

**Sixto Batista v Friendly Group, Ltd.**

2014 NY Slip Op 33330(U)

January 6, 2014

Supreme Court, Bronx County

Docket Number: 305657/2012

Judge: Mary Ann Brigantti-Hughes

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**SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15**

**PRESENT:** Honorable Mary Ann Brigantti-Hughes  
-----X

SIXTO BATISTA and MARIA LIBERATO,

Plaintiffs,

-against-

**DECISION / ORDER**  
Index No. 305657/2012

THE FRIENDLY GROUP, LTD., AHMED SIMPORE,  
and ANDRE ELOI,

Defendants.

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The following papers numbered 1 to 7 read on the below motion noticed on July 19, 2013 and duly submitted on the Part IA15 Motion calendar of **October 28, 2013**:

<u>Papers Submitted</u>	<u>Numbered</u>
Def. Notice of Motion, Exhibits	1,2
Pls' Cross-Motion, Exhibits	3,4
Defs.' Aff. In Opp.	5
Defs' Aff. In Reply	6
Pls.' Aff, in Reply	7

In an action seeking damages for personal injuries arising out of an alleged motor vehicle accident, the defendants the Friendly Group, Ltd. and Ahmed Simpore (collectively "Defendants") move and for summary judgment, dismissing the complaint of the plaintiffs Sixto Batista ("Batista") and Maria Liberato ("Liberato") for failure to meet the "serious injury threshold" requirement of New York Insurance Law §5102. Plaintiffs oppose the motion and cross-move for summary judgment against Defendants on the issue of liability. Defendants oppose the cross-motion.

**I. Background**

Plaintiffs allegedly sustained personal injuries as a result of a motor vehicle accident that took place on February 5, 2012.

Plaintiff Batista testified that on that date, he was driving his vehicle east on 42<sup>nd</sup> Street when he saw a yellow light ahead of him at the intersection of 42<sup>nd</sup> Street and 10<sup>th</sup> Avenue, New York, New York. Batista testified that he came to a slow stop at the intersection. His vehicle

was stopped, with his foot firmly on the brake for “2-4 seconds” when he was struck in the rear by Defendants’ vehicle. Plaintiff Liberato similarly testified that their vehicle was fully stopped for 2-3 seconds at the yellow light before being struck from behind. Plaintiffs also submits an uncertified police accident report. However, since the report is not certified, and Plaintiff failed to lay a foundation for its admission as a business record, this Court will not consider it (*Figueroa v. Luna*, 281 A.D.2d 204, 206 [1<sup>st</sup> Dept. 2001]). Plaintiffs also note that, since the defendants Simpure and Eloi failed to appear for depositions, they are precluded from offering testimony, by virtue of a June 12, 2013 discovery order.

According to Batista’s verified bill of particulars, as a result of this accident, he sustained a multitude of injuries, including tears within the left shoulder that required surgical repair, herniation at C3-4 with impingement of the spinal cord, disc bulging at L3-4 and L4 extending into the neural foramina resulting in foraminal stenosis at both sides, and a broad-based disc herniation at L5-S1. According to Liberato’s verified bill of particulars, as a result of this accident, she sustained disc herniations at L4-5 and L5-S1, “8.8mm angular kyphosis at C4-5 due to hyperflexion sprain,” and herniation of C4-5 indenting the thecal sac.

*Defendants’ Submissions with respect to the “Serious Injury” Motion*

Defendants submit the affirmed reports of radiologist Michael Setton, M.D., who examined the MRI films of Batista’s left shoulder, cervical spine, and lumbar spine, taken approximately one month following this accident. With respect to the left shoulder, Dr. Setton opined that all findings were degenerative in nature and “long-standing,” with no evidence of an acute soft tissue injury or tear. There was a “SLAP” tear which typically occurs as a result of chronic repetitive overhead type motion/injury. As for the cervical spine, Dr. Setton likewise found evidence of “mild multilevel degenerative disc disease” that “in no way causally related to the accident one month prior.” All other findings, including bulging and straightening of the cervical lordosis, was also degenerative in nature and there was no indication of a recent injury to the cervical spine. Regarding the lumbar spine, Dr. Setton found a degenerative loss in disc hydration that predated the accident and was in no way causally related.

