

Cervantes v McDermott
2015 NY Slip Op 32661(U)
January 15, 2015
Supreme Court, Nassau County
Docket Number: 601090/13
Judge: Randy Sue Marber
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

Justice

TRIAL/IAS PART 12

EVA CERVANTES, individually and as m/n/g of
LUIS CERVANTES, an infant under the age of
17 years,

Plaintiffs,

Index No.: 601090/13
Motion Sequence...01
Motion Date...12/10/14

- against-

XXX

JOHN A. MCDERMOTT and MUZAK, LLC,

Defendants.

Papers Submitted:
Notice of Motion.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Upon the foregoing papers, the motion by the Defendants, John A. McDermott and Muzak, LLC, seeking an Order awarding them summary judgment dismissal of the Plaintiff's complaint on the grounds that (1) there are no issues of material fact with respect to the Defendants' negligence; and (2) the Plaintiff, Luis Cervantes, did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), is decided as hereinafter provided.

This action arises out of an automobile accident that occurred on April 20,

2012, at the intersection of Grand Boulevard and Union Avenue in New Cassel, New York. According to the Plaintiff, he was injured when the vehicle operated by the Defendant, John McDermott, and owned by the Defendant, Muzak, LLC, struck him while he was a pedestrian crossing Union Avenue.

The Defendants submit the deposition testimony of the Plaintiff in support of their motion for summary judgment on liability. The Plaintiff testified at an Examination Before Trial (“EBT”) that on March 10, 2014 the accident occurred when he was on his way to school at the intersection, of Grand Boulevard and Union Avenue. (*See* Transcript of the Plaintiff’s EBT annexed to the Notice of Motion as Exhibit “D”, p. 23, l. 25, p. 24, l. 2-3, p. 43, l. 12-17) He testified that there was a traffic light and a faded crosswalk at the intersection but there was no sign or electronic device for pedestrian traffic. (*Id.* at p. 49, l. 2-22) The Plaintiff testified that as he approached the intersection, the light was green for the vehicles traveling on Grand Boulevard and crossing Union Avenue. (*Id.* at p. 51, l. 11-25, p. 52, l. 17-25, p. 53, l. 2-9) He testified that he saw cars coming from both sides on Union Avenue. (*Id.* at p. 51, l. 17-19, p. 53, l. 16-25) He testified that as he approached the intersection he continued walking, he did not stop at the intersection and he did not look to his right or left to see the approaching vehicles before the incident occurred. (*Id.* at p. 54, l. 18-25, p. 55, l. 2-16) The Plaintiff testified that the light may have changed to red when he was walking but he didn’t see it and as he was halfway through the last lane he saw the vehicle that hit him out of the corner of his eye. (*Id.* at p. 52, l. 7-12)

The Defendants further submit the deposition testimony of the Defendant, John

McDermott. On March 10, 2014, Mr. McDermott testified at an EBT that he was traveling in the right lane of Union Avenue when he came to a stop at a red light at the intersection with Grand Boulevard. (*See* Transcript of the Defendant John McDermott's EBT annexed to the Notice of Motion as Exhibit "F", p.16, l. 13-19) He testified that he proceeded forward when the light turned green. (*Id.* at p. 25, l. 3-8) Mr. McDermott testified that he traveled three feet before the accident happened. (*Id.* at p. 25, l. 9-11) He testified that he was aware that something occurred when he heard a bang on the front driver's side of his vehicle. (*Id.* at p. 27, l. 2-9) Mr. McDermott testified that he did not see the pedestrian until after he stood up after the accident occurred. (*Id.* at p. 28, l. 8-25, p. 29, l. 2-11)

The Defendants further submit the affidavit of Christopher Cuomo, a witness to the accident, sworn to on July 18, 2014. The affidavit states that Mr. Cuomo was stopped at a red light in the left lane of Union Avenue at its intersection with Grand Boulevard on the date of the accident. (*See* Affidavit of Christopher Cuomo annexed to the Notice of Motion as Exhibit "G" at ¶ 3) The affidavit states that when the light turned green, Mr. Cuomo observed the Defendant's van slowly start to move forward and he noticed a young man attempting to cross Union Avenue against the light. (*Id.* at ¶ 4) Mr. Cuomo states that the light was green when the Plaintiff stepped off the curb, that he never slowed down from the time he entered the intersection to the time of impact and that after the impact the Defendant immediately stopped and the Plaintiff immediately jumped to his feet. (*Id.* at ¶¶ 5-7)

In support of their motion on liability, the Defendants argue that based on the evidence, the Plaintiff was negligent in violating the Vehicle and Traffic Law by crossing the

roadway when there was a green light and by suddenly leaving the curb and running into the path of a vehicle which is so close that it is impractical for the driver to yield. The Defendants contend that the Plaintiff's negligence was the proximate cause of the accident, and as such, summary judgment should be granted dismissing the complaint. Specifically, the Defendants contend that the evidence shows that the Plaintiff crossed Union Avenue against the light while the Defendant was lawfully proceeding on Union Avenue. The Defendants contend that there are no issues of material fact with respect to the Defendants' alleged negligence and that the Plaintiff's violation of the Vehicle and Traffic Law is negligence *per se*.

