

**McCoy v Cara**

2019 NY Slip Op 30160(U)

January 11, 2019

Supreme Court, Suffolk County

Docket Number: 15-14050

Judge: David T. Reilly

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

COPY

INDEX No. 15-14050

CAL. No. 18-00745MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 30 - SUFFOLK COUNTY

**PRESENT:**

Hon. DAVID T. REILLY  
Justice of the Supreme Court

MOTION DATE 7-19-18 (002)

MOTION DATE 9-12-18 (003)

ADJ. DATE 11-14-18

Mot. Seq. # 002 - MG; CASEDISP  
# 003 - MD

-----X

TERRISH MCCOY,

Plaintiff,

- against -

JAMES CARA, I G LEASING CORP. and  
DARIN JENKINS,

Defendants.

-----X

MORTON POVMAN, P.C.  
Attorney for Plaintiff  
108-18 Queens Blvd.  
Forest Hills, New York 11375

BAKER McEVOY, MORRISSEY &  
MOSKOVITS, ESQS.  
Attorney for Defendants Cara and I G Leasing  
One Metro Tech Center  
Brooklyn, New York 11201

McCABE, COLLINS, McGEOUGH, FOWLER,  
LEVINE & NOGAN, LLP  
Attorney for Defendant Jenkins  
346 Westbury Avenue  
Carle Place, New York 11514

Upon the following papers numbered 1 to 40 read on these motions for summary judgment: Notice of Motion/  
Order to Show Cause and supporting papers 1 - 15; 16 - 24; Notice of Cross Motion and supporting papers   ; Answering  
Affidavits and supporting papers 25 - 30; 31 - 34; Replying Affidavits and supporting papers 35 - 37; 38 - 40; Other   ; ~~(and~~  
~~after hearing counsel in support and opposed to the motion) it is,~~

**ORDERED** that these motions are hereby consolidated for purposes of this determination; and it is  
further

**ORDERED** that the motion by defendants James Cara and I G Leasing Corp. for an Order granting  
summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury"  
as defined in Insurance Law §5102(d) is granted; and it is further

*RW*

McCoy v Cara  
Index No. 15-14050  
Page 2

**ORDERED** that the motion by defendant Darin Jenkins for an Order granting summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law §5102(d) is denied, as moot.

This is an action to recover damages for personal injuries sustained by plaintiff when the vehicle in which he was a passenger collided with a taxi owned by defendant I G Leasing Corp. (“I G Leasing”) and operated by defendant James Cara. The accident occurred on March 31, 2015, on New York Avenue, near the intersection with West Hills Road, in Huntington, New York. At the time of the accident, plaintiff was a front seat passenger in a vehicle operated by defendant Darin Jenkins. By his bill of particulars, plaintiff alleges that, as a result of the subject accident, he sustained serious injuries and conditions, including a torn anterior cruciate ligament (ACL) of the right knee, herniated and bulging discs in the lumbar region, and left S1 radiculopathy.

Defendants Cara and I G Leasing move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law §5102(d).

Insurance Law §5102(d) defines “serious injury” as “a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

In order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or a “significant limitation of use of a body function or system” categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (see *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Cebron v Tuncoglu*, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) (see *Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos*, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff’s deposition testimony and the affirmed medical report of the defendant’s own examining physician (see *Moore v Edison*, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; *Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see *Winegrad*

