

**Tansky v City of New York**

2014 NY Slip Op 31167(U)

May 1, 2014

Supreme Court, New York County

Docket Number: 113040/08

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

PRESENT:

Justice

PART 5

Index Number : 113040/2008  
TANSKY, BENJAMIN  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 003  
SUMMARY JUDGMENT

CAL # 91

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

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

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

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

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

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

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

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

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED

MAY 06 2014

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 5-1-14  
MAY 01 2014

  
HON. KATHRYN FREED, J.S.C.  
JUSTICE OF SUPREME COURT

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 NEW YORK  
COUNTY OF NEW YORK: Part 5

-----X  
BENJAMIN TANSKY,

Plaintiff,

-against-

DECISION/ORDER  
Index No. 113040/08  
Seq. No. 003

THE CITY OF NEW YORK,  
MICHAEL A.J. VANBROOK,  
CHASE AUTO FINANCE CORP.,  
MARC LICHT AND JODI N. LICHT,

Defendants.

-----X  
KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

| PAPERS                                       | NUMBERED         |
|--|------------------|
| NOTICE OF MOTION AND AFFIDAVITS ANNEXED..... | 1,2.(Exs. A-G)   |
| NOTICE OF CROSS MOTION.....                  | ..3..(Exs. A-E). |
| ANSWERING AFFIDAVITS.....                    | ..4..(Exs. A-G). |
| REPLY AFFIRMATION .....                      | .....5.....      |
| OTHER...(Memo of Law) .....                  | .....            |

**FILED**  
MAY 06 2014  
NEW YORK  
COUNTY CLERK'S OFFICE

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this personal injury action, defendants Chase Auto Finance Corp. ("Chase") and Jodi N. Licht and Marc Licht ("the Lichts") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the ground that plaintiff Benjamin Tansky did not sustain a "serious injury" as defined by Insurance Law §5102(d). Defendants the City of New York ("the City") and Michael A. J. Vanbrook cross-move for summary judgment pursuant to CPLR 3212 dismissing the complaint as well as all cross-claims asserted against them. Plaintiff opposes the motions. After oral argument and consideration of the parties' papers and the relevant statutes and case law, this

Court **denies** the motion and cross motion.

**Factual and Procedural Background:**

This case, arising from an automobile accident which occurred on April 25, 2008 at or near the intersection of 77<sup>th</sup> Street and 1<sup>st</sup> Avenue in Manhattan, was commenced on or about September 25, 2008. In his complaint, plaintiff alleged that, at the time of the incident, he was inside his 2008 Hyundai when it was struck by a vehicle owned by the City and driven by Vanbrook, as well as another vehicle owned by Chase, leased to Marc Licht, and driven by Jodi Licht. Ex. A.<sup>1</sup> As a result of the incident, plaintiff alleged that he sustained a “serious injury” as defined by Insurance Law §5102(d). Ex. A.

Chase and the Lichts joined issue by service of their verified answer and verified amended answer, in which they denied all substantive allegations of wrongdoing and cross-claimed against the City and Vanbrook for “contribution and/or indemnification.” Ex. A.

In his verified bill of particulars, plaintiff alleged that he sustained, inter alia, a herniated disc at L5-S1 and bulging discs at L1-L2, L2-L3, and L3-L4 with impingement upon the thecal sac and marked restriction of motion, herniated discs at C3-C4, C4-C5, C5-C6 with impingement upon the thecal sac and marked restriction of motion, and a traumatic neurogenic bladder with urinary hesitancy and decrease of the urinary stream. Ex. B. He alleged that these conditions were permanent. *Id.* Plaintiff further claimed that, as a result of the alleged incident, he sustained:

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<sup>1</sup>Unless otherwise noted, all references are to the exhibits annexed to the motion for summary judgment by Chase and the Lichts.

a fracture and an injury which has resulted in a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury of impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the [alleged accident].” *Id.*

At his deposition on August 26, 2011, plaintiff testified that, at the time of the impact, his head struck the frame of the car and his right leg hit the steering column. Ex. C, at 21. Although plaintiff was taken to the hospital, he was not admitted. Ex. C, at 33-34. He took approximately four weeks off from work after the accident due to his pain and so that he could rest. Ex. C, at 71-74. When he resumed his employment, he worked only 6 ½ hours per day instead of the 6-12 hours he had worked before. Ex. C, at 74-75.

The accident caused plaintiff to have a concussion and memory loss. Ex. C, at 27, 78. In 2008 or early 2009 he visited Dr. Jay Rosenblum, a neurologist, although he could not recall what diagnosis was made. Ex. C, at 79-82. He said he no longer had difficulty concentrating. Ex. C, at 83.

