| **Camara v South Beach Contr. Co., Inc.** |
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| 2020 NY Slip Op 35657(U) |
| May 22, 2020 |
| Supreme Court, Bronx County |
| Docket Number: Index No.: 26180/2018E |
| Judge: John R. Higgitt |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, **PART 14**

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**CAMARA, OUMAR**

Index №. **26180/2018E**

- against -

Hon. **JOHN R. HIGGITT**,

**SOUTH BEACH CONTR. CO., INC., et ano**

J.S.C.

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The following papers in the NYSCEF System were read on this motion for **SUMMARY JUDGMENT (LIABILITY)**, duly submitted as No. ___ on the Motion Calendar of **April 21, 2020**

| | NYSCEF Doc. Nos. |
|---|---|
| Notice of Motion – Order to Show Cause - Exhibits and Affidavits Annexed | 13-20 |
| Notice of Cross-Motion - Order to Show Cause - Exhibits and Affidavits Annexed | 23-30 |
| Answering Affidavit and Exhibits | 21-22, 34-44 |
| Replying Affidavit and Exhibits | 45 |
| Memoranda of Law | |
| Filed Papers | |

Upon the foregoing papers, plaintiff's motion for partial summary judgment on the issue of defendants' liability for causing the subject November 30, 2017 motor vehicle accident and for dismissal of defendants' affirmative defenses alleging plaintiff's culpable conduct is granted in part, and defendants' cross motion for summary judgment on the ground that plaintiff did not sustain a "serious injury" in the accident is granted in part, in accordance with the annexed decision and order.

Dated: **05/22/2020**

Hon. John R. Higgitt, J.S.C.

**Check one:**
□ Case Disposed in Entirety
■ Case Still Active

**Motion is:**
□ Granted ■ GIP
□ Denied □ Other

**Check if appropriate:**
■ Schedule Appearance □ Settle Order
□ Fiduciary Appointment □ Submit Order
□ Referee Appointment

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA PART 14

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OUMAR CAMARA,

Plaintiff,

- against -

SOUTH BEACH CONTRACTING COMPANY, INC. and JAMES J. KILCARR,

Defendants.

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DECISION AND ORDER

Index No. 26180/2018E

Present: John R. Higgitt, J.S.C.

Upon plaintiff's December 23, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; defendants' January 2, 2020 affirmation in opposition; defendants' January 7, 2020 notice of cross motion and the affirmation and exhibits submitted in support thereof; plaintiff's April 2, 2020 affirmation in opposition and the exhibits submitted therewith; defendants' April 20, 2020 affirmation in reply; and due deliberation; plaintiff's motion for partial summary judgment on the issue of defendants' liability for causing the subject November 30, 2017 motor vehicle accident and for dismissal of defendants' affirmative defenses alleging plaintiff's culpable conduct is granted in part, and defendants' cross motion for summary judgment on the ground that plaintiff did not sustain a "serious injury" in the accident is granted in part.

**LIABILITY**

In support of the motion, plaintiff submits the transcripts of the parties' deposition testimony.

Plaintiff testified that he had been stopped in an intersection, intending to turn left, for approximately one minute, when his vehicle was rear-ended by defendants' vehicle. Defendant Kilcarr testified that plaintiff's vehicle was stationary when it was struck from behind.

In opposition to plaintiff's prima facie showing of entitlement to summary judgment, defendants assert that there are triable issue of fact as to whether the plaintiff suddenly stopped and

failed to engage his left turn signal as required by Vehicle and Traffic Law § 1163. Defendant Kilcarr testified that "[plaintiff] slammed on the brakes to make a left-hand turn out of nowhere. And he was, you know, already a little bit past the intersection, no blinker," and that plaintiff's vehicle had been stopped for fewer than five seconds prior to the accident.

Defendants' assertion of plaintiff's sudden stop in an intersection was insufficient to raise an issue of fact as to their negligence (*see Vasquez v Chimborazo*, 155 AD3d 432 [1st Dept 2017]); however, the differing testimony as to plaintiff's conduct prior to the accident raises issues of fact as to plaintiff's culpable conduct (*see Geralds v Damiano*, 128 AD3d 550 [1st Dept 2015]). Because plaintiff need not establish his freedom from fault to be awarded summary judgment on the issue of defendants' motion, that facet of the motion is granted (*see Rodriguez v City of N.Y.*, 31 NY3d 312 [2018]).