Defendants also submit the affirmed report of Dr. Alan M. Crystal, who performed an

orthopedic examination of Batista on February 28, 2013. Dr. Crystal reviewed the police accident report and all available medical records. Upon physical examination, he found Batista to have full or normal range of motion in the lumbar spine, and other objective testing including straight-leg raising and Lasegues Test was negative. Motor strength was normal. With respect to the cervical spine, Plaintiff exhibited full range of motion upon flexion, extension, rotation, and lateral flexion. As for the left shoulder, Dr. Crystal states "claimant performed active motion and would not allow any passive motion to the left shoulder." Abduction was to 120 degrees in the left shoulder, 180 being normal. External rotation in the left shoulder was 70 degrees, 90 being normal. Plaintiff's hands and wrists were normal with no deformities. Ultimately, Dr. Crystal opined that Batista had no objective findings of traumatic injuries in the cervical and lumbar spine, and any injuries were not causally related to this accident. With respect to the left shoulder, Dr. Crystal opined that, based on review of medical records and his recent examination, the mechanism of injury to this body part could not be linked to the causation of the claimed injuries.

Defendants submit Batista's deposition transcript, wherein he testified that he was only confined to his bed for one day after this accident, and confined to his home for one week. While Plaintiff testified that he missed six weeks of work immediately following the accident, and then missed ten to twelve weeks following surgery, there is no evidence of a directive from a medical provider ordering Batista to remain incapacitated from employment.

With respect to Plaintiff Liberato, the Defendants submit reports from radiologist Dr. Setton, who examined MRIs of her cervical and lumbar spine taken approximately three weeks post-accident. Dr. Setton opined that the cervical disc bulging was degenerative in nature and not causally related to this accident. With respect to her lumbar spine, Dr. Setton found no disc herniation, and the disc bulging, again, was degenerative and unrelated to any recent trauma. Defendants submit the affirmed orthopedic report of Dr. Crystal, who examined Liberato on February 28, 2013. With respect to the lumbar spine, Dr. Crystal noted that the plaintiff put "minimal effort into doing testing range of motion and started to groan and moan as soon as she flexed a few degrees." Straight-leg testing and Laseques test, however, were negative. Plaintiff had full motor strength in the lower extremities. Regarding the cervical spine, Liberato had full

or normal range of motion in all directions with no spasms. Dr. Crystal ultimately found that Liberato had no objective findings of a symptomatic herniated disc at a lumbar or cervical level causing nerve root impingement. Any subjective complaints of back and neck pain "can not be confirmed or denied by any objective test." He concluded that there was no basis to causally related the alleged injuries of record to the accident of February 5, 2012.

At deposition, Plaintiff Liberato testified that she was not confined to her bed/home following the accident, and only lost one month from work.

*Plaintiffs' Opposition to the "Serious Injury" Motion*

Plaintiff opposes the motion and cross-moves for summary judgment on the issue of liability.

With respect to Batista, Plaintiffs submit certified hospital records from shortly after the accident, along with the affidavit of his treating physician, Maxim Tyorkin, M.D. Dr. Tyorkin explained that Batista had no prior significant medical history. On February 10, 2012, he reported to Central Bronx P.T. and came under the care of "Dr. Kuo" and acupuncturist Xiaona Qu. Dr. Tyorkin annexes certified acupuncturist records that indicate Plaintiff started receiving treatment that day. At the examination with Dr. Kuo, Batista reported pain and had diminished range of motion in the cervical and lumbar spine, and noted "other joint derangement NEC, shoulder." He referred Batista to physical therapy. On February 15, 2012, Batista was examined by Dr. Albert Ciancimino. Dr. Ciancimino examined Plaintiff's cervical and lumbar spine, as well as left shoulder and right knee. He found range of motion in the left shoulder "within normal limits" although Plaintiff had "some soreness." He diagnosed Batista with, among other things, cervical/lumbar sprain/strain as well as left shoulder sprain/strain.

