| **Garner v Percel** |
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| 2016 NY Slip Op 30698(U) |
| March 8, 2016 |
| Supreme Court, Bronx County |
| Docket Number: 310163/2009 |
| Judge: Fernando Tapia |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part 13

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DERRICK J. GARNER and REGINALD L. DOZIER,

Plaintiffs,

v.

WILFREDO PERCEL,

Defendant.

Hon. Fernando Tapia

Index No.: 310163/2009

Action 1

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WILFREDO PERCEL,

Plaintiff,

v.

THE CITY OF NEW YORK, KIEWIT CONSTRUCTORS, Inc. and TREVON CONSTRUCTION, Inc.,

Defendants.

Index No.: 301972/2010

Action 2

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REGINALD L. DOZIER,

Plaintiff,

v.

DERRICK J. GARNER and VENICE GARNER,

Defendants.

Index No.: 308763/2010

Action 3

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DECISION

In the personal injury action resulting from a rear end motor vehicle collision, Action 1 Defendant Wilfredo Percel ("Percel") moves for summary judgment against plaintiffs Derrick Garner ("Garner") and Reginald Dozier ("Dozier") for failure to meet the "serious injury" threshold under Insurance Law § 5102. Garner filed papers in opposition while Dozier did not oppose the motion.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 324 [1986]; *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]). Percel has made a prima facie showing establishing that he is entitled to judgment in his favor. Garner and Dozier both allege neck and back injuries. Plaintiff's injuries are similar and can be summed-up as bulging or protruding discs, sprains/strains, and according to Percel, of the variety that fail to meet the definition of "serious injury".

Additionally, Percel points to the lack of follow-up medical treatment by the plaintiffs as further evidence that the injuries do not qualify for the relief sought. Percel also questions the medication regiment by the plaintiffs as well as ongoing complaints of pain. This evidence or lack thereof is submitted in support of the argument that the injuries do not meet the "serious injury" threshold.

Percel had the plaintiffs examined by the defendant's physicians who similarly found no evidence of the alleged injuries. Roy Shannon, M.D. conducted a neurological examination of Garner and found no evidence of any neurological impairments. Dr. Shannon also concluded that Garner's Range of Motion (ROM) was normal. Frank Segreto, M.D., conducted an orthopedic examination and similarly found that Garner suffered no range of motion deficits.

The physicians reached the same conclusions after examining Dozier. Mariana Golden, M.D., performed a neurological examination in which she found Dozier suffered from no neurological impairments and had normal ROM. The orthopedic examination conducted by Thomas Nipper, M.D., also found that Dozier's ROM was normal.

In light of these findings, defendant Percel has established prima facie his entitlement to judgment. This is in addition to an overall absence of evidence of continuing pain, other than slight discomfort. Under § 5102(d), for an injury to qualify, there must be "permanent loss or use of a body function or system". The motion casts serious doubts as to any permanency with regards to the alleged injuries. Any limitation of use of a body organ or member must be permanent and consequential. Notwithstanding the lack of any probative evidence of permanency, the injuries also fail to qualify as consequential. Any alleged "serious injury" under the "significant limitation of use of a body function" category also suffers in that the injuries appear to be more mild or minor limitations than significant.

The burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). As stated above, the motion for summary judgment was not opposed by plaintiff Dozier. As defendant Percel has established, prima facie, that there exists no triable issues of fact, and as plaintiff Dozier has failed to introduce any evidence in rebuttal to this motion with regards to his injuries, defendant Percel's motion must be granted and judgment must be entered against Dozier.

Regarding plaintiff Garner, he argues that the defendant cannot meet his prima facie burden because the examinations occurred approximately four years after the date of the accident. While it is fair to question the large gap in time between the accident and the examination, this question ultimately is a question of what weight the fact finder affords the evidence. A delay in examining goes to the weight given to the medical opinion and is properly for a jury (*Cassagnol v. Williamsburg Plaxa Taxi, Inc. et al.*, 234 AD2d 208, [1st Dept 1996] *discussing the defendant's doctor's examination*).

He also argues that the examinations are insufficient to demonstrate entitlement to judgment on the issue of whether plaintiff could perform his usual and customary daily activities for a period in excess of ninety days during the period immediately following this accident. As the defendant's Reply points out, Garner has made no claim of serious injury based on the 90/180 category. Therefore, Garner's opposition based on any claims with regards to this category must fail.

Garner claims that the motion must be denied because none of defendant's physicians address the positive MRI report findings that were submitted in opposition. This Court disagrees. While it is true that medical records were attached, the opposition papers fail to identify the reports, which according to the papers, should have been examined. There is also no accompanying affirmation from the medical care provider who prepared the aforementioned reports for the Court to review. While an opponent to a summary judgment motion may be excused for failing to tender evidence in admissible form (*See Animals v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065 [1979]), at the very least, that opponent must *identify* the evidence offered in support of their argument. Garner's opposition to the motion on this ground also fails.

Garner provided the report of Dr. Mani Ushyarov, which indicates, contrary to the findings of defendant's physicians, that Garner suffered limitations in the normal range of motion for both cervical spine and the lumbar spine. Defendant argues that in portions of the follow-up examination report under the section heading Spinal Range of Motion ("ROM") (Exhibit B of Plaintiff's Aff & Opp re-examination on 8/26/09) it omits any indication for cervical spine, same for thoracic spine, and the word normal is circled for lumbar spine. All three categories are marked off as normal on the re-examination on 7/29/09 (*See id*). However, the

follow-up examination report dated 8/6/09 provided by Dr. Ushyarov specifies limited ROMs. It appears the reports were made by different physicians and this may account for the inconsistency. Plaintiff Garner has come forward with objective medical evidence demonstrating a controversy regarding the nature of his injury. This Court finds that any discrepancy with regards to the medical evidence goes to the question of the weight of the evidence and not to whether plaintiff has presented objective medical evidence to support his claim.

As to the portion of defendant's argument regarding a possible gap or cessation of treatment, in light of Garner's production of objective medical evidence supporting his claim of "serious injury", this Court finds that there exists questions of fact as to whether this constituted an actual halt or whether continuation would have been purely palliative. Furthermore, the answer to this question calls for fact-finding of a nature precluded by a motion of this kind. In that issues of fact exist, summary judgment must be denied.

The motion is denied with respect to plaintiff Garner and granted with respect to Dozier.

This constitutes the Decision and Order of the Court.

**Dated:** March 8, 2016
Bronx, NY

**Hon. Fernando Tapia, JSC**