Gomaa v Forego Taxi Corp.
2016 NY Slip Op 31375(U)
June 24, 2016
Supreme Court, Bronx County
Docket Number: 309831/12
Judge: Betty Owen Stinson
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FILED Jul 08 2016 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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ABDELHAMID GOMAA AND NESREEN GOMAA,

Plaintiff(s),

- against -

FOREGO TAXI CORP. AND CLAYTON J. WALSH,

Defendant(s).

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DECISION AND ORDER

Index No: 309831/12

Stinson, J.

In this action for personal injuries arising from an automobile accident, defendants move for an order granting them summary judgment and dismissing plaintiffs' complaint on grounds that plaintiff ABDELHAMID GOMAA (Gomaa) failed to sustain a serious injury as defined by the Insurance Law. Plaintiffs oppose the instant motion asserting that questions of fact as to whether Gomaa sustained a serious injury preclude summary judgment.

For the reasons that follow hereinafter defendants' motion is granted.

Read together, the complaint and bill of particulars allege the following: On June 8, 2012, on 48th Street near its intersection with 6th Avenue, New York, NY, Gomaa was involved in a motor vehicle accident. Specifically, Gomaa's vehicle came into contact with a vehicle owned by defendant FOREGO TAXI CORP. and

operated by defendant CLAYTON J. WALSH. Plaintiffs allege that defendants were negligent in the operation and ownership of their vehicle, said negligence causing Gomaa to sustain injuries. Gomaa alleges to have sustained a host of injuries, the most serious being disc herniations at C5-C7 and L2-L3. Plaintiffs allege that the foregoing injuries are serious as defined by Insurance Law § 5102(d), inasmuch as Gomaa sustained a (1) permanent loss of use of a body organ, member, function or system; (2) permanent consequential limitation of use of a body organ or member; and (3) significant limitation of use of a body function or system. Plaintiff NESREEN GOMAA, Gomaa's wife, asserts a derivative loss of consortium claim.

Defendants' motion seeking summary judgment is hereby granted. Defendants establish *prima facie* entitlement to summary judgment by both establishing the absence of a serious injury and that Gomma's injuries were not caused by the instant accident. Because plaintiffs' evidence in opposition fails to specifically address Gomma's prior accident and exclude it as the cause of his injuries, plaintiffs fail to raise an issue of fact so to preclude summary judgment.

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, a 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]).

With respect to objective medical evidence negating the existence of a serious injury, the tests relied upon must be specified within the doctor's medical report (*Janco* at 440), and what is required is "objective proof such as X-rays, MRIs,

straight-leg or Laseque tests, and any other similarly-recognized tests or quantitative results based on. . .[an] examination" (*Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). Range of motion testing is an objective measure of the presence or absence of injury (*Kraemer v Henning*, 237 AD2d 492, 493 [2d Dept 1997]; *Zalduondo v Lazowska*, 234 AD2d 455, 455-456 [2d Dept 1996]), and when used, the doctor must specify plaintiff's range of motion and compare the same to normal (*Bray v Rosas*, 29 AD3d 422, 423 [1st Dept 2006] [Court held that the failure of a defendant's doctor to quantify plaintiff's range of motion while concomitantly failing to compare the same to normal constituted a failure to establish prima facie entitlement to summary judgment "thereby leaving the court to speculate as to the meaning of those figures."]; *Kelly v Rehfeld*, 26 AD3d 469, 470 [2d Dept 2006]; *Spektor v Dichy*, 34 AD3d 557, 558 [2d Dept 2006]; *Webb v Johnson*, 13 AD3d 54, 55 [1st Dept 2004]).

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]). 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."]).

