Fernandez v Chiriboga
2014 NY Slip Op 32684(U)
September 22, 2014
Supreme Court, Bronx County
Docket Number: 306394/10
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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JOSELY FERNANDEZ,

DECISION AND ORDER

Plaintiff(s), Index No: 306394/10

- against -

GINO R. CHIRIBOGA AND DEPINO TRANSPORTATION, INC.,

Defendant(s).

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In this action for personal injuries stemming from an automobile accident, plaintiff moves for an order granting reargument of this Court's decision dated November 21, 2013, which granted defendants' motion for summary judgment on grounds that plaintiff did not sustain a serious injury in the accident at bar. Specifically, plaintiff argues that reargument is warranted insofar as the Court, in holding that plaintiff failed to proffer sufficient contemporaneous medical evidence and adequately explain a gap in medical treatment, either misapprehended the facts or misapplied the law. Plaintiff contends that under prevailing case law, his evidence sufficiently established that he sustained a serious injury, thereby warranting denial of defendants' motion. Plaintiff also seeks reargument from this Court's denial of his cross-motion on the issue of liability, which this Court denied as moot. On this issue, plaintiff avers that the evidence tendered

establishes defendants' negligence as a matter of law. Defendants oppose the instant motion averring that the Court, in granting them summary judgment on grounds that plaintiff did not sustain a serious injury, neither misapprehended the facts nor misapplied the law. Specifically, defendants contend that plaintiff failed to sufficiently establish that he sustained a serious injury. Should the Court grant reargument and, therefore, reach the merits of plaintiff's prior cross-motion seeking summary judgment on liability, defendants contend that extant questions of fact preclude summary judgment.

For the reasons that follow hereinafter, plaintiff's motion for reargument is granted and upon reargument defendants' motion for summary judgment is denied as is plaintiff's cross-motion seeking summary judgment on the issue of liability.

The instant action is for personal injuries allegedly sustained in a motor vehicle accident. Plaintiff's complaint alleges the following. On September 22, 2008 plaintiff was involved in a motor vehicle accident when his vehicle came into contact with a vehicle owned by defendant DEPINO TRANSPORTATION, INC and operated by defendant GINO R. CHIRIBOGA (Gino). Plaintiff alleges that the accident was the result of defendants' negligence in the operation and maintenance of their vehicle and that as a result of such negligence he sustained injuries. Within his bill of particulars, plaintiff alleges that he sustained a host of

injuries, including a Type II SLAP lesion in his left shoulder, disc herniations at C6-C7 and L5-S1, and a sprained meniscus in his right knee. Plaintiff also alleges that the foregoing injuries are serious as defined by Insurance Law § 5102(d), inasmuch as he sustained injuries under all categories thereunder, including a (1) permanent loss of use of a body organ, member, function or system; (2) permanent consequential limitation of use of a body organ or member; (3) significant limitation of use of a body function or system; and/or (4) a medically determined injury or impairment of a non-permanent nature which prevented him from performing 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 his accident.

Reargument With Respect to Defendants' Motion

CPLR § 2221(d)(1), prescribes the reargument of a prior decision on the merits and states that such motion

> shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.

Accordingly,

> [a] motion for reargument, addressed to the discretion of the Court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principal of law. Its purpose is not to serve as a

> vehicle to permit the unsuccessful party to argue once again the very questions previously decided

(*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; *see also*, *Fosdick v Town of Hemstead*, 126 NY 651, 652 [1891]; *Vaughn v Veolia Transp., Inc.*, 117 AD3d 939, 939 [2d Dept 2014]). Thus, because reargument is not a vehicle by which a party can get a second bite at the same apple, a motion for reargument preludes a litigant from advancing new arguments or taking new positions which were not previously raised in the original motion (*Foley* at 567).

A motion to reargue, must be made within 30 days after service of a copy of the underlying order with notice of entry (CPLR § 2221[d][3]; *Perez v Davis*, 8 AD3d 1086, 1087 [4th Dept 2004]; *Pearson v Goord*, 290 AD2d 910, 910 [3rd Dept 2002]).

