

**Bongiorno v Raphael**

2020 NY Slip Op 35684(U)

November 18, 2020

Supreme Court, Queens County

Docket Number: Index No. 707218/18

Judge: Robert I. Caloras

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NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS

PART 36

Justice

FILED

STEVEN J. BONGIORNO and  
XIOMARA A. BONGIORNO,

Index No. 707218/18  
Seq. No. 1

11/20/2020  
02:40 PM

Plaintiffs,  
-against-

KELVIN F. RAPHAEL and VICTOR D. RAPHAEL,  
Defendants.

COUNTY CLERK  
QUEENS COUNTY

The following papers numbered E42-E55, E63-E74 read on this motion by Defendants for an order granting them summary judgment pursuant to CPLR 3212, dismissing the Complaint on the basis Plaintiffs did not sustain a serious injury under Insurance Law 5102(d).

PAPERS  
NUMBERED

Notice of Motion-Affirmation-Memo of Law-Exhibits.....	E42-E55
Affirmation in Opposition-Exhibits.....	E63-E73
Reply Affirmation.....	E74

Upon the foregoing papers, it is ordered that the motion by Defendants is determined as follows:

In the Complaint, Plaintiffs allege they sustained serious personal injuries as a result of a motor vehicle accident that occurred on August 20, 2017. In the Verified Bill of Particulars, Plaintiff Steven J. Bongiorno's (hereinafter "Steven") alleges as a result of the accident he sustained, *inter alia*, the following injuries: subcutaneous edema over the dorsal aspect of the second, third and fourth metacarpals; and severe partial tear of the radial collateral ligament of the third MP joint, with a small third MP joint effusion. Steven further alleges he was partially incapacitated and unable to work for several days. Plaintiff Xiomara A. Bongiorno's (hereinafter "Xiomara") alleges as a result of the accident she sustained, *inter alia*, the following injuries: grade 1 anterolisthesis L5-S1 with L5 spondylolysis; levoscoliosis; numbness, tingling radiating from the neck to the left upper extremities; and weakness of both upper and lower extremities. Xiomara further alleges she was confined to her bed and house for two days, totally incapacitated from her employment for two days, and partially incapacitated from her employment for several days.

Defendants now move for summary judgment dismissing the Complaint as against them on the ground that Plaintiffs have not sustained a serious injury within the meaning of Sections 5102 of the Insurance Law. Defendants have submitted, among other things, the following: Verified Bill of Particulars; Plaintiff Xiomara's deposition transcript; an affirmed report from R. Hillsman, M.D. for Xiomara; affirmed reports from Steven M. Peyser, M.D.; Plaintiff Steven's deposition transcript; and an affirmed report from R. Hillsman, M.D. for Steven.

At her deposition, Xiomara testified she was injured in a motor vehicle accident on August 20, 2017. Xiomara testified she has not been treated for those injuries since 2017. After the accident, she missed two to three days of work, and was confined to her bed and home for two days.

At Defendants' request, Dr. Hillsman, a board certified orthopedic surgeon, examined Xiomara on February 4, 2019. Dr. Hillsman performed objective testing, including range of motion testing. Range of motion was measured with a goniometer in accordance with AMA guidelines. Upon examining Xiomara, Dr. Hillsman found she exhibited full range of motion in her cervical spine, lumbar spine, thoracic spine, left shoulder, elbow, wrist and hand. All other objective tests were negative. After examining plaintiff and

were all resolved. Dr. Hillsman also found Xiomara had no orthopedic disability.

At Defendants' request, Dr. Peyser, a radiologist, reviewed Xiomara's cervical and lumbar MRI films taken on October 21, 2017. As to Xiomara's cervical MRI, Dr. Peyser determined Xiomara's cervical spine had straightening of the normal cervical lordosis. Dr. Peyser concluded this is a non-specific finding which may be positional in nature or related to spasm. Dr. Peyser further concluded that spondylitic changes with bulging at C4-5 are findings consistent with pre-existing degenerative disc disease. As to Xiomara's lumbar MRI, Dr. Peyser determined her lumbar spine had spondylitic change with Grade 1 anterior spondylolisthesis at L5-S1, as well as bilateral spondylolysis at L5. Dr. Peyser concluded these findings appear most consistent with longstanding degenerative-type change. Dr. Peyser also reviewed Xiomara's lumbar, right humerus, and left humerus x-ray taken on September 6, 2017. As to Xiomara's lumbar x-ray, Dr. Peyser determined had a Grade 1 anterior spondylolisthesis L5-S1 with bilateral spondylolysis at L5. Dr. Peyser concluded these findings are most likely related to longstanding degenerative-type change. As to Xiomara's right humerus and left humerus x-ray, Dr. Peyser determined she did not have a fracture or dislocation.