A defendant can also establish entitlement to summary judgment

by negating causation, meaning by the tender of evidence establishing that the injuries alleged are not related to the accident at issue (*Pommells v Perez*, 4 NY3d 566, 573-574 [2005]; *Franchini* at 537; *Marsh v City of New York*, 61 AD3d 552, 552 [1st Dept 2009]; *Kaplan v Vanderhans*, 26 AD3d 468, 469 [2d Dept 2006]; *Giraldo v Mandanici*, 24 AD3d 419, 419-420 [2d Dept 2005]). Once defendant establishes the foregoing, a plaintiff's failure to rebut a defendant's *prima facie* showing that the injuries sustained by plaintiff pre-dated the accident or were caused by some other event or condition warrants dismissal of the action (*Franchini* at 537 ["Plaintiff's submissions were insufficient to defeat summary judgment because her experts failed to adequately address plaintiff's preexisting back condition and other medical problems."]; *Marsh* at 552; *Kaplan* at 469; *Giraldo* at 420).

Notably, the court in *Linton v Nawaz* (62 AD3d 434 [1st Dept 2009] *affd*, 14 NY3d 821 [2010]) held, despite the foregoing cases, that where a defendant's assertion to negate causation is evidence of degeneration and/or a preexisting condition based solely on the review of plaintiff's imaging studies, a plaintiff sufficiently raises an issue of fact by merely submitting a medical affirmation from an examining doctor containing an opinion causally relating the injuries alleged to the accident giving rise to the suit (*id.* at 443). Specifically, the court stated

> [d]efendants' sole competent evidence in

> favor of summary judgment was a doctor's opinion that plaintiff's injuries pre-existed the accident. Plaintiff submitted the affirmation of a treating physician, based on a physical examination performed within days of the accident, opining that the injuries were caused by the accident. There is no basis on this record to afford more weight to defendants' expert's opinion and there are no 'magic words' which plaintiff's expert was required to utter to create an issue of fact. If anything, plaintiff's expert's opinion is entitled to more weight. Moreover, that opinion constituted an unmistakable rejection of defendants' expert's theory.

(*id.* at 443). In rejecting the magic word rule, however, it is clear that the court in *Linton* was only doing so in cases where causation was negated via a medical affirmation supported solely by a review of radiological films, which the court deemed unpersuasive (*id.* at 441). In fact, the court cited cases such as *Becerril v Sol Cab Corp.* (50 AD3d 261 [1st Dept 2008]) and *Brewster v FTM Servo, Corp.* (44 AD3d 351 [1st Dept 2007]) with approbation, noting that these cases

> involved plaintiffs who were undisputedly involved in a prior accident in which the same body parts were injured but [who] failed to address why the prior accidents were not a possible cause of their current symptoms

(*Linton* at 442). Thus, where a defendant's evidence establishes that the injuries alleged are causally unrelated to an accident because they can be traced to a prior accident, to avoid summary judgment, plaintiff's doctor must specifically address that

contention and relate the injuries alleged to the accident giving rise to the suit (*Becerril* at 261-262 ["Notably, plaintiff conceded at his deposition that he sustained injuries to his neck and back in a prior accident, and an MRI conducted shortly after the subject accident showed degenerative disc disease. In these circumstances, it was incumbent upon plaintiff to present proof addressing the asserted lack of causation."]; *Brewster* at 352 ["Brewster conceded at his deposition that he had sustained injuries to his neck, back and shoulder in a prior automobile accident. Once a defendant has presented evidence of a preexisting injury, even in the form of an admission made at a deposition, it is incumbent upon the plaintiff to present proof to meet the defendant's asserted lack of causation. Brewster's submissions totally ignored the effect of his previous mishap on the purported symptoms caused by the latest accident. The fact that Hernandez's expert discerned some minor loss of motion in Brewster's lumbar spine is irrelevant where the objective tests performed by this physician were negative, and Brewster had testified to a preexisting injury in that part of his body" (internal citations omitted).]).

In support of this motion, defendants submit a sworn report from Thomas P. Nipper (Nipper), an orthopedic surgeon, wherein he chronicles a medical examination he performed upon Gomaa on July 14, 2015. Gomaa presented with complaints of neck and low back pain secondary to a motor vehicle accident on June 12, 2012. An

examination of Gomaa's cervical spine yielded full range of motion in all planes. Flexion was 50 degrees, 50 degrees constituting normal. Lumbar range of motion was also normal in all planes. Flexion was 60 degrees, 60 degrees constituting normal. Based on the foregoing, Nipper concludes that Gomaa has no injury or disability and that he could work without restrictions.

