

**Taveras v Suarez**

2016 NY Slip Op 31367(U)

June 29, 2016

Supreme Court, Bronx County

Docket Number: 304593/11

Judge: Elizabeth A. Taylor

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 2  
RICHARD TAVERAS,

Plaintiff,

Index No. 304593/11

- against -

DECISION/ORDER

Present:  
HON. ELIZABETH A. TAYLOR

LEONARDO SUAREZ, GAC and FERNANDEZ  
AUTO, CORP., BILLY EPPS AND DERRICK  
ROBINSON,

Defendants.

The following papers numbered 1 to \_\_\_ read on this motion, \_\_\_\_\_

| No. On Calendar of _____  | PAPERS NUMBERED |
|---|-----------------|
| Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed----- | 1-2             |
| Answering Affidavit and Exhibits-----                                       | 3-4             |
| Replying Affidavit and Exhibits-----  | 5               |
| Affidavit-----  |                 |
| Pleadings -- Exhibit-----   |                 |
| Stipulation -- Referee's Report --Minutes-----                              |                 |
| Filed papers-----   |                 |

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants Leonardo Suarez' and GAC and Fernandez Auto, Corp.'s motion pursuant to CPLR 3212 for an order dismissing plaintiff's complaint, on the ground that plaintiff has not suffered a serious injury within the meaning of Insurance Law §5102 (d), is denied.

Plaintiff commenced the instant action to recover for injuries allegedly sustained in a motor vehicle accident on October 3, 2010. Plaintiff alleges to have suffered injuries to his right shoulder, right wrist, and cervical and lumbar spine. Defendants Leonardo Suarez and GAC, Fernandez Auto, Corp. move for summary judgment, alleging that plaintiff has not suffered a "serious injury," as defined in the Insurance Law.

In his bill of particulars, plaintiff alleges "serious injuries" in the following categories: 1) "permanent consequential limitation of use of a body organ or member;" 2) "significant limitation of use of a body function or system;" and 3)"a medically determined injury or impairment of a non-permanent nature which prevents him 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.”

To prevail on a motion for summary judgment, defendants have the initial burden of presenting competent evidence establishing that plaintiff has not suffered a serious injury (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [1st Dept 2011]). Such evidence includes affirmations of medical experts who examined the plaintiff and have concluded that no objective medical findings support plaintiff’s claims (*Id.*).

In support of their motion, defendants submit: 1) the report of Dr. Gregory Montalbano, an orthopaedist and 2) the report of Dr. Mark Decker, a radiologist.

On June 1, 2012, Dr. Montalbano conducted an orthopaedic examination of plaintiff, including range of motion testing, and found no restriction in the range of motion of plaintiff’s right shoulder, right wrist, and cervical and lumbar spine. He concluded that his examination of plaintiff was normal. Dr. Decker reviewed the MRI of plaintiff’s cervical spine and concluded that plaintiff suffered from diffused degenerative disc disease that was not casually related to the accident.

Based upon the foregoing, this court finds that defendants have met their prima facie burden of demonstrating that plaintiffs have not suffered a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system.

To create an issue of fact, plaintiff must establish a serious injury arising from a “permanent consequential limitation of use of a body organ, member, function or system” or “significant” limitation of use of a body function or system.” To establish a serious injury, plaintiff must set forth medical proof containing objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff’s present limitation to the normal function, purpose and use of the affected body organ, member, function or system (*Perl v Mehis*, 18 NY3d 208 [2011]; *Toure v Avis Rent A Car System, Inc.*, 98 NY2d 345, 353 [2002]).

In opposition, plaintiff submits the affirmations of 1) Dr. Jacob Lichy, a radiologist, 2) Dr. Kevin Wright; 3) Dr. Hank Ross, an orthopaedist, and Dr. Mark Heyligers, a chiropractor.

On November 16, 2010, approximately six weeks after the accident, Dr. Heyligers examined the plaintiff and found restricted range of motion in plaintiff's cervical and lumbar spine. MRIs of plaintiff's right shoulder and right wrist were conducted on December 12, 2010. Dr. Lichy reviewed the MRI films and found that, as a result of the accident, plaintiff suffered a tear of the anterior labrum and acromioclavicular ligament in his right shoulder, and a disc tear of the triangular fibro-cartilage of plaintiff's right wrist. Dr. Wright performed surgery on plaintiff's right wrist on March 30, 2011 and on his right shoulder on June 8, 2011. On November 22, 2013, Dr. Ross reviewed plaintiff's medical records and conducted an orthopaedic examination of plaintiff, including range of motion testing of plaintiff's right shoulder, right wrist, and cervical and lumbar spine. Dr. Ross found restricted range of motion of plaintiff's right shoulder and right wrist. Dr. Ross further concluded that the injuries were casually related to the accident and not degenerative.

Additionally, plaintiff adequately explained the approximate one year gap in treatment by asserting in his affidavit that he stopped receiving treatment for his injuries when his no-fault insurance benefits were cut-off because he was unemployed and without medical insurance (*see Bonilla v Abdullah*, 90 AD3d 466, 467-68 [1st Dept 2011]).

Based upon the affirmations of plaintiff's experts, this court finds that plaintiff raises an issue of fact as to whether he suffered a permanent consequential limitation or a significant limitation of use of a body function or system (*see Grant v United Pavers Co. Inc.*, 91 Ad3d 499 [1st Dept 2012]).

Accordingly, the branch of the motion to dismiss plaintiffs' claims that he suffered from a permanent consequential limitation or a significant limitation, is denied.

The branch of the motion to dismiss plaintiff's claim that he was unable to perform his usual and customary daily activities for 90 days out of the first 180 days following the date of the accident, is denied.

To establish entitlement to summary judgment on plaintiff's claim that he was incapacitated for 90 of the 180 days immediately following the accident, defendants' experts must relate their findings to the period of time immediately following the accident (*Feaster v Boulabat*, 77 AD3d 440 [1st Dept 2010]; *Toussaint v Claudio*, 23 AD3d 268 [1st Dept 2005]).

In the instant matter, the reports of defendants' medical experts are based upon examinations conducted over twenty two months after the accident and do not address the plaintiff's condition during the 180 days immediately following the accident.

Based upon the foregoing, defendants have failed demonstrate that plaintiff has not suffered a serious injury by reason of having been incapacitated from performing substantially all of his customary practices for 90 of the 180 days immediately following the accident.

As defendants have failed to meet their initial burden on the 90 out of 180 claim, this court does not have to consider plaintiff's opposition.

The foregoing shall constitute the decision and order of this court.

Dated: JUN 29 2016

**Elizabeth A. Taylor**



A.J.S.C.