

Stewart v Delacruz
2016 NY Slip Op 31351(U)
June 2, 2016
Supreme Court, Bronx County
Docket Number: 300156/2013
Judge: Julia I. Rodriguez
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**SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: Part IA 27**

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ROBERTO STEWART and DWAIN COLLINS,

Index No. 300156/2013

Plaintiffs,

-against-

VICTOR M. DELACRUZ, JR. and DAHIANA J. PENN-
GARCIA,

DECISION and ORDER

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

Defendants

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VICTOR M. DELACRUZ, JR. and DAHIANA J. PENN-
GARCIA,

Third Party Plaintiffs,

-against-

MELVIN VIN BREWINGTON, DANIEL SIMS, DUO
COLONY FUEL CORP., SALVATORE MELI,
MAXIMO LOPEZ, GEORGINA CEPIN, SALVADOR
RIVERA and MATHEW CONCEPCION,

Third Party Defendants.

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Recitation of papers considered in Defendants' motion for summary judgment on threshold:

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion by Defendants DeLaCruz & Penn-Garcia, Affirmation & Exhibits	1
Affirmation in Support by Defendants Cepin & Lopez	2
Notice of Motion by Third-Party Defendants Concepcion & Rivera, Affirmation & Exhibits	3
Affirmation in Support by Defendants Meli & Duo Colony	4
Plaintiffs/Stewart & Collins' Affirmation in Opposition & Exhibits	5
Reply Affirmation by DeLaCruz & Penn-Garcia	6

Plaintiffs commenced this action alleging they sustained injuries as a result of a motor vehicle accident which occurred on September 29, 2012. Plaintiff Roberto Stewart alleged he sustained injuries to his neck and back; Plaintiff Dwaine Collins alleged he sustained injuries to his neck, back and right knee, .

After discovery Defendants VICTOR M. DELACRUZ, JR. and DIHANA PENN-GARCIA, joined by Third Party Defendants GEORGINA CEPIN, MAXIMO LOPEZ, SALVATORE MELI and DUO COLONY FUEL OIL CO., move for an order granting summary judgment and dismissing Plaintiff ROBERTO STEWART'S complaint for failure to

satisfy the serious injury threshold under Insurance Law §5102(d). In support of summary judgment Defendants submitted the medical affirmations of doctors **Arnold T. Berman**, a Board Certified Orthopedist, and **David A. Fisher**, a Licensed Radiologist.

ROBERTO STEWART:

Dr. Berman conducted an orthopedic evaluation on Jan. 17, 2015. Berman conducted range of motion testing of the cervical and thoracic spines, both shoulders and knees; he found normal ranges in all of these body parts. Berman found no tenderness to palpation and no spasm to the cervical and thoracic spines, and no pain on range of motion in the testing of the cervical and thoracic spines and shoulders. Grip and motor strength testing of the hands was normal and bilateral. Muscle testing of the shoulders was normal. He reported no tenderness, swelling or effusion on both knees. Berman diagnosed Plaintiff with “cervical and lumbar spine/strain resolved with no residuals and no aggravation of pre-existing discogenic disease.” Berman discussed the cervical and lumbar MRIs; he opined that their findings were “consistent with a resolved soft tissue injury, lumbar and cervical strain.” Berman concluded that Plaintiff “can participate in all activities of daily living . . he was unemployed at the time of accident and remains unemployed at the time of the exam.”

Dr. Fisher reviewed the lumbar and cervical MRIs, both performed on 11/4/2012 five weeks post-accident. Fisher reported that the lumbar MRI was normal with “no disc herniations ... [and] no radiographic evidence of traumatic or casually related injury.” Fisher reported that the cervical MRI indicated “mild degenerative changes, most pronounced at C4/5, C5/6 and C6/7 levels.” He found “no disc herniations ... [and] no radiographic evidence of traumatic or casually related injury.”

* * * * *

The issue of whether a claimed injury falls within the statutory definition of a “serious injury” is a question of law for the courts which may be decided on a motion for summary judgment. *See Licari v. Elliott*, 57 N.Y.2d 230, 237, 441 N.E.2d 1088, 1091, 455 N.Y.S.2d 570, 573 (1982). This court finds that Defendants met their initial burden of proof that Plaintiff ROBERT STEWART did not sustain a “serious injury.” Once a defendant sets forth a *prima facie* case that the claimed injury is not serious, the burden shifts to the plaintiff to demonstrate, by the submission of objective proof, that there are substantial triable issues of fact as to whether

the purported injury was serious. *See Toure v. Avis Rent-A-Car Sys., Inc.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865, 774 N.E.2d 119 (2002); *Rubensccastro v. Alfaro*, 29 A.D.3d 436, 437, 815 N.Y.S.2d 514, 515 (1st Dep't 2006).

In opposition to summary judgment, Plaintiff ROBERTO STEWART submitted, *inter alia*, a medical affirmations by **Ali Guy**, a specialist in Physical Medicine and Rehabilitation, who first examined him on Oct. 10, 2012 and found restrictions contemporaneously with the accident of 9/29/12. Dr. Guy treated Plaintiff through December 2013 and recently examined Plaintiff on July 16, 2015; Dr. Guy maintains that Plaintiff suffered permanent injuries to his neck and back as a result of the accident. Plaintiff also submitted the affirmation of **Thomas M. Kolb**, Licensed Radiologist, who conducted and interpreted the MRI studies of the cervical and lumbar spines. Finally, Plaintiff submitted copies of his physical therapy records, which included lumbar epidural injections.

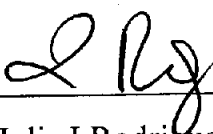
After consideration of Plaintiff's submission, the Court finds that the differing and/or contradictory medical opinions expressed by the parties' respective doctors raise issues of fact and credibility which should be determined by the trier of fact. Consequently, the Court holds that although defendants met their initial burden, plaintiff's submission raised material issues of fact and credibility as to whether he sustained a "significant limitation of use of a body function or system," and/ or "permanent consequential limitation of use of a body organ or member." At this juncture the court declines to dismiss these claims as matter of law. *Pommells v. Perez*, 4 N.Y.3d 566, 577, 797 N.Y.S.2d 380, 386-387, 830 N.E.2d 278, 284-285 (2005); and see *Victor Pantojas v. Lajara Auto Corp.*, 117 A.D.3D 577, 986 N.Y.S.2D 87, 2014 N.Y. (1st Dept. 2014) (plaintiff's physical therapy records, submitted by defendants, showing that he began physical therapy five days after the accident provides contemporaneous evidence of injures). Any claim that Plaintiff failed to explain a gap in treatment is similarly deferred to the trier of fact. Cf. *Deloris Brown v. Joseph Covington*, 82 A.D.3d 406, 918 N.Y.S.2d 36 (1st Dept. 2011) (Plaintiff offered sufficient explanation for gap in treatment in that her no fault benefits were denied).

However, the Court finds that Plaintiff failed to meet his burden of rebuttal regarding the 90/180 claim, i.e., that he suffered "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." Here, Plaintiff was unemployed at the time of the accident through at least January 2015 when Dr. Berman examined him.

For the foregoing reasons, Defendant's motion for summary judgment dismissing the complaint for Plaintiff's failure to meet the "serious injury" threshold of Insurance Law §5102(d) is **granted** solely to the extent that Plaintiff's 90/180 claim is **dismissed**, as that claim was not medically substantiated. Defendants' motion is otherwise **denied**, as herein above described.

Dated: June 2, 2016



Hon. Julia I Rodriguez, J.S.C.