Batista thereafter began physical therapy treatments with chiropractor Ronald Lambert, D.C., whose certified "daily progress" records are attached. Dr. Lambert found continued restrictions in the cervical and lumbar spine and prescribed further physical therapy.

Batista was thereafter seen by neurologist Dr. Noel Fleischer on February 18, 2012. Referred to these unsworn reports, Dr. Tyorkin notes that the plaintiff complained of neck and back pain, and weakness in his left shoulder. Dr. Fleischer found some diminished range of

motion in the lumbosacral spine, left shoulder, and right knee. He diagnosed Plaintiff with, among other things, traumatically-induced radiculopathy in the cervical and lumbar spine and wished to "rule out" internal derangement in the left shoulder and right knee. Dr. Fleischer causally related the injuries to this accident "if the history" was correct, and prescribed physical therapy treatment. EMG tests performed by Dr. Fleischer revealed positive findings in the neck and back.

Dr. Tyorkin's affidavit refers to Batista's MRIs of the cervical and lumbar spine, as well as left shoulder, that revealed bulges and herniations in the spine as well as tears within the left shoulder. Dr. Tyorkin states that, because of those findings as well as the "ineffectiveness of physical therapy," he was consulted for orthopedic review on March 1, 2012. Dr. Tyorkin then determined that Batista was unable to work, and directed him out of work for five months. He performed left shoulder surgery on May 8, 2012. During that operation, Dr. Tyorkin states that he personally saw and identified that Plaintiff had a left rotator cuff tear, synovitis, chondroplasty and synovectomy all traumatically related. He prescribed more physical therapy post-surgery. On July 13, 2012, Batista was again examined by Dr. Kuo, who reported continued restricted range of motion in the cervical and lumbosacral spine.

Dr. Tyorkin himself examined Batista on August 22, 2013. Upon range of motion examination of the cervical spine, Plaintiff demonstrated restricted movement upon flexion (45 degrees, 60 normal), extension (50 degrees, 60 normal), and left and right rotation (60 degrees, 80 normal). With respect to the left shoulder, Plaintiff exhibited restricted movement upon forward elevation to 160 degrees (180 normal), abduction to 150 degrees (180 normal), and external rotation to 60 degrees (80 normal). Examination of the lumbar spine revealed limited forward flexion (70 degrees, 90 normal), extension to 20 degrees (30 normal), as well as positive straight-leg raising. His diagnosis of Batista remained "cervical radiculopathy" and disk herniation, lumbar radiculopathy with disk herniation, and status post-left shoulder arthroscopy with continued derangement. He opined that these injuries were causally-related to this accident, based on the mechanics of this accident, based on the fact that he had no pre or post-accident injuries, that fact that he had no prior physical complaints, and the resultant pain and radicular symptoms. He concluded that Batista now has a "permanent loss" of the cervical spine, lumbar

spine, and left shoulder.

Dr. Tyorkin also submits an affidavit with respect to the medical treatment and condition of plaintiff Liberato. As with Batista, Plaintiff Liberato initially was seen at Central Bronx P.T. by Dr. Kuo and acupuncturist Xiaona Qung on February 10, 2012. Dr. Kuo performed a physical examination of Liberato's lumbar spine and found restricted movement. Dr. Kuo did not examine the plaintiff's cervical spine,. He diagnosed Liberato with a lumbosacral sprain/strain and referred her to physical therapy treatment. On February 15, 2012, Liberato was examined by Dr. Ciancimino. In an affirmed report, Dr. Ciancimino states that Plaintiff presented with complaints of headaches, neck pain, and lower back pain. Physical examination of the cervical spine, however, revealed full range of motion in all directions. With respect to the lumbar spine, Plaintiff exhibited restrictions upon flexion and lateral flexion. He diagnosed Plaintiff with cervical and lumbar sprains/strains, lumbar radiculitis, and headaches. Dr. Ciancimino prescribed a course of physical therapy treatments, which are documented by certified records from chiropractor Dr. Lambert.

