

**Canales v Martinez**

2017 NY Slip Op 30383(U)

January 6, 2017

Supreme Court, Bronx County

Docket Number: 310644/10

Judge: Elizabeth A. Taylor

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**NEW YORK SUPREME COURT-COUNTY OF BRONX  
I.A.S. PART 2**

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FREDDY CANALES, MARIA TAVERAS and  
LORRAINE SIRETT,

Plaintiffs,

-against-

**MEMORANDUM  
DECISION/ORDER**  
Index No.: 310644/10

JEAN C. MARTINEZ, JESUS MENDEZ, RAM  
HARKESH and DARGONE INC.,

Defendants.

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HON. ELIZABETH A. TAYLOR

Defendants, Ram Harkesh (“Harkesh”) and Dargone Inc. (“Dargone”) move for an order, pursuant to CPLR 3212, granting summary judgment on the issue of liability to defendants Harkesh and Dargone, dismissing plaintiff’s complaint and “all claims asserted against defendants Jean C. Martinez (“Martinez”) and Jesus Mendez (“Mendez”).”<sup>1</sup> Defendants, Martinez and Mendez, cross-move for an order, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs’ complaint for failure to meet the “serious injury” threshold requirement of Insurance Law §§5102 and 5104. Defendants, Harkesh and Dargone, cross-move for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiffs’ complaint for failure to meet the threshold requirements of Insurance Law §§5102 and 5104. The motion and cross-motions are decided as hereinafter indicated.

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<sup>1</sup>While the Notice of Motion states defendants Harkesh and Dargone seek dismissal of all cross-claims asserted against defendants Martinez and Mendez, the content of the motion papers clearly indicates that defendants Harkesh and Dargone seek dismissal of the cross-claims of Martinez and Mendez against them and the Court will treat the motion of Harkesh and Dargone as seeking such relief.

This is an action by plaintiffs to recover monetary damages for serious injuries allegedly sustained by them on April 1, 2010, as a result of a two vehicle accident.

Plaintiff, Freddy Canales ("Canales"), claims in his bill of particulars, dated October 21, 2011 (Exhibit B), that as a result of the accident, he sustained the following:

1. Diffuse posterior bulging discs at L4-L5 and L5-S1 deforming the thecal sac and bilateral L5 and S1 nerve roots respectively;
2. Minimal hypertrophic changes of the bilateral ztgapvseal joints at L4-L5, L5-S1 and to a lesser extent L2-L2, L2-L3 and L3-L4 disc space levels;
3. Disc space narrowing at L5-S1;
4. Slight loss of normal disc intensity at C2-C3, C3-C4, C4-C5, C5-C6 and C6-C7 disc space levels;
5. Increased cervical lordosis;
6. Loss of range of motion of the lumbar spine;
7. Loss of range of motion of the cervical spine;
8. Cervical radiculopathy;
9. Lumbar radiculopathy;
10. Loss of range of motion of bilateral hands; and
11. Loss of range of motion of the left knee.

Canales served a second supplemental bill of particulars, dated March 11, 2014 (Exhibit B to plaintiffs' opposition papers), wherein he further claims, as a result of the accident, to have sustained the following:

12. Left L4-L5 lumbosacral radiculopathy; and
13. Bilateral C-5-C6 cervical radiculopathy.

Plaintiff, Maria Taveras ("Taveras"), claims in her bill of particulars, dated October 21, 2011 (Exhibit B), that as a result of the accident, she sustained the following:

1. Partial intrasubstance meniscal tear involving the posterior horn of the medical (*sic*) meniscus;
2. Suprapatellar effusion extending into the joint space;
3. Central posterior bulging disc C3-C4 deforming the thecal sac;
4. Loss of normal disc signal intensity at C2-C3, C3-C4, C4-C5 and C5-C6 disc space levels;
5. Reversal of the upper and mid cervical curvature;

6. Diffuse posterior bulging disc at L4-L5 deforming the thecal sac and bilateral L5 nerve roots;
7. Posterior bulging disc L5-S1 extending into the epidural fat abutting the thecal sac and bilateral S1 nerve roots;
8. Lumbar lordosis;
9. Disc space narrowing at L5-S1;
10. Loss of range of motion of the lumbar spine;
11. Loss of range of motion of the cervical spine;
12. Cervical radiculopathy;
13. Lumbar radiculopathy; and
14. Loss of range of motion of the right knee.