In opposition, the Plaintiff contends that there are questions of fact as to whether he acted negligently. The Plaintiff argues that he was not facing a steady red signal immediately prior to entering the roadway and that the oncoming traffic was far enough away when he stepped off the curb that it was not an impractical distance for the driver to yield.

Vehicle and Traffic Law § 1150 provides that pedestrians shall be subject to traffic-control signals as provided in section eleven hundred eleven. Vehicle and Traffic Law § 1111 (d) (4) provides that unless otherwise directed by a pedestrian-control signal as provided in section eleven hundred twelve, pedestrians facing any steady red signal shall not enter the roadway. Additionally, Vehicle and Traffic Law § 1151 (b) provides that no pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impractical for the driver to yield.

“The Pattern Jury Instruction informs the jurors of the general rule, *inter alia*,

that a driver is under a duty to keep a reasonably careful look out for pedestrians, to see what is there to be seen, and to use reasonable care to avoid hitting any pedestrian on the roadway.” (*See Deitz v. Huibregtse*, 25 A.D.3d 645 [2d Dept. 2006])

A motion for summary judgment is granted in favor of the moving party where there are no material issues of fact, and as a result, the moving party is entitled to judgment as a matter of law. (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]) The burden placed upon the party opposing the motion requires that they produce “evidentiary proof in admissible form” sufficient to impose a trial as to the material issues of fact upon which the opposing claim depends. (*Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966 [1988]; *Rebecchi v. Whitmore*, 172 A.D.2d 600 [2d Dept. 1991])

In the instant action, the Court finds that the Plaintiff proffered proof in admissible form sufficient to defeat a motion for summary judgment on liability. The testimony of the Plaintiff and the Defendant, John McDermott, raises a factual dispute as to whether the light was green when the Plaintiff crossed Union Avenue or whether the light turned when the Plaintiff was already in the crosswalk. Additionally, the Plaintiff’s testimony raises a question of fact as how far the oncoming cars were when he began crossing Union Avenue.

Accordingly, based upon the record, issues of material fact exist as to whether the Plaintiff’s and/or the Defendant’s actions were the proximate cause of the accident. Ultimately, the Plaintiff and the Defendant had a duty to assume that each would comply with Vehicle and Traffic Laws. (*Moreno v. Gomez*, 58 A.D.3d 611 [2d Dept. 2009])

With regard to the branch of the Defendants' motion for summary judgment on the grounds that the Plaintiff did not suffer a "serious injury" as defined by Insurance Law § 5102 (d), the Defendants submit the Affirmed Report of Daniel S. Rich, M.D., dated April 22, 2014 (*See* Affirmed Report annexed to the Notice of Motion as Exhibit "H") and the Affirmed Report of Naunihal Sachdev Singh, M.D., dated April 15, 2014 (*See* Affirmed Report annexed to the Notice of Motion as Exhibit "I").

In opposition, the Plaintiff submits, an Affirmation by Steven Winter, M.D., dated September 26, 2014 (*See* Affirmation annexed to the Affirmation in Opposition as Exhibit "A"), an Affirmation by Steven Winter, M.D., dated September 26, 2014 (*See* Affirmation annexed to the Affirmation in Opposition as Exhibit "B"), an Affirmation by Steven L. Mendelsohn, M.D., dated September 30, 2014 (*See* Affirmation annexed to the Affirmation in Opposition as Exhibit "C"), an Affirmation by Richard L. Parker, M.D., dated November 3, 2014 (*See* Affirmation annexed to the Affirmation in Opposition as Exhibit "D"), an Affirmation by Peter M. Swerz, D.C., dated September 24, 2014 (*See* Affirmation annexed to the Affirmation in Opposition as Exhibit "E"), an Affirmation by Jordan Kerker, M.D., dated November 4, 2014 (*See* Affirmation annexed to the Affirmation in Opposition as Exhibit "F"), an Affirmation by Nizarali Visram, M.D., dated November 5, 2014 (*See* Affirmation annexed to the Affirmation in Opposition as Exhibit "G"), an Affirmation by Kerin Hausknecht, M.D., dated September 23, 2014 (*See* Affirmation annexed to the Affirmation in Opposition as Exhibit "H") and the notarized medical report of Peter M. Swerz, D.C., dated October 15, 2014. (*See* notarized medical report annexed to the

Affirmation in Opposition as Exhibit “J”)

The Court notes that the report of Dr. Swerz annexed as Exhibit “E” was signed and notarized on June 12, 2012, and as such, the portion of the medical records that refers to the Plaintiff’s treatment after June 12, 2012 is unsworn inadmissible evidence and will not be considered by the Court. Additionally, the first sentence of the “affirmed” statement contained in the reports of Dr. Swerz, annexed to the Affirmation in Opposition as Exhibits “E” and “J”, are improper as he is not “a physician duly authorized to practice medicine in the State of New York.”

