Barreras v Vargas
2016 NY Slip Op 32982(U)
July 15, 2016
Supreme Court, Bronx County
Docket Number: 22207/14
Judge: Betty Owen Stinson

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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MARIA BARRERAS,

Plaintiff(s),

- against -

FRANCISCO MARTINEZ VARGAS AND CITY BRONX LEASING INCORPORATION,

Defendant(s).

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DECISION AND ORDER

Index No: 22207/14

Stinson, J.

In this action for personal injuries arising from an automobile accident, defendants move for an order granting them summary judgment and dismissing plaintiff's complaint on grounds that plaintiff failed to sustain a serious injury as defined by the Insurance Law. Plaintiffs oppose the instant motion asserting that defendants have failed to establish *prima facie* entitlement to summary judgment and that in any event, questions of fact as to whether plaintiff sustained a serious injury preclude summary judgment.

For the reasons that follow hereinafter defendant's motion is granted.

Read together, the complaint and bill of particulars allege the following: On October 29, 2012, at the intersection of East 208th Street and Jerome Avenue, Bronx, NY, plaintiff was involved

in a motor vehicle accident. Specifically, plaintiff, a pedestrian, came into contact with a vehicle owned by defendant CITY BRONX LEASING INCORPORATED and operated by defendant FRANCISCO MARTINEZ VARGAS. Plaintiff alleges that defendants were negligent in the operation and ownership of their vehicle, said negligence causing her to sustain injuries. Plaintiff alleges to have sustained a host of injuries, the most serious being a rotator cuff tear in her right shoulder and disc herniations at C5-T1[1].

Defendants' motion seeking summary judgment is hereby granted. Defendants establish *prima facie* entitlement to summary judgment by establishing that plaintiff's injuries - permanent and nonpermanent - were not caused by the instant accident. Plaintiff's opposition fails to raise an issue of fact sufficient to preclude summary judgment with respect to all categories of serious injury insofar as she fails to submit sufficient evidence of injuries contemporaneous with the accident alleged.

The proponent of a motion for summary judgment carries the

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[1]While plaintiff fails to allege under what categories of the Insurance Law her injuries fall, it is clear that the foregoing injuries could only be serious as defined by Insurance Law § 5102(d), inasmuch as plaintiff 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; (3) significant limitation of use of a body function or system; or (4) a medically determined injury or impairment of a non-permanent nature which prevented her 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.

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.

A defendant can establish entitlement to summary judgment with regard to all categories of serious injury 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 addition to the foregoing, once a defendant establishes *prima facie* entitlement to summary judgment, such motion must be granted 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."])

In support their motion, defendants submit a sworn report from John H. Buckner, an orthopedic surgeon who chronicles a physical examination he performed upon plaintiff on October 12, 2015 and his review of the police accident report for the instant accident, plaintiff's emergency room records for the subject accident, and other medical records. According to Buckner, plaintiff presented

with complaints of pain in her neck, right shoulder and right arm secondary to a motor vehicle accident on October 29, 2012. Plaintiff also indicated that as a result of the foregoing accident, she had surgery to her right sholuder on April 21, 2014. An examination of plaintiff's cervical spine indicated left and right rotation to 55 degrees, no tenderness, and no spasm. An examination of plaintiff's upper extremities yielded assymetrical range of motion. Flexion and abduction were 110 degrees on the right and 155 degrees on the left. Based on the foregoing, Buckner concludes that plaintiff's examination was normal and that she had no injuries to her cervical spine or right shoulder. Buckner further opines that with respect to plaintiff's claimed injuries to her cervical spine and right shoulder, the same were not caused by the accident on October 29, 2012. Specifically, Buckner notes his review of the plaintiff's EMS report and her emergency room records stating that they fail to indicate that plaintiff made any complaints of pain regarding her cervical spine. In fact, Bruckner states that the EMS report indicates that plaintiff was transported to the hospital without any immobilization and that the emergency room records do not indicate that there were any cervical x-rays or any other imaging studies of the cervical spine. Thus, Buckner concludes that plaintiff did not injure her cervical spine in the instant accident. For identical reasons - namely, the absence of any reference to shoulder injury in the foregoing records - Buckner

concludes that plaintiff did not injure her shoulder as a result of this accident. To the extent that plaintiff had surgery to her right shoulder on April 21, 2014, Buckner - relying on an MRI study performed upon plaintiff's right shoulder on June 6, 2013 - opines that because the studies indicate the presence of arthritis and fail to indicate any evidence of trauma, the surgery was due to degeneration and not the accident alleged.

Defendant's also submit two sworn reports from Mark Decker (Decker), a radiologist, who details his review of MRI studies performed upon plaintiff's cervical spine and right shoulder. Within the first report, Decker details his review of an MRI study performed upon plaintiff's right shoulder on June 6, 2013, which according to Decker depicts degenerative tears of the labrum and biceps anchor. Decker opines that the tears are longstanding and unrelated to trauma. Within the second report, Decker details his review of an MRI study performed upon plaintiff's cervical spine on June 6, 2013. Decker opines that while the study establishes the existence of multiple disc bulges and one herniation, they are longstanding and the result of degenerative disc disease.

Based on the foregoing, defendants establish *prima facie* entitlement to summary judgment with respect to all categories of serious injury in that they tender evidence negating any relationship between the injuries alleged and the instant in 2012. Defendants, thus, negate causation. A defendant establishes

entitlement to summary judgment by negating causation, meaning 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). Here, both Buckner and Decker opined, based on a review of plaintiff's medical records, that all the injuries to her shoulder and cervical spine, if any, were degenerative in nature and not caused by trauma.

While plaintiff submits a host of evidence in opposition, none of it sufficiently raises an issue of fact so as to preclude summary judgment. Significantly, a plaintiff's proof must demonstrate the existence of a serious injury contemporaneous with the accident alleged (*Blackmon* at 242; *Thompson* at 98; *Nemchyonok* at 421; *Pajda* at 730; *Jimenez* at 583. Such contemporaneous medical evidence 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; *Perl* at 218). Here, plaintiff's evidence consists of his emergency room records for the instant accident, detailing his hospital visit on the day of the instant accident and a host of other medical evidence evincing medical treatment and/or evaluations no earlier than May 29, 2013. Clearly, any records

evincing medical treatment on May 29, 2013 - seven months after the instant accident - and at any time thereafter are not contemporaneous with the instant accident. While the emergency room records submitted are indeed contemporaneous with the instant accident, they nevertheless fail to raise an issue of fact with respect to the existence of a serious injury because they fail to indicate that plaintiff was afflicted with any limitations in her cervical spine and right shoulder (*Toure* at 350; *Perl* at 218). To be sure, the foregoing records indicate that plaintiff only complained of knee and wrist pain. The records contain no mention of any injury to her cervical spine and shoulder, let alone any limitations attributable thereto. 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 : July 15, 2016
Bronx, New York

Betty Owen Stinson, JSC