| **Spann v Niang** |
| --- |
| 2016 NY Slip Op 30313(U) |
| February 23, 2016 |
| Supreme Court, New York County |
| Docket Number: 159833/13 |
| Judge: Arlene P. Bluth |
|  |
|  |

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: IAS PART 22**

----------x

**Tanzie Spann,**

***Plaintiff,***

**-against-**

**Amadou Niang,**

***Defendant.***

----------x

**Index No. 159833/13**
**Motion Seq 01**

**DECISION AND ORDER**

**Hon. ARLENE P. BLUTH, JSC**

Defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff has not demonstrated that his injuries meet the serious injury threshold pursuant to Insurance Law § 5102(d) is denied. Plaintiff's cross-motion for summary judgment on the issue of liability is granted.

In this action, plaintiff alleges that on April 9, 2012 he suffered injuries, inter alia, to his left knee and lumbar spine in an accident involving defendant's motor vehicle.

**Defendant's Motion for Summary Judgment**

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395 [1st Dept 1992]). Such evidence includes "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Shinn v Catanzaro*, 1 AD3d 195, 197, 767 NYS2d 88 [1st Dept 2003], quoting *Grossman v Wright*, 268 AD2d 79, 84, 707 NYS2d 233 [1st Dept 2000]). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert affidavits indicating that plaintiff's injury was

caused by a pre-existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818, 907 NYS2d 479 [1st Dept 2010], citing *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]). In order to establish prima facie entitlement to summary judgment under the 90/180 category of the statute, a defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident (*Elias v Mahlah*, 58 AD3d 434, 435, 870 NYS2d 318 [1st Dept 2009]). However, a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*id.*).

Once the defendant meets his or her initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury (*see Shinn*, 1 AD3d at 197, 767 NYS2d at 90). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351, 746 NYS2d 865 [2002]). Further, where the defendant has established a pre-existing condition, the plaintiff's expert must address causation (*see Valentin v Pomilla*, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214, 820 NYS2d 26 [1st Dept 2006]).

In support of his motion, defendant submits plaintiff's St. Luke's Emergency Department records from the day of the accident which indicate that an x-ray of plaintiff's left knee did not reveal any fractures.

Defendant also submits the affirmed reports of Dr. Tantleff, who reviewed (1) an MRI of plaintiff's left knee taken 2 weeks after the subject accident, and found evidence of bone contusions and soft tissue swelling, but no tears or fractures, and (2) a lumbar spine MRI taken 9 months after the accident, and found no evidence of any significant disc bulge, protrusion, or herniation. Dr. Tantleff also concluded that plaintiff suffered from juvenile discogenic disease and a congenital transitional lumbosacral junction which might be causing him pain.

Defendant also submits the affirmed report of Dr. Nason, who measured the ranges of motion in 3 planes of plaintiff's lumbar spine and in his left knee on July 17, 2014. Dr. Nason found normal ranges of motion in both body parts and concluded that plaintiff's alleged injuries had resolved.

Additionally, defendant submits the affirmed report of Dr. Desrouleaux, who performed a neurological exam on plaintiff on December 4, 2014. Dr. Desrouleaux stated that plaintiff had a normal neurological exam and measured normal ranges of motion in his lumbar spine.

Finally, regarding the 90/180 claim, defendant's attorney cites to plaintiff's deposition testimony that plaintiff was confined to his bed for two weeks and to his home for about a month after the subject accident. Plaintiff also testified that he had not worked since 2008 and was not working at the time of the accident.

Based on the foregoing, defendant has established a prima facie case for summary judgment that plaintiff did not suffer a serious injury, and the burden shifts to the plaintiff to raise a triable issue of fact.

In opposition, plaintiff submits the affirmation of Dr. Schwartz, plaintiff's treating

physician, who measured limited ranges of motion in plaintiff's lumbar spine and left knee on both April 20, 2012 (11 days after the accident) and most recently on March 10, 2015, ranging from 40%-72% restriction in the lumbar spine and 21% restriction in left knee flexion. Dr. Schwartz opined that plaintiff suffered a permanent partial disability in the left knee and in the lumbar spine as a result of the subject accident. Dr. Schwartz had also recommended that plaintiff cease treatment in March 2013 because plaintiff had reached maximum recovery and further treatment would not cure plaintiff's injuries.

Plaintiff also submits the affirmation of Dr. Milbauer, who reviewed the MRIs of plaintiff's left knee and lumbar spine. Dr. Milbauer concluded that plaintiff suffered multiple trabecular fractures of the left knee and suffered a bulging disc. However, Dr. Milbauer did not causally link the injuries to the subject accident or address the congenital condition that defendant's radiologist, Dr. Tantleff, noted in plaintiff's lumbar spine.

Dr. Nason and Dr. Desrouleaux state that in late 2014 plaintiff had full range of motion in his lumbar spine and left knee; Dr. Schwartz states that in March 2015 plaintiff had significant range of motion restrictions in these areas which he causally relates to the accident, and that plaintiff has sustained a partial permanent disability. Thus, it is up to the jury, not this Court, to decide which doctor(s) to believe; accordingly, defendant's motion for summary judgment on the issue of serious injury is denied.

**Plaintiff's Cross-Motion for Summary Judgment on the Issue of Liability**

In order to prevail on its motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence,

eliminating all material issues of fact *(Alvarez v Prospect Hospital,* 68 NY2d 320, 508 NYS2d 923 [1986]). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie showing (*Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872, 433 NYS2d 1015 [1980]). In opposing such a motion, a party must lay bare its evidentiary proof. Conclusory allegations are insufficient to defeat the motion; the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of New York,* 49 NY2d 557, 562, 427 NYS2d 595 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the non-moving party and must not decide credibility issues (*Dauman Displays, Inc. v Masturzo,* 168 AD2d 204, 205, 562 NYS2d 89 [1st Dept 1990], *lv. denied* 77 NY2d 939, 569 NYS2d 612 [1991]). As summary judgment is a drastic remedy which deprives a party of being heard, it should not be granted where there is any doubt as to the existence of a triable issue of fact (*Chemical Bank v West 95th Street Development Corp.,* 161 AD2d 218, 219, 554 NYS2d 604 [1st Dept 1990]), or where the issue is even arguable or debatable (*Stone v Goodson,* 8 NY2d 8, 12, 200 NYS2d 627 [1960]).

In support of plaintiff's cross-motion for summary judgment on the issue of liability, plaintiff submits his affidavit wherein he claims that he was driving on West 114th Street through the intersection with Seventh Avenue with a green light when defendant's vehicle, which was traveling southbound on Seventh Avenue, went through a red light and struck the left side of his car. These sworn statements set forth a prima facie case of negligence against defendant.

In opposition, defendant claims that plaintiff's cross-motion is procedurally deficient because plaintiff did not attach the summons and complaint. However, this Court will overlook

the failure to attach a summons and complaint on a cross-motion for summary judgment (*see Rodriguez v Ford Motor Co.*, 62 AD3d 573, 574, 965 NYS2d 451 [1st Dept 2009]).

In further opposition, defendant submits uncertified copies of a police report and a motor vehicle report, which purport to show that defendant had a green light; neither is sufficient to raise an issue of fact.

The police accident report is inadmissible hearsay because it contains defendant's self-serving statements about the accident rather than the police officer's own observations (*see Holliday v Hudson Armored Car & Courier Serv., Inc.*, 301 AD2d 392, 396, 753 NYS2d 470 [1st Dept 2003]). The notation on the unsworn motor vehicle accident report filed by defendant, that "#2" [plaintiff] ran a red light causing the collision, is also inadmissible hearsay (*see Rue v Stokes*, 191 Ad2d 245, 246, 594 NYS2d 749 [1st Dept 1993]). Although hearsay evidence can be used in an opposition to a motion for summary judgment, it "is insufficient to warrant denial of summary judgment where it is the only evidence upon which the opposition to summary judgment is predicated" (*Narvaez v NYRAC*, 290 AD2d 400, 400-01, 737 NYS2d 76 [1st Dept 2002].

The Court notes that by order dated March 27, 2015, defendant was precluded from testifying at trial or submitting an affidavit on a dispositive motion based on his failure to appear for his deposition.

Plaintiff has set forth entitlement to summary judgment on the issue of liability; defendant has not raised a triable issue of fact sufficient to defeat the cross-motion.

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing this action on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5012(d) is denied, and it is further

ORDERED that plaintiff's motion for summary judgment on the issue of liability is granted.

This is the Decision and Order of the Court.

**Dated: February 23, 2016**
**New York New York**

**HON. ARLENE P. BLUTH, JSC**