

**Majjett v Macareno**

2015 NY Slip Op 30803(U)

April 14, 2015

Sup Ct, Bronx County

Docket Number: 310680/11

Judge: Wilma Guzman

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

Index No. **310680/11**  
Motion Calendar No. 20  
Motion Date: 2/9/15

JOYCE MAJETT and RAYMOND LUGO,  
Plaintiff,

-against-

**DECISION/ ORDER**

**Present:**  
**Hon. Wilma Guzman**  
Justice Supreme Court

FREDDY MACARENO, MARIA MACARENO  
and OSCAR FORTUNATO

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>
<b>Notice of Motion by Plaintiff, Affirmation in Support,</b>	
<b>Exhibits Thereto.....</b>	<b>1</b>
<b>Affirmation in Opposition .....</b>	<b>2</b>
<b>Reply Affirmation .....</b>	<b>3</b>

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

Defendant Fortunato moves this Court pursuant to CPLR § 3212 for an Order seeking summary judgment on the issue of liability. Defendant Fortunato also moves this Court dismissing the plaintiffs complaint on the grounds that plaintiff Lugo does not meet the burden of a sustainable serious injury under Ins. Law sections 5102(d) and 5104(a). Plaintiff submitted written opposition.

Defendants Freddy Macareno and Maria Macareno (hereinafter referred to as “defendants Macereno”) partially adopting and relying upon the Fortunato motion, cross-move this Court for an Order dismissing the plaintiffs complaint on the grounds that plaintiff Lugo does not meet the burden of a sustainable serious injury under Ins. Law sections 5102(d) and 5104(a).

For purpose of disposition, the motion and cross-motion are consolidated and decided as follows:

This action arises from a motor vehicle accident that occurred on August 30, 2011, at the intersection of 41<sup>st</sup> Street and 2<sup>nd</sup> Avenue, Brooklyn, NY. Plaintiffs were passengers in the vehicle driven by defendant Freddy Macereno.

Defendant Macereno testified that the accident occurred in the intersection of 41<sup>st</sup> Street and Second Avenue. He described both 41<sup>st</sup> Street and Second Avenue as a two way roads, with one lane in each direction. There was no traffic light and he did not recall seeing any stop sign as it was dark outside. The Macarena vehicle was traveling approximately fifteen miles per hour on 41<sup>st</sup> Street in the direction of the Second Avenue intersection. Defendant Macareno attempted to make a left turn at the intersection. Prior to making a left turn, he did not bring his vehicle to a stop. He testified that he did not observe the white Lexus until it came in contact with the right front bumper of his vehicle while in the intersection. He did not know how fast the Lexus was traveling. He described the impact as heavy.

Defendant Fortunato testified that he was driving a white Lexus minivan on the date of the accident. His vehicle was westbound on Second Avenue, which is one lane in each direction. Defendant Fortunato traveling towards 41<sup>st</sup> Street. There are no traffic devices on Second Avenue. His vehicle was going straight on Second Avenue. As he approached the intersection, he did not see the [Macarena] vehicle. The Fortunato vehicle was three quarters into the intersection when the accident occurred. Defendant Fortunato testified that his vehicle was hit on the front end of driver's side fender by the front end of the [Macarena] vehicle. His vehicle then hit a light pole.

Plaintiff Lugo testified that he was a rear seat passenger in the Macereno vehicle. He did not observe the other vehicle prior to the impact of the accident. He did not know if the Macareno vehicle was turning at the time.

Plaintiff Majjet testified that she was a second row rear seat passenger in the Macareno vehicle. She observed the Fortunato vehicle prior to the accident traveling in the way the Macareno vehicle was turning. She testified that the other vehicle was going "very fast."

The 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. Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy, and it

should not be granted when there is any doubt as to the existence of a triable issue of fact. Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 385 N.E.2d 1068, 413 N.Y.S.2d 141 (1978). The court's function on this motion for summary judgment is issue finding, not issue determination. Krupp v. Etna Life & Cas. Co., 103 A.D.2d 252, 479 N.Y.S.2d 992 (2nd Dept. 1984). Summary judgment will only be granted if there are no material, triable issues of fact. Stillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 (1957). The failure of an opposing party to rebut the presumption of negligence will entitle the moving party to summary judgment on the issue of fault. Toulson v. Young Han Pae, 6 A.D.3d 292, 774 N.Y.S.2d 706, 2004 N.Y. Slip Op. 03006 (1st Dept. 2004).

Vehicle and Traffic Law § 1141 states:

The driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard.

In the instant case, defendant Macareno, who was the driver of the vehicle in which plaintiffs Majjett and Lugo traveled, testified that he did not observe the Fortunato vehicle prior to the accident. Plaintiff Majjett testified that she observed the Fortunato vehicle prior to accident and it was traveling "very fast." As such, questions of fact exist as to any comparative negligence of defendant Fortunato warranting denial of the summary judgment motion. Espinal v. Volunteers of America-Greater New York, Inc., et al., 121 A.D.3d 558 (1<sup>st</sup> Dept. 2014) citing Rodriguez v. CMB Collision, Inc., 112 A.D.3d 473 (1<sup>st</sup> Dept. 2013). As such, defendant Fortunato's motion is denied on the issue of liability.