Plaintiff, Lorraine Sirett ("Sirett"), claims in her bill of particulars, dated October 21, 2011 (Exhibit B), that as a result of the accident, she sustained the following:

1. Diffuse posterior bulging discs at L4-L5 and L5-S1 deforming the thecal sac and bilateral L5 and S1 nerve roots respectively;
2. Disc space narrowing at L5-S1;
3. Increase lumbar lordosis;
4. Increase cervical lordosis;
5. Loss of range of the lumbar spine;
6. Loss of range of the cervical spine;
7. Cervical radiculopathy;
8. Lumbar radiculopathy; and
9. Loss of range of motion of the left knee.

The burden rests on defendant to establish by evidentiary proof, in admissible form, that plaintiff has not suffered a serious injury (*Lowe v. Bennet*, 122 AD2d 728 [1<sup>st</sup> Dept. 1986], aff'd 69 NY2d 701 [701]). When defendant's evidence is sufficient to make out a *prima facie* case that a serious injury has not been sustained, the burden shifts, and it is then incumbent upon plaintiff to produce sufficient evidence in admissible form to raise a triable issue of fact as to whether plaintiff sustained a serious injury (see *Licari v. Elliot*, 57 NY2d 230 [1982]).

Defendants submits in support of their cross-motions, *inter alia*, a copy of the pleadings, plaintiffs' bill of particulars (Exhibit B); the affirmed reports of Arnold T. Berman, M.D., an

orthopedist, who examined plaintiffs Canales, Taveras and Sirett at defendants' request on October 11, 2012, February 14, 2013 and November 8, 2012, respectively (Exhibits C, E and G); Alan B. Greenfield, M.D., a radiologist, who examined the MRI films of Canales' cervical spine, taken on April 8, 2010, (Exhibit D), of Taveras' right knee and cervical spine, taken on April 14, 2010 and April 7, 2010 (Exhibit F), of Sirett's lumbar spine, taken on May 3, 2010 (Exhibit H), and a copy of the transcripts of the deposition testimony of Canales and Taveras, taken on August 13, 2012 (Exhibits I and J), and of Sirett, taken on October 4, 2012 (Exhibit K).

Dr. Berman, after examining Canales, found the cranial nerve to be normal. Ranges of motion for the cervical spine for flexion, extension, rotation (right and left), and lateral flexion (right and left), were normal. There was no tenderness to palpation, no spasms and no pain. Reflexes were 2+ and normal. The Spurling test was negative. Triceps, biceps, brachioradialis were bilateral and equal. Sensation was normal. The deltoid, triceps, biceps, forearm muscles and intrinsic muscles of the hand were normal. Waddell testing was normal. Ranges of motion for the thoracolumbosacral spine for flexion, extension, lateral flexion (right and left), and rotation (right and left) were normal. There was no spasms, tenderness to palpation and no pain. The neurologic exam of the lower extremities demonstrates that deep tendon reflexes, patellar and Achilles were normal. The Babinski test was normal. No abnormal sensations were noted. Quadriceps, hamstrings, calf muscles, extensor hallucis longus were normal bilaterally and equal 5/5. The Straight Leg Raising sitting and supine were negative bilaterally with no radiculopathy noted. The Lasegue test was negative. Heel and toe walking was normal. Waddell testing was normal.

Ranges of motion for the shoulders for forward and backward elevation, abduction,

adduction, and internal and external rotation were normal. There was no pain on range of motion. There was no heat, swelling, erythema or effusion. The impingement sign was negative. Tenderness and the apprehension test was negative. Provocative testing for labral tear was negative. There was no atrophy in the upper arms.

Ranges of motion for the elbows for flexion, extension, supination and pronation was normal. There was no pain on range of motion. There was no tenderness, swelling or effusion noted.

