

**Fermin v Medina-Minyesty**

2015 NY Slip Op 32153(U)

October 27, 2015

Supreme Court, Bronx County

Docket Number: 308114/12

Judge: Howard H. Sherman

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NEW YORK SUPREME COURT - COUNTY OF BRONX

**PART 04**

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 DARY A. FERMIN,

Index No.: 308114/12

Plaintiff,

-against-

**DECISION/ORDER**

JUNIOR P. MEDINA-MINYESTY  
 and DANGELO CORP.,

Present:

Defendants.

Howard H. Sherman  
 J.S.C.

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The following papers numbered 1 to 3 read on this motion of defendants for an award of summary judgment dismissing the complaint on the grounds of lack of serious injury noticed on August 18, 2014 and fully submitted on the Motion Calendar on November 21, 2014.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Exhibits A-T and Affirmation Annexed	1	
Affirmation in Opposition to Motion - Exhibits A-C	2	
Affirmation in Reply	3	
Memorandum of Law in Support of Motion	1A	

Upon the foregoing papers the motion by defendants for an order awarding summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury is granted to the extent and for the reasons set forth below.

Facts and Procedural Background

Plaintiff seeks damages for injuries alleged to have been sustained on February 27, 2012 in a motor vehicle accident that occurred at or near the intersection of Grand Avenue and Macombs Road and Featherbed Lane, Bronx, New York.

This action was commenced in October 2012, and issue was joined in December. The second affirmative defense alleged is that the action is barred by virtue of Article 51 of the New

York Comprehensive Motor Vehicle Insurance Reparation Act, Sections 5101 to 5108.

Plaintiff alleges that as a result of the accident he sustained the following injuries: meniscal tear and partial ACL tear of the left knee requiring surgical repair on September 20, 2012; bulging cervical and lumbar disc and cervical radiculopathy and a S1-S2 radiculopathy and post concussion syndrome.

All injuries are alleged to be permanent in nature, and as having caused plaintiff to be confined to bed and to home for approximately one week post-accident [Id ¶ 13].

Plaintiff further alleges that the injuries qualify as serious in five of the nine categories of serious injury.

#### Motion

Defendants move for summary judgment dismissing the complaint on the grounds that the record demonstrates a s a matter of law that plaintiff failed to sustain an accident-related serious injury as contemplated by Insurance Law 5102(d).

The motion is supported by the affirmed reports of: John H. Buckner, M.D., a board-certified orthopedic surgeon; Fernando Jara, M.D., a board-certified emergency medicine specialist, and Scott A. Springer, O.D., a radiologist. The motion is also supported by copies of contemporaneous treatment records, and a copy of plaintiff's 5/23/14 examination before trial.

#### Independent Medical Evaluations

1) Plaintiff presented for orthopedic examination on June 9, 2014, with complaints of pain in his left knee and difficulty walking, bending, as well as blurred vision.

For purposes of the evaluation, Dr. Buckner reviewed contemporaneous emergency treatment, medical reports and diagnostic studies for the period 2/27/12 through 2/14/13 as well as

the reports of defendants' experts.

Upon his clinical findings on examination and a detailed review of the contemporaneous records, Dr. Buckner concluded that there was no causally-related cervical spine injury due the negative findings on examination and the mechanism of the low-impact collision, as well as the absence of emergency treatment objective findings of and treatment for such an injury, and the recommendation for physical therapy after the initial evaluation of March 4, 2012, and the electro-diagnostic studies of 5/1/12 and the findings upon MRI testing, in addition to the lack of any "spinal precautions" being taken during the course of the arthroscopic surgery.

Upon his findings of a "normal" lumbar spine examination and his review of the treatment records and reports of diagnostic studies, Dr. Buckner also considered in like fashion that plaintiff had sustained no accident-related lumbar injury.

Finally, Dr. Buckner finding his examination of the left knee to be normal with the exception of the healed surgical incision, reviewed the contemporaneous reports and concluded that there was no left knee disability causally related by the accident, noting that plaintiff neither requested nor received emergency medical treatment for such an injury and the surgical report includes findings suggestive of chronic patellar injury.

2) Dr. Jara <sup>1</sup> reviewed the St. Barnabas Hospital emergency department records; EMS PCR; police accident report and the Bill of Particulars and concludes that these records reveal that plaintiff complained of neck, back and left thigh pain and denied a head injury on arrival at the ER and he did not complain of left knee injury. The examination of the neck revealed palpable tenderness over the mid cervical region without evidence of soft tissue swelling or bruising. There was full and

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<sup>1</sup> Exhibit S.

unrestricted range of motion of all extremities, joints, including the knees. Medication was administered and plaintiff discharged with a diagnosis of a cervical strain. Dr. Jara opines with a reasonable degree of medical certainty that the emergency treatment records reveal no acute findings to causally relate the accident to the claimed injuries other than a cervical strain.

3) Dr. Springer<sup>2</sup> reviewed the MRI studies of the cervical and lumbar spine and of the left knee.

He concluded that the 5/22/12 films of the cervical spine revealed likely positional straightening of the normal lordosis and mild generalized degenerative changes with anterior osteophyte formation, and disc desiccation at C5-6, and a mild bulge at C5-6 with mass effect on the anterior thecal sac found to be degenerative in origin. Dr. Springer found no posttraumatic changes causally related to the motor vehicle accident.

The lumbar spine study of 6/11/12 was found to reveal likely positional straightening of the normal lumbar lordosis, and mild anterior and posterior osteophyte formation at L5-S1 as well as bulging at L4-5 and L5-S1 concluded to be degenerative in origin. Dr. Springer opined to a reasonable degree of medical certainty that the lumbar spine study revealed no accident related post-traumatic changes.

The MRI study of the left knee was conducted three months post accident and Dr. Springer's review finds the films to reveal a "sprain versus partial tear of the distal portion of the anterior cruciate ligament" and given the "thinned appearance" and lack of a "sizeable joint effusion" he states that a "sprain is favored and is likely a chronic finding." A tear of the posterior horn of the medial meniscus was also revealed "which is a common location for degenerative meniscal tear to

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<sup>2</sup> Exhibit C

occur.”

#### Contemporaneous Medical Records

Defendants submit copies of the emergency treatment records, as well as acupuncture, treatment reports, and the Gerard Avenue Medical, P.C. reports of an initial consultation on 3/14/12 and a final narrative report of 10/29/12 addressed to the subsequent treatment at the facility through 10/26/12 and related diagnostic studies, as well as the treatment of the pain management specialist and the orthopedic surgeon to whom, in August, plaintiff was referred. Also submitted and those physician’s reports, including the 9/20/12 Operative Report.

#### Deposition

Plaintiff testified that the force of the collision his left knee hit the bottom of the dashboard and his left arm hit the door [Fermin EBT: 22-25]. The air bags did not deploy [14]. He was removed from the car by emergency services and he was taken by ambulance to the hospital where he complained of pain in the neck, the back and left knee [25-27; 30-31]. He was discharged five or six hours later and took a taxi home [32-33].

He commenced a two to three month course of therapy at a medical facility on Prospect and Third Avenue presenting initially with complaints of pain in the left knee and back and neck [33-35]. He underwent surgery on his left knee at a facility in New Jersey, and could not recall when he last saw a physician in connection with the accident [39]. Plaintiff testified that he was confined to home for three months after the [54], but did not have to stay home before [54-55].

#### Discussion and Conclusions

Upon review of the probative medical proof in support of the motion, and upon consideration thereof, it is the finding of this court that defendants have sustained their initial burden on the motion to prove as a matter of law the lack of any accident-related significant limitation of use of body

function and system, and/or permanent consequential limitation of use of body organ or member. Moreover, upon consideration of plaintiff's testimony of the lack of any immediate post-accident confinement, it is the further finding of this court that defendants have made their initial showing with respect to the 90/180 category of serious injury.

Upon this showing it is incumbent upon plaintiff to come forward with probative medical proof to raise an issue of fact that he sustained a serious injury.

As afforded all favorable inferences, it is submitted that the affirmation<sup>3</sup> of the treating orthopedic surgeon in conjunction with the contemporaneous records submitted in support of defendants' prima facie case, is sufficient for such purpose.

Marion Tyorkin, M.D. records the findings of restriction of range of motion of the spinal areas and of the left knee upon initial examination as well as those upon examination on September 25, 2014. It is noted that upon the examination one year post-operation, surgeon found the knee to exhibit parapatellar tenderness and cubitus and mild quadriceps atrophy was found. Dr. Tyorkin opines that the restriction of ranges of motion are permanent and that the motor vehicle accident "is the competent cause for the injuries" to the affected areas. To the extent these findings conflict with those of Dr. Buckner, there is raised an issue of fact to be resolved by the jury. It is also noted that the somewhat equivocal findings of defendants' expert as to the pre-existing etiology of the left knee tear are not sufficiently "persuasive" for the treating physician to be required to address them.

Plaintiff comes forward with no evidence to raise an issue of fact of a serious injury in the 90/180 category, that seeing no support in the contemporaneous records that plaintiff was required

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<sup>3</sup> To the extent that the non-notarized "affidavit" includes the statement that the physician "being duly sworn, hereby deposes" the court will consider Dr. Tyorkin's report despite the fact that the statement does not reference CPLR 2106 and concludes with the physician affirming the statement to be true not under the penalties of perjury, but "with a reasonable degree of medical certainty."

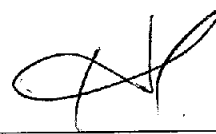
to significantly curtail his daily activities in the immediate aftermath of the accident.

Accordingly, for the reasons above stated it is

ORDERED that defendants' motion be and hereby is granted solely to the extent of awarding partial summary judgment dismissing the claim of serious injury in all categories with the exception of the "significant" and "permanent consequential" loss of use.

This constitutes the decision and order of this court.

Dated: October 27, 2015  
Bronx, New York



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Howard H. Sherman  
J.S.C.