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There

is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.' Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

Moreover, when deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

> [s]upreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(*see also Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even

debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

Insurance Law § 5104(a), also known as the "no-fault law," by design and intent, severely limits the number of personal injury law suits brought as a result of motor vehicle accidents (*Licari v Elliott*, 57 NY2d 230, 236 [1982] ["There can be little doubt that the purpose of enacting an objective verbal definition of serious injury was to significantly reduce the number of automobile personal injury accident cases litigated in the courts, and thereby help contain the no-fault premium." (internal quotation marks omitted)]). Thus, because any injury not falling within the statute's definition of "serious injury" is minor, it should not be accorded a trial by jury, and, therefore, "[i]t is incumbent upon the court to decide in the first instance whether plaintiff has a cause of action to assert within the meaning of the statute" (*id.* at 237 ["While it is clear that the Legislature intended to allow plaintiffs to recover for non-economic injuries in appropriate cases, it had also intended that the court first determine whether or not a prima facie case of serious injury has been established which would permit a plaintiff to maintain a common-law cause of action in tort."]). As promulgated by the Court of Appeals in *Licari*,

> plaintiffs in automobile cases no longer have an unfettered right to sue for injuries sustained. Thus, to the extent that the legislature has abrogated a

> cause of action, the issue is one for the court, in the first instance whether plaintiff has a cause of action to assert within the meaning of the statute

(*id.* at 237). Thus, if after a review of the of the evidence on a motion for summary judgment or after a trial, it is determined that plaintiff has not suffered a serious injury, then "plaintiff has no claim to assert and there is nothing for a jury to decide" (*id.* at 238).

A defendant seeking summary judgment on grounds that plaintiff's injuries are not serious under the insurance law must establish that plaintiff's injuries are not serious as defined by the Insurance Law (*Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Brown v Achy*, 9 AD3d 30, 31 [1st Dept 2004]; *Rodriguez v Goldstein*, 182 AD2d 396, 397 [1st Dept 1992]). A defendant can meet this burden thereby establishing prima facie entitlement to summary judgment in a myriad of different ways. Defendant can negate the existence of serious injury using plaintiff's own pleadings (*Fortune v Sacks & Sacks*, 272 AD2d 277, 277 [1st Dept 2000]; *Craft v Brantuk*, 195 AD2d 438, 438 [2d Dept 1993]; *Grier v Kuhn*, 187 AD2d 559, 560 [2d Dept 1992]["In this case, an examination of the report of the plaintiff's chiropractor, the verified complaint, the plaintiff's verified bill of particulars, the plaintiff's affidavit, and the affirmation of the plaintiff's physician, clearly show that there is absolutely no merit to the plaintiff's claims of a serious injury as defined in Insurance Law § 5104"

(internal citation marks omitted)]), by submitting objective medical evidence negating the existence of a serious injury (*Black v Robinson*, 305 AD2d 438, 439 [2d Dept 2003]; *Junco v Ranzi*, 288 AD2d 440, 440 [2d Dept. 2001]; *Papadonikolakis v First Fid. Leasing Group*, 283 AD2d 470, 470-471 [2d Dept 2001]), or by other evidence which demonstrateS the absence of a serious injury (*Lowe v Bennett*, 122 AD2d 728, 729 [1st Dept 1986], *affd* 69 NY2d 700 [1986], such as plaintiff's own deposition testimony (*Arjona v Calcano*, 7 AD3d 279, 280 [1st Dept 2004]).

With respect to objective medical evidence negating the existence of a serious injury, the tests relied upon must be specified within defendant's doctor's medical report (*Janco* at 440), and what is required is "objective proof such as X-rays, MRIs, straight-leg or Laseque tests, and any other similarly-recognized tests or quantitative results based on. . .[an] examination" (*Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). Range of motion testing is an objective measure of the presence or absence of injury (*Kraemer v Henning*, 237 AD2d 492, 493 [2d Dept 1997]; *Zalduondo v Lazowska*, 234 AD2d 455, 455-456 [2d Dept 1996]), and when used, the doctor must specify plaintiff's range of motion and compare the same to normal (*Bray v Rosas*, 29 AD3d 422, 423 [1st Dept 2006] [Court held that the failure of a defendant's doctor to quantify plaintiff's range of motion while concomitantly failing to compare the same to normal constituted a

failure to establish prima facie entitlement to summary judgment "thereby leaving the court to speculate as to the meaning of those figures."]; *Kelly v Rehfeld*, 26 AD3d 469, 470 [2d Dept 2006]; *Spektor v Dichy*, 34 AD3d 557, 558 [2d Dept 2006]; *Webb v Johnson*, 13 AD3d 54, 55 [1st Dept 2004]).

