

**Cairney v Metropolitan Transp. Auth.**

2014 NY Slip Op 32474(U)

September 23, 2014

Supreme Court, New York County

Docket Number: 150125/2011

Judge: Michael D. Stallman

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: Hon. MICHAEL D. STALLMAN  
*Justice***

**PART 21**

**BRIAN CAIRNEY and NICOLE CAIRNEY,**

**INDEX NO. 150125/2011**

**Plaintiffs,**

**MOTION DATE 5/8/14**

**- v -**

**MOTION SEQ. NO. 003**

**METROPOLITAN TRANSPORTATION AUTHORITY, MTA  
BUS COMPANY, WARREN BROWN, NEW YORK CITY  
TRANSIT AUTHORITY, and NEW YORK CITY  
DEPARTMENT OF TRANSPORTATION,**

**Defendants.**

The following papers, numbered 67-82, 85-104, were read on this motion for summary judgment.

Notice of Motion; Affirmation; Exhibits A; B; C; D; E; F; G; H; I; J; K; L; M;  
Affidavit of Service;

**No(s). 67; 68; 69; 70;  
71; 72; 73; 74; 75; 76;  
77; 78; 79; 80; 81; 82**

Affirmation in Opposition; Exhibits A; B; C; D; E; F; G; H; I; J; K; L; M; N; O;  
Affidavit of Service

**No(s). 85; 86; 87; 88;  
89; 90; 91; 92; 93; 94;  
95; 96; 97; 98; 99; 100;  
101**

Reply Affirmation ; Exhibit A; Affidavit of Service

**No(s). 102; 103; 104**

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

Upon the foregoing papers, it is **ORDERED** that defendants' motion for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly.

In this action, plaintiffs allege that, on June 1, 2010, at approximately 12:00 p.m., plaintiff Brian Cairney was involved in a motor vehicle collision on the northbound FDR Drive at or near its intersection with Houston Street in Manhattan. Cairney's wife asserts a derivative cause of action. According to the bill of particulars,

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**Cairney suffered a chondral injury to his right knee, lumbar disc bulges and disc dessication, lumbar radiculopathy, a contusion to his right elbow with lateral epicondylitis, and cervical strain, sprain, and radiculopathy. (Parker Affirm., Ex D [Verified Bill of Particulars] ¶ 8.)**

**By decision and order dated October 2, 2013, this Court extended the defendants' time to move for summary judgment for an additional 120 days from the date of the decision, i.e., until January 30, 2014. According to an affidavit of service, defendants served the instant motion for summary judgment on January 29, 2014, seeking dismissal of the action on the ground that plaintiff Brian Cairney did not suffer a serious injury within the meaning of Insurance Law § 5102 (d).**

**As a threshold matter, plaintiffs did not show that defendants' motion for summary judgment was untimely. "A motion is 'made' when the notice of motion is served." (*Gazes v Bennett*, 38 AD3d 287, 288 [1st Dept 2007]; *Derouen v Savoy Park Owner, L.L.C.*, 109 AD3d 706 [1st Dept 2013] [court erred in ruling summary judgment motion was untimely because it incorrectly used the date movant filed its motion, not the date movant served it].) Here, an affidavit of service indicates that the motion papers were served on January 29, 2014, one day before the expiration of the extended deadline. The fact that the motion papers were efiled on February 3, 2014 is irrelevant.**

**Defendants met their prima facie burden of summary judgment. Defendants submitted affirmed medical reports finding normal ranges of motion in the claimed affected body parts and no objective evidence that any limitations resulted from the accident. (*Vega v MTA Bus Co.*, 96 AD3d 506, 507 [1st Dept 2012].) Dr. Feuer, a neurologist, who examined Cairney on December 3, 2012, found that Cairney did not demonstrate an objective neurological disability or neurological permanency. (Parker Affirm., Ex F.) Dr. Rubinshteyn, an orthopedic surgeon who examined Cairney on August 9, 2013, found normal ranges of motion in Cairney's cervical spine, lumbar spine, and right elbow, and orthopedic tests were negative. (Parker Affirm., Ex I.)**

**Defendants also submitted deposition testimony that Cairney**

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missed a total of two weeks from work after the accident (Parker Affirm., Ex E, at 60.) Cairney's return to work supports a legitimate inference that he must have been able to perform at least most of his usual and customary daily activities within the 180 day period after the motor vehicle collision. (*Correa v Saifuddin*, 95 AD3d 407, 409 [1st Dept 2012].)

Although Dr. Rubinshteyn found less than normal range of motion in Cairney's right knee, this range of motion was identical to the range of motion in his uninjured left knee, which is sufficient to establish defendants' prima facie burden. (*Martinez v Goldmag Hacking Corp.*, 95 AD3d 682 [1st Dept 2012] [range of motion in plaintiff's left knee that was identical to that of her uninjured right knee].)

In opposition, plaintiff submits narrative reports from Dr. Michael Palmeri, who initially examined Cairney on June 4, 2010, and other medical records. (Culhane Opp. Affirm., Exs F-N.) Defendants point out that the medical records are not authenticated and the narrative reports are unsworn. However, most of those records can be considered in opposition to the motion (Culhane Opp. Affirm., Exs F-J, L-N), because "they were reviewed by defendants' experts in preparing their reports." (*Boateng v Ye Yiyen*, 119 AD3d 424 [1st Dept 2014]; see also *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 47 n 1 [2d Dept 2005] ["this Court has held that even a reference to the unsworn or unaffirmed reports in the moving papers is sufficient to permit the plaintiff to rely upon and submit these reports in opposition to the motion"]; but see *Hernandez v Almanzar*, 32 AD3d 360 [1st Dept 2006] ["The defense experts' review of such unaffirmed reports (as noted in their reports) did not open the door to plaintiffs' reliance on them"].)

Dr. Palmeri's unsworn report dated August 31, 2010 may not be considered (Culhane Opp. Affirm., Ex K), because it was not listed among the records that defendants' experts reviewed in preparing their reports.

Notwithstanding the above, plaintiffs fail to raise a triable issue of

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fact warranting denial of summary judgment, because plaintiffs' submission failed to address how Cairney's injuries were causally related to the motor vehicle collision on June 1, 2010. (*Pines v Lopez*, 88 AD3d 545 [1st Dept 2011]; *Barner v Shahid*, 73 AD3d 593 [1st Dept 2010].)

**Therefore, defendants' motion for summary judgment is granted.**

Dated: 9/23/14  
New York, New York

, J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED                       NON-FINAL DISPOSITION
- GRANTED    DENIED    GRANTED IN PART    OTHER
- SETTLE ORDER                                       SUBMIT ORDER
- DO NOT POST    FIDUCIARY APPOINTMENT    REFERENCE

**HON. MICHAEL D. STALLMAN**