

**Varas v Goorevitch**

2016 NY Slip Op 30574(U)

April 6, 2016

Supreme Court, New York County

Docket Number: 155388/12

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NY  
COUNTY OF NEW YORK: PART 22**

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Index No.: 155388/12

Motion Seq: 001

**Miguel Veras,**

*Plaintiff,*

*-against-*

**Mark Goorevitch,**

*Defendant.*

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**DECISION/ORDER**

**HON. ARLENE P. BLUTH, JSC**

Defendant's motion for summary judgment dismissing the complaint on the grounds that plaintiff failed to satisfy the serious injury threshold is granted, and the action is dismissed.

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Rodriguez v Goldstein*, 182 AD2d 396, 582 N.Y.S.2d [1<sup>st</sup> Dept 1992]). Such evidence includes "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" *Shinn v Catanzaro*, 1 AD3d 195, 197, 761 N.Y.S.2d (1<sup>st</sup> Dept 2003), quoting *Grossman v Wright*, 268 AD2d 79, 84, 707 N.Y.S. 2d 233 (2d Dept 2000). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert affidavits indicating that plaintiff's injury was caused by a pre-existing condition and not the accident. *Farrington v Go On Time Car Serv.*, 76 AD3d 818, 907 N.Y.S. 479 (1<sup>st</sup> Dept 2010), citing *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 (2005).

Once the defendant meets his or her initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury (*see Shinn*, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss

of range of motion. *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351, 746 N.Y.S.2d 865 (2002). Further, where the defendant has established a pre-existing condition, the plaintiff's expert must address causation (see *Valentin v Pomilla*, 59 AD3d 184, 873 N.Y.S.2d [1<sup>st</sup> Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214, 820 N.Y.S.2d [1<sup>st</sup> Dept 2006]).

In his verified bill of particulars, plaintiff claims that as a result of the subject August 11, 2009 accident, he sustained pinched nerves in his right wrist, right elbow, neck, mid-back and lower back, bruised ribs and collar bone, right hip labral tear, 3 cervical disc bulges and lumbar disc bulges. Additionally, plaintiff claims that the subject accident aggravated injuries to his low back, right shoulder, right elbow, right side of rib cage and right wrist, and that he was treated for those injuries at Long Island College Hospital 3 years before the subject accident.

In support, defendant submits the affirmed orthopedic report of a no-fault doctor, Dr. Baskies, who examined plaintiff on May 24, 2012 and stated that plaintiff had full ranges of motion in his cervical and lumbar spine, both shoulders, elbows, hands and wrists, hips, knees, feet and ankles, and that any sprains/strains and contusions in these areas had resolved.

Additionally, defendant submits the report of Dr. Frazier who examined plaintiff on July 19, 2012. Dr. Frazier reviewed plaintiff's 3/20/12 lumbar MRI which showed mild degenerative disc disease at L4-5 and L5-S1, and plaintiff's 3/19/12 cervical MRI which showed one cervical bulge. In his assessment, Dr. Frazier opined that the MRIs of plaintiff's spine showed no evidence of an acute injury associated with the subject accident, but showed only changes consistent with plaintiff's age.

Defendant also submits the affirmed report of Dr. Bender, a neurologist who examined plaintiff on July 28, 2014. Dr. Bender indicated that plaintiff had 2 bicycling accidents *before*

the subject accident (in 2002 and 2006), as well as one *after* the subject accident (on 2/19/12). Dr. Bender measured full range of motion in plaintiff's cervical and lumbar spine and administered several other tests; he stated that plaintiff had a normal neurological exam and no disability. He noted mild degenerative changes in plaintiff's cervical and lumbar MRIs.

Regarding the 90/180-day claim, defendant cites to plaintiff's bill of particulars wherein he stated that he was confined to bed for 2-3 weeks and to home for 6 weeks after the subject accident. Thus, defendant set forth a prima facie case for dismissal, and the burden shifts to plaintiff.

In opposition, plaintiff submits the affirmed report of a single medical provider— Dr. Chase, who first examined plaintiff on 9/17/09, 5 weeks after the accident.

At plaintiff's initial exam on 9/17/09, Dr. Chase said that plaintiff complained of pain in his right shoulder, right hip, right rib and upper and lower back. Plaintiff told Dr. Chase that (1) he had some right shoulder pain in the past but he did not have any at the time of the subject accident, and (2) he had no prior hip, rib or spine issues. At that initial exam, Dr. Chase noted that plaintiff had full range of motion in his right shoulder and right hip. Dr. Chase stated that the range of motion of plaintiff's lumbar spine was "decreased". Dr. Chase diagnosed plaintiff with right shoulder, right hip and right rib contusions and lumbosacral sprain. Significantly, Dr. Chase does not report that he ever measured any limitations in the range of motion in plaintiff's right shoulder or right hip.

Plaintiff returned to the office on October 15, 2009, complaining of pain. Dr. Chase measured full range of motion in his right shoulder. Dr. Chase noted decreased range of motion in plaintiff's lumbar spine but he did not set forth what constitutes a normal measurement. Plaintiff returned to the office on October 29, 2009 for pain medication and was told to resume

physical therapy.

Plaintiff returned to the office on December 10, 2009 complaining of pain in his right hip and shoulder. Dr. Chase did not note any range of motion restrictions in plaintiff's hip, shoulder or lumbar spine. On January 21, 2010, plaintiff returned to the office complaining of pain but examination of the shoulder, hip and lumbar spine were essentially the same and no range of motion restrictions were found.

Dr. Chase states that plaintiff had an ultrasound study of his right hip on March 30, 2010 and was found to have a right superior labral tear. Significantly, Dr. Chase did not state who ordered the ultrasound or who issued the report; plaintiff did not attach the report to his papers.

Plaintiff returned to the office on April 29, 2010 complaining that he had intermittent severe right hip pain while running.

More than 18 months later, on November 3, 2011, plaintiff returned to Dr. Chase's office complaining of numbness and pain in his back. Dr. Chase measured full range of motion in plaintiff's lumbar spine. Dr. Chase stated that a lumbar spine MRI was performed on November 9, 2011 and it showed narrowing and degenerative changes.

Plaintiff was next examined on January 19, 2012 complaining of stiffness and pain but Dr. Chase's affirmed report does not indicate any restrictions in range of motion of plaintiff's lumbar spine. On February 8, 2012, cervical and thoracic MRIs were taken; Dr. Chase did not say he read the films but he notes the scans showed numerous mild bulges in both areas of the spine.

Dr. Chase indicated that plaintiff was injured in another bicycle accident on February 19, 2012; he had head trauma and neck and low back pain. When Dr. Chase examined plaintiff approximately 3 months later on May 10, 2012, Dr. Chase stated that "it was unclear whether

[plaintiff's] major symptoms were from the accident of 8/11/09 [the subject accident] or 2/19/12". Significantly, he did not set forth any range of motion measurements from before or after either accident and could not compare them.

Plaintiff returned to the office on April 30, 2015, approximately 3 years later. Plaintiff complained of back and shoulder pain but no range of motion measurements were taken; he was still riding his bicycle at that time.

### Analysis

Dr. Chase's affirmed report, the only medical report submitted by plaintiff, fails to raise an issue of fact.

Regarding the right hip, Dr. Chase referred to an unattached report of an unnamed medical provider which allegedly diagnosed a labral tear 13 months after the subject accident. Even if Dr. Chase's statement that plaintiff had a labral tear was admissible, evidence of a tear in plaintiff's hip, standing alone, without any evidence of limitation, would be insufficient to raise an issue of fact as to whether a serious injury exists in that body part. *See Clementson v Price*, 107 AD3d 533 (1<sup>st</sup> Dept 2013). There is no evidence of range of motion limitation.

Regarding plaintiff's alleged cervical and lumbar disc bulges, Dr. Chase refers to unattached MRI reports and does not say he read the films; he does state however that those lumbar and cervical MRIs showed degenerative changes.

Dr. Chase's affirmed report merely details plaintiff's frequent subjective complaints of pain but fails to set forth any range of motion restrictions in plaintiff's shoulder, hip or low back after October 19, 2009, which was only 2 months after the subject accident. Thus, Dr. Chase's affirmed report does not raise a triable issue of fact. *See Arenas v Guaman*, 949 NYS2d 688, 689 (1<sup>st</sup> Dept 2012).

Moreover, Dr. Chase's opinion that the subject accident caused plaintiff's chronic pain contradicts his admission that he cannot determine which accident (the subject 2009 accident or the subsequent 2012 accident) caused plaintiff's "major symptoms" today.

Finally, plaintiff has not raised any issue of fact regarding the 90/180 claim. Although plaintiff annexes Dr. Chase's November 19, 2009 unaffirmed letter of "total" disability, plaintiff admits the letter was just to excuse him from work although plaintiff worked anyway. (See para. 12, plaintiff's aff in opp). Significantly, Dr. Chase did not mention any finding that plaintiff was "totally disabled" (as a result of 3 contusions and back strain) in his affirmed report.

Accordingly, it is

ORDERED that defendants' motion to dismiss this action is granted, and the action is hereby dismissed.

This is the Decision and Order of the Court.

Dated: April 6, 2016  
New York, New York



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ARLENE P. BLUTH, JSC