

Vargas v Marte

2014 NY Slip Op 33443(U)

February 28, 2014

Supreme Court, Bronx County

Docket Number: 0304018/2009

Judge: Wilma Guzman

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This opinion is uncorrected and not selected for official publication.

[* 1]

PART 07

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

- Case Disposed
- Settle Order
- Schedule Appearance

-----X
VARGAS, REINALDO

Index No. **0304018/2009**

-against-

Hon. **WILMA GUZMAN**

MARTE, JUAN
 -----X

Justice.

The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**
 Noticed on **July 12 2013** and duly submitted as No. _____ on the Motion Calendar of _____

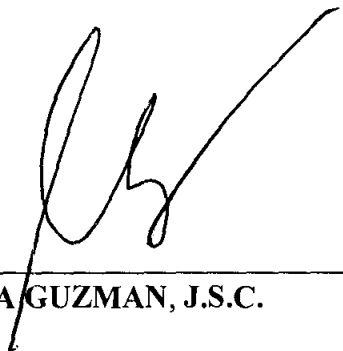
	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this *Motion* is decided in accordance with
 The attached decision and order.

Motion is Respectfully Referred to:
 Justice: _____
 Dated: _____

Dated: 2/28/14

MAR - 6 2014

Hon. 

 WILMA GUZMAN, J.S.C.

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

304018-2009
Index No. ~~310611/08~~
Motion/Calendar No. 23
Motion Date: 12/16/13

REINALDO VARGAS
Plaintiff,
-against-

DECISION/ ORDER
Present:
Hon. Wilma Guzman
Justice Supreme Court

JUAN MARTE and GOODO BEVERAGE CORP.,
Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support,	
Exhibits Thereto.....	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers and after due deliberation, and following oral argument, the Decision/Order on this motion is as follows:

Defendants move this Court for an Order granting summary judgment dismissing plaintiff Acuasiati's complaint on the grounds that this plaintiff failed to sustain a "serious injury" as defined by Insurance Law 5102(d). Defendants also move this Court dismissing the plaintiff's second cause of action for property damage.

Plaintiff moves this Court for an Order granting summary judgment on the grounds of liability. Defendants submitted written opposition.

Plaintiffs commenced this cause of action seeking damages for injuries allegedly sustained as the result of a motor vehicle accident which occurred on September 4, 2008.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. *see, Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (NY 1986) and *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (NY 1985) Summary judgment is a drastic remedy that deprives a litigant of his or her day in Court. Therefore, the party opposing a

motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party. *see, Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). It is well settled that issue finding, not issue determination, is the key to summary judgment. *see, Rose v. Da Ecib USA*, 259 A.D.2d 258, 686 N.Y.S.2d 19 (1st Dept. 1999). Summary judgment will only be granted if there are no material, triable issues of fact. *see, Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 (NY 1957) Summary judgment in negligence cases may be granted where the facts clearly point to the negligence of one party without any culpable conduct by the other. *see, Barnes v. Lee*, 158 A.D.2d 414, 551 N.Y.S.2d 247 (1st Dept. 1990). Summary judgment will only be granted if there are no material, triable issues of fact. *see, Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 (NY 1957) Summary judgment in negligence cases may be granted where the facts clearly point to the negligence of one party without any culpable conduct by the other. *see, Barnes v. Lee*, 158 A.D.2d 414, 551 N.Y.S.2d 247 (1st Dept. 1990).

In support of the motion for summary judgment, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician. *Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2nd Dept. 1992) Also, an affirmed physician's report, being in admissible form and showing that a plaintiff was not suffering from any disability or consequential injury from the accident would be sufficient to satisfy a defendant's burden of proof and shift to the plaintiff the burden of establishing the existence of a triable issue of fact. See *Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992), where defendant established a prima facie case that plaintiff's injuries were not serious through the affidavit of a physician who examined plaintiff and concluded that plaintiff had a normal examination. When the movant has made such a showing, the burden shifts and it then becomes incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). To raise a triable issue of fact as to whether a herniated disc constitutes a serious injury, a plaintiff is required to 'provide objective evidence of the extent or degree of the alleged physical limitations resulting from the [injury] and their duration' (*Noble v. Ackerman*, 252 A.d.2d 392, 394). In lieu thereof, "[a]n 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 (see Dufel, 85 N.Y.2d at 798." (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 350.).

