

**Franco v Richards**

2019 NY Slip Op 33452(U)

November 14, 2019

Supreme Court, Kings County

Docket Number: 505049/2018

Judge: Lara J. Genovesi

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 14<sup>th</sup> day of November 2019.

PRESENT:

HON. LARA J. GENOVESI,  
J.S.C.

-----X  
JERIMIAH FRANCO,

Index No.: 505049/2018

Plaintiff,

DECISION & ORDER

-against-

TIJANA RICHARDS

Defendant.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>NYSCEF Doc. No.:</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	<u>11-18, 20-27, 30-41</u>
Opposing Affidavits (Affirmations) _____	<u>19</u>
Reply Affidavits (Affirmations) _____	<u>42, 44, 45</u>

***Introduction***

Plaintiff, Jerimiah Franco, moves by notice of motion, sequence number one, pursuant to CPLR § 3212 for partial summary judgment on the issue of liability.

Defendant, Tijana Richards, opposes this application. Defendant cross-moves by notice of cross motion, sequence number two, pursuant to CPLR § 3212 for summary judgment, dismissing the complaint on the basis that plaintiff did not sustain a serious injury within

the meaning of Insurance Law § 5102(d). Plaintiff opposes this motion and cross-moves, sequence number three, for summary judgment demonstrating that plaintiff did sustain a serious injury within the meaning of Insurance Law.

### *Background*

Plaintiff allegedly sustained personal injuries on February 2, 2018, in a motor-vehicle accident. The parties were on the exit ramp of the eastbound Brooklyn Queens Expressway (BQE), near the McGuinness Boulevard/Humbolt Street exit. The exit ramp has two lanes of travel with a traffic light at the end of the ramp. Plaintiff testified that he travelled in the right lane, with the intention of continuing straight. Immediately prior to the accident, plaintiff was traveling approximately 4-5 miles per hour, as he was in the process of bringing his vehicle to a stop, to obey the traffic signal. Plaintiff testified that defendant's white Jeep Cherokee, which was in the left lane, merged into plaintiff's lane of travel and collided with the driver's side front and rear doors of plaintiff's vehicle (*see* Plaintiff EBT at 19).

Defendant testified that the left lane of the exit ramp was a "left turn only" lane. Before she began to merge into the right lane, which was "clear", she looked in her middle mirror and then her right mirror and turned her right turn signal on and the collision occurred within seconds (*see* Defendant EBT at 19). She also testified that she looked in the left mirror out of habit and then looked over her right shoulder and did not see anything (*see id.* at 22, 25). She never saw plaintiff's vehicle prior to the impact.

Plaintiff alleged in his bill of particulars that he sustained injuries to his left knee, right knee and mouth which resulted in (1) permanent loss; (2) permanent consequential

limitation; (3) significant limitation; and (4) a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of his usual and customary activities for the first 90 out of 180 days after the accident.<sup>1</sup>

Plaintiff was involved in a prior motor vehicle accident in 2015 or 2016. Prior to this accident, plaintiff underwent surgery on both knees; right knee arthroscopy in 2003 and left knee ACL reconstruction surgery in 1998. After the accident, plaintiff underwent internal derangement surgery to his left knee on April 13, 2018, and internal derangement surgery to his right knee on May 9, 2018.

### *Discussion*

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact” (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]).

Such a motion must be supported "by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions". To make a prima facie showing, the moving party must "demonstrate its entitlement to summary judgment by submission of proof in admissible form". Admissible evidence may include "affidavits by persons having knowledge of the facts [and] reciting the material facts"... "In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party". "The

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<sup>1</sup> This Court notes that at oral argument, plaintiff withdrew his claim that he sustained a medically determined injury or impairment which prevented him from performing substantially all of his usual and customary activities for the first 90 out of 180 days after the accident.

function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist". Accordingly, "[t]he court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned". "[W]here credibility determinations are required, summary judgment must be denied" [internal citations omitted].

(*Bank of N.Y. Mellon v. Gordon*, 171 A.D.3d 197, 97 N.Y.S.3d 286 [2 Dept., 2019]).

Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh*, 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra*; *see also Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

### ***Liability- Motion Seq. # 1***

With respect to plaintiff's motion for partial summary judgment on the issue of liability, plaintiff met his prima facie burden. "A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" (*Tejada v. Cedeno*, 173 A.D.3d 808, 99 N.Y.S.3d

686 [2 Dept., 2019]). Here, plaintiff provided the parties deposition testimony, wherein they both testified that defendant's vehicle struck the drivers side of plaintiff's vehicle while attempting to change from the left to the right lane on the exit ramp of the BQE. Defendant testified she looked in her right mirror and over her right shoulder but thought the right lane was "clear"; she did not see plaintiff prior to the accident.

In opposition, defendant failed to raise a triable issue of fact. Defendant's contentions that (1) it is plaintiff's burden to demonstrate that defendant is the sole proximate cause of the accident and (2) that plaintiff's failure to warn by utilizing his horn raises a question of fact, are without merit. "[C]omparative negligence is *not* a defense to the cause of action of negligence, because it is not a defense to any element (duty, breach, causation) of plaintiff's prima facie cause of action for negligence, and as CPLR 1411 plainly states, is not a bar to plaintiff's recovery, but rather a diminishment of the amount of damages" (*Rodriguez v. City of New York*, 31 N.Y.3d 312, 101 N.E.3d 366 [2018]).

"To be entitled to partial summary judgment a plaintiff does not bear the ... burden of establishing ... the absence of his or her own comparative fault" (*Rodriguez v. City of New York*, 31 N.Y.3d at 324-325, 76 N.Y.S.3d 898, 101 N.E.3d 366; *see Odetalla v. Rodriguez*, 165 A.D.3d 826, 826, 85 N.Y.S.3d 560; *Outar v. Sumner*, 164 A.D.3d 1356, 1356, 81 N.Y.S.3d 751; *Edgerton v. City of New York*, 160 A.D.3d 809, 811, 74 N.Y.S.3d 617). Even though a plaintiff is no longer required to establish his or her freedom from comparative negligence, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence (*see Poon v. Nisanov*, 162 A.D.3d 804, 808, 79 N.Y.S.3d

227).

(*Wray v. Galella*, 172 A.D.3d 1446, 101 N.Y.S.3d 401 [2 Dept., 2019]).

Here, plaintiff moved for partial summary judgment against defendant on the issue of liability. Plaintiff did not move to dismiss defendant's affirmative defense of comparative negligence, nor did plaintiff allege in his moving papers that defendant is the sole proximate cause of the accident (*cf. Flores v. Rubenstein*, 175 A.D.3d 1490 [2 Dept., 2019]). Therefore, it is not plaintiff's burden to establish freedom from comparative negligence. As defendant failed to raise a triable issue of fact, plaintiff's motion for partial summary judgment on the issue of defendant's liability is granted.

### ***Damages- Serious Injury***

#### ***Defendant Motion Seq. # 2***

Defendant failed to meet her prima facie burden and establish that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. Defendant provided the affirmed report of orthopedic surgeon Dr. Matthew D. Skolnick, M.D. who did not examine the plaintiff, but reviewed 18 operative photographs and medical records (*see* NYSCEF Doc. # 26). Dr. Skolnick's opinion that the meniscal tears are degenerative, and that the surgery performed was not causally related to the accident is conclusory (*see generally, Pupko v. Hassan*, 149 A.D.3d 988, 50 N.Y.S.3d 295 [2 Dept., 2017]).

Defendant further provided the affirmed report of Dr. Joseph Y. Marguilies, M.D., who performed an independent medical examination (IME) on September 5, 2018. Dr. Marguilies stated in his report that examination revealed plaintiff had 18.52% loss in

range of motion in his right knee (110 degrees/ 135 degrees normal) and 25.93% loss in range of motion of the left knee (100 degrees / 135 degrees normal). Dr. Marguilies opined that plaintiff had no functional disability at time of examination but failed to identify the objective tests utilized to measure range of motion, such as a goniometer (*see Gersbeck v. Cheema*, -- A.D.3d --, 107 N.Y.S.3d 705 [2 Dept., 2019]). In addition, defendant failed to address the mouth injury set forth in the bill of particulars (*see Meyers v. Tarulli*, 152 A.D.3d 759, 60 N.Y.S.3d 78 [2 Dept., 2017]). Inasmuch as defendant failed to meet her initial burden, her motion for summary judgment on the issue of damages is denied.

***Plaintiff Cross Motion – Seq. # 3***

Plaintiff failed to meet his prima facie burden and establish that he sustained a serious injury within the meaning of Insurance Law § 5102(d). With respect to his knee injuries, plaintiff provided the affirmed report of Dov J. Berkowitz, M.D., who examined plaintiff on February 26, 2018, approximately three weeks after the accident (*see* NYSCEF Doc. # 37). This physical examination showed 40% loss in extension and flexion of both the left and right knees (90 degrees/150 degrees normal). Dr. Berkowitz diagnosed bilateral knee derangement. In a follow up visit a month later, March 26, 2018, plaintiff's range of motion remained the same in both knees. Dr. Berkowitz diagnosed bilateral derangement and meniscal tears and opined that these injuries were causally related to the accident (*see id.*). However, plaintiff also provided the affirmed report of Dr. Berkowitz dated June 14, 2019. At examination with a goniometer on May 29, 2019, Dr. Berkowitz found that plaintiff had 7.15% loss in range of motion of both

his left and right knees (130 degrees out of 140 degrees normal) which is insignificant within the meaning of the no-fault statute (*see generally, Il Chung Lim v. Chrabascz*, 95 A.D.3d 950, 944 N.Y.S.2d 236 [2 Dept., 2012]).

With respect to his mouth injury, plaintiff provided records from Advanced Dental Care of NYC which state that he suffered Temporomandibular Joint Dysfunction (TMJ) as a result of the impact during the accident (*see* NYSCEF Doc. # 33). However, these records are unaffirmed and therefore “were not submitted in admissible form” (*Radoncic v. Faulk*, 170 A.D.3d 1058, 96 N.Y.S.3d 352 [2 Dept., 2019]). Plaintiff further provided certified medical records from Dental Arts, contemporaneous with the accident, wherein Dr. Ivette Krol, DDS, opines that plaintiff suffered loss in range of motion of his mouth and a fracture of tooth #9 (*see* NYSCEF Doc. # 36). His “maximum interincisal opening is 36 mm less than normal range” (Normal range for adults is 50 mm without pain), right lateral is 7mm with pain, left lateral is 8mm with pain, and protrusion is 6mm with pain (normal lateral and protrusive movements are 10-12 mm) (*id.*). In a follow up examination on April 5, 2019, Dr. Krol opined that his “maximum interincisal opening 39 MM less than normal range” and moderate pain persists. However, Dr. Krol failed to identify the objective tests utilized to measure range of motion (*see Gersbeck v. Cheema*, -- A.D.3d --, *supra*). Furthermore, Dr. Kroll’s opinion that since the plaintiff’s symptoms did not occur prior to the accident “[a]s one can readily see, there is reasonable medical certainty that the accident caused these injuries” is conclusory (*see generally, Rosa v. Delacruz*, 32 N.Y.3d 1060, 87 N.Y.S.3d 550 [2018]).

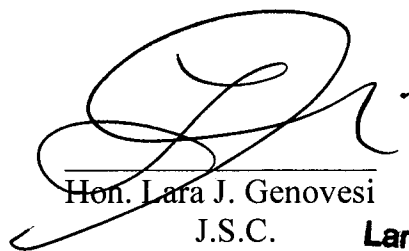
Inasmuch as plaintiff failed to meet his initial burden, his motion for summary judgment on the issue of damages is denied.

**Conclusion**

Accordingly, the plaintiff's motion for partial summary judgment on the issue of defendant's liability, sequence number one, is granted. Plaintiff and defendant's motions for summary judgment on the issue of damages, sequence number two and three, are denied as both parties failed to meet their burden.

The foregoing constitutes the decision and order of this Court.

ENTER:



Hon. Lara J. Genovesi  
J.S.C.

**Lara J. Genovesi**  
J.S.C.

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