

**Cuadro v Watkins**

2019 NY Slip Op 32100(U)

May 22, 2019

Supreme Court, Bronx County

Docket Number: 25750/2016E

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 15



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FLORISELDA CUADRO, et al.

Index No. 25750/2016E

-against-

Hon. MARY ANN BRIGANTTI

DAVID L. WATKINS, et al.

Justice Supreme Court

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The following papers numbered 1 to \_\_\_\_\_ were read on this motion ( Seq. No. 4 )  
for SUMMARY JUDGMENT noticed on October 10, 2018.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1,2
Answering Affidavit and Exhibits	No(s).	3,4,5,6
Replying Affidavit and Exhibits	No(s).	7,8

Motion is Respectfully Referred to Justice:  
Dated: \_\_\_\_\_

Upon the foregoing papers, the defendant Dorothy Bucchieri ("Defendant") moves for summary judgment, dismissing the complaint of the plaintiff Floriselda Cuadro ("Plaintiff") on the grounds that she failed to satisfy the "serious injury" threshold as defined by New York Insurance Law §5102(d). Co-defendants David L. Watkins and Craig Ramsey ("Co-Defendants") have cross-moved for the same relief. Plaintiff opposes the motion and cross-motion. By decision and order dated March 4, 2019, Plaintiff's complaint and any cross-claims against Co-Defendants were dismissed. Accordingly, Co-Defendants' cross-motion is deemed moot.

When a defendant seeks summary judgment alleging that a plaintiff does not meet the "serious injury" threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v. Plameri*, 1 N.Y.3d 536 [2003]). "Such evidence includes 'affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim'" (*Spencer v. Golden Eagle, Inc.*, 82 A.D.3d 589, 590 [1<sup>st</sup> Dept. 2011][internal quotations omitted]). A defendant may also meet his or her summary judgment burden with sufficient medical evidence demonstrating that the plaintiff's injuries are not causally related to the accident (*see Farrington v. Go On Time Car Service*, 76 A.D.3d 818 [1<sup>st</sup> Dept. 2010], citing *Pommels v. Perez*, 4 N.Y.3d 566, 572 [2005]). Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 [2002]).

In this matter, Defendant has failed to demonstrate, prima facie, that Plaintiff did not suffer significant or permanent limitations in the use of her cervical spine, lumbar spine, or right elbow as a result of this accident. Defendant's medical expert, Dr. Maurice Carter, performed an independent medical examination of Plaintiff, but he failed to compare any range-of-motion measurements that he took in those

body parts to normal. Regarding the cervical spine, he states that Plaintiff "performed chin to chest, extended the neck 45 degrees, and rotated the neck 50 or 55 degrees left and right. Specifically no pain was reported with motion of the neck." However, the doctor does not disclose what a normal range of motion is, nor does he supply the results of any other objective diagnostic tests he performed on the cervical spine (see *Green v. Jones*, 133 A.D.3d 472, 473 [1<sup>st</sup> Dept. 2015], citing *Zhijan v. Alston*, 73 A.D.3d 562 [1<sup>st</sup> Dept. 2010]; compare *Rodriguez v. Konate*, 161 A.D.3d 565, 566 [1<sup>st</sup> Dept. 2018])[although defendant's orthopedist declined to compare plaintiff's ranges of motion to normal, he found no objective evidence of injury upon recent examination using diagnostic tests]). While he found no tenderness or spasm in the lumbar spine, Dr. Carter does not disclose any specific range-of-motion measurements or other diagnostic tests he performed on that body part (*Green*, 133 A.D.3d at 473; see also *Prince v. Lovelace*, 115 A.D.3d 424 [1<sup>st</sup> Dept. 2014]). Dr. Carter also reports "[r]ecumbent straight leg raising signs were reported positive about 70 degrees bilaterally." Positive straight-leg raising tests are objective evidence of a serious injury (*Brown v. Achy*, 9 A.D.3d 30, 32 [1<sup>st</sup> Dept. 2004]). With respect to the right elbow, Dr. Carter states that Plaintiff had "excellent strength" but he provides no range-of-motion testing and states that flexion strength testing "was reported to have produced pain in the olecranon region of the elbow." While Dr. Carter ultimately finds that "any injuries that [P]laintiff might have received extended only as far as the self-limited conditions of bruises and sprains," he fails to specifically elaborate as to what if any of Plaintiff's limitations if any were voluntary or self-imposed (see, e.g., *Frias v. James*, 69 A.D.3d 466, 467 [1<sup>st</sup> Dept. 2010]; *Collazo v. Anderson*, 103 A.D.3d 527, 528 [1<sup>st</sup> Dept. 2013], citing *Park-Lee v. Voleriaperia*, 67 A.D.3d 734, 735 [2<sup>nd</sup> Dept. 2009]).