Defendants also submit a sworn report from Lewis M. Rothman (Rothman), a radiologist, who chronicles his review of radiological studies performed upon Gomaa. Upon his review of MRI studies performed on Gomaa's lumbar spine on August 7, 2012, Rothman notes that they depict retrolisthesis of the disc space at L2-L3 and a minimal disc bulge at L3-L4. He also notes the presence of dessication in the lumbar spine. Upon Rothman's review of MRI studies performed upon Gomaa's cervical spine on August 23, 2012, Rothman notes that they depict an incidental hemangioma at C6. Rothman notes the presence of dessication in the cervical spine. Based on the foregoing, Rothman concludes that because of the, *inter alia*, dessication, which is evidence of degenerative disc disease, there is no evidence of acute posttraumatic abnormality.

Defendants submit Gomaa's deposition transcript wherein he testified, in pertinent part, as follows: Prior to this accident in 2012, he had been involved in two prior motor vehicle accidents. Specifically in 2001, Gomma was hit by a car as he stood and helped

another person. The car's mirror hit him in the back. As a result of that accident, he sued, claiming injuries to his neck and low back. Subsequent to that accident, Gomma underwent three months of physical therapy.

Based on the foregoing, defendants establish *prima facie* entitlement to summary judgment in that they tender evidence negating the existence of any injury resulting from the instant accident in 2012. Range of motion testing is an objective measure of the presence or absence of injury (*Kraemer* at 493; *Zalduondo* at 455-456), provided that when used, the doctor specifies plaintiff's range of motion and compares the same to normal (*Bray* at 423; *Kelly* at 470; *Spektor* at 558; *Webb* at 55). Here, Nipper's sworn report details an examination he performed upon Gomaa, after which and after employing range of motion testing, he concludes that Gomaa is neither injured nor disabled.

Additionally, defendants' evidence - namely, Gomaa's deposition testimony - negates causation, thereby establishing *prima facie* entitlement to summary judgment for this additional reason. A defendant establishes entitlement to summary judgment by negating causation, meaning by the tender of evidence establishing that the injuries alleged are not related to the accident at issue (*Pommells* at 573-574; *Franchini* at 537; *Marsh* at 552; *Kaplan* at 469; *Giraldo* at 419-420). Once defendant establishes the foregoing, a plaintiff's failure to rebut a defendant's *prima facie*

showing that the injuries sustained by plaintiff pre-dated the accident or were caused by some other event or condition warrants dismissal of the action (*Franchini* at 537; *Marsh* at 552; *Kaplan* at 469; *Giraldo* at 420). Here, Gomaa testified that in 2001 he was involved in a motor vehicle accident wherein he injured his neck and low back requiring that he undergo months of physical therapy. Thus, defendants establish that the injuries claimed - identical to those sustained by Gomma prior to this accident - were caused by the prior accident.

Plaintiffs' opposition fails to raise an issue of fact sufficient to preclude summary judgment because the evidence they submit fails to sufficiently establish causation. It is well settled that where a defendant's evidence negating causation is degeneration and/or a preexisting condition based solely on the review of a plaintiff's imaging studies, a plaintiff sufficiently raises an issue of fact by merely submitting a medical affirmation from an examining doctor containing an opinion causally relating the injuries alleged to the accident giving rise to the suit (*id.* at 443). However, where a defendant's evidence establishes that the injuries alleged are causally unrelated to an accident because they can be traced to a prior accident, to avoid summary judgment, a plaintiff's doctor must specifically address that contention and relate the injuries alleged to the accident giving rise to the suit (*Linton* at 442; *Becerril* at 261-262; *Brewster* at 352). Here, while

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plaintiffs submit a legion of medical evidence - some of it admissible - none of it specifically addresses Gomaa's accident in 2001 where he sustained identical injuries to those claimed herein. Thus, none of the evidence submitted specifically references and rebuts the contention that Gomma's current injuries stem from a prior accident. Accordingly, defendants' motion is granted. It is hereby

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

ORDERED that defendants 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 29, 2016
Bronx, New York

Betty Owen Stinson

Betty Owen Stinson, JSC