McCoy v Cara  
Index No. 15-14050  
Page 3

*v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Boone v New York City Tr. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendants Cara and I G Leasing made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) through the affirmed report of their examining physician (see *Bailey v Islam*, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; *Sierra v Gonzalez First Limo*, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). On April 21, 2017, approximately two years after the subject accident, moving defendants' examining orthopedist, Dr. Jeffrey Guttman, examined plaintiff and performed certain orthopedic and neurological tests, including the straight leg raising test, the Kemp test, the Slump test, the Hoover sign, the Milgram test, the McMurray sign, the anterior drawer sign, posterior drawer sign, the patellar apprehension sign, the Lachman test, the pivot shift test, and the J sign. Dr. Guttman found that all the test results were negative or normal, and that there was no spasm or trigger point in plaintiff's lumbar region. Dr. Guttman also performed range of motion testing on plaintiff's lumbar region and right knee, using a goniometer to measure his joint movement. Dr. Guttman found that plaintiff exhibited normal joint function. Dr. Guttman opined that plaintiff had no orthopedic disability at the time of the examination (see *Willis v New York City Tr. Auth.*, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]). On April 6, 2017, moving defendants' examining neurologist, Dr. Edward Weiland, examined plaintiff and performed certain orthopedic and neurological tests, including the straight leg raising test, the Babinski test, the Waddell test, the Fabere-Patrick sign, the Patrick test, the Adson test, and the Lhermitte sign. Dr. Weiland also performed range of motion testing on plaintiff's lumbar region, using a goniometer to measure his joint movement. Dr. Weiland found that plaintiff exhibited normal joint function. However, Dr. Weiland failed to provide any specific range of motion testing results for plaintiff's right knee, leaving it to this court to speculate as to the respective ranges of motion (see *Sentino v Valerio*, 72 AD3d 1063, 902 NYS2d 106 [2d Dept 2010]; *Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]). In view of the foregoing, Dr. Weiland's report is insufficient to establish a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Although the affirmed report of Dr. Weiland is deficient, the affirmed report of Dr. Guttman is sufficient to establish a prima facie case that plaintiff did not sustain a serious injury.

Further, at his deposition, plaintiff testified that following the accident, he was not confined to his bed, but he missed approximately one month from work. He testified that he underwent a right knee arthroscopy in February 2016. Following the surgery, he missed one month from work and returned to work part-time. He testified that there is no activity that he is unable to perform because of the accident. Plaintiff's deposition testimony established that his injuries did not prevent him from performing "substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident (see *Burns v McCabe*, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; *Curry v Velez*, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]).

Thus, defendants Cara and I G Leasing met their initial burden of establishing that plaintiff did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that he was not prevented from performing substantially all of his usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (see *Gonzalez v Green*, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]).

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see Gaddy v Eyer, supra*). A plaintiff claiming injury within the “limitation of use” categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see Ferraro v Ridge Car Serv.*, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; *Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of the plaintiff or a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (*see Perl v Meher, supra; Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott, supra; Cebron v Tuncoglu, supra*). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (*Pommells v Perez*, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see Vasquez v John Doe #1*, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; *Rivera v Bushwick Ridgewood Props., Inc.*, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]).

Plaintiff opposes the motion, arguing moving defendants’ expert reports are insufficient to meet their burden on the motion. Plaintiff also argues that the medical reports prepared by his treating physicians, Dr. Barry Katzman and Dr. Nizarali Visram, raise a triable issue as to whether he suffered injury within the “significant limitation of use” category of Insurance Law § 5102 (d). In opposition, plaintiff submits, *inter alia*, the sworn report of Dr. Katzman, the sworn report of Dr. Visram, and the unaffirmed records of Huntington Hospital emergency department. The unaffirmed records of Huntington Hospital submitted by plaintiff are insufficient to raise a triable issue of fact, as they are not in admissible form (*see Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *Scheker v Brown*, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; *Karpinos v Cora*, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]).

Here, Dr. Katzman’s report set forth plaintiff’s complaints and the findings, including significant limitation in his right knee joint function measured during range of motion testing performed at his initial consultation on June 27, 2015, approximately three months after the subject accident. Dr. Katzman stated that plaintiff could not straighten his right knee, and that he had “minus 50 degrees” extension (0 degrees normal). However, Dr. Katzman failed to adequately explain or describe how he obtained the result of the extension, thereby leaving the court to speculate as to the meaning of such finding (*see Djetoumani v Transit, Inc.*, 50 AD3d 944, 857 NYS2d 601 [2d Dept 2008]; *Manceri v Bowe*, 19 AD3d 462, 463, 798 NYS2d 441 [2d Dept 2005]). Moreover, Dr. Katzman failed to state how he measured the joint function in plaintiff’s right knee. The Court can only assume that Dr. Katzman’s tests were visually observed with the input of plaintiff. The failure to state and describe the tests used will render the opinion insufficient (*see Harney v Tombstone Pizza Corp.*, 279 AD2d 609, 719 NYS2d 704 [2d Dept 2001]; *Herman v Church*, 276 AD2d 471, 714 NYS2d 87 [2d Dept 2000]). Dr. Katzman also stated that plaintiff had a “good flexion” in his right knee with positive Drawer and Lachman’s tests. However, Dr. Katzman offered no range of motion testing results for flexion (*see Barrett v Jeannot*, 18 AD3d 679, 795 NYS2d 727 [2d Dept 2005]). On August 10, 2018, approximately three years and four months after the subject accident, when Dr. Katzman re-examined plaintiff and performed range of motion testing on plaintiff’s lumbar region and

