Moreira v Mahabir
2016 NY Slip Op 32325(U)
October 12, 2016
Supreme Court, Bronx County
Docket Number: 301455/12
Judge: Barry Salman
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.

 FILED Oct 21 2016 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------x

RUFINA MOREIRA,

Plaintiff(s),

- against -

PRAKASH MAHABIR, NEW YORK CITY TRANSIT AUTHORITY, MOHAMMAD HOSSAIN, AND RELAX AUTO SERVICES, INC.,

Defendant(s).

----------x

DECISION AND ORDER

Index No: 301455/12

In this action for personal injuries arising from an automobile accident, defendants PRAKASH MAHABIR (Mahabir) and NEW YORK CITY TRANSIT AUTHORITY (NYCTA) move for an order granting them summary judgment and dismissing plaintiff's complaint on grounds that she did not sustain a serious injury as defined by the Insurance Law. Defendants MOHAMMAD HOSSAIN (Hossain) and RELAX AUTO SERVICES, INC. (Relax) cross-move seeking identical relief, incorporating Mahabir and NYCTA's motion by reference, and adopting all arguments therein and evidence appended thereto. Plaintiff opposes the instant motion and cross-motion asserting that movants fail to establish prima facie entitlement to summary judgment and that questions of fact with respect to whether she sustained a serious injury nevertheless preclude summary judgment.

For the reasons that follow hereinafter, defendants' motion and

cross-motion are granted.

Read together, the complaint and bill of particulars allege the following: On July 28, 2011, at the intersection of East 160th Street and Westchester Avenue, Bronx, NY, plaintiff was involved in a motor vehicle accident. Specifically, it is alleged that a vehicle owned by NYCTA, operated by Mahabir, and in which plaintiff was a passenger, came into contact with a vehicle owned by Relax and operated by Hossain. Plaintiff alleges that defendants were negligent in the operation and ownership of their vehicles, said negligence causing her to sustain injuries. Plaintiff alleges to have sustained a host of injuries, the most serious being disc herniations at C4-C5 and L3-L5[1].

NYCTA and Mahabir's motion is granted insofar as the evidence submitted establishes plaintiff has no permanent injury thereby warranting entitlement to summary judgment with respect to the permanent category of injury. In addition, with respect to the 90/180 category of injury, NYCTA and Mahabir establish that

---

[1] While plaintiff fails to allege that the foregoing injuries are serious as defined by Insurance Law § 5102(d), an under which categories thereunder she seeks to proceed, based on the injuries alleged, the only applicable categories are (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; (3) significant limitation of use of a body function or system; and/or (4) a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following her accident.

plaintiff's activities of daily living were not curtailed to the requisite degree or duration.

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 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]). 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."]). Additionally, in order to raise an issue of fact as to the existence of a serious injury the medical evidence presented must include a recent examination of the plaintiff at which the injuries are objectively established (*Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Thomson v Abassi*, 15 AD3d 95, 97 [1st Dept 2005]; *Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000])

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 demonstrates a 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 indicates the absence 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 their motion NYCTA and Mahabir submit two sworn medical reports, one from Alvin M. Bregan (Bregman), an orthopedic surgeon, and another from Iqbal Merchant (Merchant), a neurologist, both whom chronicle examinations performed upon the plaintiff in 2014. Bregman tested plaintiff's cervical and lumbar range of motion, quantified it, compared the same to disclosed normal range, and found that plaintiff had full and normal range of motion. Merchant also tested plaintiff's cervical and lumbar range motion, quantified it, compared the same to disclosed normal range, and found that plaintiff had full and normal range of motion in her cervical spine. While Merchant found restrictions in plaintiff's lumbar spine, he attributes the limited lumbar range of motion to pre-existing disc herniations as evinced by MRI studies performed upon plaintiff's lumbar spine on September 8, 2011; which reports Merchant reviewed. Both Bergman and Merchant concluded that

plaintiff was neither disabled nor injured and that she could engage in all activities of daily living.

NYCTA amd Mahabir also submit plaintiff's 50-h transcript, wherein she testified that she was disabled prior to and at the time of this accident. Moreover, plaintiff testified that while she was treated immediately after this accident, she went on vacation immediately thereafter. Specifically, plaintiff went to Guatemala for two weeks. Plaintiff's bill of particulars, also submitted by NYCTA and Mohabir, indicates that plaintiff was only confined to her home and her bed for a period of two weeks.

Based on the foregoing, NYCTA and Mahabir establish prima facie entitlement to summary judgment. With respect to a plaintiff's injuries under the permanent category of injury, range of motion testing is an objective measure of the presence or absence of injury (*Kraemer* at 493; *Zalduondo* at 455-456), and when used, the doctor must specify plaintiff's range of motion and compare the same to normal (*Bray* at 423; *Kelly* at 470; *Spektor* at 558; *Webb* at 55). Here, with the submission of Bregman and Merchant's sworn reports, which as noted above, numerically quantified, compared and disclosed plaintiff's cervical and lumbar range of motion, NYCTA and Mahabir establish the absence of any permanent injury and/or disability. Significantly, Bregman found that plaintiff had full range of motion and found no disability or injury. While Merchant found that plaintiff's lumbar range of motion was restricted, he

nevertheless concluded that she was not disabled and that such restriction was attributable to pre-existing disc herniations as evinced by her MRI studies (*Style* at 214 n [Court found that defendant met his burden despite doctor's finding that plaintiff had restricted range of motion. Doctor explained that restriction was self imposed.]). Thus, NYCTA and Mahabir establish prima facie entitlement to summary judgment with regard to permanent injuries.