Ranges of motion for the wrists for flexion, extension, radial and ulnar deviation was normal. Range of motion was pain free and there was no tenderness or effusion. Phalen's test and Tinel's sign were negative.

Ranges of motion for right and left hands for proximal interphalangeal joint flexion, distal interphalangeal joint flexion, and extension was normal. There was full closing of the hand to the distal palmer crease. No atrophy was present of the thenar or hypothenar musculature. There was no tenderness, swelling, erythema, ecchymosis or pain present. The Finkelstein's test was negative. Sensation was normal. Hand grip was normal bilaterally.

Ranges of motion for the hips for forward flexion, extension, internal and external rotation, abduction and adduction were normal. There was no pain on range of motion. Patrick's test was negative. Trendelenburg sign was negative. The trochanter was nontender.

Ranges of motion for the left and right knees for flexion and extension was normal. The Lachman, McMurray and Drawer signs were negative. The patellofemoral inhibition test was negative. The knee was stable to varus and valgus stress. There was no tenderness, heat, swelling, erythema or effusion. There was no pain with range of motion or squat. The

circumference of the thighs above the superior pole of the patella and the circumference of the calf were equal with no atrophy.

Ranges of motion for the left and right ankles for dorsiflexion, plantar flexion, inversion and eversion were normal. There was no swelling, ecchymosis, erythema or deformity present. There was no pain. Plantar flexion toe raises X5 bilaterally, heel/toe walking.

Dr. Berman states that Canales had cervical and lumbar spine strains and a left knee contusion, all of which had resolved, with no clinical residuals. With respect to the radiological studies, Dr. Berman states that the MRIs of Canales' cervical and thoracic spine, dated April 8, 2010, demonstrate degenerative findings and spinal stenosis at C2-C7 that pre-existed the incident and did not correlate with the normal clinical examination. There was no evidence of radiculopathy, radiologically or clinically, and there is no neuroforaminal compromise. The MRI study of the lumbar spine, dated May 5, 2010, demonstrates changes and bulging discs at L4-S1 that pre-existed the incident and did not correlate with the normal clinical examination. There was no evidence of radiculopathy clinically. These findings were consistent with a resolved soft tissue injury lumbar, cervical and thoracic strain. There was no aggravation of a pre-existing condition. Dr. Berman states that Canales did not sustain a permanent injury, and has no permanency or disability due to the accident of April 1, 2010. He further states that Canales can participate in all activities of daily living and can work his regular employment as a cabdriver full time without restrictions.

Dr. Greenfield's review of the MRI of the cervical spine of Canales found a normal lordosis. There was mild but diffuse degenerative disc disease present at all cervical disc levels. He states that this develops over a period of years and is entirely unrelated to the accident of

April 1, 2010. There was no evidence of disc bulge, disc herniation or fracture. There were no finding on this study which could be attributed to an accident occurring on April 1, 2010 with any degree of medical certainty.

Based upon the above, defendants made out a *prima facie* case that Canales' injuries did not meet the threshold requirements for serious injury as regards the categories of loss of use, permanent consequential limitation or significant limitation.

As to Canales' 90/180 claim, defendants have not made out a *prima facie* case. No evidence has been submitted by defendants pertaining to this category of serious injury to establish that Canales had not sustained a medically determined injury or impairment of a non-permanent nature which has prevented him from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

In opposition to the defendants' cross-motions, plaintiffs submit, *inter alia*, the affirmed MRI reports of Robert Scott Schepp, M.D., a radiologist, of the cervical and lumbar MRIs taken of Canales (Exhibit A), of the cervical, lumbar and right knee MRIs taken of Taveras (Exhibit E), of the cervical and lumbar MRIs of Sirett (Exhibit H), the affirmed reports of Peter C. Kwan, M.D., a neurologist (Exhibits D), Donald I. Goldman, M.D., an orthopedist (Exhibits G and I), unaffirmed medical records and reports of Canales, Taveras and Sirett (Exhibits A, E and H); and the affidavits of Canales and Taveras (Exhibits C and F).

