Gill v Duenas
2016 NY Slip Op 30341(U)
February 25, 2016
Supreme Court, Suffolk County
Docket Number: 24106/12
Judge: Paul J. Baisley
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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IMRAN A. GILL and FARID A. RIVAS,

Plaintiffs,

-against-

ALBERTO DUENAS,

Defendant.

----------X

INDEX NO.: 24106/12
CALENDAR NO.: 201500296MV
MOTION DATE: 8/25/15
MOTION SEQ. NO.: 002 MG; 003 MG

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Upon the following papers numbered 1 to 44 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1- 14; 24-39 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 15-21; 40-42 ; Replying Affidavits and supporting papers 22-23; 43-44 ; Other__; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (motion sequence no. 002) of defendant Alberto Duenas and the motion (motion sequence no. 003) of plaintiff Imran Gill hereby are consolidated for the purposes of this determination; and it is further

ORDERED that the motion of defendant Alberto Duenas seeking summary judgment dismissing the claim of plaintiff Farid Rivas is granted; and it is further

ORDERED that the motion of plaintiff Imran Gill seeking summary judgment in his favor on the issue of negligence is granted.

Plaintiffs Imran Gill and Farid Rivas commenced this action to recover damages for injuries they allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Route 110 and East 11th Street in the Town of Huntington on March 14, 2012. It is alleged that the accident occurred when the vehicle operated by plaintiff Imran Gill in which Farid Rivas was a front-seat passenger was struck in the rear by the vehicle operated by defendant Alberto Duenas while it was stopped in traffic at a red traffic light on Route 110. By his bill of particulars, Farid Rivas alleges that he sustained various personal injuries as a result of the accident, including thoracic and lumbar subluxation and a disc bulge at level L5/S1.

By order of the Court (BAISLEY, J.), dated October 24, 2103, this action was consolidated under Index No. 24106/12 with the action entitled *Imran A. Gill v Alberto Duenas*, commenced under Index No. 60499/13, and the caption was amended to reflect such consolidation.

Defendant now moves for summary judgment dismissing the claim of Farid Rivas, arguing that he did not sustain injuries within the meaning of Insurance Law §5102(d) as a result of the subject accident. In support of the motion, defendant submits copies of the pleadings, Farid Rivas' deposition transcript, the sworn medical report of Dr. Gary Kelman, and the affidavit of Dr. Joseph McGowan, a professional engineer and bioengineer. Dr. Kelman, at defendant's request, conducted an independent orthopedic examination of Farid Rivas on March 24, 2014. Farid Rivas opposes the motion on the grounds that defendant failed to meet his *prima facie* burden demonstrating that he did not sustain a serious injury as a result of the subject accident, and that the evidence submitted in opposition shows that he sustained injuries within the "limitation of use" and the "90/180" categories of the Insurance Law. In opposition to the motion, Rivas submits the sworn medical reports of Dr. Roberto Rivera and Dr. David Rabinovici. Rivas also submits the unsworn report of Paul Ivancic, Ph.D., a biomechanics scientist.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (*Dufel v Green*, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Porcano v Lehman*, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; *Nolan v Ford*, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [1984]).

Insurance Law §5102(d) defines a "serious injury" as "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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under 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.*, *supra*; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on 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 (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; *Torres v Micheletti*, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of

the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see Dufel v Green*, *supra*; *Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; *Pagano v Kingsbury*, *supra*).

Based upon the adduced evidence, defendant, through the submission of Rivas' deposition testimony and competent medical evidence, has established a *prima facie* case that Rivas did not sustain an injury within the meaning of the serious injury threshold requirement 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*; *Torres v Ozel*, 92 AD3d 770, 938 NYS2d 469 [2d Dept 2012]; *Wunderlich v Bhuiyan*, 99 AD3d 795, 951 NYS2d 885 [2d Dept 2007]). Defendant's examining orthopedist, Dr. Kelman, used a goniometer to test Rivas' ranges of motion in his spine, set forth his specific findings, and compared those findings to the normal ranges (*see Martin v Portexit Corp.*, 98 AD3d 63, 948 NYS2d 21 [1st Dept 2012]; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; *DeSulme v Stanya*, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). Dr. Kelman states in his medical report that an examination of Rivas revealed that he had full range of motion in his spine, that there were no muscle spasms or tenderness upon palpation of the paraspinal muscles, that the straight leg raising test was negative, and that there was no atrophy of intrinsic muscles. Dr. Kelman opined that the strains/sprains that Rivas sustained to his thoracic and lumbar regions of his spine as a result of the subject accident have resolved, and that he is capable of performing all tasks of daily living and maintaining full employment without restrictions. Dr. Kelman further states that there is no permanency to Rivas' alleged back injury based upon his examination of Rivas.

Defendant, having made a *prima facie* showing that Rivas did not sustain a serious injury within the meaning of the statute, shifted the burden to Rivas to come forward with evidence to overcome defendant's submissions by demonstrating the existence of a triable issue of fact as to whether a serious injury was sustained (*see Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see Ferraro v Ridge Car Serv.*, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; *Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Dufel v Green*, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]; *Toure v Avis Rent A Car Systems, Inc.*, *supra* at 350; *see also Valera v Singh*, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; *Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott*, *supra*). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see Perl v Meher*, *supra*; *Paulino v Rodriguez*, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition, Rivas has failed to raise a triable issue of fact as to whether he sustained a serious injury within the limitation of use categories or the 90/180 category of the Insurance Law (*Gaddy v Eyler, supra*; *Licari v Elliott, supra*; *Frisch v Harris*, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law §5102(d), but also that the injury was casually related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (*see Valentin v Pomilla*, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). Although Rivas is not required to proffer proof of a quantitative assessment contemporaneous with the accident (*see Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]; *Ortiz v Salahuddin*, 102 AD3d 617, 959 NYS2d 64 [1st Dept 2013]), he is required to offer competent objective medical evidence based upon a recent examination showing significant or consequential limitations in the range of motion in his spine (*see Vega v MTA Bus Co.*, 96 AD3d 506, 946 NYS2d 162 [1st Dept 2012]; *Castaldo v Migliore*, 291 AD2d 526, 737 NYS2d 862 [2d Dept 2002]). Rivas failed to proffer such evidence in opposition to the motion (*see Jean v Labin-Natochenny*, 77 AD3d 623, 909 NYS2d 103 [2d Dept 2010]; *Rivera v Bushwick Ridgewood Props., Inc.*, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]). The most current admissible medical evidence upon which Rivas relies is the affirmed report of Dr. Rabinovici, which was prepared almost four years ago, and states that Rivas' gait is normal, and that, although the straight leg raising test was not performed, the bent leg raise test was negative bilaterally (*see Zambrana v Timothy*, 95 AD3d 422, 943 NYS2d 92 [1st Dept 2012]). Moreover, despite Dr. Rabinovici stating in his medical report that Rivas is unable to work, he fails to provide any range of motion testing outlining any limitations in Rivas' range of motion in his spine or any other region of his body to support his conclusion.

Furthermore, Rivas testified at an examination before trial that he stopped all treatment for the injuries to his back in 2012. Rivas further testified that the medical facility where he was receiving physical therapy informed him that "[he] was already better" and did not require any additional medical treatment. Evidence of complaints of pain and discomfort alone, unsupported by credible medical evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (*see Scheer v Koubek*, 70 NY2d 678, 518 NYS2d 788 [1987]; *Young v Russell*, 19 AD3d 688, 798 NYS2d 101 [2d Dept 2005]; *Grant v Fofana*, 10 AD3d 446, 781 NYS2d 160 [2d Dept 2004]). Thus, Rivas' medical evidence fails to demonstrate that he sustained an injury within the meaning of the Insurance Law as a result of the subject collision (*see Larrabee v Bradshaw*, 96 AD3d 1257, 947 NYS2d 659 [3d Dept 2012]; *Picott v Lewis*, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]).

Lastly, Rivas failed to produce any objective medical evidence to substantiate the existence of an injury which limited his usual and customary daily activities for at least 90 of the first 180 days immediately following the subject accident (*see Catalano v Kopmann*, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; *Haber v Ullah*, 69 AD3d 796, 892 NYS2d 531 [2d Dept 2010]). Accordingly, defendant's motion for summary judgment dismissing the claim of Farid Rivas is granted.

Imran Gill moves for summary judgment in his favor on the issue of negligence, arguing that the sole proximate cause of the subject accident was defendant's negligent operation of his vehicle. In support of the motion, Imran Gill submits copies of the pleadings and the parties'

deposition transcripts. Defendant opposes the motion on the ground that there are triable issues of fact as to who was at fault for the happening of the subject accident. In opposition to the motion, defendant submits Farid Rivas' deposition transcript.

It is well settled that a driver approaching a vehicle from the rear is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see* Vehicle and Traffic Law §1129[a]; *see also Nsiah-Ababio v Hunter*, 73 AD3d 672, 913 NYS2d 659 [2d Dept 2010]). A rear-end collision with a stopped vehicle creates a *prima facie* case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see Tutrani v County of Suffolk*, 10 NY3d 906, 861 NYS2d 610 [2008]; *Pollard v Independent Beauty & Barber Supply Co.*, 94 AD3d 845, 942 NYS2d 360 [2d Dept 2012]; *Cortes v Whelan*, 83 AD3d 763, 922 NYS2d 410 [2d Dept 2011]; *Ramirez v Konstanzer*, 61 AD3d 837, 837 NYS2d 381 [2d Dept 2009]). A non-negligent explanation for the collision, such as mechanical failure, a sudden stop of the vehicle ahead, or an unavoidable skidding on wet payment is sufficient to overcome the inference of negligence and preclude an award of summary judgment (*see Ramos v TC Paratransit*, 96 AD3d 924, 946 NYS2d 644 [2d Dept 2012]; *Fajardo v City of New York*, 95 AD3d 820, 943 NYS2d 587 [2d Dept 2012]; *Davidoff v Mullokandov*, 74 AD3d 862, 903 NYS2d 107 [2d Dept 2010]).

Here, Gill has established his *prima facie* entitlement to judgment as a matter of law on the issue of liability by demonstrating that his vehicle was stopped at a red traffic light when it was struck in the rear by the Duenas' vehicle (*see Gifford v Consolidated Edison Co. of N.Y.*, 103 AD3d 773, 959 NYS2d 728 [2d Dept 2013]; *Hearn v Manzolillo*, 103 AD3d 689, 959 NYS2d 531 [2d Dept 2013]; *Martin v Cartledge*, 102 AD3d 841, 958 NYS2d 452 [2d Dept 2013]; *Kastritsios v Marcello*, 84 AD3d 1174, 923 NYS2d 863 [2d Dept 2011]). Imran Gill submitted the deposition transcript of defendant, who testified at an examination before trial that he was traveling southbound on Route 110, that he did not see the traffic light ahead, but he did see the Gill vehicle prior to the accident's occurrence, and that he struck the rear of the Gill vehicle while it was stopped. Although defendant testified that Gill was on the phone and stopped suddenly, because someone was "waving him down," defendant also testified that "he was looking forward, thinking about stuff and not really paying attention to stuff," and that he informed the responding officer that he struck the Gill vehicle while it was stopped. Thus, defendant has admitted in his deposition not once, but twice, to striking the rear of the Gill vehicle while it was stopped (*see e.g. Jackson v Trust*, 103 AD3d 851, 962 NYS2d 267 [2d Dept 2013]; *Valden v Rose*, 4 AD3d 468, 771 NYS2d 670 [2d Dept 2004]; *Kemenyash v McGoey*, 306 AD2d 516, 762 NYS2d 629 [2d Dept 2003]. Moreover, a claim of a sudden stop by the lead vehicle alone is insufficient to rebut the presumption of negligence (*Byrne v Calogero*, 96 AD3d 704, 705, 945 NYS2d 737 [2d Dept 2012]; *see Mallen v Su*, 67 AD3d 974, 890 NYS2d 79 [2d Dept 2009]; *Lundy v Llatin*, 51 AD3d 877, 858 NYS2d 341 [2d Dept 2008]).

In opposition, defendant has failed to raise a triable issue of fact as to whether Imran Gill contributed to the subject accident's occurrence or to provide a non-negligent explanation for the collision (*see Sehgal v www.nyairportsbus.com,Inc.*, 100 AD3d 860, 955 NYS2d 604 [2d Dept 2012]; *Romero v Greve*, 100 AD3d 617, 953 NYS2d 296 [2d Dept 2012]; *Murphy v Epstein*, 72 AD3d 767, 899 NYS2d 319 [2d Dept 2010]). The deposition transcript of Farid Rivas submitted

by defendant in opposition to the motion fails to raise a triable issue as to whether Imran Gill was negligent, and, if so, whether such negligence was a proximate cause of the subject collision (*see Reed v New York City Tr. Auth.*, 299 AD2d 330, 749 NYS2d 91 [2d Dept 2002]; *Belitsis v Airborne Express Frgt. Corp.*, 306 AD2d 507, 761 NYS2d 329 [2d Dept 2003]). Indeed, Farid Rivas testified that he was a passenger in the Gill vehicle when the accident occurred; that he observed the red traffic light; that the Gill vehicle was traveling slowly prior to stopping for the red traffic signal; that there were approximately eight vehicles stopped ahead of the Gill vehicle at the red light; and that defendant's vehicle struck the Gill vehicle "all of a sudden" while it was stopped. Accordingly, plaintiff Imran Gill's motion for summary judgment in his favor on the issue of negligence is granted.

Dated: February 25, 2016

PAUL J. BAISLEY, JR.

J.S.C.