

**Torosina v Guzman**

2023 NY Slip Op 32385(U)

July 14, 2023

Supreme Court, New York County

Docket Number: Index No. 160849/2018

Judge: James G. Clynes

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

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ROBERT D. TOROSINA,
Plaintiff,

- v -

ROBERT J. GUZMAN,
Defendant.

INDEX NO. 160849/2018

MOTION DATE 04/07/2022,
04/06/2022,
04/08/2022

MOTION SEQ. NO. 002 003 004

DECISION + ORDER ON MOTION

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ROBERT GUZMAN
Third-Party Plaintiff,

Third-Party
Index No. 595485/2019

-against-

VIRGILIO H. MORAN and MERCEDES MORAN,
Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 58

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40, 41, 59, 60, 63

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 52, 53, 54, 55, 56, 57, 61, 62

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents and following oral argument, the motion by Defendant/Third-Party Plaintiff Robert Guzman (Guzman) for summary judgment in his favor and dismissal of Plaintiff's Complaint against him on the grounds that Plaintiff's alleged injuries fail to satisfy the serious injury threshold of Insurance Law 5102 (d) (Motion Sequence #2); and the motions by Third-Party Defendants Virgilio Moran and Mercedes Moran for summary judgment and dismissal of the Third-Party Complaint against them based upon Plaintiff's failure to satisfy

the serious injury threshold requirement of Insurance Law 5102 (d) (Motion Sequence #3) and on the basis that Third-Party Defendants did not breach any duty owed to the Plaintiff and therefore did not proximately cause the accident from which Plaintiff's alleged injuries arose (Motion Sequence #4) are consolidated for decision and decided as follows:

Plaintiff seeks recovery for personal injuries allegedly sustained as a result of a March 19, 2016 motor vehicle accident between a vehicle owned and operated by Third-Party Defendants Virgilio Moran and Mercedes Moran, in which Plaintiff and non-party Cindy Zambrano were passengers, and the vehicle owned and operated by Defendant/Third-Party Robert Guzman (NYSCEF Doc No. 1, complaint). Plaintiff submitted written opposition to the serious injury motions (Motion Sequence #2 and #3).<sup>1</sup> Plaintiff's written opposition papers do not address the Third-Party Defendants' motion for summary judgment and dismissal of the Third-Party Complaint against them under Motion Sequence #4.

### **Background**

On March 19, 2016, between 4:00 am to 5:00 am, Mercedes Moran was driving a white Volkswagen Jetta owned by her father, Virgilio H. Moran (NYSCEF Doc No. 17 at 9-12, Mercedes Moran deposition). Mercedes, Plaintiff and plaintiff's friend, non-party Cindy Zambrano, were in the car after leaving a bar, but Mercedes testifies that she did not drink any alcohol as she was the designated driver (NYSCEF Doc No. 17 at 27-28). Mercedes was driving in the middle lane on Harlem River Drive and testifies that she saw a vehicle in her rear-view mirror (NYSCEF Doc No. 17 at 27-28). Mercedes felt a hard hit to the back of her car which moved her into the right lane (NYSCEF Doc No. 17 at 15). Mercedes testifies that defendant allegedly began to verbally insult her for the crash which escalated into a fight between defendant and plaintiff (NYSCEF Doc No. 17 at 15-19).

Plaintiff testifies that he was sitting in the passenger seat when the accident occurred (NYSCEF Doc No. 25 at 12, 15, plaintiff Torosina deposition). He states that he had taken off his seatbelt to go to sleep but that it was on at the time of impact (NYSCEF Doc No. 25 at 15). Plaintiff testifies that his knees hit the dashboard and his head hit the front of the car near the side of the steering wheel (NYSCEF Doc No. 25 at 16). Plaintiff testifies that defendant walked over, pulled

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<sup>1</sup> Plaintiff opposes motion sequences 002 and 003, although plaintiff mislabels his opposition for motion sequence 002 as motion sequence 004. There is no opposition in the record for third-party defendants' motion for summary judgment (mot. seq. 004) of the third-party complaint.

him out of the car, and began hitting him (NYSCEF Doc No. 25 at 16-17). Following the fight, plaintiff received treatment at the hospital before being discharged into custody (NYSCEF Doc No. 25 at 19).

Defendant testifies that he was driving about 25 miles an hour around 5:00 am on March 19, 2016 (NYSCEF Doc No. 57 at 19-20, defendant Guzman deposition). Defendant says that as he approached the top of the hill, he saw a car stopped on the top of the hill, but he did not have enough time to change lanes or stop before he hit the car (NYSCEF Doc No. 57 at 42). Defendant says there were two men and two women in the car, and a man was driving before one of the women switched with him into the driver's seat after the accident (NYSCEF Doc No. 57 at 24). Defendant testifies he stayed inside of his vehicle after the accident and the four people got out of the car he hit, broke the glass of his driver's side door, pulled him out of the car, and began beating him (NYSCEF Doc No. 57 at 25). Defendant called the police as the four people were pulling him out of the car and beating him (NYSCEF Doc No. 57 at 40).

Plaintiff alleges that because of the vehicle collision, he sustained shallow central disc herniations, bulging discs, knee sprain/strain, and a tear of his medial meniscuses (NYSCEF Doc No. 24 ¶ 10, verified bill of particulars; NYSCEF Doc No. 49 at 6). Plaintiff states he sought treatment from a chiropractor twice a week and received an injection in his back (NYSCEF Doc No. 40 at 26-28, 87). Plaintiff testifies that he stopped going to the chiropractor after about a year in 2017 because his insurance stopped covering the treatment (NYSCEF Doc No. 40 at 88). Plaintiff was advised to talk to his insurance carrier about continuing his care, but plaintiff did not follow up with the insurance carrier and stopped treatment (NYSCEF Doc No. 40 at 89). After his coverage ended, plaintiff did not seek any further medical treatment (NYSCEF Doc No. 40 at 92, 96). The evidence in the record indicates that plaintiff did not seek additional medical treatment until his evaluation with Dr. Dassa in 2022 (NYSCEF Doc No. 60).

When asked if there are activities that plaintiff was unable to participate in following the accident, plaintiff testifies that he is no longer able to play soccer (NYSCEF Doc No. 40 at 100). However, plaintiff also testifies that he broke his foot playing soccer in 2020 after the accident occurred in 2016 (NYSCEF Doc No. 40 at 98). Plaintiff testified that he returned to work three to four weeks after the car accident, but that his doctor had not told him that he could not return to work (NYSCEF Doc No. 40 at 26).

In bringing this action, plaintiff contends that he has sustained serious and permanent injuries in that he suffers from ongoing pain as a result of the accident.

### **Discussion**

#### ***Motion Sequence 004***

Third-party defendants Mercedes and Virgilio Moran's motion for summary judgment in their favor and against Defendant/Third-Party Plaintiff Guzman and for dismissal of the third-party complaint against them is unopposed. Defendant/Third-Party Plaintiff Guzman did not submit written opposition. The third-party complaint alleges that any damages caused to the plaintiff were "solely by reason of the active and primary carelessness and negligence of the Third-Party Defendants...in being negligent, reckless and careless in the control of their motor vehicle" (NYSCEF Doc No. 3 ¶9, third-party complaint).

There is no dispute that the vehicle occupied by Torosina and Moran was stopped when it was struck in the rear by the vehicle operated by Guzman. There is no evidence of negligence by Third-Party Defendants. If anything, the record before the court establishes prima facie negligence by Guzman for the rear-end collision. Third-Party Defendants' motion for summary judgment and dismissal of the third-party complaint against them is granted without opposition and the Third-Party Complaint is dismissed.

#### ***Motion Sequences 002 and 003***

In motion sequences 002 and 003, respectively, defendant and third-party defendants (herein referred to as "movants") move for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury. Movant bears the initial burden of establishing, through competent medical evidence, that the plaintiff did not sustain a serious injury as a result of the subject accident (*see Antepara v Garcia*, 194 AD3d 513, 513 [1<sup>st</sup> Dept 2021]; *Cohen v Bayer*, 167 AD3d 1397, 1398 [3d Dept 2018]). If this threshold burden is met, the plaintiff must come forward with objective medical evidence sufficient to raise a triable issue of fact regarding the existence of a serious injury (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350-352 [2002]; *see Cortez v Bray*, 192 AD3d 451, 451 [1<sup>st</sup> Dept 2021]).

Pursuant to Insurance Law § 5104, when a plaintiff sues for personal injuries allegedly caused by the negligent operation of a motor vehicle there is no right to recovery of non-economic loss unless a serious injury has occurred. Movants argue that plaintiff has not sustained a serious injury as defined by Insurance Law § 5102 (d). As is relevant here, under this provision,

“‘[s]erious injury’ means a personal injury which results in... *permanent* consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; 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 days during the one hundred eighty days immediately following the occurrence of the injury or impairment” (Insurance Law § 5102 [d] [emphasis added]).

The court evaluates the summary judgment motions under both the permanent and non-permanent serious injury thresholds.

### **Permanent Serious Injury**

In support of his motion, defendant files an expert report from Dr. Berman that was conducted on October 21, 2021 (NYSCEF Doc No. 49, defendant expert report). Here, Dr. Berman found the alleged cervical spine strain/sprain was resolved with no residual problems and the alleged right and left knee strain/sprains were resolved with no residual issues with bilateral knee MRIs indicating no acute injury (NYSCEF Doc No. 49 at 6). Dr. Berman reports that “[t]here were no objective findings to substantiate [plaintiff’s] subjective complaints of pain on examination. . . . The subjective complaints were not supported by the objective findings on the physical exam with no radiculopathy of the cervical and lumbar spine” (NYSCEF Doc No. 49 at 6). Furthermore, Dr. Berman states that plaintiff is able to participate in all activities of daily living (NYSCEF Doc No. 49 at 7). Defendant has *prima facie* established through competent medical evidence that plaintiff did not sustain a serious injury and shifted the burden to plaintiff (*see Antepara v Garcia*, 194 AD3d at 513; *Cohen v Bayer*, 167 AD3d at 1398).

Plaintiff’s expert, Dr. Dassa, conducted an examination on June 3, 2022, and compared plaintiff’s range of motion to normal ranges (NYSCEF Doc No. 60, plaintiff expert report). Dr. Dassa found losses in plaintiff’s range of motion in multiple areas, but most severely a 50% loss in cervical spine flexion, 73% loss in cervical spine extension, 62.5% loss in cervical spine lateral rotation, 50% loss in lumbosacral spine bending, and 21.4% loss in left knee extension as compared to normal scores (NYSCEF Doc No. 60; *see also* NYSCEF Doc No. 59 at 2-3, plaintiff Torosina affirmation). Dr. Dassa found that plaintiff suffers from a restricted range of motion in his back, neck, and both knees (NYSCEF Doc No. 60 at 5). In Dr. Dassa’s opinion, plaintiff “sustained a permanent consequential loss of function in both knees as well as neck and back” (NYSCEF Doc No. 60 at 5). Dr. Dassa relied on plaintiff’s subjective reports of his injury, previous medical

reports from 2016-2018 (none of which are in evidence), and his own examination of plaintiff (NYSCEF Doc. No. 60).

To support a claim for serious injury under No-Fault Law, “an expert may designate a numeric percentage of a plaintiff’s loss of range of motion or may make a qualitative assessment of plaintiff’s condition, provided that the latter evaluation has an objective basis and compares the plaintiff’s limitations to the normal use of the affected body system or function” (*Shinn v Catanzaro*, 1AD3d 195, 198[1<sup>st</sup> Dept 2003]). Furthermore, “an expert’s designation of a numeric percentage of a plaintiff’s loss of range of motion can be used to substantiate a claim of serious injury” (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d at 350). Dr. Dassa concludes that plaintiff has sustained “a permanent consequential limitation of use of a body organ or member” as required by Insurance Law § 5102 (d) through demonstrating the loss of range of motion plaintiff has suffered in comparison to a normal range. Plaintiff has met his initial burden in raising triable issues of fact through Dr. Dassa’s expert report.

Movants further argue that the matter is ripe for summary judgment because there is a fatal gap in plaintiff’s medical treatment (NYSCEF Doc No. 39). “While a cessation of treatment is not dispositive—the law surely does not require a record of needless treatment in order to survive summary judgment—a plaintiff who terminates therapeutic measures following the accident, while claiming ‘serious injury,’ must offer some reasonable explanation for having done so” (*Pommells v Perez*, 4 NY3d 566, 574 [2005]). Plaintiff testifies that he stopped treatment after about a year following the accident, but he explains that his cessation was due to his insurance denying coverage (NYSCEF Doc No. 40 at 88). “A plaintiff need not incur the additional expense of consultation, treatment or therapy, merely to establish the seriousness or causal relation of his injury” (*Pommells v Perez*, 4 NY3d at 577 ).

Movants’ argument relates to the credibility of plaintiff’s contention, which is not an appropriate basis for granting summary judgment. “Determination[s] based upon credibility of parties is to be resolved at trial, not on motion for summary judgment” (*DeSario v SL Green Mgt. LLC*, 105 AD3d 421, 422 [1<sup>st</sup> Dept 2013]). Furthermore, movants’ argue against the credibility of plaintiff’s expert; however, “the subject of directly conflicting expert testimony. . . . [is] not an appropriate issue for resolution on summary judgment” (*Severino v Weller*, 148 AD3d 272, 275 [1<sup>st</sup> Dept 2017]). Thus, the court denies summary judgment on the issue of whether plaintiff successfully alleges permanent serious injuries as defined by Insurance Law § 5102 (d).

**Non-Permanent Serious Injury (90/180 days)**

Movants further argue that plaintiff has not established that he was prevented from performing “substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment” (*Id.*). Plaintiff's complaint only vaguely alleges he “sustained serious injuries as defined by the Insurance Law of the State of New York” (NYSCEF Doc No. 1 ¶ 16). Plaintiff's own deposition testimony states that he returned to work within four weeks although he claims he was unable to play soccer for at least some period of time (NYSCEF Doc No. 40 at 26, 100). Plaintiff's opposition papers make no mention of non-permanent serious injuries nor does he argue anything related to being prevented from performing substantially all of material activities for at least ninety days (*see* NYSCEF Doc No. 61). The court finds it clear that plaintiff is not attempting to claim non-permanent injuries. Furthermore, courts have held that by remaining silent within opposition papers, the nonmovant concedes (*Steffan v Wilensky*, 150 AD3d 419, 420 [1<sup>st</sup> Dept 2017]).

The court grants summary judgment dismissing plaintiff's claims to the extent that they allege non-permanent injuries (90/180 days category) as defined by Insurance Law § 5102 (d).

Accordingly, it is hereby

ORDERED that motion of Third-Party Defendants Virgilio H. Moran and Mercedes Moran (Motion Sequence #4) for summary judgment and dismissal of the third-party complaint against them is granted without opposition and the Third-Party Complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly in favor of said Third-Party Defendants; and it is further

ORDERED that the motion by Third-Party Defendants (Motion Sequence #3) for summary judgment and dismissal of the Third-Party Complaint on the grounds that Plaintiff alleged injuries fail to satisfy the serious injury threshold as defined by Insurance Law § 5102 (d) is denied as moot because the Third-Party Complaint has been dismissed; and it is further

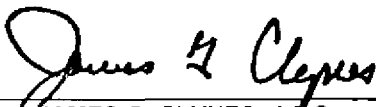
ORDERED that the motion by Defendant Guzman (Motion Sequence #2) for summary judgment and dismissal of the Complaint against him on the grounds that Plaintiff's alleged injuries fail to satisfy the serious injury threshold as defined by Insurance Law § 5102 (d) is granted with respect to Plaintiff's claims relating to non-permanent injuries under the 90/180 day category and is otherwise denied; and it is further

ORDERED that counsel for movants shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk’s Office, who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website).

This constitutes the Decision and Order of the Court.

7/14/2023  
DATE

  
JAMES G. CLYNES, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: