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| <b>Rodriguez v Rabii</b>                                                                                                                                                                                                                                         |
| 2015 NY Slip Op 32387(U)                                                                                                                                                                                                                                         |
| November 24, 2015                                                                                                                                                                                                                                                |
| Supreme Court, Bronx County                                                                                                                                                                                                                                      |
| Docket Number: 304353/2012                                                                                                                                                                                                                                       |
| Judge: Ben R. Barbato                                                                                                                                                                                                                                            |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

-----X  
BIENVENIDO A. RODRIGUEZ,  
Plaintiff,

Index No.: 304353/2012

-against-  
MOURAD RABII and PARK AVENUE TOWN CAR,  
INC.,  
Defendants.

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HON. BEN R. BARBATO:

Defendants move for summary judgment upon the ground that Plaintiff, BIENVENIDO A. RODRIGUEZ, did not sustain a “serious injury” within the meaning of the Insurance Law. This is an action to recover for alleged personal injuries sustained by Plaintiff in a motor vehicle accident involving the livery vehicle driven by Defendant MOURAD RABII, and owned by Defendant PARK AVENUE TOWN CAR, INC., which occurred on February 28, 2011, in the afternoon. Plaintiff RODRIGUEZ, then 23 years old, alleges that the collision occurred because Defendants’ vehicle “disregarded a stop sign”<sup>1</sup>.

Pursuant to Insurance Law §5102(d), a “serious injury” is defined, in relevant part, as follows:

““Serious injury” means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus;

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<sup>1</sup> (See Plaintiff RODRIGUEZ’s Affidavit, dated Dec. 4, 2013).

permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

In support of their Motion, Defendants submit the affirmed reports of their experts, Dr. Alan M. Crystal, an orthopedic surgeon; and Dr. A. Robert Tantleff, a Radiologist.

In arriving at his opinion in his report, Dr. Crystal reviewed the Reports of the MRIs that were made by Dr. Tantleff, as well as the Reports of the MRIs made by Plaintiff's Radiologist, Dr. David R. Payne, respectively.<sup>2</sup> While these Radiologists reviewed the same MRIs, they arrived at different conclusions. The following MRIs were involved: the MRI of the Plaintiff's Cervical Spine performed on March 26, 2011; the MRI of the Lumbar Spine performed on March 26, 2011; the MRI of the Left Hand performed on April 2, 2011; and the MRI of the Left Wrist performed on Nov. 9, 2011. It is noted that, as far as the latter, Dr.

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<sup>2</sup> It is noted that, even if the MRI Reports are unsworn, “plaintiff's radiologist's reports [are] properly considered, because they were reviewed by defendant's expert in reaching his conclusion.” Ayala v. Douglas, 57 A.D.3d 266 (1st Dept. 2008). The Court of Appeals held that, though MRI reports were unsworn, the various medical opinions relying on those MRI reports are sworn and thus competent evidence. Pommells v. Perez, 4 N.Y.3d 566 (2005).

Tantleff could not offer an analysis, since he alleges that the MRI is of “poor quality”. Further, Dr. Crystal did not review the Report of the Plaintiff’s MRI of the Left Elbow taken on May 8, 2012, that is referred to by Plaintiff’s doctor, as discussed infra.

Dr. Crystal examined Plaintiff once, on May 29, 2013. As far as the Plaintiff’s wrist injury, he noted that he did observe “occasional snapping sensation by the left ulna on repeat supination/ pronation”. In his report, Dr. Crystal integrated various medical records, even those from Plaintiff’s treating orthopedic surgeons, Dr. Charles DeMarco and Dr. Steven J. Touliopoulos of University Orthopedics of New York, PLLC, including the latter’s operative report concerning Plaintiff’s left wrist surgery. Dr. Crystal acknowledges that the operative report notes that the TFCC (triangular fibrocartilagenious complex) had central and peripheral tearing which were debrided; that there was chondromalacia; and that ligaments were partially injured. However, Dr. Crystal believes that: “a debridement of the TFCC is only performed on chronic degenerated areas. Degeneration of the TFCC is common with arthritic changes secondary to an old wrist injury”; and he concludes that “there is no basis to causally relate the alleged injuries ... of the left wrist to the accident of 02/28/2011.”

