

**Whitfield v Harris**

2021 NY Slip Op 31515(U)

May 3, 2021

Supreme Court, Kings County

Docket Number: 514779/2018

Judge: Lillian Wan

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 17

Index No.: 514779/2018  
Motion Date: 4/21/21  
Motion Seq.: 01, 02, 04 & 05

-----X  
CHRISTOPHER S. WHITFIELD,

Plaintiff,

-against-

**DECISION AND ORDER**

CHANLISS HARRIS, S.K. MABATANO-HARRIS,  
STEVEN N. SOMERVILLE, THOMAS MICHAEL  
LAPIERRE and P. MEENAN-LAPIERRE,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 01) 23-34, 37, 40, 42-46; (Motion 02) 48-56; (Motion 04) 77-86, 101-113, 128; and (Motion 05) 87-93 and 114-126 were read on these motions for summary judgment.

**THE DEFENDANTS' LIABILITY MOTIONS (Motions 01 & 02)**

The defendants, Thomas Michael Lapierre and P. Meenan-Lapierre (hereinafter Lapierre), move for summary judgment on liability pursuant to CPLR § 3212, seeking dismissal of the complaint and all cross-claims asserted against them (Motion 01). Defendant Steven N. Somerville (hereinafter Somerville) cross moves for summary judgment also seeking dismissal of the complaint and all cross-claims of the co-defendants (Motion 02). For the reasons set forth below, the motions are granted.

This action arises from a motor vehicle accident involving three cars that occurred on April 23, 2018, on the westbound Jackie Robinson Parkway, in the County of Kings, City and State of New York. The vehicle owned by defendant P. Meenan-Lapierre and operated by Thomas Michael Lapierre was the lead vehicle. The rear most vehicle was owned by S.K. Mabatano-Harris and operated by defendant Chanliss Harris (hereinafter Harris). It is undisputed that the Harris vehicle collided into the rear of the middle vehicle operated by defendant Steven N. Somerville, in which the plaintiff was a passenger. The impact pushed the Somerville vehicle into the rear of the Lapierre vehicle.

In support of the motion, defendants Lapierre submit the pleadings, the deposition transcripts of Thomas Michael Lapierre, Chanliss Harris and the plaintiff, as well as the uncertified police accident report. According to his deposition testimony, Thomas Michael LaPierre was driving in the far right lane of the Jackie Robinson Parkway in stop and go traffic.

Based on the traffic conditions, his vehicle had been stopped for approximately 30 seconds and when he removed his foot from the brake pedal and started to proceed, travelling at five to ten miles per hour, his vehicle was struck from behind. Co-defendant Chanliss Harris testified that the traffic conditions were stop and go, and that his vehicle was behind the two other vehicles involved in this accident. He further testified that immediately before colliding into the Somerville vehicle, which was directly in front of his, he took his eyes off the roadway, looked down at his wallet which was by his foot, and reached down to pick it up. When he looked up, he observed that the vehicle in front was stopped, and he rear-ended the Somerville vehicle. Harris testified that at the time of impact his foot was on the accelerator, and he was aware that the Somerville vehicle was pushed into the rear of the Lapierre vehicle. The plaintiff was deposed and testified that he was a front-seat passenger in defendant Somerville's vehicle and that the traffic was "bumper to bumper." He further testified that the Somerville vehicle was stopped at the time of the rear impact from the Harris vehicle, and was pushed into the rear of the Lapierre vehicle.

The Harris defendants oppose the motion, arguing that it is premature and that there are issues of fact concerning the happening of the accident. The plaintiff also opposes the motion, asserting that it is premature and that triable issues of fact exist as to liability.

In support of his cross-motion defendant Somerville submits the pleadings and his deposition transcript. According to his deposition testimony, Somerville's vehicle was in the right lane behind the Lapierre vehicle. Prior to the impact his vehicle was stopped for approximately 10 seconds. The first impact was to the rear of his vehicle, and the force of the collision caused him to be pushed into the rear of the Lapierre vehicle. Somerville also relies on the deposition testimony of co-defendant Chanliss Harris, who testified that his vehicle was moving at the time of the accident. He further testified that he was looking down as his wallet fell and was reaching for it when the accident occurred, and that his vehicle rear-ended the Somerville vehicle.

Co-defendants Lapierre partially oppose the cross-motion, arguing that they bear no responsibility for the accident, as there is no evidence of any negligent act or omission on their part, or that they caused or contributed to the happening of the accident. The Lapierre defendants further argue that if the Court finds an issue of fact to deny the motion of Lapierre, that same issue of fact would be sufficient to deny co-defendant Somerville's cross-motion. Neither the plaintiff nor co-defendants Harris oppose the cross-motion.

It is well-settled that a rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision. *Perez v Persad*, 183 AD3d 771 (2d Dept 2020); *see also Edgerton v City of New*

*York*, 160 AD3d 809 (2d Dept 2018); *Billis v Tunjian*, 120 AD3d 1168 (2d Dept 2014). A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle. *Perez v Persad*, 183 AD3d 771; *Tutrani v County of Suffolk*, 10 NY3d 906 (2008); *Witonsky v New York City Transit Authority*, 145 AD3d 938 (2d Dept 2016); *Nsiah-Ababio v Hunter*, 78 AD3d 672 (2d Dept 2010); see Vehicle and Traffic Law § 1129(a).

The Lapierre defendants have demonstrated their prima facie entitlement to summary judgment as a matter of law. See *Lopez v Dobbins*, 164 AD3d 776 (2d Dept 2018); *Nikolic v City-Wide Sewer & Drain Serv. Corp.*, 150 AD3d 754 (2d Dept 2017); see also *Rodriguez v City of New York*, 31 NY3d 312 (2018). The deposition testimony submitted in support of the motion amply establishes that defendant Lapierre's vehicle had been stopped for approximately 30 seconds, and that he had just removed his foot from the brake pedal and was proceeding slowly in heavy traffic. Defendant Chanliss Harris conceded that he was looking down and attempting to retrieve his wallet from the floor just prior to striking the rear of the Somerville vehicle. Moreover, defendant Lapierre's testimony makes clear that his vehicle did not abruptly slow or stop prior to the impact. In opposition, the plaintiff and co-defendants Harris have failed to submit proof sufficient to rebut the inference of negligence. See *Perez v Persad*, 183 AD3d 771.

Likewise, defendant Somerville has demonstrated his prima facie entitlement to summary judgment as a matter of law based on his testimony that he was stopped for ten seconds at the time of impact, and that the force of the collision caused his vehicle to strike the rear of the Lapierre vehicle, which was directly in front of him. The plaintiff and co-defendants Harris have not opposed the motion, and the submissions fail to rebut the inference of negligence by providing a non-negligent explanation for the rear-end accident. *Perez v Persad*, 183 AD3d 771.

Further, the opposing parties' argument that the motions are premature is moot as the deposition of defendant Somerville has now been completed, and in any event they have failed to demonstrate how further discovery might reveal or lead to relevant evidence. Moreover, the opposing parties have not demonstrated that facts essential to oppose the motion were exclusively within the plaintiff's control. See CPLR § 3212(f); *Zhou v 828 Hamilton, Inc.*, 173 AD3d 943 (2d Dept 2019). Accordingly, the motion of defendants Lapierre and the cross-motion of defendant Somerville are granted.

#### THE DEFENDANTS' SERIOUS INJURY MOTIONS (Motions 04 & 05)

Defendants, Harris and Lapierre, move for summary judgment on the ground that the plaintiff has not sustained a serious injury as a result of the accident under Insurance Law §§5102(d) and 5104(a). Defendants Lapierre have filed a separate summary judgment motion, adopting and incorporating the facts, legal arguments, procedural history and exhibits contained in co-defendants' motion and supporting papers. In light of the Court's determination in favor of

defendants Lapierre on liability, their motion seeking summary judgment on serious injury is moot. For the reasons set forth below, defendants Harris' motion is denied.

The plaintiff's bill of particulars alleges that he sustained serious injuries as a result of the accident under Insurance Law § 5102(d), including:

permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and/or a medically determined injury or impairment of a non permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment.

According to his bill of particulars, the injuries the plaintiff allegedly sustained in the accident include, inter alia: left knee tear of medial meniscus; tear of lateral meniscus; disruption of anterior cruciate ligament (ACL) and internal derangement; left knee arthroscopic surgery with partial meniscectomy of medial and lateral meniscus; lysis of adhesions; removal of loose bodies ACL reconstruction and major synovectomy; broad-based disc herniations at C3-C4 and C4-C5 with compression and impingement upon the ventral CSF space; broad-based disc herniation at C6-C7 with compression and impingement upon the ventral CSF space and narrowing of the neural foramina bilaterally; straightening of the normal cervical lordosis; cervical radiculopathy; thoracic spine sprain/strain; broad-based disc herniation at L4-L5 with compression and impingement upon the ventral thecal sac and narrowing of the neural foramina bilaterally; lumbar radiculopathy; acute post-traumatic headaches; and sleep disturbance.

In support of their motion the defendants submit the pleadings, the plaintiff's deposition transcript, the unsigned deposition transcript of defendant Steven N. Somerville, and the affirmed reports of the defendants' medical experts, Dr. Dorothy Scarpinato and Dr. Jonathan S. Luchs. Dr. Scarpinato, a board-certified orthopedic surgeon, examined the plaintiff on September 5, 2019. She reviewed the plaintiff's medical records and reports relating to the injuries he allegedly sustained in the accident, but not the radiographic images. With the use of a goniometer, comparing normal ranges of motion to the A.M.A. "Guides to the Evaluation of Permanent Impairment", fifth edition, Dr. Scarpinato conducted objective range of motion testing of the plaintiff's thoracic and lumbar spine, as well as his left knee. All areas examined were found to be within normal range of motion limitations, and other objective testing was also found to be normal. The report notes that the plaintiff received massage and physical therapy, acupuncture and chiropractic treatment after the accident, which he was no longer receiving at the time of the examination. Dr. Scarpinato also noted that the plaintiff had received an injection to his back (a lumbar facet joint injection and epidurography); that an electromyography and nerve conduction velocity (EMG/NCV) study and MRIs were done; and

that the plaintiff had undergone left knee surgery. In her report, Dr. Scarpinato does not provide the results of the EMG/NCV testing, although she reviewed the reports of Dr. Lee, who performed the testing on May 21, 2018. Dr. Scarpinato opined that her examination of the plaintiff revealed normal findings, with subjective complaints of back and left knee tenderness. She concluded that based on her review of the plaintiff's medical records, the history given by the plaintiff, and the objective medical findings noted during the examination, her final impression was resolved cervical spine strain, resolved thoracic spine strain, resolved lumbar spine strain and healed left knee surgery. Dr. Scarpinato's initial report did not discuss whether the injuries were causally related to the motor vehicle accident.

On April 28, 2020, Dr. Scarpinato authored an addendum to the independent medical examination she performed seven months earlier, which stated that she reviewed the report of Dr. Luchs dated December 30, 2019 concerning the MRIs of plaintiff's cervical spine and left knee, as well as the EBT transcripts of August 5, 2019 and November 14, 2019. After reviewing the records, Dr. Scarpinato opined that the knee surgery was not causally related to the accident, as the MRI findings of the left knee revealed degenerative pathology that pre-date the plaintiff's accident. The addendum was inadvertently omitted from the defendants' initial submissions, and was provided to the Court and the parties after oral argument without objection.

The defendants also submit the report of Dr. Luchs, a board-certified radiologist, who conducted a review of the MRI films performed at New York Medical & Diagnostic Care of the plaintiff's cervical spine on May 15, 2018, and the plaintiff's left knee on May 1, 2018. Dr. Luchs opined that the cervical spine film revealed early degenerative disc disease and early degenerative changes of the uncovertebral joints. He opined that he disagreed with the primary findings in the initial report of disc herniations at C3-C4, C4-C5 and C6-C7 with compression and impingement and narrowing, and concluded that the injuries were not traumatic and not causally related to the accident. As to the MRI of the plaintiff's left knee, Dr. Luchs also disagreed with the initial findings of a full thickness tear of the proximal fibers of the anterior cruciate ligament; a tear of the posterior horn of the medial meniscus; and chondral injury of the patella and trochlea. Dr. Luchs concurred with the initial finding of joint fluid and popliteal cyst and scarring within the Hoffa's fat pad. His impression was that there was a grade-1 degenerative signal within the medial meniscus and osteoarthropathy of the knee, which was not contained within the initial report. Dr. Luchs concluded that these findings are chronic and predate the plaintiff's injury, and were not caused by the accident.

In opposition, the plaintiff submits uncertified and unsworn records and reports of Long Island Jewish Medical Center/Northwell Health of April 23, 2018; HKP Physical Therapy, P.C initial evaluation dated April 25, 2018; the records from New York Medical & Diagnostic Care, P.C., where the MRI studies were performed, which include the MRI report of the left knee, performed on May 1, 2018, finding a full-thickness tear of the proximal fibers of the anterior cruciate ligament as well as a tear of the posterior horn of the medial meniscus, the plaintiff's

cervical spine performed on May 15, 2018 finding broad based central disc herniations at C3-C4, C4-C5 and C6-C7 with compression and impingement on the ventral CSF space, and the lumbar spine performed on May 23, 2018, finding L4-L5 herniation with compression and impingement on the ventral thecal sac and narrowing of the neural foramina bilaterally; Dr. Ajoy K. Sinha's operative report of May 24, 2018, relating to the left knee arthroscopy; and the lumbar facet joint injection and epidurography report of Dr. Conrad F. Cean dated August 8, 2018.

The plaintiff also submits the affirmed report of Dr. Sinha dated May 4, 2018, who reviewed the MRI report of the left knee and conducted an orthopedic evaluation of the plaintiff's left knee using objective testing. Dr. Sinha's diagnosis was left knee medial meniscus tear, complete ACL tear, and chondromalacia of the patella. Dr. Sinha recommended arthroscopic surgery in light of the clinical findings, positive mechanical symptoms, longevity of complaints, and the MRI report.

The plaintiff submits the affirmed orthopedic report relating to Dr. Howard Baum's examination of the plaintiff, which was conducted on July 22, 2020, along with the records Dr. Baum reviewed. Dr. Baum reviewed the MRI films of the plaintiff's left knee and cervical and lumbar spine and concurred with the findings contained in the reports. He also conducted an examination of the plaintiff with the use of a goniometer and found limited ranges of motion to his cervical and lumbar spine and left knee, however Dr. Baum did not state any authoritative guideline for normal ranges of motion.

The plaintiff's affidavit is also submitted, and the plaintiff avers that at the time of the accident he was employed by the New York City Department of Sanitation and was a Fireguard for Allied Universal. He stated that based on the injuries he sustained in the accident he was out of work and unable to perform his normal daily activities and duties for seven to eight months. The plaintiff further asserts that as a result of the accident he has difficulty or can no longer perform certain activities, including standing or sitting for long periods of time, taking long drives, doing certain exercises at the gym, lifting more than 20 pounds, and performing household chores such as washing dishes and cooking.

The defendants argue, inter alia, that the plaintiff's injuries, particularly to his left knee were pre-existing, and were not causally related to the accident. The defendants further argue that the injuries were not traumatic, and were chronic and degenerative in nature. The defendants also contend that in opposing the motion, the plaintiff relies on unsworn and inadmissible medical records and reports; that there is a two-year gap in treatment; and that Dr. Baum's findings should not be considered because in his report he does not state any authoritative guideline for normal ranges of motion. The defendants assert that the plaintiff is precluded from introducing any evidence regarding injury to his left knee based on a court order, dated July 28, 2020, directing the plaintiff to provide the defendants with certain authorizations concerning medical treatment relating to a previous knee injury, and that failure to do so would

result in preclusion. The defendants assert that the plaintiff did not comply with the order, which was self-executing, and that the plaintiff is barred from presenting any medical evidence concerning the left knee injury.

The plaintiff argues that he has sustained a serious injury under Insurance Law § 5102(d) based on the medical records and reports, MRIs, the examinations of Drs. Sinha and Baum and the operative report concerning the arthroscopic surgery of the plaintiff's left knee. He further argues that pursuant to *Ayzen v Melendez*, 299 AD2d 381 (2d Dept 2002), he is permitted to rely on the unsworn and uncertified medical records and reports submitted in opposition to the defendants' motion because the defendants' medical expert, Dr. Scarpinato, referred to them in her report, and relied on the records in reaching her diagnosis. Based on Dr. Sinha's review of the MRI, his examination of the plaintiff, the failure of conservative treatment in alleviating the plaintiff's symptoms, and the arthroscopic surgery, the plaintiff contends that the plaintiff's left knee injury was not pre-existing, and was caused by the accident. The plaintiff also contends that the plaintiff's lumbar injuries are uncontested by the defendants, and that there are no film reviews of the lumbar spine attached to the defendants' submissions suggesting that the injuries are either pre-existing or degenerative.

A motion for summary judgment is granted in favor of the moving party where there are no material issues of fact, and as a result, the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). As the proponent of the summary judgment motion, the defendants have the initial burden of establishing that the plaintiff did not sustain a serious injury under the categories of injury claimed in his bill of particulars. *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002). A defendant can satisfy the initial burden by relying on statements of defendants' examining physician, or plaintiff's sworn testimony, or by the affirmed reports of plaintiff's own examining physicians. *See Pagano v Kingsbury*, 182 AD2d 268 (2d Dept 1992). The defendants' medical expert must specify the objective tests upon which the medical opinions are based, and when rendering an opinion as to the range of motion measurement, must compare the range of motion findings to those that are considered to be normal for the particular body part. *See Browdame v Candura*, 25 AD3d 747 (2d Dept 2006). Once the defendants have made a *prima facie* showing that the plaintiff did not sustain a serious injury, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating that a triable issue of fact exists that the plaintiff sustained a serious injury. *See Gaddy v Eycler*, 79 NY2d 955 (1992).

The defendants' submissions demonstrate their *prima facie* entitlement to summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eycler*, 79 NY2d 955; *Fest v Agnew*, 68 AD3d 1051 (2d Dept 2009). The defendants have submitted competent medical evidence, including the affirmed report of their examining medical experts, establishing that the plaintiff's alleged injuries do not constitute a

serious injury under the permanent loss of use, permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102(d). *See Hayes v Vasilios*, 96 AD3d 1010 (2d Dept 2012); *Staff v Yshua*, 59 AD3d 614 (2d Dept 2009).

In opposition, the plaintiff has raised a triable issue of fact that he sustained a serious injury under Insurance Law § 5102(d). Initially, it should be noted that based on the Court's review of the submissions and the New York State Court Electronic Filings (NYSCEF), the defendants' contention that the plaintiff is precluded from presenting evidence concerning the left knee injury based on a violation of a discovery order dated July 28, 2020, is without merit. At oral argument plaintiff's counsel represented that all discovery demanded in the court order concerning the left knee had been disclosed to the defendants. NYSCEF filings show that on March 20, 2020, the plaintiff served a discovery response to the defendants' post-EBT demands, including a HIPAA authorization for treatment records of Jamaica Hospital relating to the previous knee injury (*see* NYSCEF Doc. No. 133). Further, the defendants have only submitted the order and no other correspondence, communication or documentation to substantiate that the plaintiff did not comply with the court order.

Moreover, contrary to the defendants' contentions, the plaintiff's reliance on the unsworn and uncertified medical records and MRI and operative reports relating to his injuries was proper since the defendants' examining doctor, Dr. Scarpinato, referred to the records in her affirmed report. *See Zarate v McDonald*, 31 AD3d 632 (2d Dept 2006); *Ayzen v Melendez*, 299 AD2d 381 (2d Dept 2002). Through the affirmed medical report of Dr. Sinha of May 4, 2018, which was performed shortly after the accident, the plaintiff has raised a triable issue of fact as to whether the left knee injury was causally related to the accident. In his report, Dr. Sinha references the accident, and states that the plaintiff struck his knee on the dashboard, and subsequently attended physical therapy three times a week and was taking anti-inflammatories, but continued to have intermittent knee pain, stiffness and muscle weakness. Dr. Sinha notes that the plaintiff was asymptomatic prior to the accident. He reviewed the MRI report of the left knee performed on May 1, 2018 and conducted objective testing, including the McMurry, Patellofemoral Crepitus and Grind tests, which were positive. He noted that locking, joint effusion and crepitus was present. Dr. Sinha concluded that there was a causal relationship between the accident and the left knee injuries based on his review of the MRI report and examination, and he recommended arthroscopy because conservative treatments had failed. According to the operative report, Dr. Sinha performed the surgery on May 24, 2018, which included arthroscopic ACL reconstruction.

However, Dr. Baum's report concerning his range of motion evaluation of the plaintiff's cervical and lumbar spine and left knee examination of the plaintiff lacked objectivity and was speculative, as he failed to identify what authoritative guidelines he used to determine what the normal measurement is. *See Hoe Suk Nam v Schossig*, 2015 NY Slip Op 31721(U) (Sup Ct,

Queens County 2015); *Young v Durso*, 2012 NY Slip Op 31880(U) (Sup Ct, Nassau County 2012); *Henry v Nidhi*, 2013 NY Slip Op 31603(U) (Sup Ct, NY County 2013). The mere existence of a disc bulge or herniation or a meniscus tear of the knee is not evidence of a serious injury in the absence of objective evidence of the extent of the physical limitations resulting from the injury and its duration. *See McLoud v Reyes*, 82 AD3d 848 (2d Dept 2011).

Nonetheless, the defendants' radiology expert, Dr. Luchs, did not review the MRI report or the films of the plaintiff's lumbar spine, and failed to dispute the findings of L4-L5 disc herniation or render an opinion as to causation of the lumbar spine injuries. Moreover, Dr. Scarpinato reviewed the lumbar MRI report, and the report of the lumbar facet joint injection and epidurography report of Dr. Cean, and failed to opine as to causation concerning the lumbar injuries in her initial report of September 5, 2019, and in the addendum of April 28, 2020. As such, those injuries are deemed uncontested by the defendants as to whether the plaintiff sustained a serious injury.

While the plaintiff's contrary evidence was "hardly powerful," it was sufficient to raise an issue of fact whether he sustained a serious injury under the permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system categories of Insurance Law § 5102(d). *See Perl v Meher*, 18 NY3d 208, 219 (2011). Therefore, based on the foregoing, the motion of defendants Harris is denied.

The remaining contentions are without merit.

Accordingly, it is hereby

**ORDERED**, that the summary judgment motions of defendants Lapierre and Somerville as to liability (Motion 01 and Motion 02) are granted in their entirety; and it is further

**ORDERED**, that the summary judgment motion of defendants Harris as to serious injury (Motions 04) is denied in its entirety.

**ORDERED**, that the summary judgment motion of defendants Lapierre as to serious injury (Motion 05) is denied as moot in light of the Court's determination on their motion on liability.

This constitutes the decision and order of the Court.

Dated: May 3, 2021

  
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HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.