a triable factual question. *See Soho v Konate*, 85 AD3d 522, 523, 925 NYS2d 456, 457 (1st Dept 2011).

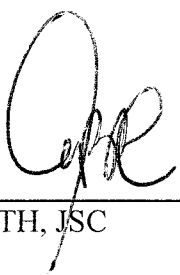
Finally, plaintiff did not oppose the branch of defendant's motions seeking dismissal of his 90/180-day claim. Thus, plaintiff failed to submit any evidence that raises a triable issue of fact sufficient to defeat summary judgment.

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 the action is hereby dismissed.

This is the Decision and Order of the Court.

Dated: March 21, 2014  
New York, New York



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ARLENE P. BLUTH, JSC

**FILED**

MAR 25 2014

COUNTY CLERK'S OFFICE  
NEW YORK