CPLR § 2106 (a) states: “the statement of an attorney admitted to practice in the courts of the state, or of a physician, osteopath or dentist, authorized by law to practice in the state, who is not a party to an action, when subscribed and affirmed by him to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit.” Dr. Swerz is a chiropractor, which is not a profession covered under CPLR § 2106. However, the Court will accept the second part of his “affirmed” statement whereby he swears under penalties of perjury to the truth and accuracy of his statements because it is duly notarized.

In his Verified Bill of Particulars, the Plaintiff alleges, *inter alia*, that he sustained the following injuries:

- herniated disc at L1-2, L2-3, L3-4, L4-5 and L5-S1
- acute myofascial pain syndrome to lumbar spine
- acute lumbar radiculitis
- permanent partial loss of use, function, strength, motion of lumbar and spine

- radial annular tear at C6-7
- posterior subligamentous disc bulges at C5-6 and C6-7
- acute cervical radiculitis
- acute cervico-cranial headaches with intermittent dizziness and nausea
- internal derangement of right knee
- medial subcutaneous edema of right knee with lateral subluxation and patella alta with thickened plica
- right knee contusion and laceration
- permanent partial loss of use, function, strength, motion of right knee
- internal derangement, severe sprain and permanent partial loss of use, function, strength and motion of left wrist

(See Notice of Motion, Exhibit “C” ¶ 11)

The Plaintiff’s Bill of Particulars alleges that the Plaintiff sustained serious personal injuries as defined in Insurance Law § 5102 (d), by reason of the aforementioned injuries, in that he sustained permanent and/or partial consequential limitation of use of a body organ and/or member, permanent significant limitation of use of a body function and/or a system, and a medically determined injury which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence. (See Notice of Motion, Exhibit “C” ¶ 22)

It appears from the Plaintiff’s opposition to the instant motion that he is alleging serious injuries under only two categories of Insurance Law § 5102 (d). Thus, this Court will restrict its analysis to those two categories of the serious injury statute; to wit, permanent consequential limitation of use of a body organ or member; and, significant limitation of use of a body function or system.

Under the no-fault statute, to meet the threshold of a significant limitation of

use of a body function or system or permanent consequential limitation, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. (*Licari v. Elliot*, 57 N.Y.2d 230 [1982]; *Gaddy v. Eycler*, 79 N.Y.2d 955 [1992]) A minor, mild or slight limitation shall be deemed “insignificant” within the meaning of the statute. (*Licari v. Elliot*, supra; *Grossman v. Wright*, 268 A.D.2d 79, 83 [2d Dept. 2000])

Furthermore, when, as in this case, a claim is raised under the “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories, then, in order to prove the extent or degree of the physical limitation, an expert’s designation of a numeric percentage of a plaintiff’s loss of range of motion is acceptable. (*Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 [2002]) In addition, an expert’s qualitative assessment of a plaintiff’s condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system” (*Id.*).

Having said that, in 2011, the Court of Appeals in *Perl v. Meher*, held that a quantitative assessment of a plaintiff’s injuries does not have to be made during an initial examination and may instead be conducted much later, in connection with litigation (*Perl v. Meher*, supra).

Furthermore, even where there is ample objective proof of the plaintiff’s injury,

the Court of Appeals held in *Pommels v. Perez, supra*, that certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of the plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a pre-existing condition, would interrupt the chain of causation between the accident and the claimed injury. (*Pommels v. Perez, supra*)

With these guidelines in mind, this Court will now turn to the merits of the Defendant's motion.