At Steven's deposition, he testified he was injured in a motor vehicle accident on August 20, 2017. Steven testified he stopped occupational or physical therapy after four months because his doctors told him he "didn't need treatment anymore". Steven also testified he stopped occupational or physical therapy, because his no-fault was terminated. Steven stated the last time he was treated by his orthopedist for the injuries he sustained in this accident was in the Fall of 2018. Steven also stated he injured his right hand and arm in a prior accident, and was still being treated for these injuries at the time of the subject accident. Steven stated as a result of this accident he missed four days of work, was not confined to his bed, and was confined to his home for two days.

At Defendants' request, Dr. Hillsman examined Steven on February 4, 2019. Dr. Hillsman performed objective testing including range of motion testing. Range of motion was measured with a goniometer in accordance with AMA guidelines and ASSH Guidelines (American Society for Surgery of the Hand). Upon examining Steven, Dr. Hillsman found he exhibited full range of motion in her cervical spine, lumbar spine, thoracic spine, left elbow, right elbow, right hand, right wrist. All other objective tests were negative. After examining Steven and reviewing pertinent medical records, Dr. Hillsman concluded that Steven's sprains, strains, and contusions were all resolved. Dr. Hillsman also found Steven had no orthopedic disability.

Based upon the foregoing, Defendants argue Plaintiffs did not sustain a serious injury as the result of this accident. Defendants also argue there is a gap in treatment for those injuries Plaintiffs claim they sustained as a result of this accident. Accordingly, Defendants argue the Complaint should be dismissed.

In opposition, Plaintiffs argue that Defendants have failed to establish their prima facie burden of demonstrating she has not sustained a serious injury as a result of this accident. In the alternative, Plaintiffs argue they have submitted sufficient proof that raises issues of fact as to whether they sustained a significant limitation of use, permanent consequential limitation, and a 90/180 injury as a result of the accident. Plaintiffs have submitted, among other things, the following: affidavit from Steven; affidavit from Xiomara; affidavit of Peter Stein, M.D., including his report and CV; affirmation from Andrew Margulies, DC; Allied Chiropractic medical records; and records from North Merrick Family Practice and Zwanger Persiri Radiology.

In her affidavit, Xiomara states, among other things, on September 6, 2017 she was treated by Dr. Johnson. Xiomara went for physical therapy until November 2017. She began treating with Dr. Basra on October 17, 2017. At Dr. Basra's recommendation, Xiomara went for acupuncture treatment for three months until no-fault denied further acupuncture treatment in April 2018. After being treated by Dr. Johnson several times in 2018, Xiomara started seeing Dr. Halchech from April 2019 through February 2020. Xiomara also treated with Dr. Margulies from October 2019 through March 2020.

In his affirmation, Dr. Margulies states he is a Chiropractor. Dr. Margulies treated Xiomara on October 3, 2019, October 10, 2019, October 24, 2019, and March 19, 2020. Dr. Margulies' office records also include Dr. Basra's records, and Zwanger Persiri Radiology's records.

In his affidavit, Steven states, among other things, on August 23, 2017 and August 30, 2017 he was treated by Dr. Johan at North Merrick Family Practice. Thereafter, he was treated by Dr. Wilson, an orthopedist, on August 31, 2017, September 15, 2017, October 18, 2017, January 3, 2018, October 16, 2018, and January 28, 2020. Steven began occupational therapy on October 21, 2017 at Professional PT, and treated there until February 15, 2018 when no fault terminated further treatment. On March 9, 2020, Dr. Stein treated Steven.

In his affirmation, Dr. Stein, an orthopaedic surgeon, states he examined Steven on March 9, 2020. Based upon his exam of Steven, Dr. Stein found the angulatory deformity at the right third MP joint with aspination of Steven's hand reflects the injury of his radial collateral ligament. Dr. Stein concluded this injury resulted from the subject accident, and that Steven has reached maximum medical improvement for this injury.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (see Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

A Defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]; Beltran v Powow Limo, Inc., 98 AD3d 1070 [2d Dept. 2012]). When such a defendant's motion relies upon the findings of the defendant's own witnesses, those findings must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to judgment as a matter of law (see Brite v Miller, 82 AD3d 811 [2d Dept. 2011]; Damas v Valdes, 84 AD3d 87 [2d Dept. 2011], citing Pagano v Kingsbury, 182 AD2d 268 [2d Dept. 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony (see Beltran v Powow Limo, Inc., supra; Bamundo v Fiero, 88 AD3d 831 [2d Dept. 2011]; McIntosh v O'Brien, 69 AD3d 585 [2d Dept. 2010]). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which creates a material issue of fact (see Gaddy v Eyler, supra; Zuckerman v City of New York, supra; Beltran v Powow Limo, Inc., supra).

Here, the Court finds Defendants have met their prima facie burden of demonstrating both Plaintiffs did not sustain a serious injury within the meaning of Insurance Law §5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., supra; Gaddy v Eyler, supra; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]). Consequently, the burden shifts to Plaintiffs to come forward with evidence to overcome Defendants' submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (see, Gaddy v Eyler, supra; Sin v Singh, 74 AD3d 1320 [2d Dept. 2010]).

The Court finds both Plaintiffs' submissions fail to raise any triable issues of fact as to whether they sustained a serious injury. Both Plaintiffs failed to submit sufficient proof of a contemporaneous quantitative assessment of range-of-motion limitations based on objective testing that satisfies causation concerns (see Lopez v Simpson, 39 AD3d 420 [1st Dept. 2017]). As to Xiomara, the Court finds Dr. Margulies' affirmation and office records are not admissible. A Chiropractor is not authorized under CPLR 2106 to submit an affirmation (Doumanis v Conzo, 265 AD2d 296 [2d Dept. 1999]). As such, Dr. Margulies' affirmation and attending medical records are inadmissible (id.). Even if Dr. Margulies submitted an affidavit, his findings

would still be deficient. Dr. Margulies only performed range of motion testing on Xiomara on October 3, 2019 and March 19, 2020. At both of these exams, Dr. Margulies failed to state what, if any, instrument he used to obtain his findings and failed to state what medical standard he used to compare his findings to. As to Steven, his medical records from North Merrick Family Practice and Zwanger Persiri Radiology are not admissible, because they were neither sworn to nor affirmed (CPLR 2106), and are not evidentiary proof in admissible form (Toure, supra, Licari, supra; see also Grasso v Angerami, 79 NY2d 813 [1991]; Fung v Uddin, 60 AD3d 992 [2d Dept. 2009]; Perez v Santiago, 59 AD3d 692 [2d Dept. 200]; Pagano v Kingsbury, 182 AD2d 268 [2d Dept. 1992]). The Court also finds both Plaintiffs failed to sufficiently address the gap in their treatment, and also failed to submit admissible medical evidence of a recent exam (Finnegan v Gabriel, 7 AD3d 663 [2d Dept. 2004]). As set forth above, the only medical records Xiomara submitted are inadmissible. Although Steven submitted a report from Dr. Stein, this report failed to identify the objective tests used to determine Steven's quantitative limitations, and did not address Steven's prior accident. Furthermore, Xiomara testified she missed two to three days of work, and was confined to her bed and home for two days. Steven testified he missed four days of work, was not confined to his bed, and was confined to his home for two days. Consequently, the Court finds that Plaintiff failed to meet his burden of demonstrating that he sustained a 90/180 injury as a result of the subject accident (see Marin v Ieni, 108 AD3d 656 [2d Dept. 2013]). Accordingly, the motion is granted, and the Complaint is dismissed.

**Dated: November 18, 2020**



**ROBERT I. CALORAS, J.S.C.**

**FILED**

**11/20/2020  
02:40 PM**

**COUNTY CLERK  
QUEENS COUNTY**