

**Nunez v Jimenez**

2020 NY Slip Op 31033(U)

March 2, 2020

Supreme Court, Bronx County

Docket Number: 20558/2019E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 14

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RONNY NUNEZ,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 20558/2019E

BETTY JIMENEZ and "JOHN DOE" driver,

Defendants.

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John R. Higgitt, J.

Upon defendant's December 4, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; plaintiff's February 10, 2020 affirmation in opposition and the affidavit and exhibits submitted therewith; defendant's February 11, 2020 affirmation in reply; and due deliberation; defendant's motion for summary judgment on the ground that plaintiff did not sustain a "serious injury" in the subject May 4, 2018 motor vehicle accident is granted in part.

Plaintiff alleges injuries to his knees and to the cervical and lumbar aspects of his spine, and claims "serious injury" under the Insurance Law § 5102(d) categories of significant disfigurement, permanent loss of use, permanent consequential limitation, significant limitation and 90/180-day injury (*see* CPLR 3043[a][6]).

In support of the motion, defendant submits the affirmed report of orthopedic surgeon Dr. Kashyap and the transcript of plaintiff's August 1, 2019 deposition testimony.

Dr. Kashyap examined plaintiff on September 24, 2019. Dr. Kashyap measured full ranges of motion in all tested planes of movement of plaintiff's cervical and lumbar spine and knees, without tenderness or spasm. All objective provocative testing yielded negative results, and the neurological examination was normal. Dr. Kashyap concluded that plaintiff had sustained resolved cervical, lumbar and knee sprain/strain causally related to the accident,

without objective orthopedic findings correlating with plaintiff's subjective complaints of pain.

This proof was sufficient to meet defendant's prima facie burden of demonstrating that plaintiff did not sustain a permanent consequential or significant limitation of use of his neck, back or knees (*see Maraj v Fletcher*, 2020 NY Slip Op 01393 [1st Dept 2020]; *Bianchi v Mason*, 2020 NY Slip Op 00504 [1st Dept 2020]).

Defendant also asserts that a prior accident in which plaintiff injured his back interrupts the causal chain between the accident and plaintiff's claimed injuries. Plaintiff testified that he was involved in a rear-end motor vehicle accident three years prior to the subject accident, after which he underwent an MRI and approximately four months of therapy and commenced a personal injury action. This evidence is sufficient to shift the burden to plaintiff to raise an issue of fact as to causation with respect to the claimed lumbar injuries (*see Silverman v MTA Bus Co.*, 101 AD3d 515 [1st Dept 2012]; *Chintam v Fenelus*, 65 AD3d 946 [1st Dept 2009]). "[Because] the evidence of this prior injury ... [is] plaintiff's own 'persuasive' admission, [defendant is] not required to submit medical records of the injury" (*Chintam*, 65 AD3d at 947). "Once a defendant has presented evidence of a preexisting injury, even in the form of an admission made at a deposition, it is incumbent upon the plaintiff to present proof to meet the defendant's asserted lack of causation" (*Brewster v FTM Servo, Corp.*, 44 AD3d 351, 352 [1st Dept 2007] [internal citation omitted]; *see also Bobbio v Amboy Bus Co. Inc.*, 143 AD3d 655 [1st Dept 2016]).

In opposition, plaintiff submitted the affirmations and affirmed records of his treating physicians and the affidavits and sworn records of his treating chiropractor (*see CPLR 4518[c]*).

Plaintiff's proof was sufficient to raise an issue of fact as to causation of the spinal injuries. Dr. Alladin's contemporaneous records noted the prior accident and deemed plaintiff's history non-contributory, and Drs. Winn and Wattermaker noted that plaintiff was asymptomatic prior to the subject accident. Furthermore, Dr. Wattermaker opined that plaintiff's

complaints and injuries were consistent with the mechanism of injury and, given his history of treatment and records and diagnostic results reviewed, were related to the subject accident (*see Ortiz v Boamah*, 169 AD3d 486 [1st Dept 2019]; *Bux v Pervez*, 156 AD3d 550 [1st Dept 2017]).

Furthermore, plaintiff's proof of persistent limitations which his doctors causally related to objective evidence of injury arising as a result of the subject accident was sufficient to raise an issue of fact as to whether he sustained a significant limitation of use of his cervical and/or lumbar spine, and a permanent consequential limitation of use of his cervical spine (*see Brownie v Redman*, 145 AD3d 636 [1st Dept 2016]; *Rosado v Wadolowski*, 128 AD3d 454 [1st Dept 2015]; *James v Perez*, 95 AD3d 788 [1st Dept 2012]). Plaintiff's proof was insufficient to raise an issue of fact as to whether he sustained a permanent consequential limitation of use of his lumbar spine, because the single-plane limitation recently measured by Dr. Winn is not consequential within the meaning of the statute (*see Sone v Qamar*, 68 AD3d 566 [1st Dept 2009]).