As far as the Plaintiff's cervical and lumbar spine, Dr. Crystal acknowledges that it is alleged that the MRIs show that Plaintiff sustained herniated disc at L4-5 disc, impinging on the exiting right L4 root, and bulges in cervical and lumbar discs. However, Dr. Crystal accepts Dr. Tantleff's interpretation, that "cervical and lumbar discogenic (degenerative) changes and lumbar facet arthropathy" are present, and Dr. Crystal states that the "facet arthropathy is a potential pain generator". Dr. Crystal also theorizes that "if a spine MRI is performed on an asymptomatic adult [,] the chances of finding disc degeneration, disc bulging, and disc herniation is extremely high and increases with age." Dr. Crystal comes to the conclusion that "there is no basis to causally related the alleged injuries of ... the cervical and lumbar spine to the accident of 02/28/2011."

In opposition to Defendants' Motion, Plaintiff RODRIGUEZ submits the affirmed reports of Dr. Steven Touliopoulos of University Orthopedics of New York, PLLC, Plaintiff's treating orthopedic surgeon; and Dr. Brian Haftel, Plaintiff's treating pain management specialist.

In Dr. Touliopoulos' Operative Report, he sets forth that he performed a "left wrist arthroscopic debridement of [a] partial triangular fibrocartilage complex tear, [and] arthroscopic synovectomy" on May 14, 2012. His post operative diagnosis was "left wrist posttraumatic partial tear of the triangular fibrocartilage

complex, intraarticular synovitis, and posttraumatic chondral injuries of the left carpus.” In Dr. Touliopoulos’ summary report, dated February 14, 2014, he concluded, “to a reasonable degree of medical certainty, that Bienvenido Rodriguez’s injuries are causally related to the motor vehicle accident that occurred on February 28, 2011. With respect to his left wrist, he has a partial permanent disability.”

In a recent case, a plaintiff had sustained a similar injury, namely “a central tear of the triangular fibrocartilage complex”. Rodgers v. Duffy, 95 A.D.3d 864 (2d Dept. 2012). The Court denied defendant’s motion for summary judgment on whether plaintiff had sustained a “serious injury”, holding that there was “a triable issue of fact as to whether the injured plaintiff sustained the wrist injury as a result of the subject accident or sustained an exacerbation of a preexisting condition as a result of the accident.” Rodgers v. Duffy, 95 A.D.3d 864, 866 (2d Dept. 2012).

In Rodgers, like in the case at bar, defendants had alleged that the wrist injury may have been preexisting and not causally related to the subject accident. However, the Court held that defendants had “failed to establish, prima facie, that the wrist injury was entirely preexisting and not causally related to the subject accident. A preexisting condition does not foreclose a finding that the injuries were causally related to the accident...The injured plaintiff alleged that his wrist

was injured in the subject accident and that the injury persisted, ultimately requiring surgery in February 2010.” Rodgers v. Duffy, 95 A.D.3d at 866.

Another case on point, decided in the Bronx County Supreme Court, also involved the injury of “a tear of the fibrocartilage” which “was corroborated when surgery was performed”. Pabon v. Cerda, 22 Misc. 3d 1106(A) (Bronx Sup. Ct. 2009). Therein, the Court denied defendant’s motion for summary judgment on the issue of whether plaintiff sustained a “serious injury”, finding that the defendant’s expert’s opinion as to the “degenerative nature of the left wrist injury, is highly speculative given the lack of any evidence that the plaintiff had any complaints to his left wrist prior to the occurrence of the accident.” Id.

In the case at bar, Dr. Haftel’s detailed summary report also substantiates Plaintiff’s claim that he suffered a “serious injury” causally related to the subject accident. Dr. Haftel explains the particulars of Plaintiff’s course of treatment, from his initial examination on March 22, 2011, shortly after the accident, until his recent followup in January 2014. On March 22, 2011, Dr. Haftel first examined Plaintiff, a young man born on March 7, 1987. Dr. Haftel’s office consultations and examinations include physical examinations, goniometric range of motion measurements, muscle testing including sensory and reflex examinations and motor function testing. Dr. Haftel prescribed EMG nerve conduction studies on

the Plaintiff's lumbar and cervical spines. Dr. Haftel prescribed MRIs, mentioned above, of the Plaintiff's: Cervical Spine performed on March 26, 2011; Lumbar Spine performed on March 26, 2011; Left Hand performed on April 2, 2011; Left Wrist performed on Nov. 9, 2011; and Left Elbow taken on May 8, 2012 – all of which came back with positive findings.