**"SERIOUS INJURY"**

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

In support of the cross motion, defendants submit the affirmed report of neurologist Dr. Elkin, plaintiff's medical records from March 15, 2018 and the transcript of plaintiff's deposition testimony.

Dr. Elkin examined plaintiff on November 14, 2019, measuring full ranges of motion in all tested planes of movement of plaintiff's cervical and lumbar spine, and finding the thoracic spine to be normal. All objective testing yielded negative results, and the neurological examination was normal. Dr. Elkin concluded that there were no objective findings corresponding with positive electrodiagnostic findings or plaintiff's subjective complaints, and that the reports from the MRI

studies of plaintiff's cervical and lumbar spine described degenerative findings not caused by the accident. He concluded that there were no objective findings of disability or permanency.

The March 2018 office notes include range-of-motion testing finding that the range of motion of plaintiff's left knee was equal to that of his right, uninjured knee, and that imaging of his left knee conducted in February 2018 was normal except for specific degenerative findings (the February 2018 MRI of plaintiff's right knee was unremarkable).

Defendants' proof was sufficient to establish, prima facie, that plaintiff's claimed injuries were not caused by the accident, and are not "serious" within the meaning of the statute (*see Bianchi v Mason*, 179 AD3d 567 [1st Dept 2020]). Although the knee ranges of motion noted in plaintiff's records were not compared to norms, the range of motion of plaintiff's left knee was equal to that of his right, uninjured knee and the examination was negative for signs of injury (*see Karounos v Doulalas*, 153 AD3d 1166 [1st Dept 2017).

In opposition, plaintiff submits the affidavit of chiropractor Dr. Zeren, the affirmed reports of Dr. Canty (who administered lumbar injections) and neurologist Dr. Hausknecht (who discussed lumbar electrodiagnostic testing), and various medical records including reports from MRIs of plaintiff's cervical and lumbar spine and from electrodiagnostic testing.

Dr. Zeren measured reduced ranges of motion of plaintiff's cervical and lumbar spine contemporaneously and recently, and opined that plaintiff's complaints corresponded with positive MRI results and were causally related to the subject accident. Because defendants did not submit evidence of degeneration or other pre-existing injuries in plaintiff's own records, this was sufficient to raise an issue of fact (*see Gordon v Hernandez*, 2020 NY Slip Op 01462 [1st Dept 2020]), particularly because plaintiff's MRI reports did not characterize their findings as degenerative. Plaintiff's doctors were not required to reconcile their range-of-motion findings with those of defendants' doctors (*see De Los Santos v Basilio*, 176 AD3d 544 [1st Dept 2019]).

Plaintiff failed to raise an issue of fact as to his alleged thoracic and knee injuries (*see Stovall v New York City Transit Auth.*, 2020 NY Slip Op 01705 [1st Dept 2020]; *Cano v U-Haul Co. of Ariz.*, 178 AD3d 409 [1st Dept 2019]). Accordingly, he may not recover for thoracic and knee injuries, regardless of whether it is ultimately determined by the factfinder that plaintiff sustained some other "serious injury" (*see Deneen v Bucknor*, 178 AD3d 461 [1st Dept 2019]).

With respect to the 90/180-day claim, defendants' initial demonstration of a lack of causal connection between the accident and plaintiff's claimed injuries was sufficient to meet their prima facie burden (*see Massillon v Regalado*, 176 AD3d 600 [1st Dept 2019]). Furthermore, plaintiff testified that, despite not returning to work for three and a half months after the accident, he continued to attend school. This proof demonstrated, prima facie, that plaintiff did not sustain a 90/180-day injury (*see Hernandez v Adelango Trucking*, 89 AD3d 407 [1st Dept 2011]; *Antonio v Gear Trans Corp.*, 65 AD3d 869 [1st Dept 2009]), and plaintiff failed to raise an issue of fact.

Accordingly, it is

ORDERED, that the aspects of defendants' motion for dismissal of plaintiff's claims of "serious injury" under the Insurance Law § 5102(d) category of 90/180-day injury, and with respect to thoracic and knee injuries, are granted, and those claims are dismissed; and it is further

ORDERED, that the motion is otherwise denied; and it is further

ORDERED, that the 9:30 a.m. June 5, 2020 status conference before the undersigned is adjourned to **October 2, 2020** in Part 14, courtroom 407.

This constitutes the decision and order of the court.

Dated: May 22, 2020

Hon. John R. Higgitt, J.S.C.