On February 18, 2012, Liberato was referred to neurologist Dr. Fleischer. Upon examination of the cervical spine, Dr. Fleischer found "impaired" external, rotation, and lateral flexion. He also found limitations of "roughly 33%" in the lumbar spine, as well as positive straight leg raising to 45 degrees. Dr. Fleischer ultimately diagnosed Liberato with traumatic cervical and lumbar radiculopathy, along with post traumatic headaches. EMG testing revealed L5-S1 nerve root injury, and post-traumatic cervical and lumbar radiculopathy, myofascial pain syndrome, and headaches. Dr. Tyorkin also refers to certified medical records from Dr. Stephen Mastrangelo, dated March 14 and April 11, 2012, detailing a continued impairment of the neck and back.

On March 1, 2012, Dr. Tyorkin was consulted for an orthopedic review. He conducted a range of motion examination and found minor restrictions in the cervical spine, and further restrictions in the lumbar spine upon flexion (70 degrees, 90 normal), and extension (20 degrees, 30 normal). Dr. Tyorkin's affidavit then states that he "determined that Ms. Liberato was medically unable to work as a *construction worker* as a result of the injuries..." and "order *him* out of work for 5 months post-accident". This sentence of the affidavit appears to confuse Ms.

Liberato with Mr. Batista. In her affidavit, Ms. Liberato states that at the time of the accident she was working as a produce clerk. Dr. Tyorkin prescribed physical therapy three times per week.

On August 22, 2013, Dr. Tyorkin re-evaluated Liberato. He found only limited range of motion limitations in Plaintiff's cervical spine. Examination of the lumbar spine revealed limitations upon flexion to 75 degrees (90 normal), extension to 20 degrees (30 normal), and positive straight leg raising to 5 degrees (90 normal). He concluded that Plaintiff sustained a permanent disabling injury to the spine, and an injury that prevented her from performing her usual and customary daily activities for 90 of the first 180 days following the accident. Plaintiff testified that she lost her job as a result of the accident. Since her various pains and limitations did not exist beforehand, and Plaintiff did not have any post-accident re-injuries, Dr. Tyorkin opined that they were causally related to this accident.

## II. Standard of Review

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). There is no requirement that the proof for said motion be submitted in affidavit form, rather, the requirement is that the evidence proffered be in admissible form. (*Muniz v. Bacchus*, 282 A.D.2d 387 [1st Dept. 2001]). Accordingly, affirmations from attorneys having no personal knowledge of the facts are not evidence and offer nothing more than hearsay. (*Reuben Israelson v. Sidney Rubin*, 20 A.D.2d 668 [2nd Dept. 1964]; *Erin Federico v. City of Mechanicville*, 141 A.D.2d 1002 [3rd Dept. 1988]).

Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). 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. (*Knepka v. Tallman*, 278

A.D.2d 811 [4th Dept. 2000]).

If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738,[1993]; *Bronx County Public Adm'r v. New York City Housing Authority*, 182 A.D.2d 517 [1st Dept. 1992]).

### III. Applicable Law and Analysis

#### *Serious Injury Motion*

Defendants have met their prima facie burden of showing that Plaintiffs did not sustain a permanent, serious injury to the cervical or lumbar spine, or with respect to Batista, to his left shoulder, by submitting an affirmed expert report stating that Plaintiffs either had full range of motion in those body parts when compared those values to normal (*Steinbergin v. Ali*, 99 A.D.3d 609 [1<sup>st</sup> Dept. 2012]), or the injuries, such as those to the left shoulder or cervical and lumbar spine, were degenerative in nature and pre-existed the accident (*Abreu v. NYLL Mgt. Ltd.*, 107 A.D.3d 512 [1st Dept. 2013]).

In opposition, Plaintiffs have submitted sufficient evidence in admissible form to raise a triable issue of fact as to whether their injuries were "serious." With respect to both Plaintiffs, they have submitted medical records indicating certain restrictions in movement and complaints of pain in the days following the accident. The MRI reports annexed to the opposition papers are competent evidence of qualitative injuries. Simply because some of those contemporaneous records do not contain numerical measurements regarding the severity of Plaintiffs' alleged injuries does not render them insufficient (*see Rosa v. Mejia, supra, citing Perl v. Meher*, 18 N.Y.3d 208 [2011]). When read as a whole, the affidavit of Dr. Tyorkin along with the records and reports annexed to the affidavit are sufficient proof of causation. While Defendants argue that Dr. Tyorkin relies on unsworn reports in rendering his opinion, those contemporaneous reports may be considered since they are not the "only evidence submitted by plaintiff in opposition to the motion" (*Clemmer v. Drah Cab Corp.*, 74 A.D.3d 660 [1st Dept. 2010], citing *Rivera v. Super Star Leasing, Inc.*, 57 A.D.3d 288 [1st Dept. 2008]). Although Dr. Tyorkin does

not expressly address the defense experts' non-conclusory opinion that the injuries were "degenerative" in origin and unrelated to the accident, "by attributing the injuries to a different, equally plausible cause, that is, this accident," he had rejected the defense experts' opinions and his opinion was entitled to equal weight (*Lee Yuen v. Akra Memory Cab Corp.*, 80 A.D.3d 481 [1<sup>st</sup> Dept. 2011]; citing *Linton v. Nawaz*, 62 A.D.3d 434 [1<sup>st</sup> Dept. 2009], *aff'd*, 14 N.Y.3d 821 [2010]). Dr. Tyorkin opined that Batista's left shoulder injuries were traumatically induced and not degenerative, based on his own viewing of the shoulder during surgery. He also opined that since each Plaintiff was asymptomatic before the accident, the injuries sustained were causally related. A recent examination of each Plaintiff's spine, as well as Batista's left shoulder, continued to show numerical restrictions in movement. Because Plaintiff Batista has raised a triable issue of fact as to the serious nature of his left shoulder injury, and Plaintiff Liberato has raised a triable issue of fact as to the serious nature of her lumbar spine injuries, Plaintiffs are also entitled to recover for all other injuries causally related to the accident, including those not meeting the serious injury threshold (*Perez-Hernandez v. M. Marte Auto Corp.*, 104 A.D.3d 489 [1<sup>st</sup> Dept. 2013][internal citations omitted]). With respect to Defendants' "gap in treatment" argument, it must be disregarded since it was raised for the first time in reply papers (*Tadesse v. Degnich*, 81 A.D.3d 570 [1<sup>st</sup> Dept. 2011]).

As to Plaintiffs' 90/180 day claim, with respect to Batista, he has raised a genuine issue of fact since he did not return to work for six weeks immediately following the accident, and was medically directed to remain home from work for five months following his May 8, 2012 surgery (*see Feliz v. Weir*, 107 A.D.3d 468 [1<sup>st</sup> Dept. 2013]). With respect to Plaintiff Liberato, however, she has failed to meet her burden since she testified that she was not confined to her bed/home after the accident, and missed only four weeks of work. She testified at deposition that after four weeks of disability, she remained unemployed because she could not find another job (*see Martin v. Portexit Corp.*, 948 N.Y.S.2d 21 [1<sup>st</sup> Dept. 2012]; *Seck v. Balla*, 92 A.D.3d 543 [1<sup>st</sup> Dept. 2012]).

#### *Plaintiffs' Cross-Motion*

In opposition to Plaintiffs' cross-motion for summary judgment on the issue of liability, Defendants argue (1) that the cross-motion is procedurally defective since the notice page

requests relief different than that requested in the affirmation, and (2) there remains a triable issue of fact as to “the manner of stop of plaintiff’s vehicle.” With respect to the procedural argument, the discrepancies between the notice page and the relief sought do not require denial of the cross-motion, since a court may grant relief warranted by the facts plainly appearing on the papers on both sides, and like here, where there is no prejudice (*see Frankel v. Stavsky*, 40 A.D.3d 918 [2<sup>nd</sup> Dept. 2007]).

“It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate non-negligent explanation for the accident.” *Cabrera v Rodriguez*, 72 A.D.3d 553 (1<sup>st</sup> Dept. 2010) *citing Tutrani v County of Suffolk*, 10 NY3d 906, 908 (2008); *Agramonte v City of New York*, 288 AD2d 75, 76 (1<sup>st</sup> Dept. 2001); *see also Dattilo v Best Transp. Inc* 79 A.D.3d 432 (1<sup>st</sup> Dept. 2010). However, “not every rear-end collision is the exclusive fault of the rearmost driver. The frontmost driver also has the duty not to stop suddenly or slow down without proper signaling so as to avoid a collision. Thus, where the frontmost driver also operates his vehicle in a negligent manner, the issue of comparative negligence is for a jury to decide.” *Gaeta v. Carter*, 6 A.D.3d 576, 577 (2<sup>nd</sup> Dept. 2004) [citations omitted].

Here, Plaintiffs have established their prima facie case of negligence on the part of the Defendants, as it is undisputed that Plaintiffs’ vehicle was struck in the rear by Defendants’ vehicle. *See Cabrera v Rodriguez, supra*. The burden now shifts to Defendants to provide evidence of a “nonnegligent explanation for the accident, or a nonnegligent reason for her failure to maintain a safe distance between her car and the lead car.” *Mullen v. Rigor*, 8 A.D. 3D 104 (1<sup>st</sup> Dept. 2004) *citing Jean v Xu*, 288 A.D.2d 62, (1<sup>st</sup> Dept. 2001); *Mitchell v Gonzalez*, 269 A.D.2d 250, 251 (1<sup>st</sup> Dept. 2000).

Defendants’ affirmation of counsel is insufficient to create a triable issue of fact as to whether they were liable for the accident, and the mere fact that Batista testified he did not see Defendants’ vehicle prior to the impact does not require denial of the cross-motion. A bare explanation that the Plaintiffs’ vehicle suddenly stopped, is insufficient to rebut the presumption. *See Francisco v. Schoepfer*, 30 A.D.3d 275 (1<sup>st</sup> Dept. 2006). Indeed, it is well-settled that “[a]

driver is expected to drive at a sufficiently safe speed and to maintain enough distance between himself and cars ahead of him to avoid collisions with stopped vehicles, taking into account weather and road conditions.” *Malone v. Morillo*, 6 A.D.3d 324 (1<sup>st</sup> Dept. 2004), quoting *Mitchell v. Gonzalez*, 269 A.D.2d 250 (1<sup>st</sup> Dept. 2000).

III. Conclusion

Accordingly, it is hereby

ORDERED, that the Defendants’ motion for summary judgment, dismissing Plaintiffs’ “permanent consequential” and “significant limitation” claims under New York Insurance Law, are denied, and it is further,

ORDERED, that the Defendants’ motion for summary judgment, dismissing Plaintiff Batista’s “90/180” claim, is denied, and it is further,

ORDERED, that the Defendants’ motion for summary judgment, dismissing Plaintiff Liberato’s “90/180” claim, is granted, and it is further,

ORDERED, that Plaintiffs’ cross-motion for summary judgment on the issue of Defendants’ liability is granted.

This constitutes the Decision and Order of this Court.

Dated: 1/6, 2014



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Hon. Mary Ann Brigantti-Hughes, J.S.C.