With respect to Canales, the Court notes that Dr. Kwan's examination was conducted only after defendants moved to dismiss his complaint. Dr. Kwan's conclusions causally relating Canales' injuries to the accident are based upon the examination and treatment records of

medical providers, which are unsworn or not affirmed to be true under the penalty of perjury, and, thus, do not meet the test of competent admissible medical evidence sufficient to defeat a motion for summary judgment. *Lazu v. Harlem Group, Inc.*, 89 A.D.3d 435 (1<sup>st</sup> Dept. 2011); *Clemmer v. Drah Cab Corp.*, 74 A.D.3d 660 (1<sup>st</sup> Dept. 2010); *Hernandez v. Almanzar*, 32 A.D.3d 360 (1<sup>st</sup> Dept. 2006). Canales failed to submit admissible evidence of the extent and duration of his alleged limitations. *Clemmer v. Drah Cab Corp.*, *supra*; *Lopez v. Abdul-Wahab*, 67 A.D.3d 598 (1<sup>st</sup> Dept. 2009). Further, Dr. Kwan's findings, occurring over three years and eleven months after Canales' accident, while quantitative, are too remote in time to raise an inference that Canales' purported present limitations were causally related to Canales' accident. *Pou v. E & S Wholesale Meats, Inc.*, 68 A.D.3d 446 (1<sup>st</sup> Dept. 2009).

Dr. Berman, after examining Taveras, found the cranial nerve to be normal. Ranges of motion for the cervical spine for flexion, extension, rotation (right and left), and lateral flexion (right and left), were normal. There was no tenderness to palpation, no spasms and no pain. Reflexes were 2+ and normal. The Spurling test was negative. Triceps, biceps, brachioradialis were bilateral and equal. Sensation was normal. The deltoid, triceps, biceps, forearm muscles and intrinsic muscles of the hand were normal. Waddell testing was normal. Ranges of motion for the thoracolumbosacral spine for flexion, extension, lateral flexion (right and left), and rotation (right and left) were normal. There was no spasms, tenderness to palpation and mild pain on range of motion. The neurologic exam of the lower extremities demonstrates that the deep tendon reflexes, patellar and Achilles were normal. The Babinski test was normal. No abnormal sensations were noted. Quadriceps, hamstrings, calf muscles, extensor hallucis longus were normal bilaterally and equal 5/5. The Straight Leg Raising sitting and supine were negative

bilaterally with no radiculopathy noted. The Lasegue test was negative. Heel and toe walking was normal. Waddell testing was normal.

Ranges of motion for the shoulders for forward and backward elevation, abduction, adduction, and internal and external rotation were normal. There was no pain on range of motion. There was no heat, swelling, erythema or effusion. The impingement sign was negative. Tenderness and the apprehension test was negative. Provocative testing for labral tear was negative. There was no atrophy in the upper arms.

Ranges of motion for the hips for forward flexion, extension, internal and external rotation, abduction and adduction were normal. There was no pain on range of motion. Patrick's test was negative. Trendelenburg sign was negative. The trochanter was nontender.

Ranges of motion for the left and right knees for flexion and extension was normal. The Lachman, McMurray and Drawer signs were negative. The patellofemoral inhibition test was negative. The knee was stable to varus and valgus stress. There was no tenderness, heat, swelling, erythema or effusion. There was no pain with range of motion or squat. The circumference of the thighs above the superior pole of the patella and the circumference of the calf were equal with no atrophy.

Ranges of motion for the left and right ankles for dorsiflexion, plantar flexion, inversion and eversion were normal. There was no swelling, ecchymosis, erythema or deformity present. There was no pain. Plantar flexion toe raises X5 bilaterally, heel/toe walking. Both upper extremities demonstrate full range of motion with no pain, swelling or tenderness.

Dr. Berman states that Taveras had cervical, lumbar spine strains/sprains, a right knee contusion and bilateral hand contusions, all of which had resolved, with no clinical residuals,

except for mild pain on range of motion of the lumbar spine. There were subjective complaints of pain without objective findings. There was no aggravation of a pre-existing condition. Dr. Berman states that Taveras can participate in all activities of daily living and can work at her regular employment as an office worker full time without restrictions.

