

**Thomas v Mague**

2017 NY Slip Op 31561(U)

June 7, 2017

Supreme Court, Bronx County

Docket Number: 302103/2013

Judge: Norma Ruiz

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 22

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KHIREK THOMAS AND DARRELL WILSON,

Index No.: 302103/2013

Plaintiffs,

DECISION/ORDER

-against-

MAMADOU MAGUE AND FOFINA C. FACHET,

Defendants.

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**HON. NORMA RUIZ:**

This negligence action arises out of a motor vehicle collision that occurred on the Bruckner Expressway near its intersection with 138<sup>th</sup> Street in Bronx County, New York, on September 28, 2012. Plaintiffs were passengers in the taxicab owned and operated by the respective defendants when the vehicle spun on the wet roadway. The vehicle sustained two impacts; the first, in the rear by an unknown vehicle, and the second, when the vehicle hit the barricade on the side of the expressway before coming to a stop. Both plaintiffs were taken to the hospital from the scene of the accident.

Plaintiff Khirek Thomas (“Thomas”) alleges that he sustained serious injuries within the meaning of Insurance Law § 5102 to his head, left shoulder, left knee, and cervical, lumbar and thoracic spines. Plaintiff Darrell Wilson (“Wilson”) alleges that he sustained serious injuries to his head, left knee, and cervical, lumbar and thoracic spines. Both plaintiffs allege that their respective injuries satisfied the serious injury categories of permanent loss, significant limitation, permanent consequential limitation, and 90/180-day injury. Defendants seek summary judgment dismissing the complaint on the ground that neither of the plaintiffs sustained an Insurance-Law- § 5102(b)

serious injury.

A defendant seeking summary judgment in an action governed by Insurance Law § 5102 must demonstrate that the plaintiff did not sustain a “serious injury” or that the plaintiff’s injuries were not causally related to the accident at issue (*see Baez v Rahamatali*, 6 NY3d 868 [2006]; *Pommells v Perez*, 4 NY3d 566 [2005]). In the event defendant meets this burden, plaintiff must come forward with evidence demonstrating the existence of a triable issue of fact (*see Gaddy v Eyler*, 79 NY2d 955 [1992]). A plaintiff’s subjective claim of pain and limitation of motion must be corroborated by verified objective medical findings (*see Stevens v Bolton*, 135 AD3d 647 [1<sup>st</sup> Dept 2016]; *see also Toure v Avis Rent A Car Sus.*, 98 NY2d 345 [2002]; *Bent v Jackson*, 15 AD3d 46 [1<sup>st</sup> Dept. 2005]).

Defendants have met their prima facie burden of showing that neither plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d) under the categories of permanent loss, permanent consequential limitation or significant limitation (*see Malupa v Oppong*, 106 AD3d 538 [1<sup>st</sup> Dept 2013]; *Barry v Arias*, 94 AD3d 499 [1<sup>st</sup> Dept 2012]; *see also Lowe v Bennett*, 122 AD2d 728 [1<sup>st</sup> Dept. 1986], *aff’d* 69 NY2d 701 [1986]; *Rose v Tall*, 149 AD3d 554 [1<sup>st</sup> Dept. 2017]). Defendants submit a copy of the pleadings; the verified bill of particulars; deposition transcripts of the plaintiffs; uncertified medical records; an uncertified copy of the police report; and the affirmed reports of Dr. Stacey M. Donegan, an emergency medicine specialist, Dr. John H. Buckner, an orthopedist, Rafael Abramov, a physiatrist, and Audrey Eisenstadt, a radiologist.

The Court will first address that branch of the motion seeking summary judgment dismissing the claims of Thomas. Defendants’ examining orthopedist, Dr. Buckner, examined Thomas and reviewed his medical records before concluding that there was no objective evidence of injury. With

regard to Thomas' left knee injury, Dr. Buckner commented that there was evidence of a longstanding chronic condition. Dr. Donegan, an emergency medicine specialist, examined plaintiff's EMS Report and Emergency Department Report taken shortly after the accident, compared those records with Thomas' bill of particulars, and found that the injuries allegedly sustained were "unsupported by [Thomas'] own claims to EMS and/or the ER staff, and unsupported by their findings and examination." She concluded her report by stating that "the claimed injuries do not have an acute traumatic origin and could not be causally related to the accident on September 28, 2012."

Having established, *prima facie*, that Thomas' injuries fail to satisfy the statutory serious injury threshold requirements of Insurance Law § 5102, the burden now shifts to Thomas to raise a triable issue of fact.

Thomas raises triable issues of fact with regard to the injuries allegedly sustained as the result of the subject accident to his left knee, left shoulder, and cervical, lumbar and thoracic spines (see *Lindo v Brett*, 149 AD3d 459 [1<sup>st</sup> Dept. 2017]; *Rickert v Diaz*, 112 AD3d 451 [1<sup>st</sup> Dept 2013]; *Paduani v Rodriguez*, 101 AD3d 470 [1<sup>st</sup> Dept 2012]). Thomas submits the affirmed reports of his treating orthopedic surgeon, Dr. Emmanuel Hostin, and his treating physiatrist, Dr. Guatam Khakhar, as well as the MRI reports from Doshi Diagnostic Imaging Services.<sup>1</sup> Dr. Khakhar provides findings of limitations of range of motion, using objective means of measurements with comparisons to normal ranges of motion, taken both contemporaneous to the accident and recently, and causally relates such findings to Thomas'

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<sup>1</sup>Although the MRI reports are not certified, Thomas may rely on them because they were reviewed by defendants' medical experts (see *Shapiro v Spain Taxi, Inc.*, 146 AD3d 451 [1<sup>st</sup> Dept 2017]; *Francis v Nelson*, 140 AD3d 467 [1<sup>st</sup> Dept 2016]).

subjective complaints of permanent consequential and significant limitation of functioning as a result of the subject accident. He also provides a detailed synopsis of the treatment plan provided to Thomas along with his recommendation that Thomas seek orthopedic surgical intervention once conservative treatments fails to alleviate Thomas' left knee issues.

Dr. Hostin examined Thomas approximately three months after the date of the accident and performed arthroscopic surgery on the left knee, confirming MRI findings and noting that Thomas had "internal derangement of the left knee with a focal high grade chondral injury of the medical femoral condyle." As to Thomas' left shoulder, Dr. Hostin reviewed the MRI and opined that Thomas had "impingement and partial tear of the infraspinatus." According to Dr. Hostin, arthroscopic surgery on Thomas' left knee disclosed "a partial lateral posterior horn meniscus tear, left femoral condyle lesion, chronic synovitis and intraarticular adhesions."

"Although [Thomas'] physicians did not expressly address [defendants' experts'] conclusion that the injuries [to Thomas' left knee] were degenerative in origin, by relying on the same MRI report as [defendants'] expert, and attributing Thomas' injuries to a different, yet equally plausible cause, [Thomas'] raised a triable issue of fact (see *Lee Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482, 915 NYS2d 529 [2011]; *Linton v Nawaz*, 62 AD3d 434, 440, 879 NYS2d 82 [2009], *affd.* 14 NY3d 821, 900 NYS2d 239, 926 NE2d 593 [2010]). Although [a] factfinder could of course reject this opinion (*Perl v Meher*, 18 NY3d 208, 936 NYS2d 655, 960 NE2d 424 [2011]), [this court] cannot say on this record, as a matter of law, that [Thomas'] injuries had no causal connection to the accident" (*Grant v United Pavers Co.*, 91 AD3d 499 [1<sup>st</sup> Dept 2012]; *Jacobs v Rolon*, 76 AD3d 905 [2d Dept 2010]).

Based on the foregoing, the court finds that Thomas has raised issues of fact warranting

denial of defendants' motion with regard to the permanency of injuries to his left knee, left shoulder, and cervical, lumbar and thoracic spines (see *Encarnacion v Castillo*, 146 AD3d 600 [1<sup>st</sup> Dept 2017]).

As to defendants' contention that Thomas had an unexplained gap in treatment warranting dismissal of his claims, Thomas sufficiently establishes that he did receive treatment after the accident for an extended period of time and that no-fault coverage had ended. Both Dr. Hosin and Dr. Khakhar noted that Thomas had reached maximum recovery (see *Ramkumar v Grand Style Transp. Enterprises Inc.*, 22 NY3d 905 [2013]; *Pommells v Perez*, supra), and that therefore any further treatment would be palliative. There is no requirement that Thomas continue to seek treatment beyond that which is medically efficacious (see *Ramkumar v Grand Style Transp. Enterprises, Inc.*, supra; *Pommells v Perez*, supra).

With respect to Thomas' claim of serious injury under the 90/180-day category, defendants made a prima facie showing of entitlement to judgment as a matter of law dismissing it based on Thomas' deposition testimony (see *Stevens v Bolton*, 135 AD3d 487 [1<sup>st</sup> Dept 2016]; *Sougstad v Meyer*, 40 AD3d 839 [2d Dept 2007]; *Blackman v Dinstuhl*, 27 AD3d 241 [1<sup>st</sup> Dept. 2006]). In opposition, Thomas failed to raise a triable issue of fact. Thomas' own treating physiatrist noted in his reports that Thomas elected to withdraw from school. Thus, "even if the court were to consider this claim, plaintiff has not shown that any medical provider advised [him] not to engage in work or other activities following the accident (see *Pinkhasov v Weaver*, 57 AD3d 334 [1<sup>st</sup> Dept 2008])" (*Long v Taida Orchids, Inc.*, 117 AD3d 624 [1<sup>st</sup> Dept 2014]).