While generally, defendant's medical evidence must be in admissible form, namely sworn by affidavit (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003]; *Rodriguez* at 397; *Pagano v Kingsbury*, 182 AD2d 268, 270 2d Dept 1992]), a defendant can nevertheless establish the lack of serious injury by using plaintiff's own unsworn medical records, and otherwise inadmissible medical reports from plaintiff's own doctors (*Newton v Drayton*, 305 AD2d 303, 304 [1st Dept 2003]; *Pagano* at 271).

Once defendant meets the burden of prima facie entitlement to summary judgment, by establishing that plaintiff has not suffered a serious injury, summary judgment is warranted unless plaintiff can establish the existence of a serious injury. To that end, plaintiff must establish that the injuries alleged are the result of the accident claimed and that the limitations alleged are the result of those injuries (*Noble v Ackerman*, 252 AD2d 392, 394-395 [1st Dept 1998]). Plaintiff's proof establishing serious injury, medical or otherwise, must not only be admissible, but it must also be objective (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 350 [2002]; *Grasso v Angerami*, 79 NY2d 813, 814-815 [1991];

Blackmon v Dinstuhl, 27 AD3d 241, 242 [1st Dept 2006]; *Thompson v Abassi*, 15 AD3d 95, 97 [1st Dept 2005]; *Shinn* at 198; *Andrews v Slimbaugh*, 238 AD2d 866, 867-868 [2d Dept 1997]; *Zoldas v Louise Cab Corporation*, 108 AD2d 378, 382 [1st Dept 1985]). Significantly, plaintiff's proof must also demonstrate the existence of a serious injury contemporaneous with the accident alleged (*Blackmon* at 242; *Thompson* at 98 [Court held that the failure by plaintiff's doctor to provide objective proof of injury contemporaneous with the accident was fatal and was not cured by same doctor's finding of injury, with objective evidence, two and one half years later.); *Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]; *Pajda v Pedone*, 303 AD2d 729, 730 [2d Dept 2003]; *Jimenez v Kambli*, 272 AD2d 581, 583 [2d Dept 2000]). Such contemporaneous medical evidence, however, can be an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or "an expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Toure* at 350; *see also Perl v Meher*, 18 NY3d 208, 218 [2011] ["We therefore reject a rule that would make contemporaneous quantitative measurements a prerequisite to recovery."]). When defendant, in moving for summary judgment on the issue of serious injury, relies on plaintiff's unsworn MRI reports (*Bent v Jackson*,

15 AD3d 46, 47 [1st Dept 2005]; *Toledo v A.P.O.W. Auto Repair/Towing*, 307 AD2d 233, 234 [1st Dept 2003]) or unsworn versions of plaintiff's medical records (*Pech v Yael Taxi Corp.*, 303 AD2d 733, 733-734 [2d Dept 2003] *Raso v Statewide Auto Auction, Inc.*, 262 AD2d 387, 387-388 [2d Dept 1999), plaintiff can rely on those very same records, even if unsworn, in opposition to defendant's motion.

An unexplained gap in treatment between treatment received shortly after the accident and treatment received long thereafter, warrants dismissal of plaintiff's case (*Pommells v Perez*, 4 NY3d 566, 574 [2005]; *Brown v City of New York*, 29 AD3d 447, 448 [1st Dept 2006]; *Vasquez v Reluzco*, 28 AD3d 365, 366 [1st Dept 2006]). In order to avoid dismissal, any medical reasons for gaps in treatment must generally be explained by medical doctors (*Farozes v Kamran*, 22 AD3d 458, 458 [2d Dept 2005]; Ali v. Vasquez, 797 A.D.3d 520 (2nd Dept 2005); *Hernandez v Taub*, 19 AD3d 368, 368 [2d Dept 2005]). However, when the explanation for the gap in treatment is non-medical in nature, such as the cessation of medical benefits, an affidavit from the plaintiff stating that a gap in treatment was attributable to the cessation of no fault benefits will suffice (*Jules v Barbecho*, 55 AD3d 548, 549 [2d Dept 2008]; *Francovig v Senekis Cab Corp.*, 41 AD3d 643, 644 [2d Dept 2007]). Any requirement that a plaintiff corroborate a non-medical explanation for a gap in treatment with documentary proof has been