In support of the motion for summary judgment on the threshold issue, the defendants submit the affirmed reports of Dr. A. Robert Tantleff (radiologist) and Dr. Edward S. Crane (orthopedist) and a copy of a medical report of plaintiff's doctor, Dr. Albert Graziosa .

Dr. Crane examined the plaintiff on October 12, 2008, post arthroscopic surgery. Dr. Crane conducted range of motion testing and indicates its numerical value in the neck and left knee but fails to indicate the norms for comparison. As such, this report has no probative value and insufficient to meet the burden for summary judgment. Taylor v. Vasquez, 58 A.D.3d 406 (1st Dept. 2009); Toure v. Avis Rent A Car, 98 N.Y.2d 342 (2002); Parreno v. Jumbo Trucking, Inc. 40 A.D.3d 520 (1st Dept. 2007); Taylor v. Terrigno, 27 A.D. 3d 316 (1st Dept. 2006); Aronov v. Leybovich, 3 A.D.3d 511, 770 N.Y.S.2d 741 (2nd Dept. 2004).

Dr. Tantleff upon examination of the right knee MRI taken October 4, 2004 notes any changes as attributed to wear and tear degenerative changes. In the left knee MRI taken on October 4, 2004, Dr. Tantleff finds a degenerative complex tear of the medial joint compartment and degenerative change of the lateral meniscus. In the left knee MRI taken on September 24, 2008, Dr. Tantleff notes no evidence of recent trauma nor any evidence of acute or traumatic meniscal tear.

Dr. Graziosa's March 25, 2009 report notes a tear of the anterior cruciate ligament and left knee internal derangement, medial meniscus tear and early signs of degenerative joint disease to due narrowing of the medial compartment of the left knee joint. Although the doctor made an observation of a abundant callus formation over the anterior aspect of the patella, he indicated there was no effusion present.

In opposition papers, plaintiff submits the March 25, 2013 report of Dr. Graziosa who opines that the based upon his review of the plaintiff's prior medical reports including prior MRI's and the MRI's from the subject accident, he found plaintiff medically necessary for surgery for his injury related left knee injury causally related to the subject accident. Dr. Graziosa reviewed Dr. Tantleff's report and agrees that there may have been some age related degeneration the bilateral meniscal

tears and the need for surgery were due to accident on September 4, 2008 and not due to degeneration.

Dr. Goldman an orthopedist who examined plaintiff on July 25, 2013 and also reviewed the prior and accident related MRI's of the left knee indicates that while there is normal age related degeneration the tear of the anterior cruciate ligament contusion to the medial and tibial plateau and narrowing of the medial compartment in the left knee are causally related to the subject accident.

Dr. Ahmad Raiz, opines that he aware of the plaintiffs prior accident for which he had left knee surgery and he was treated and made a full recovery. Based upon his medical opinion and his range of motion testing taken on September 24, 2008, he noted limitations of 80 degrees as compared the norm of 135 degrees.

Plaintiff's cross-motion on the issue of liability is granted. Defendant fails to submit any admissible proof sufficient to raise a triable issue of fact as to causation or any negligence on behalf of the plaintiff. Furthermore, defendants reliance on the police report is insufficient to raise a triable issue of fact. Coleman v. Maclas, 61 A.D3d 569 (1st Dept. 2009).

Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied. It is further

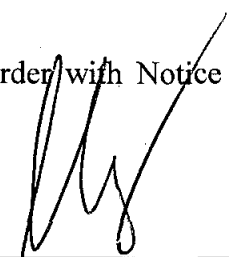
ORDERED that plaintiff's cross-motion on the issue of liability is hereby granted. It is further

ORDERED that the Clerk is directed to enter a judgment in favor of the plaintiff against the defendants on the issue of liability only. Upon the completion of discovery and the payment of the appropriate fees, plaintiff is directed to file the Note of Issue, upon which this matter will be placed on the trial calender on the issue of damages only. It is further

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

This constitutes the decision and Order of the Court.

2/28/14
DATE



HON. WILMA GUZMAN, JSC