Dr. Greenfield's review of the MRI of the cervical spine of Taveras found a straightening of the cervical lordosis, stating this is a nonspecific finding which may be constitutional in origin, related to her positioning with the MR gantry or related to muscular spasm. There was mild degenerative disc disease at all cervical levels, but no bulging discs or herniations at any level. There was no fracture or subluxation. Dr. Greenfield concluded that there were no finding on this study which can be attributed to the accident of April 1, 2010, with any reasonable degree of medical certainty.

Dr. Greenfield's review of the MRI of the right knee of Taveras found that a Grade 2 intrasubstance mucoid degerative signal was present within the posterior horn of the medial meniscus. He states that this represents intrasubstance degeneration from within the meniscus, rather than from trauma introduced externally. This does not represent a meniscal tear, but rather degeneration within the substance of the meniscus and is entirely unrelated to the accident on April 1, 2010. There was trace intra-articular fluid, within the range of normal. Dr. Greenfield concluded that there were no finding on this study which can be attributed to the accident of April 1, 2010, with any reasonable degree of medical certainty.

Based upon the above, defendants made out a *prima facie* case that Taveras' injuries did not meet the threshold requirements for serious injury as regards the categories of loss of use, permanent consequential limitation or significant limitation.

As to Taveras' 90/180 claim, defendants have not made out a *prima facie* case. No evidence has been submitted by defendants pertaining to this category of serious injury to establish that Taveras had not sustained a medically determined injury or impairment of a non-permanent nature which has prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

The Court notes that Dr. Goldman's examination of Taveras was conducted only after defendants moved to dismiss his complaint. Dr. Goldman's conclusions causally relating Taveras' injuries to the accident are based upon the examination and treatment records of medical providers, which are unsworn or not affirmed to be true under the penalty of perjury, and, thus, do not meet the test of competent admissible medical evidence sufficient to defeat a motion for summary judgment. *Lazu v. Harlem Group, Inc.*, 89 A.D.3d 435 (1<sup>st</sup> Dept. 2011); *Clemmer v. Drah Cab Corp.*, 74 A.D.3d 660 (1<sup>st</sup> Dept. 2010); *Hernandez v. Almanzar*, 32 A.D.3d 360 (1<sup>st</sup> Dept. 2006). Taveras failed to submit admissible evidence of the extent and duration of her alleged limitations. *Clemmer v. Drah Cab Corp.*, *supra*; *Lopez v. Abdul-Wahab*, 67 A.D.3d 598 (1<sup>st</sup> Dept. 2009). Dr. Goldman's findings, occurring over three years and eleven months after Taveras' accident, while quantitative, are too remote in time to raise an inference that Taveras' purported present limitations were causally related to Taveras' accident. *Pou v. E & S Wholesale Meats, Inc.*, 68 A.D.3d 446 (1<sup>st</sup> Dept. 2009).

Dr. Berman, after examining Sirett, found the cranial nerve to be normal. Ranges of motion for the cervical spine for flexion, extension, rotation (right and left), and lateral flexion (right and left), were normal. There was no tenderness to palpation and no spasm. There was

mild pain on range of motion on extension. Reflexes were 2+ and normal. The Spurling test was negative. Triceps, biceps, brachioradialis were bilateral and equal. Sensation was normal. The deltoid, triceps, biceps, forearm muscles and intrinsic muscles of the hand were normal. Waddell testing was normal. Ranges of motion for the thoracolumbosacral spine for flexion, extension, lateral flexion (right and left), and rotation (right and left) were normal. There were no spasms, tenderness to palpation and mild pain on range of motion. The neurologic exam of the lower extremities demonstrates that the deep tendon reflexes, patellar and Achilles were normal. The Babinski test was normal. No abnormal sensations were noted. Quadriceps, hamstrings, calf muscles, extensor hallucis longus were normal bilaterally and equal 5/5. The Straight Leg Raising sitting and supine were negative bilaterally with no radiculopathy noted. The Lasegue test was negative. Heel and toe walking was normal. Waddell testing was normal.