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 (2<sup>nd</sup> 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.).

#### Plaintiff Lugo

Defendant has met the burden of prima facie entitlement to summary judgment through the submission of the affidavit of Dr. Joseph Margulies, who reviewed the plaintiff’s medical records and performed an independent orthopedic examination on the plaintiff on March 7, 2013. Dr. Margulies noted normal ranges of motion in the plaintiff’s cervical spine, lumbosacral spine, and bilateral shoulders. Dr. Margulies opined that plaintiff Lugo revealed no functional disability and could continue with activities of daily living, as well as with his present employment. that all sprains and strains had resolved and there was no evidence of disability nor the need for orthopedic treatment including physical therapy.

In opposition, the plaintiff’s submission of the chiropractic reports of Dr. Mitchell Zeren is inadmissible as it is signed or notarized. Gibbs v. Reid, 94 A.D3d 636(1<sup>st</sup> Dept. 2012) *contra* Long v. Taid Orchids, Inc., 117 A.D3d 624 (1<sup>st</sup> Dept. 2014) [where defendant did not object to admissibility or form of Chiropractor’s report]. This Court notes that the records of Dr. Yolande Bernard, Dr. Jacob Lichy and Dr. Thomas M. Kolb, however these reports were reviewed by defendant’s doctor and thus are admissible before this Court. See, Thompson v. Abassi, 15 A.D3d 95 (1<sup>st</sup> Dept. 2005). Plaintiff has submitted medical records contemporaneous with the subject accident. *Contra* Camilo v. Villa Livery Corp., 118 A.D.3d 586 (1<sup>st</sup> Dept. 2014); Perl v. Meher, 18

N.Y.3d 208 (2011). Dr. Bernard noted range of motion limitations as compared to the norm in the plaintiff's cervical spine, lumbosacral spine and recommended that plaintiff Lugo continue physical therapy. Dr. Bernard's notes are consistent through December, 2011. Dr. Bernard's notes reveal that the plaintiff went back to work, as early as October, 2011.

Dr. Lichey performed an MRI of plaintiff Lugo's lumbar spine on October 10, 2011 and noted a herniation of the L4-5 intervertebral disc. The cervical spine MRI revealed disc herniations as C5-C6 and C6-7.

Dr. Aric Hauskenect performed a neurological examination of plaintiff Lugo on November 2, 2011 and noted range of limitations as compared to the norm in the cervical spine and lumbar spine. Based upon his examination and the review of the MRI's Dr. Hasckenect opined plaintiff had closed head trauma with post-concussion syndrome, cervical derangement and lumbosacral derangement with L4-L5. Dr. Hauskenect opined that the plaintiff was partially disabled and his injuries causally related to the subject accident. Furthermore, he advised the plaintiff to restrict his activities.

Plaintiff Lugo has submitted sufficient proof to raise a triable issue of fact as to whether he sustained a serious injury under Ins. Law 5102(d). However, plaintiff Lugo not submitted competent medical proof that she could not perform substantially all of her daily activities for the first 90 out of 180 days immediately following the accident. Coley v. DeLarosa, 105 A.D.3d 527 (1<sup>st</sup> Dept. 2013); Uddin v. Cooper, 32 A.D.3d 270 (1st Dept. 2006).

Accordingly, it is

ORDERED that defendant Fortunato's motion for summary judgment pursuant to C.P.L.R. § 3212 on the issue of liability is hereby denied. It is further

ORDERED that defendant Fortunato's motion for summary judgment under Ins. Law 5102(d) is hereby granted to the extent that plaintiff Lugo has failed to raise a triable issue of fact as to whether he was incapable of performing all of her usual and customary activities for 90 out of 180 days following the accident. All other aspects of defendant Fortunato's motion are hereby denied. It is further

ORDERED that defendants Macareno's motion for summary judgment under Ins. Law 5102(d) is hereby granted to the extent that plaintiff Lugo has failed to raise a triable issue of fact

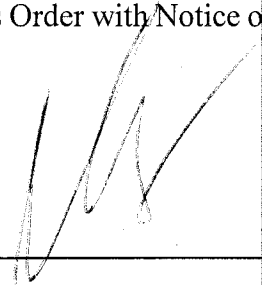
as to whether he was incapable of performing all of her usual and customary activities for 90 out of 180 days following the accident. All other aspects of defendants Macareno's motion are hereby denied. It is further

ORDERED that Defendant Fortunato shall serve a copy of this Order with Notice of Entry upon all parties within 30 days after entry.

This constitutes the decision and Order of the Court.

**APR 14 2015**

DATE



HON. WILMA GUZMAN  
Justice Supreme Court