rejected by the Court of Appeals (*Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 906 [2013] ["The Appellate Division's requirement that plaintiff either offer documentary evidence to support his sworn statement that his no-fault benefits were cut off, or indicate that he could not afford to pay for his own treatment, is an unwarranted expansion of Pommells."]).

Conflicting explanations with regard to gaps in treatment, however, are tantamount to no explanation at all (*Gonzalez v A.V. Managing, Inc.*, 37 AD3d 175, 176 [1st Dept 2007] [Court rejected plaintiff's explanation for a gap in treatment when plaintiff gave several conflicting reasons for the gap and his doctors gave reasons at odds with the same.]).

When a plaintiff claims that he has suffered a serious injury because he has sustained "a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing all of the material acts which constitute such persons usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment," he has to demonstrate, besides the medically determined injury, that he was indeed prevented from performing activities for at least 90 days and that the curtailment was to great degree rather than slight (*Licari v Elliot*, 57 NY2d 230, 236 [1982]. Subjective complaints of occasional transitory headaches and dizziness do not qualify as a serious injury (*id.* at

238-239). Further, a claim pursuant to this section of the Insurance Law must be supported by objective medical evidence, detailing the injury and the limitations caused by such injury (*Beaubrum v New York City Transit Authority*, 9 AD3d 258, 259 [1st Dept 2004]; *Kaplan v Vanderhans*, 26 AD3d 468, 469 [2d Dept 2006]). Accordingly, a plaintiff's unsupported statement that activities were curtailed for the required degree and duration, without more, do not establish a serious injury under this category (*Cullum v Washington*, 227 AD2d 370, 371 [2d Dept 1996]; *Atamian v Mintz*, 216 AD2d 430, 430 [2d Dept 1995]).

Thus, in order to satisfy his burden a plaintiff must tender medical evidence establishing that the restrictions alleged were medically indicated (*Grimes-Carrion v Carroll*, 17 AD3d 296, 296 [1st Dept 2005]; *Dabiere v Yager*, 297 AD2d 831, 831 [3d Dept 2002])Stated differently, a plaintiff must proffer "medical evidence that her [his] injuries from the automobile accident were the cause of her [his] disability over the applicable period" (*Kimbal v Baker*, 174 AD2d 925, 927 [1st Dept 1991]). In order to establish prima facie entitlement to summary judgment under this category of the serious injury statute, defendant must provide medical evidence with regard to an absence of injury during the relevant time period, meaning the first 180 days, subsequent to the accident (*Sayers v Hot*, 23 AD3d 453, 454 [2d Dept 2005]; *Buford v Fabrizio*, 8 AD3d 784, 786 [3d Dept 2004]). As such, medical

evidence of examinations conducted years after the accident are not probative with regard to this category of serious injury and do not entitle a defendant to summary judgment with regard to the same (*Toussaint v Claudio*, 23 AD3d 268, 268 [1st Dept 2005]); *Pijuan v Brito*, 35 AD3d 829, 829 [2d Dept 2006]; *Webb v Johnson*, 13 AD3d 54, 55 [1st Dept 2004]). Alternatively, a defendant can establish prima facie entitlement to summary judgment with regard to 90/180 category absent medical evidence, by citing to evidence, such as plaintiff's own testimony, demonstrating that he was not prevented from performing all of the substantial activities constituting plaintiff's customary daily activities for the prescribed period (*Copeland v Kasalica*, 6 AD3d 253, 254 [1st Dept 2004] [Court found that home and bed confinement for less than the prescribed period evinces lack of serious injury under the 90/180 category.]; *Robinson v Polasky*, 32 AD3d 1215, 1216 [4th Dept 2006] [Court found that plaintiff's failure to miss full days of work evinces lack of serious injury under the 90/180 category.]). Once defendant meets his burden, plaintiff must come forward with competent medical evidence demonstrating his inability to perform substantially all of his daily activities for not less than 90 of the first 180 days as a result of the accident alleged (*Ponce v Magliulo*, 10 AD3d 644, 644 [2d Dept 2004]). The mere inability to work for the prescribed time period, absent evidence that other activities were curtailed, do not establish that a plaintiff's activities were curtailed to