With respect to the 90/180 category of injury, NYCTA and Mahabir also establish prima facie entitlement to summary judgment insofar as their evidence demonstrates that plaintiff was only confined to her bed and her home for two weeks following this accident. Significantly, 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* at 254; *Robinson* at 1216; *Burns* at 111; *Parkhill* at 1090). Here, not only did plaintiff only assert bed and home confinement for a period of two weeks following this accident, but she also testified that she went on vacation immediately after the accident. Thus, based on the foregoing, plaintiff's activities were insufficiently curtailed so as to constitute injury under the 90/180 category.

Plaintiff's opposition fails to raise an issue of fact

sufficient to preclude summary judgment insofar as nothing submitted in admissible form establishes injury contemporaneous with the instant accident.

Significantly, plaintiff's MRI reports evincing studies to her cervical spine on August 29, 2011 and her lumbar spine on September 13, 2011 are the only admissible evidence submitted which are arguably contemporaneous to the instant accident. Even this evidence, however, is not contemporaneous with the accident since it evinces treatment more than a month after the accident. Moreover, while the reports indicate disc herniations, a diagnosis of a herniated disc, without more, is not evidence of a serious injury (*Perez v Rodriguez*, 25 AD3d 506, 511 [1st Dept 2006]; *Noble v Ackerman*, 252 AD2d 392, 394 [1st Dept 1998]). Thus, if a plaintiff claims to have suffered a herniated disc, he must, in addition to submitting medical proof of the injury, submit objective evidence as to the duration, extent or degree of the alleged physical limitations attributed to the disc injury (*Perez* at 511; *Arjona v Calcano*, 7 AD3d 279, 280 [1st Dept 2004]; *Noble* at 394). Accordingly, the submission of an MRI report, evincing a disc injury, is, without more, insufficient to establish the existence of a serious injury (*Thompson v Abbasi*, 15 AD3d 95, 98 [1st Dept 2005]).

Here, no other admissible evidence submitted by plaintiff evinces medical treatment close in time to the instant accident so

as to clinically corroborate the disc herniations within thwe MRI reports. To be sure, and without deciding their weight, the records from Restoration Sports & Spine Center, while admissible, nonetheless indicate treatment received by plaintiff no earlier than April 19, 2012, more than six months after the instant accident.

The same is true for Donald J. Goldman's (Goldman) sworn report, an orthopedist who examined plaintiff, since he did not see plaintiff for the first time until January 8, 2014, more than three years after the instant accident.

In recognition of the foregoing - the absence of admissible contemporaneous medical evidence - plaintiff annexes records from Prestige Medical, P.C. (Prestige), averring that they demonstrate medical treatment received by plaintiff shortly after the instant accident, and therefore contemporaneous. Plaintiff contends that the foregoing records are submitted in inadmissible form because Prestige is permanently closed thereby precluding the production of anyone who can lay the requisite evidentiary foundation. Despite the foregoing, plaintiff contends that the Court ought to consider the foregoing records insofar as Goldman reviewed and relied on said records and his report is submitted in admissible form. Plaintiff's argument has no merit.

Generally, 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). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]). In addition, "[w]hile evidence, otherwise excludable at trial, may be considered to deny a motion for summary judgment such evidence cannot form the sole basis for the courts determination" (*Clemmer v Drah Cab Corp.*, 74 AD3d 660, 661 [1st Dept 2010] [internal quotation marks omitted]; *Rivera v Super Star Leasing, Inc.*, 57 AD3d 288 [1st Dept 2008]; *Largotta v Recife Realty Co., N.V.*, 254 AD2d 225, 225 [1st Dept 1998]).

Hence, in cases involving serious injury, as defined by the Insurance Law, sworn medical reports wherein a doctor relies on other evidence submitted in inadmissible form to conclude the existence of a serious injury, are generally insufficient for purposes of establishing the existence of a serious injury (*Vishnevsky v Glassberg*, 29 AD3d 680, 681 [2d Dep. 2006]; *Uddin v Cooper*, 32 AD3d 270 [1st Dept 2006]). Ordinarily, the court must, therefore, disregard both the inadmissible evidence and the conclusions reached upon reliance on that evidence (*Clemmer* at

661). However, as the court noted in *Clemmer*, inadmissible evidence - such as unsworn reports - may be used to oppose summary judgment when it is relied upon an expert is a sworn report provided the unsworn reports are not the sole evidence raising a question a fact on an issue (*id.* at 661).

Here, as was the case in *Clemmer* (*id.* at 661), the only evidence of medical treatment contemporaneous with the instant accident are the records from Prestige, submitted in inadmissible form. Accordingly, those records cannot be deemed admissible solely because Goldman relies upon them since they constitute the only evidence on the dispositive issue of contemporaneous medical treatment and should, therefore, be excluded (*id.* at 661 ["This bootstrapping process should not be used to bring inadmissible evidence before the motion court."]).

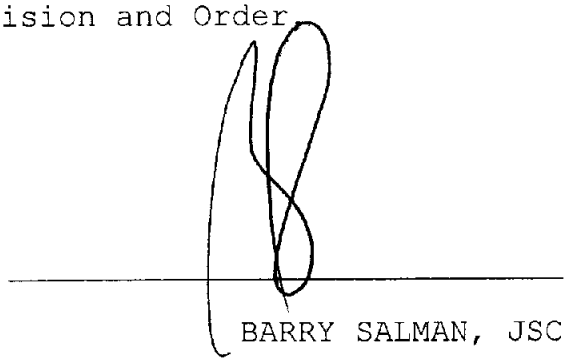
For the foregoing reasons, Relax and Hossain's cross-motion is also granted. It is hereby

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

ORDERED that NYCTA and Mahabir 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 : October 12, 2016
Bronx, New York



BARRY SALMAN, JSC