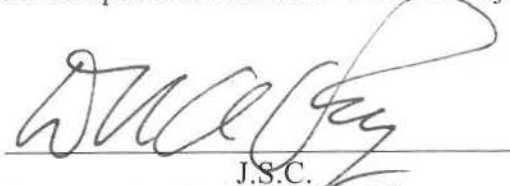
McCoy v Cara  
 Index No. 15-14050  
 Page 5

knees, he found a significant restriction to the range of motion in his lumbar flexion of 60 degrees (90 degrees normal) and in his right knee flexion of 110 degrees (140 degrees normal). However, Dr. Katzman failed to provide any medical evidence concerning plaintiff's condition contemporaneous to the accident (*see Sukalic v Ozone*, 136 AD3d 1018, 269 NYS3d 188 [2d Dept 2016]; *Griffiths v Munoz*, 98 AD3d 997, 998, 950 NYS2d 787 [2d Dept 2012]). A contemporaneous doctor's report is important to proof of causation (*see Perl v Meher, supra*), and the absence of a contemporaneous medical report invites speculation as to causation (*see Griffiths v Munoz, supra*). Dr. Katzman's report, therefore, is insufficient to raise a triable issue of fact.

Dr. Visram's April 2, 2015 report set forth plaintiff's complaints and the findings, including significant limitations in his lumbar spine and right knee joint function, measured during range of motion testing performed at his initial consultation on April 2, 2015, two days after the subject accident. More specifically, with respect to plaintiff's lumbar region, Dr. Visram indicated that plaintiff's flexion was 55 degrees (normal 90 degrees) and extension was 20 degrees (normal 30 degrees). Dr. Visram also indicated that plaintiff had a right knee flexion of 70 degrees (normal 130 degrees). On May 7, 2015 and June 4, 2015, Dr. Visram administered range of motion testing on plaintiff's lumbar region and right knee, and found that there were significant range of motion restrictions in those regions. On July 2, 2015, Dr. Visram administered range of motion testing on plaintiff's lumbar region and right knee, using a goniometer to measure his joint movement. Dr. Visram found that there was significant range of motion restriction in plaintiff's lumbar flexion of 70 degrees (90 degrees normal). He also found that plaintiff had a lumbar extension of 25 degrees (normal 30 degrees) and a right knee flexion of 120 degrees (normal 130 degrees). However, although Dr. Visram and Dr. Katzman provide medical evidence concerning plaintiff's significant restrictions in his lumbar region and right knee contemporaneous to the accident and based on a recent examination respectively, neither plaintiff nor his treating physicians adequately explained the gap in treatment from the time he stopped seeking treatment on a date only several months after the subject accident, until his reexamination in August 2018 (*see Diaz v Chaudhry*, 91 AD3d 590, 935 NYS2d 901 [2d Dept 2012]; *Haber v Ullah*, 69 AD3d 796, 892 NYS2d 531 [2d Dept 2010]; *Rivera v Bushwick Ridgewood Props.*, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]).

Finally, plaintiff failed to offer competent evidence that he sustained nonpermanent injuries that left him unable to perform his normal daily activities for at least 90 of the 180 days immediately following the accident (*see John v Linden*, 124 AD3d 598; *Il Chung Lim v Chrabaszcz*, 95 AD3d 950; *Rivera v Bushwick Ridgewood Props., Inc., supra*). Thus, the motion by defendants Cara and I G Leasing for summary judgment based on plaintiff's failure to meet the serious injury threshold is granted. Accordingly, defendant Jenkins' motion for summary judgment dismissing the complaint on the issue of serious injury is denied, as moot.

Dated: January 11, 2019



J.S.C.

**HON. DAVID T. REILLY**

FINAL DISPOSITION

NON-FINAL DISPOSITION