Ranges of motion for the elbows for flexion, extension, supination and pronation was normal. There was no pain on range of motion. There was no tenderness, swelling or effusion noted.

Ranges of motion for right and left hands for proximal interphalangeal joint flexion, distal interphalangeal joint flexion, and extension was normal. There was full closing of the hand to the distal palmer crease. No atrophy was present of the thenar or hypothenar musculature. There was no tenderness, swelling, erythema, ecchymosis or pain present. The Finkelstein's test was negative. Sensation was normal. Hand grip was normal bilaterally.

Ranges of motion for the left and right knees for flexion and extension were normal. The Lachman, McMurray and Drawer signs were negative. The patellofemoral inhibition test was negative. The knee was stable to varus and valgus stress. There was no tenderness, heat,

swelling, erythema or effusion. There was no pain with range of motion or squat. The circumference of the thighs above the superior pole of the patella and the circumference of the calf were equal with no atrophy.

Both upper and lower extremities demonstrate full range of motion with no pain, swelling or tenderness.

Dr. Berman states that Sirett had cervical, lumbar spine strains/sprains and bilateral hand and knee contusions, all of which had resolved, with no clinical residuals, except for mild pain on range of motion of the cervical and lumbar spine. There were subjective complaints of pain without objective findings. There was no aggravation of a pre-existing condition. Dr. Berman states that Sirett can participate in all activities of daily living and can work at her regular employment as a medical records clerk, full time without restrictions. He opines that from an orthopedic standpoint, Sirett did not sustain a permanent injury and has no permanency or disability due to the accident of April 1, 2010.

Dr. Greenfield's review of the MRI of the lumbar spine of Sirett found a normal lordosis. No disc abnormalities were present on any level. There were no bulging or herniated discs or evidence of fracture.

Based upon the above, defendants made out a *prima facie* case that Sirett's injuries did not meet the threshold requirements for serious injury as regards the categories of loss of use, permanent consequential limitation or significant limitation.

As to Sirett's 90/180 claim, defendants have made out a *prima facie* case. According to Sirett's deposition testimony, she was employed about one month before her accident, working forty hours a week as a medical records clerk, and she missed no time from work because of the

accident. This establishes a prima facie case that Sirett did not sustained a medically determined injury that prevented her from engaging in her usual activities for at least 90 of the first 180 days following the accident. *Jean v. Kabaya*, 63 A.D.3d 509 (1<sup>st</sup> Dept. 2009); *Alicia v. Troy Trans, Inc.*, 60 A.D.3d 521 (1<sup>st</sup> Dept. 2009); *Morris v. Cisse*, 58 A.D.3d 455 (1<sup>st</sup> Dept. 2009).

The Court notes that Dr. Goldman's examination of Sirett was conducted only after defendants moved to dismiss his complaint. Dr. Goldman's's conclusions causally relating Sirett's injuries to the accident are based upon the examination and treatment records of medical providers, which are unsworn or not affirmed to be true under the penalty of perjury, and thus, do not meet the test of competent admissible medical evidence sufficient to defeat a motion for summary judgment. *Lazu v. Harlem Group, Inc.*, 89 A.D.3d 435 (1<sup>st</sup> Dept. 2011); *Clemmer v. Drah Cab Corp.*, 74 A.D.3d 660 (1<sup>st</sup> Dept. 2010); *Hernandez v. Almanzar*, 32 A.D.3d 360 (1<sup>st</sup> Dept. 2006). Sirett failed to submit admissible evidence of the extent and duration of her alleged limitations. *Clemmer v. Drah Cab Corp.*, *supra*; *Lopez v. Abdul-Wahab*, 67 A.D.3d 598 (1<sup>st</sup> Dept. 2009). Dr. Goldman's findings, occurring over three years and eleven months after Sirett's accident, while quantitative, are too remote in time to raise an inference that Sirett's purported present limitations were causally related to Sirett's accident. *Pou v. E & S Wholesale Meats, Inc.*, 68 A.D.3d 446 (1<sup>st</sup> Dept. 2009).

Defendants Harkesh and Dargone submit in support of their motion, *inter alia*, a copy of the pleadings, an uncertified copy of the Police Accident Report ("PAR"), Compliance Conference Order of the Hon. Mitchell J. Danzier, dated June 20, 2012, transcripts of the deposition testimony of Canales and Taveras, both taken on August 13, 2012 (Exhibits J and K), of Sirett, taken on October 4, 2012 (Exhibit L), and of Harkesh, taken on May 17, 2013 (Exhibit

M).

Defendants Harkesh and Dargone cannot rely upon the uncertified copy of a PAR, which is inadmissible and cannot be considered by the Court. *Raposo v. Robinson*, 106 A.D.3d 593 (1<sup>st</sup> Dept. 2013); *Coleman v. Maclas*, 61 A.D.3d 569 (1<sup>st</sup> Dept. 2009); *Westchester Med. Ctr. v. Progressive Cas. Inc. Co.*, 51 A.D.3d1014 (2<sup>nd</sup> Dept. 2008); *Holliday v. Hudson Armored Car & Courier Servs.*, 301 A.D.2d 392 (1<sup>st</sup> Dept. 2003); *Figueroa v. Luna*, 281 A.D.2d 204 (1<sup>st</sup> Dept. 2001).

According to the pleadings, on April 1, 2010, plaintiffs, Canales, Taveras and Sirett, were passengers in a motor vehicle, bearing New York State License Plate Number T484816C, owned by defendant Dargone and operated by defendant Harkesh (“the Harkesh/Dargone vehicle”). Defendant Mendez was the owner of a motor vehicle, bearing New York State License Plate Number GYA6136, which was being operated by defendant Martinez (“the Martinez/Mendez vehicle”).

Defendant Harkesh testified at his deposition as follows: On April 1, 2010, he was operating the Harkesh/Dargone vehicle. It was dark out and the street lights were on. The weather was clear and the roads were dry. The accident occurred on Broadway, at or near its intersection with Moshulu Avenue, Bronx, New York. Broadway, at the accident location, is a two-way roadway, with two travel lanes and one parking lane in each direction. The Harkesh/Martinez vehicle had three passengers (the plaintiffs herein), all who were seated in the rear. Harkesh was proceeding northbound on Broadway for approximately two to four minutes. When Harkesh first entered onto Broadway, he was in the right lane. After receiving directions, he started to change lanes to enter the left travel lane of Broadway, at least one-half block prior to

the point of the accident. He completed his lane change about two or three car lengths prior to the intersection. Prior to changing lanes, Harkesh signaled, looked in his side view mirror and observed the left lane was clear, the nearest vehicle in the left lane being three or four car lengths behind his vehicle, completing his lane change at fifteen miles per hour. After completing the lane change, his left turn signal turned off and he turned his left signal on again about two car lengths from the intersection. The intersection at Moshulu Avenue and Broadway was controlled by a traffic light, and the light was green for vehicles traveling northbound on Broadway. As Harkesh approached the intersection he applied his brakes normally. He was stopped in the intersection for approximately thirty seconds, with his left signal on, waiting for traffic to clear, when the rear right bumper of the Harkesh/Dargone vehicle was hit by the front of the Martinez/Mendez vehicle.

All three plaintiffs were deposed and confirmed that the Harkesh/Dargone vehicle was hit in the rear. However, they all testified that the Harkesh/Dargone vehicle was not stopped at the time of the accident, but was moving.

Based upon the foregoing, Harkesh and Dargone have established their entitlement to summary judgment as a matter of law on the issue of fault, which has not been rebutted. Once an operator of a motor vehicle had made the showing that he was stopped or slowing down, and hit in the rear, it is well accepted that the operator of the vehicle that comes into contact with the rear of another vehicle must come up with a non-negligent excuse for the collision. *Dattiloo v. Best Trans. Inc.*, 79 A.D.3d 432 (1<sup>st</sup> Dept. 2010).