After he was treated at the hospital, plaintiff visited Dr. Joy Goldenberg at the referral of a friend. Ex. C, at 35. He underwent physical therapy for his lower back, neck, and shoulders at Dr. Goldenberg’s office 2-3 times per week for over two years. Ex. C, at 37-40. He estimated that his last treatment at her office before the deposition was in late 2009 or early 2010. Ex. C, at 37.

Plaintiff also visited a Dr. Robert Salant, a urologist, because he had trouble urinating after the accident. Ex. C, at 41-43. Urological pressure tests conducted by Dr. Salant were normal and he did not refer plaintiff for further treatment. Ex. C, at 44-45. Plaintiff maintained, however, that he still had occasional problems urinating and that his ability to have sexual relations has been

inhibited. Ex. C, at 49-51.

A Dr. Chatman, a pain specialist, treated plaintiff with epidural injections to his lumbar spine and prescribed Percoset. Ex. C., at 54-57. Plaintiff last took Percoset in 2010. Ex. C, at 58.

Plaintiff testified that he still had lower back pain (Ex. C, at 69) and stiffness and cracking in his neck (Ex. C, at 75) and that the lower back pain interfered with his sleep. Ex. C, at 84.

In October of 2011, Chase and the Lichts exchanged the expert report of Dr. Daniel Feuer, a neurologist, dated September 26, 2011, which reflected that plaintiff complained of recurrent lower back pain and bilateral knee pain. He found range of motion of the plaintiff's cervical and lumbar spine to be normal, said that his neurological examination of the plaintiff was within normal limits, and added that the plaintiff did not "demonstrate any objective neurological disability or neurological permanency...which [was] causally related to the [alleged accident]." Ex. E.

On or about January 18, 2012, Chase and the Lichts exchanged the report of Dr. William Kulak, an orthopedist, dated October 3, 2011. Dr. Kulak noted that the plaintiff complained only about lower back pain and was not undergoing any treatment or taking any medication as a result of his alleged injuries. Ex. D. Dr. Kulak noted that he could not fully evaluate causation without the records of plaintiff's pain management physician and the MRIs which, according to the bill of particulars, revealed herniations and bulges. Ex. D.

On June 11, 2013, counsel for Chase and the Lichts exchanged the medical reports of Dr. Steven Peyser, a radiologist, and Dr. Michael Brodherson, a urologist. In reports dated January 19, 2013, Dr. Peyser set forth his findings regarding MRIs taken of the plaintiff's lumbar and cervical spine at Lenox Hill Radiology on July 22, 2008. Dr. Peyser found minimal bulging at L5-S1 related to degenerative disc disease. He further stated that no trauma could be discerned from the study and

that the film did not reveal the L5-S1 herniation and bulges at L1-L2, L2-L3, and L3-L4 noted by Dr. Thomas Kolb of Lenox Hill Radiology. Ex. F. Dr. Peyser also observed bulging at C4-C5 and bulging with a posterior herniation at C5-C6, which he attributed to longstanding degenerative disc disease and not to trauma. Ex. F.

In an unaffirmed report dated November 28, 2012, Dr. Brodherson noted that the plaintiff had no urological injury. Ex. F.

The Lichts and Chase now move for summary judgment dismissing the complaint and the City and Vanbrook cross move for summary judgment dismissing the complaint and all claims against them. In support of their motion, the Lichts and Chase submit an attorney affirmation, the pleadings and bills of particular<sup>2</sup>, plaintiff's deposition, and the reports of their expert examining physicians. In support of their cross-motion, the City and Vanbrook submit the notice of claim, the pleadings, and the note of issue.

In opposition to the motion, plaintiff submits an attorney affirmation, an affidavit detailing his symptoms and his treatment, the police accident and ambulance call reports, medical records, including those of Dr. Goldenberg, and the radiology reports of Dr. Thomas Kolb of Lenox Hill Radiology. In his reports, dated July 22, 2008, Dr. Kolb found that plaintiff had a disc herniation at L5-S1 impinging upon the anterior epidural fat and disc bulges at L1-L2, L2-L3, and L3-L4 impinging on the thecal sac, as well as disc herniations at C3-C4, C4-C5, and C5-C6 impinging on the thecal sac. Plaintiff's Aff. In Opp., at Exs. F and G.

