

**Roman v Bates**

2019 NY Slip Op 34449(U)

March 26, 2019

Supreme Court, Orange County

Docket Number: EF005495-2017

Judge: Catherine M. Bartlett

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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

FRANCISCO ROMAN,

Plaintiff,

-against-

CHRISTINA R. BATES and JANICE L. LOVELL,

Defendants.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF005495-2017
Motion Date: February 15, 2019

The following papers numbered 1 to 6 were read on Defendants' motion for summary judgment based upon the absence of a "serious injury" per Insurance Law §5102(d):

Notice of Motion - Affirmation / Exhibits - Expert Affirmations (2) 1-4
Affirmation in Opposition / Exhibits 5
Reply Affirmation 6

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is an action for personal injuries arising out of a motor vehicle accident that occurred on July 30, 2014 when Defendants' vehicle sideswiped Plaintiff's vehicle, in consequence of which the Plaintiff's rearview mirror was dislodged and struck him on the face.

Plaintiff went to St. Luke's Cornwall Hospital after the accident complaining of photophobia. A CT scan of the brain revealed no evidence of acute trauma. A CT scan of the

facial bones revealed no evidence of fracture. Visual acuity upon eye examination was 20/20 on the right eye and 20/25 on the left eye. An ocular irrigation was performed with saline and Plaintiff was discharged.

On December 17, 2014, Plaintiff visited his eye doctor, Dr. Kumar. Visual acuity was 20/20 in both eyes. The examination revealed a scar with mild erythema over the left medial canthus; otherwise, the ocular exam was normal. Dr. Kumar recommended ointment and artificial tears as needed for ocular irritation or blurred vision. At a follow-up on May 5, 2015, Plaintiff complained of headaches associated with photophobia and blurred vision. Visual acuity was 20/20 on the right and 20/25 on the left, and the ocular exam was normal. At a June 10, 2015 follow-up for the headaches, an optical coherence tomography (OCT) was within normal limits.

Plaintiff's original Bill of Particulars asserted that as a result of the accident he sustained traumatic brain injury, concussion, corneal abrasions (caused by glass from the mirror), eye contusions, and injuries to his cervical, thoracic and lumbar spine. In a Supplemental Bill of Particulars, Plaintiff withdrew all claims of injury relating to his cervical, thoracic and lumbar spine. At issue, then, are the claimed injuries to Plaintiff's eyes and brain.

Richard Gordon, M.D., the Defendants' expert ophthalmologist, conducted an IME on August 30, 2018. Dr. Gordon concluded:

In my medical opinion and based upon my review of the available medical records and today's clinical examination findings, the motor vehicle accident did not cause any permanent injury or scarring that is affecting his vision. Numerous exams from his primary care ophthalmologist support this. He certainly has, by history, evidence of superficial corneal injuries, which appeared to have resolved and are not causing long lasting injuries and require no further treatment. I do not feel his superficial ophthalmic symptoms are related to the accident, most likely related to his underlying condition of

blepharitis, which is adequately treated with conservative measures and steroid ointments as necessary.

Plaintiff in opposition has adduced no expert ophthalmologic evidence.

As noted above, the CT scan of Plaintiff's brain revealed no evidence of acute trauma.

He never pursued any neuropsychological treatment. Nevertheless, Defendants' expert psychologist conducted a neuropsychological IME on September 11, 2018. His report states:<sup>1</sup>

Mr. Roman's level of intelligence functioning based on current performance on an abbreviated administration of the WAIS IV and several tests within the current test battery places him within the average range of intelligence. These findings do not differ significantly from expectations of his premorbid level of intelligence based on a consideration of his level of academic and vocational attainment. There has been no decline in overall intelligence ability.

Mr. Roman's overall neurocognitive profile falls within expected or average ability limits with respect to auditory attentional processing, visual memory, expressive-receptive language functioning, visuospatial processing, and motor-functioning.

A mild degree of deficit was noted for executive functions encompassing cognitive flexibility and speed of information processing.

Executive functions encompassing planning/organizational ability and response inhibition reflected a mild degree of impairment. Discrete and semantic verbal memory reflected a mild to moderate degree of impairment.

Mr. Roman's psychological profile on mental status examination and on self-support was within normal limits. There was no evidence of psychological symptomatology, emotional distress, or behavioral dysfunction.

Concerning the observed cognitive deficits, the report continues:

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<sup>1</sup>Dr. DeBenedetto's report was affirmed, not sworn. This was improper, as psychologists are not among the professionals who are authorized by law to affirm under penalty of perjury. See, CPLR §2106; *Pascucci v. Wilke*, 60 AD3d 486 (1<sup>st</sup> Dept. 2009). However, inasmuch as Plaintiff did not object to the admissibility of Dr. DeBenedetto's report, and that report was attested under penalty of perjury, the deficiency was waived and the Court may consider Dr. DeBenedetto's report. See, *Scudera v. Mahbubur*, 299 AD2d 535 (2d Dept. 2002); *Pierre v. Young*, 39 Misc.3d 1218(A) at \*2-\*3 (Sup. Ct. Kings Co. 2013).

Mr. Roman's failure on stand-alone measures of response-bias and effort (MVST, TOMM), his failure on all embedded measures of response bias (RSD; Rcg.<FR; Inconsistency in performance within may tests within the test battery; Inconsistent performance across tests in the test battery as well as his failure on an empirical measure of response-bias (degree of cognitive impairment on neuropsychological testing exceeds expectations based on known patterns of response to and recovery from mTBI) invalidates the current neurocognitive test findings as a valid or true estimate of his cognitive abilities and level of cognitive functioning.

The observed cognitive deficits on this evaluation reflect the impact of motivational and functional factors on cognitive performance and do not represent objective, acceptable clinical evidence to support a claim of TBI or the ongoing effects on cognition of TBI. Therefore, there is no objective evidence to support he has any impairment, residual or permanency from my medical standpoint.

Plaintiff in opposition has adduced no expert neurological or neuropsychological evidence.

On the evidence before the Court, including the Plaintiff's deposition testimony and medical records, and the expert ophthalmological and neuropsychological affirmations of Dr. Gordon and Dr. DeBenedetto, respectively, Defendants established *prima facie* that (1) other than superficial corneal abrasions, there is no objective medical evidence of injury, and (2) Plaintiff sustained no "serious injury" causally related to the July 30, 2014 motor vehicle accident.

Under the circumstances, it was incumbent on Plaintiff to come forward with expert medical evidence of causally-related "serious injury" within the meaning of Insurance Law §5102(d). His failure to do is perhaps unsurprising, as (1) his own eye doctor's findings were consistently negative and accord with Dr. Gordon's conclusions, and (2) the CT scan of his brain revealed no evidence of acute trauma, and he never sought any neuropsychological treatment. Regardless, the complete and utter absence of any expert medical evidence to counter the

findings of Dr. Gordon and Dr. DeBenedetto, Plaintiff has failed to demonstrated the existence of any material issue of fact.

It is therefore

ORDERED, that Defendants' motion for summary judgment is granted, and it is further

ORDERED, that Plaintiff's Complaint is dismissed.

The foregoing constitutes the decision and order of this Court.

Dated: March 26, 2019  
Goshen, New York

ENTER



HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT  
JUDGE NY STATE COURT OF CLAIMS  
ACTING SUPREME COURT JUDGE