As to that branch of defendants' motion seeking summary judgment dismissing Wilson's claims, defendants rely upon the report of their examining orthopedist, Dr. Buckner, who examined

Wilson and reviewed his medical records before concluding that there was no objective evidence of injury. Dr. Buckner reviewed the report of Dr. Abramov, Wilson's treating physiatrist, who noted that Wilson had been in a prior 2003 accident, sustaining injuries to his head and back. Further, Wilson informed Dr. Buckner that he had been in a wheelchair as a result of injuries sustained in another prior motor vehicle accident that apparently occurred in 2000, when Wilson was twelve years old. Wilson testified at his deposition that he had been in an accident subsequent to the subject 2012 accident, in 2014, injuring his head and back. Dr. Buckner concluded that there was no objective evidence for any of the injuries set forth in Wilson's bill of particulars, and further, that Wilson had returned to work, at the US Post Office, without medically-necessitated restrictions.

Dr. Donegan confirmed Dr. Buckner's findings, reviewing Wilson's ER Report and EMS Report, wherein Wilson had a cervical X-Ray as well as cervical CT-scan, and noted that none of Wilson's subjective complaints were supported by objective findings during examination immediately following the accident. Dr. Donegan noted that no CT scan or X-Ray was performed as to Wilson's thoracic or lumbar spines or left knee. Dr. Donegan opined that had Wilson sustained significant injury to his left leg/knee there would have been a record of complaint from Wilson regarding limitation of movement and/or swelling in the emergency room. Moreover, no diagnosis of cervical/thoracic/lumbar or left knee sprain was noted in these records. Neither a splint nor an orthopedic consult was ordered by the ER staff on behalf of Wilson for any of the injuries alleged in the bill of particulars.

Defendants also rely upon the radiological reports of Dr. Eisenstadt, who reviewed Wilson's MRI of Wilson's cervical spine and noted a disc bulge at C5-6. That bulge, however, was not the result of trauma, but rather is degenerative in origin. Dr. Eisenstadt stated, that, in "the absence of

any osseous injury, cord widening or intervertebral disc changes at this level strongly indicates a congenital etiology . . .” Similar results of degeneration were noted for the MRI of the lumbar spine. As for the MRI Wilson’s left knee, Dr. Eisenstadt concluded that there was evidence of congenital abnormality, and transient injury to the bone that would resolve without permanent sequela and without intervention. The mere presence of bulges, herniations or tears is insufficient to establish serious injury (see *Dembele v Cambisaca*, 59 AD3d 352 [1<sup>st</sup> Dept 2009]). Having established, prima facie, that Wilson’s injuries fail to satisfy the statutory serious injury threshold requirements of Insurance Law §5102, the burden shifts to Wilson to raise a triable issue of fact.

Wilson fails to raise a triable issue of fact. Wilson’s own medical reports confirm that he had sustained injuries to his head, back and lower left extremities in 2003, yet he fails to submit any objective findings with regard to such injuries and their resolution. Wilson testified that he had been confined to a wheelchair but provided no medical reports relating to the injuries that arose from the 2000 accident. Because his treating medical providers were not able to consider medical reports or other medical information relevant to Wilson’s prior accidents, they were not able to make informed judgments as to the causal connection, if any, between the subject accident and his alleged injuries. In short, Wilson’s evidence on causation is speculative (see *Sky v Tabs*, 57 AD3d 235 [1<sup>st</sup> Dept 2008]; see also *Alvarez v NYLL Mgmt. Ltd.*, 120 AD3d 1043 [1<sup>st</sup> Dept 2014], *aff’d*, 24 NY3d 1191 [2015]; *Santos v Perez*, 107 AD3d 572, 574 [1<sup>st</sup> Dept 2013]; *Roach v Citywide Mobile Response Corp.*, 102 AD3d 576 [1<sup>st</sup> Dept 2013]). As to Wilson’s claims of head injury, he testified that he had sought minimal treatment, and, admitted at his deposition that he had yet to make an appointment to see a doctor for such claims. Further, there are no medical reports that provide objective medical evidence to confirm the existence of such a injury and/or whether such claim satisfies the threshold

for serious injury.

With respect to the 90/180-day category, Wilson testified that he stayed home for seven months after the accident, but submits no objective medical evidence to support his claim that he was disabled for at least 90 out of the first 180 days immediately following the accident (see *Stevens v Bolton*, supra; *Sougstad v Meyer*, supra; *Blackmon v Dinstuhl*, 27 AD3d 241).

For the foregoing reasons, it is hereby ordered that the branch of defendants' motion seeking summary judgment dismissing the claim of serious injury of plaintiff Khirek Thomas premised on the 90/180-day category is granted; and it is further,

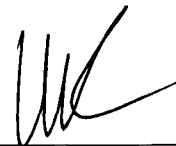
**ORDERED**, that the branch of defendants' motion seeking dismissal of the complaint as to plaintiff Darrell Wilson is granted and the claims of Wilson are dismissed; and it is further,

**ORDERED** that defendants' motion is otherwise denied.

This constitutes the decision and order of the court.

Dated:

6/07/17



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Norma Ruiz, J.S.C.