Dr. Carter also examined Plaintiff's shoulders and hips, but such injuries will not be considered because they were not specifically pleaded in Plaintiff's verified bill of particulars (see *Torres v. Dwyer*, 84 A.D.3d 626 [1<sup>st</sup> Dept. 2011]).

Defendants have also presented evidence that Plaintiff sustained injuries to her cervical and lumbar spine as a result of a prior accident that occurred in 2010, and she treated for these injuries through 2012. Ordinarily, "where a plaintiff has sustained injuries as a result of an accident that preceded the accident giving rise to the litigation, "plaintiff's expert must adequately address how plaintiff's current medical problems, in light of her past medical history, are causally related to the subject accident" (*Style v. Joseph*, 32 A.D.3d 212 [1<sup>st</sup> Dept. 2006]; see also *Linton v. Nawaz*, 62 A.D.3d 434 [1<sup>st</sup> Dept. 2009], *aff'd* 14 N.Y.3d 821 [2010]). In this case, however, Defendants' moving papers themselves fail to unequivocally demonstrate the absence of a causal connection between Plaintiff's claimed cervical and lumbar spine injuries and the subject 2015 accident. Plaintiff's verified bill of particulars alleges, among other things, that as a result of this accident, she sustained a cervical spine disc bulge at C6-7; a lumbar spine right foraminal herniation at L3-L4 causing right proximal neural foraminal stenosis; bulging disc at L4-L5

intending the ventral thecal sac, with right lateral disc herniation causing right proximal neural foraminal stenosis, and she alleges an "aggravation and exacerbation of pre-existing quiescent injury of the cervical spine" and general allegations of aggravation and exacerbation.

Defendants' expert, Dr. Carter, compared Plaintiff's lumbar and cervical spine MRIs from before and after the subject 2015 accident. With respect to the lumbar spine, Dr. Carter stated that the 2016 report showed a "healthy lumbar spine" but he also states that in one of the images the radiologist "reported with a bulge at L3/4 and a bulge at L4/5 with a right-sided disc herniation" and "[a]t L5-S1 radiologist reported a bulge and facet ligament hypertrophy." Dr. Carter also reviewed a September 2010 lumbar spine MRI which was of "far inferior" quality. He notes that the radiologist "has reported on the right foraminal herniation at L2/3 impinging upon the L2 root. Also reported was a bulge at L3/4 without stenosis and a bulge at L4/5 with mild bilateral stenosis." Dr. Carter does not specifically comment on the differences between these two sets of MRIs, and it appears that the 2016 MRI contained new or different injuries - notably right-sided disc herniation at L4/5. As for the cervical spine, Dr. Carter does note that a bulge at C6/7 is reported in the 2010 and the 2016 reports. However, the 2012 records from Dr. Imelda Cruz-Banting, also annexed to the moving papers, only disclose the existence of a bulge disc at "C5-6 without stenosis" following the 2010 accident. This presents an internal conflict in the records as to whether Plaintiff had any prior bulging disc at C6-7.