the requisite degree or for the required duration (*Ortiz v Ash Leasing Inc.*, 63 AD3d 556, 557 [1st Dept 2009]; *Uddin v Cooper*, 32 AD3d 270, 271 [1st Dept 2006]).

Here, a review of this Court's decision dated November 21, 2013, evinces that the Court misapprehended the facts when it held that plaintiff "failed to provide a reasonable excuse for his treatment gap . . . [and failed] to submit quantified restrictions until January 31, 2013 for a September 22, 2008 accident." Accordingly, reargument is warranted and upon reargument, defendants' motion for summary judgment is granted, but only in part.

As aptly noted by this Court in its prior decision, defendants' submissions, namely sworn affirmations from medical doctors who examined plaintiff, established the absence of a serious injury under the permanent categories (permanent loss, permanent consequential, and significant limitation) of injury under the insurance law, and the submission of plaintiff's deposition testimony established the absence of a serious injury under the non-permanent injury category (90/180) of the insurance law. Specifically, defendants tendered a sworn report from Thomas Nipper (Nipper), an orthopedist, who examined plaintiff on May 29, 2012, and after performing an examination of plaintiff's spine, left shoulder, and right knee, concluded that not only did he have full range of motion, but that he was injury free. Nipper listed

all of plaintiff's ranges of motion, listed normal ranges of motion for the relevant body parts, and concluded that plaintiff's range was normal. Thus, defendant established prima facie entitlement to summary judgment as to the permanent categories of injury (*Bray* at 423). Similarly, insofar a plaintiff testified at his deposition that he returned to work as a taxi driver two months after the accident, which testimony defendants submitted, defendants established prima facie entitlement to summary judgment over plaintiff's claim of serious injury under the 90/180 category (*Copeland* at 254; *Robinson* at 1216).

Contrary to the majority of this Court's prior decision, however, plaintiff tendered sufficient evidence to establish the existence of a serious injury under the permanent categories of injury, thereby raising a material issue of fact precluding summary judgment in defendants' favor. Specifically, plaintiff submitted sworn report from Maxim Tyorkin (Maxim), an orthopedist, who details his examination of plaintiff on October, 2 2008. After testing plaintiff's range of motion, recording the same, and comparing it to normal, Maxim concludes that plaintiff sustained injuries to his spine, right knee and left shoulder. Plaintiff also submits a sworn affirmation from Maxim, wherein he details a recent examination he performed upon plaintiff on January 31, 2013. Maxim again tested plaintiff's range of motion in his spine, right knee and left shoulder, found that those ranges are less than

normal, and concluded that plaintiff, as a result of the accident, sustained permanent injuries. As correctly noted by plaintiff, while pursuant to *Perl* (18 NY3d at 218), and contrary to this Court's prior holding, plaintiff's contemporaneous proof of injury need not quantify his restrictions, here, plaintiff's proof, namely Maxim's sworn report did nonetheless. Accordingly, plaintiff's proof was sufficient to establish injuries contemporaneous with his alleged accident. In addition, this Court erred in holding that plaintiff failed to adequately explain his five-year gap in treatment. Specifically, plaintiff testified that while he sought no treatment after the first six months after this accident, his failure to do so was because "the last time [he treated] was stopped by the insurance." Accordingly, plaintiff adequately explained the gap in medical treatment, namely the cessation of no-fault benefits, which to the extent not medical in nature, is sufficiently explained by his testimony (*Ramkumar* at 906).

The Court, however, did not err in dismissing plaintiff's claim of a serious injury under the 90/180 category of injury insofar as plaintiff testified that he returned to work two months after the accident. This evidence was sufficient to meet defendants' burden (*Copeland* at 254; ; *Robinson* at 1216), insofar as his activities were not curtailed for the minimally prescribed period and insofar as plaintiff failed to tender evidence to the contrary, warranted summary judgment on this issue in defendants'

favor.