Plaintiffs and co-defendants assert that plaintiffs testimony that the Harkesh/Dargone vehicle was moving at the time of the accident creates an issue of fact precluding the granting of

summary judgment to Harkesh and Dargone on the issue of liability. Assuming, *arguendo*, that the Harkesh/Dargone vehicle was moving steadily and not stopped or in the process of slowing down, this Court is unaware of any appellate authority holding that a rear-end collision does not create a presumption of negligence where the lead vehicle was in motion and not stopped or in the process of slowing down. However, the issue was addressed in *Leguen v. The City of New York*, 30 Misc.3d 1235(A) (Sup. Ct., Queens County, 2011) and *Argueta v. Thind*, 37 Misc.3d 849 (Sup. Ct., Nassau County, 2012), with both Courts concluding that a rear-end collision, in and of itself, gives rise to a presumption of negligence on the part of the following driver, even when both vehicles are in motion, and neither is stopped or slowing. This Court finds that the reasoning in *Leguen* and *Argueta*, predicated on the statutory duty of a following driver to maintain a safe speed and distance between his or her vehicle and the vehicle ahead, to be sound.

The argument raised by plaintiffs and co-defendants that the Harkesh/Dargone vehicle made an unsafe lane change and cut off the Martinez/Mendez vehicle is hearsay and unsupported by any evidence. As defendant Martinez never submitted an affidavit in opposition to the motion, the issue of whether he is precluded from doing so need not be addressed by the Court.

CPLR 3212 (b) provides, *inter alia*, that “[i]f it shall appear that any other party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.” “Recognizing that ‘[a] motion for summary judgment must be addressed to one or more specific causes of action or defenses,’ the Appellate Divisions have uniformly held that a court may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court.” *Dunham v. Hilco Construction Co., Inc.*, 89 N.Y.2d 425, 429 (1996), quoting

*Conroy v Swartout*, 135 AD.2d 945, 947 (citations omitted); *DCA Adver., Inc. v. Fox Group, Inc.*, 2 A.D.3d 173 (1<sup>st</sup> Dept. 2003).

The Court, upon searching the record, finds that defendants Martinez and Mendez were solely responsible for the subject accident. No evidence was presented by defendants to establish culpable conduct on the part of any of the plaintiffs for the subject accident.

Accordingly, the motion for summary judgment of defendants Harkesh and Dargone on the issue of liability is granted on the issue of fault, only, and the complaint of plaintiffs, Canales, Taveras and Sirett, against Harkesh and Dargone is dismissed. The cross-claims of defendants Martinez and Mendez against defendants Harkesh and Dargone are also dismissed.

Summary judgment is also granted to plaintiffs, as passengers in the Harkesh/Dargone vehicle, against defendants Martinez and Mendez, on the issue of fault. The affirmative defense of culpable conduct and contributory negligence of plaintiffs interposed by defendants Martinez and Mendez in their answer is stricken.

Defendants Martinez and Mendez' cross-motions for summary judgment are granted against plaintiffs Canales and Taveras to the extent that any claim with respect to permanent loss of use, permanent consequential limitation or a significant limitation, is dismissed. Summary judgment is denied with respect to the 90/180 day claims of Canales and Taveras.

Defendants Martinez and Mendez' cross-motions for summary judgment against plaintiff Sirett are granted, and Sirett's complaint is dismissed in its entirety.

Plaintiffs Canales and Taveras upon completion of disclosure, are permitted to file a Note of Issue for a trial as to damages. At such trial, plaintiffs shall have the burden of establishing that the injuries they allegedly sustained in the motor vehicle accident meet the

“serious injury” threshold set forth in Insurance Law Section 5102. (*See Ortiz v. Biswas*, 4 A.D.3d 151).

Accordingly, the Clerk is directed to: 1) dismiss plaintiff Lorraine Sirett’s action; 2) dismiss the remaining actions against defendants Ram Harkesh and Dargone, Inc.; and 3) amend the caption to reflect such dismissals.

The foregoing constitutes the Decision and Order of the Court.

Dated: JAN 06 2017

  
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ELIZABETH A. TAYLOR, A.J.S.C.