The records of Dr. Goldenberg reflect that she treated plaintiff from April of 2008 until May

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<sup>2</sup>One bill of particulars was served as to the City and Vanbrook and another on Chase and the Lichts, although both alleged identical injuries. Ex. B.

of 2009 and did not see him again until September of 2013. When Dr. Goldenberg initially examined plaintiff on April 29, 2008, he complained of pain in his neck, upper, middle and lower back, shoulders, and left hip and thigh. Plaintiff's Aff. In Opp., at Ex. D. At that time, she found range of motion of plaintiff's cervical and lumbar spine to be severely restricted. *Id.* When Dr. Goldenberg re-examined plaintiff on September 16, 2013, he continued to complain of pain in his neck, lower back, and shoulders and continued to have significant restrictions in range of motion in his cervical and lumbar spine. *Id.* She further stated that, if plaintiff's history were correct, the alleged accident was the "sole competent producing cause" of his injuries. *Id.* She further opined that plaintiff is "disabled from his injuries and still has limitation of motion and sufficient symptoms remaining, that indicates permanency." *Id.* Dr. Goldenberg states in her report that she stopped treating plaintiff in 2009 "because he plateaued in treatment and it was determined that further therapy would only be palliative in nature." *Id.*

#### **The Parties' Positions:**

The Lichts and Chase assert that they are entitled to summary judgment dismissing the complaint because plaintiff failed to establish that he sustained a "serious injury" as defined by Insurance Law § 5102(d). Specifically, they assert that Dr. Kulak found no objective evidence of orthopedic disability or permanent impairment, that Dr. Feuer found no objective evidence of neurological disability or permanency, that Dr. Brodherson found no injury to plaintiff's urinary tract, and that Dr. Peyser found that plaintiff's herniated and bulging discs were not caused by the alleged accident. In support of their cross-motion, The City and Vanbrook adopt the arguments set forth by the Lichts and Chase.

In opposition to the motion and cross motion, plaintiff argues that the movants failed to demonstrate their prima facie entitlement to summary judgment since they failed to establish that he did not sustain a “serious injury” within the meaning of Insurance Law § 5102(d). First, he asserts that Dr. Kulak and Dr. Feuer failed to provide any evidence in admissible form demonstrating that he did not sustain a medically determined injury which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 day period following the accident. He further asserts that his injuries are “serious” as a matter of law because he sustained a permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function or system. Plaintiff also asserts that the movants failed to establish a significant gap in treatment which would defeat his claim that he sustained a “serious injury.”

In their reply affirmation, Chase and the Lichts argue that they have established their prima facie entitlement to summary judgment because Dr. Kulak, Dr. Feuer, and Dr. Brodherson have established that “plaintiff suffers no permanent injury or any permanent loss of use of a body organ or function” and because Dr. Peyser confirms that plaintiff had only “soft tissue injuries of herniations and disc bulges.” They further assert that the plaintiff has failed to meet the “90/180” test because he did not establish that his absence from work was medically necessary. The movants also argue that, since only Dr. Goldenberg’s records and reports are certified, none of the other medical evidence submitted by plaintiff can be considered in connection with this motion. Finally, the movants maintain that they are entitled to summary judgment since Dr. Goldenberg failed to explain the 3 ½ year gap in plaintiff’s treatment between May of 2009 and September of 2013.

**Conclusions of Law:**

“The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 (1<sup>st</sup> Dept. 2007), citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of fact. See *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1989).

In order to recover for non-economic loss, i.e., pain and suffering, in a case involving personal injuries arising from an automobile accident, a plaintiff must establish a “serious injury” as defined by Insurance Law § 5102(d). See *Perl v Maher*, 18 NY3d 208, 215 (2011). That section defines “serious injury” as (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury (“the 90/180 category”). As noted above, plaintiff claims “serious injury” pursuant to categories four, six, seven, eight and nine above. Ex. B.

In moving for summary judgment in a “serious injury” case such as this, the defendant(s) has the initial burden of presenting competent evidence establishing that the plaintiff has not sustained a “serious injury.” See *Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 (1<sup>st</sup> Dept 2011); *Rodriguez*

*v Goldstein*, 18 AD2d 396, 397 (1<sup>st</sup> Dept 1992). Here, the movants made a prima facie showing of their entitlement to summary judgment as to plaintiff's claims of permanent consequential, or significant, limitation of use of his cervical and lumbar spine by submitting the expert medical reports of orthopedist Dr. Kulick and neurologist Dr. Feuer, who found full range of motion in those areas upon examination. See *11280 Tiffany Rickert v Diaz*, 112 AD3d 451 (1<sup>st</sup> Dept 2013); *Angeles v American United Transp., Inc.*, 110 AD3d 639 (1<sup>st</sup> Dept 2013).

Additionally, the movants established their entitlement to summary judgment pursuant to the 90/180 day category by submitting plaintiff's deposition testimony (Ex. C, at 71-74) that he missed only approximately four weeks of work as a result of the accident. See *Graves v L & N Car Service*, 87 AD3d 878 (1<sup>st</sup> Dept 2011) (summary judgment granted to defendant on 90/180 day category where plaintiff testified at her deposition that she missed only three weeks of work after her accident). Additionally, the fact that plaintiff worked a reduced amount of hours when he returned to work (Ex. C, at 74-75) does not rise to the level of a "serious injury" under the 90/180 category. See *Pakeman v Karekezia*, 98 AD 840 (1<sup>st</sup> Dept 2012).

In opposition, plaintiff raised an issue of fact regarding whether he sustained a significant limitation and/or a permanent consequential limitation with respect to his cervical and lumbar spine. See *Ferrara v Middleton*, 2014 N.Y. App. Div. LEXIS 2172 (1<sup>st</sup> Dept, April 1, 2014). Specifically, plaintiff's treating physician, Dr. Goldenberg, noted in an affirmed report dated September 16, 2013, on which day she examined plaintiff, that she observed significant limitation of motion in those areas and "sufficient symptoms remaining...that indicates permanency." Plaintiff's Aff. In Opp., at Ex. D. She further opined that the "limitation of use of [plaintiff's] cervical and lumbar spine...prevents him from performing his activities of daily living." *Id.* However, plaintiff failed to raise an issue of fact

regarding the 90/180 category since he did not “submit any evidence of a medical determination that he was unable to engage in substantially all of his material and customary daily activities for 90 of the first 180 days after the accident (*see Torain v Bah*, 78 AD3d 588, 589 [1<sup>st</sup> Dept 2010]).” *Id.*

Since the report of plaintiff’s expert urologist, Dr. Brodherson, was not affirmed, and was thus not in admissible form, it was insufficient to establish the movants’ entitlement to summary judgment on the ground that plaintiff did not sustain a “serious injury” to his urinary tract. *See Offman v Singh*, 27 AD3d 284 (1<sup>st</sup> Dept 2006).

In addition, the conclusion of the movants’ radiologist, Dr. Peyser, that plaintiff’s cervical and lumbar herniations were attributable solely to degeneration (Ex. F) was, “without further elaboration...insufficient to satisfy [their] prima facie burden as to causation” given that plaintiff was only 28 years old (Ex. B) at the time of the accident and when the films were taken (Exs. F and G). *De La Cruz v Hernandez*, 84 AD3d 652 (1<sup>st</sup> Dept 2011). In any event, Dr. Goldenberg’s attribution of the injuries to the accident (Ex. D to Plaintiff’s Aff. In Opp.) raised a factual issue. *Id.*, at 652-653.

Finally, this Court notes that plaintiff’s argument that the movants failed to establish a significant gap in treatment, which would defeat his claim of “serious injury”, is disingenuous, since it was not until September of 2013, after the instant motion and cross-motion were made, that plaintiff was examined by Dr. Goldenberg for the first time since 2009. Therefore, plaintiff, in effect, created a 3 ½ year gap in treatment. Contrary to the movants’ contention, however, since Dr. Goldenberg stated in her affirmed report of September 16, 2013 that she stopped treating plaintiff in 2009 “because he plateaued in treatment and it was determined that further therapy would only be palliative in nature” (Plaintiff’s Aff. In Opp., at Ex. D), plaintiff adequately explained the gap in treatment and thus the gap does not bar his claim of serious injury. *See McIntosh v Sisters Servants*

of *Mary*, 105 AD3d 672 (1<sup>st</sup> Dept 2013); *Barhak v Almanzar-Cespedes*, 101 AD3d 564 (1<sup>st</sup> Dept 2012).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by defendants Marc Licht, Jodi N. Licht, and Chase Auto Finance Corp. seeking summary judgment dismissing the complaint is denied; and it is further,

ORDERED that the cross motion by defendants the City of New York and Michael A.J. Vanbrook for summary judgment dismissing the complaint and all cross claims asserted against them is denied; and it is further,

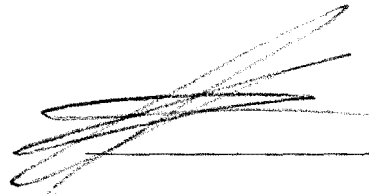
ORDERED that this constitutes the decision and order of the Court.

DATED: May 1, 2014

MAY 01 2014

**FILED**  
MAY 06 2014  
NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:



Hon. Kathryn E. Freed,  
HON. KATHRYN E. FREED  
JUSTICE OF SUPREME COURT