Plaintiff's Cross-Motion for Partial Summary Judgment

Having granted reargument with respect to defendants' dispositive motion and having concluded that summary judgment was mostly unwarranted, the Court now needs to address plaintiff's cross-motion, which was previously denied as moot. With respect to this motion - which seeks summary judgment on liability - plaintiff's own evidence raises issues of fact with respect to negligence and proximate causation so as to warrant denial of his cross-motion.

VTL §1128(a) states

> [w]henever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply. . . [and] [a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

Consequently, a party who changes lanes without ascertaining the traffic conditions behind him is deemed to have acted negligently and is subject to judgment against him (*White v Zgooding*, 21 AD3d 485, 485 [2d Dept 2005]; *Jacinto v Sugerman*, 10 AD3d 593, 595 [2d Dept 2004]). In fact, evidence that a party changes a lane in violation of VTL § 1128(a), causing an accident, if left unrebutted, is prima facie evidence of liability (*Neryaev v Solon*, 6 AD3d 510, 510 [2d Dept 2004]). Evidence that a parked car pulls

into a lane of moving traffic causing an accident, if left unrebutted, is also prima facie evidence of negligence (*Calandra v Dishotsky*, 244 AD2d 376, 376 [2d Dept 1997]). In *Jacinto*, the Court granted judgment in favor of one of the defendants after finding that liability rested with the other defendant within whose car plaintiff was a passenger (*Jacinto* at 595). In that case, plaintiff was injured when the vehicle he was occupying exited a parking space and collided with another vehicle traveling straight and past the parking spot his vehicle was attempting to exit (*id.* at 594). The court held that to the extent that plaintiff's vehicle entered a lane of travel suddenly and despite the fact that the view of traffic traveling within said lane was obstructed, said vehicle was negligent insofar as it violated VTL § 1128(a) (*id.* at 595). Moreover, the court held that the parked vehicle should have yielded the right of way to other vehicles traveling in the moving lane and that the vehicle traveling straight was entitled to anticipate that the right of way would be yielded to him (*id.*).

Here, plaintiff's deposition testimony establishes that the accident occurred as he traveled northbound on Amsterdam Avenue near 67th Street. Specifically, plaintiff testified that as he traveled on the right most lane of a one-way three-lane road, he felt an impact on the left side of his vehicle. At his deposition, Gino testified that while operating a dump truck on Amsterdam Avenue, near 67th Street, he was involved in a motor vehicle

accident. As Gino traveled on Amsterdam Avenue within the third lane from the right, he engaged his signal in order to leave his lane and enter the adjacent lane on the left. As he moved over about six inches, but while still in his lane, he felt an impact. Gino stopped and then became aware that his vehicle had collided with plaintiff's vehicle.

Contrary to plaintiff's assertion, the foregoing does not establish that the instant accident occurred when Gino switched lanes without first ascertaining that it was safe do so in violation of VTL § 1128(a). Plaintiff's testimony is vague at best in that it fails to establish that the accident occurred as a result of Gino's lane change. In fact, since plaintiff testified that he did not see defendant but merely felt the impact, his testimony fails to in any way cast defendants in negligence. Certainly one can imply as much, but on a motion for summary judgment, facts, not speculation carry the day. Moreover, Gino's testimony establishes that this accident occurred before he ever left his lane of travel, giving rise to the inference that it was plaintiff who entered his lane, casing the instant accident. Accordingly, plaintiff fails to establish that, beyond factual dispute, that defendants violated VTL § 1128(a) and therefore fail to establish prima facie entitlement to summary judgment. Plaintiff's cross-motion is thus denied. It is hereby

ORDERED that plaintiff's cause of action pursuant to the

90/180 category of serious injury under the Insurance Law, be hereby dismissed, with prejudice. It is further

ORDERED that plaintiff serve a copy of this Decision and Order with Notice of Entry upon defendants within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : September 22, 2014
Bronx, New York

MITCHELL J. DANZIGER, J.S.C.