

Hanna v Port Auth. of N.Y.

2016 NY Slip Op 31371(U)

June 6, 2016

Supreme Court, Bronx County

Docket Number: 307338/09

Judge: Betty Owen Stinson

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X

MARK HANNA,

DECISION AND ORDER

Plaintiff(s), Index No: 307338/09

- against -

THE PORT AUTHORITY OF NEW YORK AND FELIX
GARCIA,

Defendant(s).

-----X

Stinson, J.

In this action for personal injuries stemming from an automobile accident, plaintiff moves for an order granting him partial summary judgment on the issue of defendants' liability. Plaintiff contends that insofar as the instant accident occurred when his stopped vehicle was rear-ended by defendants' vehicle, defendants are liable as a matter of law. Defendant THE PORT AUTHORITY OF NEW YORK (the Port Authority) opposes plaintiff's motion asserting, *inter alia*, that because it has a cognizable and reasonable excuse for rear-ending plaintiff's vehicle, questions of fact preclude summary judgment. The Port Authority also cross-moves for an order granting it summary judgment on grounds that plaintiff failed to sustain a serious injury as defined by the Insurance Law. The cross-motion is unopposed.

For the reasons that follow hereinafter, plaintiff's motion is denied as moot and the Port Authority's cross-motion is granted.

The instant action is for personal injuries allegedly sustained in a motor vehicle accident. Read together, the complaint and bill of particulars allege the following. On October 26, 2008, on West 4th Street, near Ramp 9697, New York, NY, plaintiff was involved in a motor vehicle accident. Specifically, the vehicle owned and operated by plaintiff came into contact with a vehicle owned by the Port Authority and operated by defendant FELIX GARCIA (Garcia). Plaintiff alleges that defendants were negligent in the operation and ownership of their vehicle, said negligence causing him to sustain injuries. Plaintiff alleges to have sustained a host of injuries, the most serious being a head laceration requiring sutures. Plaintiff alleges that his injuries are serious under the Insurance law insofar as he sustained a (1) permanent consequential limitation of use of a body organ or member; (2) significant limitation of use of a body function or system; and/or (3) a medically determined injury or impairment of a non-permanent nature which prevented him from performing 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 his accident.

Because, as will be discussed below, deciding the Port Authority's cross-motion will dispose of this action, thereby

rendering plaintiff's motion moot, the Court shall address first the cross-motion.

The Port Authority's cross-motion seeking summary judgment and dismissal of plaintiff's case is granted insofar as the evidence submitted establishes the absence of a serious injury under all categories of the insurance law asserted. Significantly, plaintiff's own medical records establish that when plaintiff was first treated for his injuries, beyond an abrasion to his face, which was treated with several staples, he had none.

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 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish *prima facie* entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). Once movant meets his initial burden on summary judgment, 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).

The Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

Insurance Law § 5104(a), also known as the "no-fault law," by design and intent, severely limits the number of personal injury law suits brought as a result of motor vehicle accidents (*Licari v Elliott*, 57 NY2d 230, 236 [1982]). Thus, because any injury not falling within the statute's definition of "serious injury" is minor, it should not be accorded a trial by jury, and, therefore, "[i]t is incumbent upon the court to decide in the first instance whether plaintiff has a cause of action to assert within the meaning of the statute" (*id.* at 237).

A defendant seeking summary judgment on grounds that plaintiff's injuries are not serious under the Insurance Law must establish that plaintiff's injuries do not meet the threshold promulgated by the statute (*Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Brown v Achy*, 9 AD3d 30, 31 [1st Dept 2004]; *Rodriguez v Goldstein*, 182 AD2d 396, 397 [1st Dept 1992]), and can meet the requisite burden in a myriad of ways.

Significantly, defendant can meet the requisite burden by submitting objective medical evidence negating the existence of a serious injury (*Black v Robinson*, 305 AD2d 438, 439 [2d Dept 2003]; *Junco v Ranzi*, 288 AD2d 440, 440 [2d Dept. 2001]; *Papadonikolakis v First Fid. Leasing Group*, 283 AD2d 470, 470-471 [2d Dept 2001]), or by other evidence which demonstrates the absence of a serious injury (*Lowe v Bennett*, 122 AD2d 728, 729 [1st Dept 1986], *affd* 69 NY2d 700 [1986], such as plaintiff's own deposition testimony (*Arjona v Calcano*, 7 AD3d 279, 280 [1st Dept 2004])). A defendant can submit an affirmation from an attorney indicating that plaintiff's own medical records and the reports of plaintiff's own doctors do not indicate that plaintiff suffered a serious injury and that plaintiff's injuries were not, in any event, causally related to the accident alleged (*Franchini v Plameri*, 1 NY3d 536, 537 [2003] ["defendant properly relied on medical records and reports prepared by plaintiff's treating physicians to establish that plaintiff did not suffer a serious injury causally related to the accident."])).

Once defendant establishes that plaintiff has not suffered a serious injury, summary judgment is warranted unless plaintiff can establish the existence of a serious injury. To that end, plaintiff must establish that the injuries alleged are the result of the accident claimed and that the limitations alleged are the result of those injuries (*Noble v Ackerman*, 252 AD2d 392, 394-395

[1st Dept 1998]). Plaintiff's proof establishing serious injury, medical or otherwise, must not only be admissible, but it must also be objective (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 350 [2002]; *Grasso v Angerami*, 79 NY2d 813, 814-815 [1991]; *Blackmon v Dinstuhl*, 27 AD3d 241, 242 [1st Dept 2006]; *Thompson v Abassi*, 15 AD3d 95, 97 [1st Dept 2005]; *Shinn* at 198; *Andrews v Slimbaugh*, 238 AD2d 866, 867-868 [2d Dept 1997]; *Zoldas v Louise Cab Corporation*, 108 AD2d 378, 382 [1st Dept 1985]). Significantly, plaintiff's proof must also demonstrate the existence of a serious injury contemporaneous with the accident alleged (*Blackmon* at 242; *Thompson* at 98 [Court held that the failure by plaintiff's doctor to provide objective proof of injury contemporaneous with the accident was fatal and was not cured by same doctor's finding of injury, with objective evidence, two and one half years later.]); *Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]; *Pajda v Pedone*, 303 AD2d 729, 730 [2d Dept 2003]; *Jimenez v Kambli*, 272 AD2d 581, 583 [2d Dept 2000]). Such contemporaneous medical evidence, however, can be an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or "an expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Toure* at 350; see also *Perl v Meher*, 18 NY3d 208, 218

[2011] ["We therefore reject a rule that would make contemporaneous quantitative measurements a prerequisite to recovery."]).

In order to establish *prima facie* entitlement to summary judgment under the 90/180 non-permanent category of serious injury under the statute, the law prescribes a different burden. Generally, a defendant must provide medical evidence establishing the absence of injury during the relevant time period - first 180 days subsequent to the accident (*Sayers v Hot*, 23 AD3d 453, 454 [2d Dept 2005]; *Buford v Fabrizio*, 8 AD3d 784, 786 [3d Dept 2004]; *Lowell v Peters*, 3 AD3d 778, 780 [3d Dept 2004])). As such, medical evidence consisting of examinations conducted years after the accident are not probative as to the injuries sustained within the first 180 days after an accident and do not, in it of themselves, entitle a defendant to summary judgment with regard to the foregoing category (*Toussaint v Claudio*, 23 AD3d 268, 268 [1st Dept 2005]; *Pijuan v Brito*, 35 AD3d 829, 829 [2d Dept 2006]; *Webb v Johnson*, 13 AD3d 54, 55 [1st Dept 2004]; *Loesburg v Jovanovic*, 264 AD2d 301, 301 [1st Dept 1999])). Alternatively, a defendant can establish *prima facie* entitlement to summary judgment with regard to 90/180 category by citing to evidence, such as a plaintiff's own testimony, demonstrating that the plaintiff was not prevented from performing all of the substantial activities constituting plaintiff's customary daily activities for the prescribed period (*Copeland v Kasalica*, 6 AD3d 253, 254 [1t Dept 2004] [Court found

that home and bed confinement for less than the prescribed period evinces lack of serious injury under the 90/180 category.]; *Robinson v Polasky*, 32 AD3d 1215, 1216 [4th Dept 2006] [Court found that plaintiff's failure to miss full days of work evinces lack of serious injury under the 90/180 category.]; *Burns v McCabe*, 17 AD3d 1111, 111 [4th Dept 2005] [Court found that evidence that plaintiff missed only a week of school was prima facie evidence that his activities were not curtailed to the required duration.]; *Parkhill v Cleary*, 305 AD2d 1088, 1090 [4th Dept 2003]. Once defendant meets his burden plaintiff must come forward with competent medical evidence demonstrating that as result of the accident alleged, plaintiff was unable to perform substantially all of his activities of daily living for not less than 90 of the first 180 days after the accident (*Ponce v Magliulo*, 10 AD3d 644, 644 [2d Dept 2004]; *Sainte-Aime v Ho*, 274 AD2d 569, 570 [2d Dept 2000]).

Here, in support of the cross-motion, the Port Authority submits plaintiff's medical records from Staten Island Physician Practice, which although not in admissible form, the Court can nevertheless consider (*Newton v Drayton*, 305 AD2d 303, 304 [1st Dept 2003]; *McNair by McNair v Ofori*, 198 AD2d 47, 48 [1st Dept 1993] *Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992] ["Clearly, consideration of a plaintiff's unsworn medical report submitted in support of a defendant's motion for summary judgment, based on the plaintiff's failure to establish serious injury, fosters the

expeditious disposition of these cases, and is perfectly harmonious with the principle that the serious injury threshold "is a threshold imposed solely on plaintiff." (internal quotation marks omitted)). The foregoing records chronicle three visits by plaintiff, the first on October 29, 2008. On that date, plaintiff indicated that although he felt fine, he had been involved in an accident on October 26, 2008, injuring his head. Plaintiff was examined and beyond a laceration to his scalp, his examination was normal. Plaintiff was treated with staples and discharged. On November 3, 2008, plaintiff was again examined, the examination was normal and his wound was healing well. On November 10, 2008, plaintiff was again examined, no injuries were noted, and the staples were removed.

The Port Authority also incorporates plaintiff's deposition transcript - submitted by plaintiff - by reference, wherein he testified that at the time of the accident he was a student at Rutgers University and after the accident missed only a few days of school. Plaintiff also testified that besides a laceration to his head, and neck pain for which he received no treatment, he sustained no other injuries.

Based on the foregoing, the Port Authority establishes *prima facie* entitlement to summary judgment with respect to the permanent category of injury under the insurance law insofar as plaintiff's own medical records establish the absence of any injury under the

category's pleaded by plaintiff (*Franchini* at 537). Here, at best, plaintiff sustained a laceration to his head, and upon contemporaneous medical examinations - the first only three days after the accident - he was not diagnosed with any injury whatsoever. To the extent that plaintiff was purportedly left with a scar, he fails to assert that he sustained a serious injury under that category of the insurance law.

With respect to the 90/180 category of serious injury, the foregoing - the absence of injury (*Sayers* at 454; *Buford* at 786; *Lowell* at 780) - coupled with the absence of any interruption of plaintiff's activities of daily living to the extent required by law (*Copeland* at 254; *Robinson* at 1216; *Burns* at 111; *Parkhill* at 1090 [4th Dept 2003]), establishes the Port Authority's *prima facie* entitlement to summary judgment.

To the extent that the Port Authority's cross-motion is granted because it establishes that plaintiff did not sustain a serious injury, the Court, upon a search of the record, also grants summary judgment in favor of Garcia (*Nelson v Distant*, 308 AD2d 338, 340 [1st Dept 2003]).

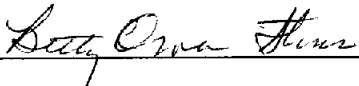
In light of the foregoing, plaintiff's motion is denied as moot. It is hereby

ORDERED that the complaint be dismissed, with prejudice. It is further

ORDERED that the Port Authority serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : June 6, 2016
Bronx, New York



Betty Owen Stinson, JSC