Furthermore, in Dr. Carter's "summary and conclusions," and following an extensive review of Plaintiff's treatment records and history, he states "it is possible that [Plaintiff] had a spraining injury to the neck" as a result of this accident, as he notes that Plaintiff complained of neck pain and limited motion when seen in the emergency room, which "is compatible with a spraining injury to the soft parts of the neck." Dr. Carter also states that "[t]hough the lumbar spine and the thoracic spine were not complained of in the emergency room in some instances these have been cited in the review above" and "[o]nce again there exists no examination either by myself, or to the degree that it existed with others which shows any evidence of a spinal problem." However, this opinion is belied by his earlier lumbar spine MRI reviews - as noted above - which show that Plaintiff had new and different findings including a disc herniation after the subject accident. Dr. Carter also noted in his review of Plaintiff's contemporaneous treatment records that she had complaints of pain in the neck and back and had limited ranges of motion and her doctors diagnosed her with disc injuries related to the subject accident. Those records also indicated that Plaintiff's treating physicians had noted that she was asymptomatic prior to the subject accident. In sum, despite the existence of a prior 2010 motor vehicle accident, and a comprehensive review of those records, Dr. Carter fails to clearly and unequivocally opine that Plaintiff's present spinal injuries and complaints are related solely to pre-existing conditions, and are unrelated to the subject accident (*see Karounos v. Doulalas*, 153 A.D.3d 1166, 1166 [1<sup>st</sup> Dept. 2017]).

As for the right elbow injury, Defendant failed to eliminate all triable issues of fact as to causation. Dr. Carter, reviewed the right elbow MRI and opined that it showed "olecranon bursitis" and he states that "this type of bursitis occurs frequently in the adult population without the need for traumatic provocation" and he disagrees with the findings of "the radiologist" of a partial thickness tear of the distal triceps tendon and medial epicondylitis. Dr. Carter later states that "[i]t is very unlikely that the olecranon bursitis was the result of the accident in question" since Plaintiff was seated behind the driver's seat of the cab at the time of the accident and thus had no opportunity to strike her right elbow on anything. However, as noted by Plaintiff, this recitation of the facts is incorrect as Plaintiff testified that she was seated on the passenger side of the cab, behind the front passenger seat (Pl. EBT at 27-28; 38-39). Dr. Carter's opinion that it is "unlikely" that the elbow injury was related to this accident, coupled with his inaccurate recitation of the operative facts, renders his opinion "too equivocal" to satisfy Defendants' initial burden as to lack of causation (*Glynn*, 55 A.D.3d at 499; *see also Collazo*, 103 A.D.3d at 528).

Finally, Defendant failed carry her initial burden of showing that Plaintiff did not sustain a "90/180 day" category of injury as a result of this accident. As noted above, Defendant failed to show, *prima facie*, a lack of causation between the claimed injuries and the instant accident. Plaintiff's verified bill of particulars alleged that, as a result of this accident, Plaintiff was incapacitated from employment to date, and she was confined to bed for 30 days and confined to home for 120 days, and intermittently thereafter. Dr. Carter also fails to specifically opine as to Plaintiff's condition during the relevant 180-day period, and Defendant fails to submit other evidence affirmatively disproving the claimed confinement period or absence from work (*see, e.g., Seepersaud v. L&M Bus Corp.*, 140 A.D.3d 579 [1st Dept. 2016]; *see also Singer v. Gae Limo Corp.*, 91 A.D.3d 526 [1st Dept. 2012]).

Because Defendant failed to satisfy her initial summary judgment burden, the Court need not examine the sufficiency of the opposing papers (*see Feaster v. Boulabat*, 77 A.D.3d 440 [1st Dept. 2010]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985]).

Since, however, there is no evidence on this record that Plaintiff sustained a "permanent loss of use" of any body part - which requires a "total" loss of use - that claim is dismissed (*Swift v. New York City Transit Authority*, 115 A.D.3d 507, 509 [1st Dept. 2014]).

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Accordingly, it is hereby

ORDERED, that Defendant's motion for summary judgment is granted only to the extent of dismissing Plaintiff's claim that she sustained a "permanent loss of use" category of injury as a result of this accident, and it is further,

ORDERED, that Defendant's motion for summary judgment is otherwise denied, and it is further,

ORDERED, that Co-Defendants' cross-motion for summary judgment is denied as moot.

This constitutes the Decision and Order of this Court.

Dated: 5/22/19

Hon. *Mary Ann Briganti*  
Hon. Mary Ann Briganti J.S.C.

- 1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY  CASE STILL ACTIVE
- 2. MOTION IS.....  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE.....  SETTLE ORDER  SUBMIT ORDER  SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT  REFEREE APPOINTMENT