Plaintiff failed to raise an issue of fact as to whether his claimed knee injuries are "serious" within the meaning of the statute. Plaintiff submitted no evidence, contemporaneous or recent, of quantitative or qualitative assessment of his knee function, other than notations of "restricted flexion." Regardless of the presence of tears or other positive imaging results, plaintiff must still present evidence sufficient to raise an issue of fact as to limitations of such magnitude and persisting for such duration, as a result of the claimed injuries, to qualify as "significant" or "consequential" (*see Corporan v Erichsen*, 148 AD3d 549 [1st Dept 2017]; *Alicea v Troy Trans, Inc.*, 60 AD3d 521 [1st Dept 2009]; *see also Vasquez v Almanzar*, 107 AD3d 538 [1st Dept 2013]). Plaintiff failed to do so, and failed to raise an issue of fact as to

whether his knee injuries were “serious” within the meaning of the statute.<sup>1</sup>

With respect to the 90/180-day injury claim, plaintiff’s bill of particulars alleges that he was confined to bed and home for only two days, and plaintiff testified that he was confined to home for one day and to home for “less than three days,” and missed “less than two days” from his full-time work. This proof is sufficient to meet defendant’s prima facie burden and warrant dismissal of the claim (*see Cano v U-Haul Co. of Ariz.*, 178 AD3d 409 [1st Dept 2019]; *Williams v Laura Livery Corp.*, 176 AD3d 557 [1st Dept 2019]; *Pouchie v Pichardo*, 173 AD3d 643 [1st Dept 2019]; *Streety v Toure*, 173 AD3d 462 [1st Dept 2019]; *Curet v Kuhlror*, 172 AD3d 634 [1st Dept 2019]; *Ortiz, supra*; *Tejada v LKQ Hunts Point Parts*, 166 AD3d 436 [1st Dept 2018]; *Rosario v Cablevision Sys.*, 160 AD3d 545 [1st Dept 2018]; *Latus v Ishtarq*, 159 AD3d 433 [1st Dept 2018]; *Moreira v Mahabir*, 158 AD3d 518 [1st Dept 2018]; *Sanchez v Oxcin*, 157 AD3d 561 [1st Dept 2018]; *Fernandez v Hernandez*, 151 AD3d 581 [1st Dept 2017]; *Rose v Tall*, 149 AD3d 554 [1st Dept 2017]). Plaintiff’s proof was insufficient to raise issue of fact as to whether he was prevented from performing *substantially all* of the material acts constituting his usual and customary daily activities for the statutory period (*see Pouchie, supra*; *Moreira, supra*; *Sanchez, supra*; *Fernandez, supra*), even though he was receiving treatment (*see Arenas v Guaman*, 98 AD3d 461 [1st Dept 2012]).

It is obvious that plaintiff did not sustain a significant disfigurement. Plaintiff’s medical records are devoid of evidence of scarring or other abnormality that could be considered unattractive, objectionable or the subject of pity or scorn (*see Fernandez, supra*).

It is obvious that plaintiff did not sustain a permanent loss of use (*see Riollano v Leavey*, 173 AD3d 494 [1st Dept 2019]). Such loss must be total (*see Swift v N.Y. Transit Auth.*, 115

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<sup>1</sup> If it is found that plaintiff sustained any injury that constitutes a “serious injury,” plaintiff is entitled to recover damages for any other injury causally related to the accident (*see Singer v Gae Limo Corp.*, 91 AD3d 526 [1st Dept 2012]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]; *see also Linton v Nawaz*, 14 NY3d 821 [2010]).

AD3d 507 [1st Dept 2014]; *Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001]), and evidence of mere limitations of use is insufficient (*see Melo v Grullon*, 101 AD3d 452 [1st Dept 2012]; *Byong Yol Yi v Canela*, 70 AD3d 584 [1st Dept 2010]).

Defendant did not raise the issue of a gap or cessation in treatment until her reply affirmation, thereby waiving such argument (*see Lewis v Revello*, 172 AD3d 505 [1st Dept 2019]; *Hayes v Gaceur*, 162 AD3d 437 [1st Dept 2018]; *Holloman v American United Transp. Inc.*, 162 AD3d 423 [1st Dept 2018]; *Paulling v City Car & Limousine Servs., Inc.*, 155 AD3d 481 [1st Dept 2017]), and obviating the need for plaintiff to address the issue (*see Massillon v Regalado*, 176 AD3d 600 [1st Dept 2019]).

Accordingly, it is

ORDERED, that the aspects of defendant's motion for summary judgment dismissing plaintiff's claims of "serious" injury (1) under the Insurance Law § 5102(d) categories of significant disfigurement, permanent loss of use and 90/180-day injury, (2) under the Insurance Law § 5102(d) category of permanent consequential limitation with respect to the claimed lumbar injuries, and (3) with respect to his claimed knee injuries, are granted, and those claims are dismissed; and it is further

ORDERED, that the motion is otherwise denied.

The parties are reminded of the March 27, 2020 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: March 2, 2020

  
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John R. Higgitt, J.S.C.