Based upon the aforesaid medical submissions, this Court finds that the Defendants have established their prima facie entitlement to judgment as a matter of law. Specifically, Dr. Rich conducted an independent orthopedic examination using a goniometer and concluded that the Plaintiff had normal ranges of motion for the left wrist, lumbar spine, cervical spine and right knee with the exception of the bilateral rotation of the cervical spine, which showed a 50/60-80. (*See Affirmed Medical Report annexed to the Notice of Motion as Exhibit "H"*) Dr. Rich concluded that there was insufficient objective medical evidence to establish a causal relationship between the Plaintiff's complaints and the subject accident on April 20, 2012. (*Id.*)

Dr. Singh conducted an independent neurological evaluation of the Plaintiff on April 15, 2014. Dr. Singh tested range of motion using a goniometer and found normal ranges of motion for the cervical and lumbar spine and shoulder joints. (*See Affirmed Medical Report annexed to the Notice of Motion as Exhibit "I"*) Dr. Singh concluded that

there is no medical necessity for further causally related treatment, diagnostic testing or follow-up his specialty of neurology. (*Id.*)

The Defendants further argue that the Plaintiff has failed to submit admissible evidence to explain the gap in treatment from June of 2013 through October of 2014¹ when the Plaintiff appeared for a physical examination by Dr. Swerz.

Having made a prima facie showing that the Plaintiff did not sustain a “serious injury” within the meaning of the statute, the burden shifts to the Plaintiff to come forward with evidence to overcome the Defendants’ submissions by demonstrating a triable issue of fact that a “serious injury” was sustained. (*Pommels v. Perez*, 4 N.Y.3d 566 [2005]; *see also Grossman v. Wright*, 268 A.D.2d 79 [2d Dept. 2000])

In opposition, the Plaintiff argues, initially, that the Defendants’ motion failed to set forth objective medical evidence to support their motion. The Plaintiff argues that the Defendants do not submit an MRI film review and that the affirmed medical reports of Dr. Rich and Dr. Singh fail to comment on the Plaintiff’s medical condition between the date of the accident and the date of their examinations. The Court finds that those arguments are without merit.

In further opposition, the Plaintiff argues that he has submitted sufficient evidence to raise a question of fact as to whether he sustained a permanent injury with consequential limitation. Specifically, the Plaintiff relies on the sworn report of Dr. Swerz,

¹Although the Defendants’ moving papers repeatedly states that the Plaintiff appeared for a physical examination with Dr. Swerz in October of 2014, according to the affirmed medical report, dated October 15, 2014, the examination took place on September 24, 2014.

which is based on his examination of the Plaintiff on September 24, 2014. (*See* Affirmed Report annexed to Affirmation in Opposition as Exhibit “J”) Dr. Swerz’s report is the only evidence submitted by the Plaintiff that is based on a recent examination. Dr. Swerz used an inclinometer to measure the range of motion of the Plaintiff’s cervical and lumbar spine, whereby he found limited range of motion for each test conducted. Dr. Swerz concluded that the Plaintiff’s cervical spine demonstrates a loss of cervical lordosis coupled with an injured intervertebral disc. Dr. Swerz further found that the Plaintiff’s lumbar spine was seriously injured and demonstrates several disc herniations causing neurological pressure. Dr. Swerz concluded that the Plaintiff was seriously and permanently injured in the motor vehicle accident on April 20, 2012.

However, even though Dr. Swerz concluded that the Plaintiff suffered permanent injuries as a result of the accident, he failed to explain or even acknowledge the Plaintiff’s significant gap in treatment. According to the evidence submitted by the Plaintiff and his testimony at his deposition on March 10, 2014, prior to examination by Dr. Swerz on September 24, 2014, the Plaintiff’s last medical treatment of any kind was in the summer of 2013. (*See* EBT transcript annexed to the Notice of Motion as Exhibit “D” at p. 139, l. 13-20)

Here, the Plaintiff has failed to provide any evidence to explain the gap in treatment of over a year. The medical evidence submitted by the Plaintiff was completely silent on why the Plaintiff ceased treatment in the June of 2013 and did not seek any medical treatment until the examination on September 24, 2014. The gap in the Plaintiff’s treatment

evidences a lack of a serious injury and since he failed to raise a question of fact regarding that gap in treatment he failed to rebut the Defendants' *prima facie* case.

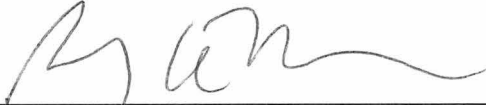
Accordingly, it is hereby

ORDERED, that the branch of the motion by the Defendant, pursuant to CPLR § 3212, seeking an order dismissing the Plaintiff's complaint on the basis that there is no factual or legal basis upon which the Defendant can be held liable, is **DENIED**; and it is further

ORDERED, that the branch of the motion by the Defendant, pursuant to CPLR § 3212, seeking an order dismissing the Plaintiff's complaint on the ground that the Plaintiff has not sustained a "serious injury" as defined by the Insurance Law § 5102 (d), is **GRANTED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
January 15, 2015



Hon. Randy Sue Marber, J.S.C.
XXX

ENTERED

JAN 16 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE