

Jimenez v City of Yonkers
2024 NY Slip Op 35582(U)
April 4, 2024
Supreme Court, Westchester County
Docket Number: Index No. 58930/2022
Judge: Nancy Quinn Koba
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
CHRISTIAN JIMENEZ and DAVID SANTOS,

Plaintiff,

DECISION AND ORDER

-against -

Index No. 58930/2022

THE CITY OF YONKERS, YONKERS FIRE
DEPARTMENT and TIMOTHY OCONNELL,

Mot. Seq. No. 1

Defendants.

-----X
QUINN KOBA, J.

By Notice of Motion (the "Motion," defendants, The City of Yonkers (the "City") and Timothy O'Connell ("O'Connell") seek an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint and granting such other and further relief as the Court may deem just and proper. Plaintiff did not timely oppose the Motion. In the absence of a reasonable excuse for the default in timely filing the opposition papers, the court declines to consider the same (see *Nakollofski v Kingsway Properties, LLC*, 157 AD3d 960 [2d Dept 2018]; *HSBC Bank USA, National Association v Krebs*, 219 AD3d 1417 [2d Dept 2023]).

The Court has reviewed the following documents in determining the Motion:

PAPER

NYSECF DOC. NO.

Notice of Motion
Affirmation in Support
Exhibits A-O
Statement of Material Facts
Memorandum of Law In Support
Certificate of Compliance

32-51

NYSCEF file

Upon review of the foregoing, the Court determines the Motion as follows:

FACTUAL AND PROCEDURAL BACKGROUND

On or about April 6, 2022, plaintiff, Christian Jimenez ("Jimenez") commenced this action to recover money damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on March 5, 2021 by filing a summons and a verified complaint asserting a

negligence cause of action against the City and O'Connell (Ex. D. [NYSCEF Doc. No. 1]). Issue was joined by the service of an answer on behalf of the City and O'Connell on or about May 11, 2022 (Ex. E [NYSCEF Doc. No. 8]). On May 17, 2022, plaintiff filed a supplemental summons and amended complaint joining as a plaintiff David Santos ("Santos") (NYSCEF Doc. No. 10). On June 1, 2022, the City and O'Connell filed an answer to the amended complaint in which they admitted the City owned a 2010 CV Fire Truck (the "Truck") (Ex. G at ¶ 7 [NYSCEF Doc. No. 16]).

It is undisputed that the accident occurred on March 5, 2021 at approximately 7:00 p.m. on Linden Street in Yonkers, New York (see SOMF at ¶ 3).¹ Jimenez was operating a 2011 328i BMW owned by his sister, and Santos, his cousin, was seated in the front passenger seat. Jimenez intended to pick up their relative, Kenneth, at 121 Linden St., which is located on the right side of this one way street with parking on both sides. Jimenez double parked his vehicle in front of 121 Linden St., leaving a space of approximately seven feet between his vehicle and the left side of the street so vehicles could pass his vehicle (*Id.* at ¶¶ 4-10, 13-15).

During his 50-h hearing conducted on July 20, 2021, Jimenez testified the road was flat. While waiting for Kenneth, his vehicle was struck by the Truck as the driver tried to pass him. The Truck hit the driver's side of his vehicle which was then pushed into the vehicle parked to his right. He said the Truck dragged his vehicle approximately 35 feet. It was a hard impact. He observed the Truck's lights operating but denied the siren was on. He saw the Truck approaching approximately one to two seconds before impact and denied having sufficient time to move after putting his car in drive. He testified he screamed and honked to no avail (Ex. B at pp. 16-24 [NYSCEF Doc. No. 38]). The Truck eventually stopped moving. He spoke to the firemen who said they were responding to an emergency (*Id.* at p. 25).

Jimenez stated his vehicle had damage to the front fender, door, back panel and passenger side. He returned home after the accident (*Id.* at p. 26). He testified he first sought medical treatment one or two days later. The following day he awoke with headaches, back, shoulder and knee pain. Upon impact, he said he hit his head, left shoulder and left knee. He started physical therapy shortly after the accident and was continuing in July 2021. He underwent MRIs of his head, shoulder, back and knee (*Id.* at pp. 28-33). He said there was little improvement in his condition following the accident. He obtained his high school diploma in June 2021 and was working for an ice cream store at the time of the accident earning \$13.50 per hour; he had not returned to work as of the date of the hearing because he could not do heavy lifting (*Id.*

¹SOMF refers to the defendants' Statement of Material Facts as to Which There Is No Genuine Issue to be Tried submitted in support of the defendants' motion for summary judgment (NYSCEF Doc. No. 33).

at pp. 5, 8-9). He denied any prior injuries or accidents (*Id.* at p. 10).

Jimenez' deposition testimony on February 17, 2023 regarding the accident was consistent with his prior testimony at the 50-h hearing (Ex. I at pp. 17-33 [NYSCEF Doc. No. 45]). Jimenez, who was twenty years old, testified he started attending Westchester Community College but dropped out in November 2022 because of pain and inability to focus (*Id.* at p. 11). He was not working. He worked at Burlington Coat Factory for two months in or about May 2022 as a cashier/ layaway clerk. He stopped working because of pain (*Id.* at pp. 14-15). He was not looking for employment at the time of his deposition.

Jimenez testified regarding his continuing injuries and treatment following the accident and his 50-h hearing. He went for physical therapy three times per week until approximately February 2022 (Ex. I at pp. 34-35, 38-42). His current complaints included pain in his back, neck, left knee and left shoulder. He continues to wear a back brace almost daily. The doctor recommended he undergo lumbar steroid injections, which he refused. He last received medical treatment in February 2022 (*Id.* at pp. 45-49). Prior to the accident, he stated he played baseball every day and he did not really play baseball or other sports as of the date of his deposition due to the pain. He has difficulty walking, sitting, running and showering. He said he cannot lift more than five pounds with his left arm (*Id.* at pp. 51-54).

Santos, who was born in 2003, testified at his 50-h hearing that he graduated from high school in June 2021 (Ex. C at pp. 4-5 [NYSCEF Doc. No. 39]). He was not employed on the date of the accident. He denied any prior accidents or injuries (*Id.* at pp. 6-7). His testimony regarding the accident was similar to that of Jimenez (*Id.* at pp. 9-16).

He stated he hit the right side of his head at impact (*Id.* at pp. 16-17). He sought medical treatment the following day. He started physical therapy days after the accident for his back and shoulders and treatment was continuing in July 2021 (*Id.* at pp. 18-20).

Santos' deposition testimony on February 17, 2023 regarding the accident was consistent with his prior testimony at the 50-h hearing (Ex. J at pp. 12-21[NYSCEF Doc. No. 46]). Santos was currently employed part time at Burlington Coat Factory as a sales associate in the shoe department; he had been so employed for approximately eighteen months. His job requires him to bend down a lot and to move around (*Id.* at pp. 10-12). He testified regarding his continued injuries and complaints regarding his head, neck, back and both shoulders. He had physical therapy three times per week until 2022. He understood the MRI revealed three fractured bones in his lower back. He wore a back brace which he continued to wear intermittently in 2023. He continued to feel pain in his lower back, mid back and neck. As a result of his injuries, he stated he cannot stand for long periods of time (*Id.* at pp. 22-37).

At the time of the accident, O'Connell was a firefighter with the Yorkers Fire Department and was driving the Truck. Part of his duties included responding to medical calls (SOMF at ¶¶ 19-24; Ex. K at pp. 12-13[NYSCEF Doc. No. 45]). Immediately prior to the impact, O'Connell testified he was driving to an emergency - a choking baby- with the Truck's lights and sirens on (*Id.* at ¶ 24; Ex. K at pp. 16, 19, 25). While on Linden St., O'Connell testified he stopped the Truck several feet behind the plaintiffs' vehicle for approximately one minute while the Truck's horn was "constantly engaged." O'Connell testified the plaintiff driver did not move the vehicle, so he attempted to pass the vehicle. The Truck came into contact with the plaintiffs' vehicle at that time (SOMF at ¶¶ 25-31; Ex. J. at pp. 26-33, 39-44).

Defendants seek summary judgment dismissing the complaint upon the grounds that they do not have any liability herein in that the "emergency doctrine" applies to O'Connell's actions and the plaintiffs have not sustained a serious injury as defined by Article 51 of the Insurance Law (*Bisesi Aff.* at ¶ 2).²

ANALYSIS

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, *supra*). The court views the evidence in the light most favorable to the non-movant (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]).

Emergency Doctrine Defense

The common-law emergency doctrine "recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context (*Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327), provided the actor has not created the emergency" (*Caristo v Sanzone*, 96 NY2d 172, 174 [2001]). "The doctrine recognizes that,

²Bisesi Aff. refers to the Affirmation of Alexandra R. Bisesi in Support of the Motion for Summary Judgment, dated October 23, 2023 (NYSCEF Doc. No. 34).

faced with an emergency, even a reasonable person might choose a course of action which, in hindsight, proves to have been mistaken or ill-advised" (*Bello v Transit Authority of N.Y. City*, 12 AD3d 58, 60 [2d Dept 2004]). However, "the emergency doctrine does not apply where the actor 'encounters a known, foreseeable hazard which he [or she] in fact observed enter his [or her] path prior to the accident or where he or she fails to be aware of the potential hazards presented by traffic conditions . . . Both the existence of an emergency and the reasonableness of a party's response to it generally present issues of fact" (*Shin v New York City Transit Authority*, 210 AD3d 717, 717-18 [2d Dept 2022][internal quotation marks and citations omitted]).

Here, viewing the evidence in the light most favorable to the plaintiffs, defendants failed to establish as a matter of law that they were confronted with a "sudden and unexpected hazard" and acted reasonably under the circumstances. The parties also differ as to whether the Truck stopped before contacting plaintiffs' vehicle, giving O'Connell time to deliberate and consider alternate options, and whether the siren was on immediately prior to contact. As defendants failed to meet their prima facie burden, this branch of the Motion is denied.

Serious Injury Defense

"Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for noneconomic loss, except in the case of a serious injury, or for basic economic loss" (Insurance Law § 5104[a], see *Aetna Health Plans v Hanover Ins. Co.*, 27 NY3d 577, 582 [2016]). "'Serious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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; 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]; see *Perl v Meher*, 18 NY3d 208, 215 [2011]).

In these threshold injury cases, when defendants cannot establish prima facie that the car accident did not cause

plaintiffs' injuries, the burden does not shift to plaintiffs to raise an issue of fact regarding causation or to explain a gap in treatment (see *Pommells v Perez*, 4 NY3d 566, 573 [2005]; *Reyes v Kashem*, 187 AD3d 1080, 1081 [2d Dept 2020]; *Torres v Rettaliata*, 171 AD3d 829, 830 [2d Dept 2019]).

Jimenez' Alleged Injuries

Pursuant to the verified bill of particulars, Jimenez alleges he sustained the following injuries: bulging disc at L5-S1 flattening thecal sac; internal derangement with Bursitis of the left knee; cervical radiculopathy; cervical sprain/strain; lumbosacral radiculopathy; lumbar sprain/strain; left knee sprain/strain; restriction of motion; headaches; depression; anxiety; fear and emotional upset and shock which are claimed to be permanent. Jimenez alleges he sustained a serious injury as defined in Article 51 of the insurance law of the state of New York in that he sustained a permanent injury, a disabling injury for a period in excess of 90 out of the first 180 days following the accident, a significant limitation of use of a bodily function or system, a significant disfigurement, and a permanent consequential limitation of use of a bodily organ and/or member (Ex. H at ¶ 11 [NYSCEF Doc. No. 44]). He alleges being confined to bed for one week after the accident and to the home for approximately two weeks (*Id.* at ¶ 12).

Defendants submitted the affirmed medical report of Richard N. Weinstein, M.D. dated May 7, 2023 in support of the motion (Ex. N [NYSCEF Doc. No. 50]). The report indicates Dr. Weinstein is a Board Certified Orthopedic Surgeon licensed to practice medicine in the state of New York. He conducted an independent orthopedic examination of Jimenez on May 2, 2023. Dr Weinstein noted Jimenez went to physical therapy, chiropractic and acupuncture treatment three times a week initially but is no longer receiving said treatment. He complained of pain in his lower back and left knee and denied any prior injuries or problems to said areas (*Id.* at p. 1). Jimenez advised he was not working and missed a few weeks of school after the accident (*Id.* at p. 2).

Dr. Weinstein's examination showed some decrease in flexion (40 degrees versus normal 45 degrees), right and left rotation (60 degrees versus normal 80 degree), right lateral bending (40 degrees versus normal 45 degrees) and left lateral bending (40 degrees versus normal 45 degrees) of the cervical spine. There was "slight left-sided paraspinal tenderness on the left and slight trapezial tenderness on the left (*Id.*). His examination showed some decrease in flexion (70 degrees versus normal 90 degrees), extension (20 degrees versus normal 30 degrees), right and left rotation (20

degrees versus normal 30 degrees), right and left lateral rotation (20 degrees versus normal 30 degrees) of the thoracolumbar spine. There was "slight paraspinal tenderness to palpation on the right and left side." The straight leg raising test was negative and there were no sensory or motor deficits in the bilateral lower extremities (*Id.*). The left knee examination was normal. In addition to his examination, Dr. Weinstein reviewed some of plaintiff's medical records. Dr. Weinstein concludes Jimenez sustained cervical, lumbosacral, left shoulder and left knee sprains that are resolved and no further treatment is required (*Id.* at pp. 5-6).

Santos' Alleged Injuries

Pursuant to the verified bill of particulars, Santos alleges he sustained the following injuries: herniated disc at L5-S1 impinging on nerve roots; bulging discs at C3-C4, C4-C4 and C5-C6; bulging discs at T5-T6 and C[sic]6-T7; cervical radiculopathy; cervical sprain/strain; lumbosacral radiculopathy; lumbar sprain/strain; restriction of motion; headaches; depression; anxiety; fear and emotional upset and shock which are claimed to be permanent. Santos alleges he sustained a serious injury as defined in Article 51 of the insurance law of the state of New York in that he sustained a permanent injury, a disabling injury for a period in excess of 90 out of the first 180 days following the accident, a significant limitation of use of a bodily function or system, a significant disfigurement, and a permanent consequential limitation of use of a bodily organ and/or member (*Id.*). He alleges being confined to bed for one week after the accident and to the home for approximately two weeks (*Id.* at ¶ 12).

Defendants submitted the affirmed medical report of Richard N. Weinstein, M.D. dated May 3, 2023 regarding his independent orthopedic examination of Santos on May 2, 2023 (Ex. O [NYSCEF Doc. No. 51]). Dr Weinstein noted Santos went to physical therapy, chiropractic and acupuncture treatment three times a week initially but is no longer receiving said treatment. He complained of pain in his neck, upper and lower back and right and left shoulders. He denied any prior injuries or problems to said areas (*Id.* at p. 1). He continued to use a lidocaine patch on his lower back at times. He did not miss any time from work and was working part time (*Id.* at p. 2).

Dr. Weinstein's examination revealed normal range of motion in the cervical and thoracolumbar spine, negative paraspinal tenderness or spasm, negative trapezial and midline boney tenderness and no pain with motion. The straight leg raising test

was negative and there were no sensory or motor deficits in the bilateral lower extremities (*Id.*). The bilateral shoulder examination was normal. In addition to his examination, Dr. Weinstein reviewed some of Santos' medical records. Dr. Weinstein concludes Santos sustained cervical, thoracic, lumbar spine and right and left shoulder sprains that are resolved and no further treatment is required (*Id.* at pp. 5-6).

Here, defendants failed to meet their prima facie burden of showing that the plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident. They failed to submit competent medical evidence as to either plaintiff. They did not establish prima facie that Jimenez did not sustain a serious injury to his cervical and lumbar spines, left shoulder or left knee under the permanent consequential limitation of use, significant limitation of use or 90/180-day category categories of Insurance Law § 5102(d) (see *Z.H.B. v Sica*, 221 AD3d 575 [2d Dept 2023]; *Zennia v Ramsey*, 208 AD3d 735 [2d Dept 2022]). Dr. Weinstein's report lacks probative value as the objective tests utilized to measure Jimenez's cervical and lumbosacral spine, left shoulder and left knee are not identified (see *Saunders v Mian*, 176 AD3d 994 [2d Dept 2019]; *Melosevich v Harris*, 166 AD3d 581 [2d Dept 2018]; *Dinc v Shalesi*, 208 AD3d 558 [2d Dept 2022]). Moreover, he found limitations in the range of motion in Jimenez' cervical spine and thoracolumbar spine varying from 5 degrees to 20 degrees less than normal range of motion and failed to give any explanation as to how he concludes the injuries to the cervical and lumbosacral spine are fully resolved while plaintiff has said limitations and decreased range of motion (see *Z.H.B. v Sica*, 221 AD3d at 576; *5 Strong v Sigman*, 224 AD3d 932 [2d Dept 2024]). Nor did defendants establish the alleged injuries to Jimenez' cervical and lumbar regions, left shoulder and left knee were not caused by the accident (*Zennia v Ramsey*, 208 AD3d at 735; *Matveieva v Metropolitan Transportation Authority*, 212 AD3d 726 [2d Dept 2023]).

Dr. Weinstein's medical report regarding his examination of Santos similarly lacks probative value in that the objective tests used by Dr. Weinstein to measure the range of motion in Santos' cervical spine and thoracolumbar spines and shoulders are not identified in his report (see *Saunders v Mian*, 176 AD3d at 994; *Melosevich v Harris*, 166 AD3d at 581; *Dinc v Shalesi*, 208 AD3d at 558). Nor did defendants establish the alleged injuries to Santos' cervical, thoracic and lumbar regions and shoulders were not caused by the accident (*Zennia v Ramsey*, 208 AD3d at 735; *Matveieva v Metropolitan Transportation Authority*, 212 AD3d at 726).

Since the defendants failed to meet their prima facie burden to warrant summary judgment in their favor on the question of whether the plaintiffs' sustained a serious injury as a result of the accident, this branch of the motion is denied.

Accordingly, it is hereby

ORDERED that the Motion is denied; and it is further

ORDERED that the parties shall appear for a settlement conference with the Court on April 12, 2024 at 9:30 a.m. in Courtroom 1602.

The foregoing shall constitute the Decision and Order of the Court in this matter.

Dated: White Plains, New York
April 4, 2024

ENTER:



HON. NANCY QUINN KOBA, J.S.C.

TO: All Counsel VIA NYSCEF