According to Dr. Haftel, in relevant part, as far as Plaintiff's back injuries, the MRIs showed that Plaintiff suffered a herniation at L4/L5, several bulging discs. The EMG studies confirmed several radiculopathies. Consequently, Plaintiff was treated with three series of 3 epidural steroid injections into his lumbar spine, and three series of 3 epidural steroid injections into his cervical spine.

During Dr. Haftel's most recent examination, as far as the Plaintiff's left wrist, Plaintiff exhibited diminished range of motion; and there was crepitus noted in all planes of motion. There was tenderness along the medial aspect of the left elbow. Also, with respect to his cervical spine, Plaintiff exhibited diminished range of motion; and bilateral paracervical and trapezius tenderness with tenderness over the greater occipital nerves. There was midline tenderness at C7; diminished sensation in the left upper extremity at C5, C6 and C7 distributions. There was crepitus noted with rotation bilaterally. As far as his lumbar spine, Plaintiff suffered diminished range of motion, all gauged with a goniometer.

Straight leg raise was positive. There was bilateral paralumbar tenderness and spasm; and midline tenderness at L4 and L5.

Dr. Haftel believes that the subject motor vehicle accident caused Plaintiff's conditions, treatment and diagnoses to the cervical and lumbar spines, and his left hand, wrist and elbow. Based upon the details set forth more fully in his report, Dr. Haftel also concludes that Plaintiff's injuries are permanent, and constitute a permanent partial disability. He notes that Plaintiff suffers from restricted range of motion in his cervical and lumbar spines, and has partial use of his cervical and lumbar spines.

Plaintiff maintains that he had "never injured [his] left wrist, low back and neck prior to this collision", and that he had "never had or required treatment or physical therapy for [his] left wrist, neck and low back." (See Plaintiff RODRIGUEZ's Affidavit, dated Dec. 4, 2013).

In a leading Court of Appeals case, plaintiff's treating physician had similarly opined that the findings were causally related to the accident, since plaintiff ""had not suffered any similar symptoms before the accident or had any prior injuries/ medical conditions that would result in these findings"." Perl v. Meher, 18 N.Y.3d 208, 219 (2011). Therein, the Court held that a "factfinder could of course reject this opinion", and so the Court could not "say as a matter of

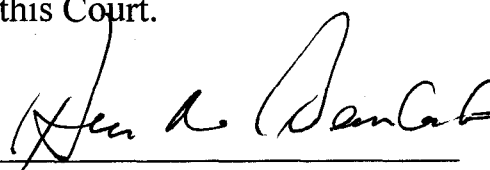
law on this record, however, that such [alleged degenerative] changes were the sole cause of Perl's injuries." Perl v. Meher, 18 N.Y.3d at 219. This was so, even though it was plausible that Perl, a man of 82, could have suffered significant degenerative changes.

Thus, likewise, in the case at bar, Defendants' opinion as to "degeneration" may be rejected by the factfinder at the time of trial. Analogous to Perl, it is plausible that Plaintiff RODRIGUEZ, a young man of 23, would not have suffered the alleged degenerative changes; and, therefore, we cannot rule as a matter of law, on the record presented, that any alleged degeneration was the sole cause of Plaintiff's injuries. "The issue presented by this evidence, of course, is one of credibility, which is not for this Court to decide." Perl v. Meher, 18 N.Y.3d at 219.

Under the circumstances, there remain questions of fact as to whether Plaintiff RODRIGUEZ sustained a "serious injury" within the meaning of the applicable law. Accordingly, Defendants' Motion for summary judgment is denied.

This constitutes the decision and order of this Court.

Dated: November 24, 2015

  
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Ben R. Barbato, A.J.S.C.