

**Aviles v Cortez**

2018 NY Slip Op 33379(U)

December 6, 2018

Supreme Court, Kings County

Docket Number: 508075/2016

Judge: Carl J. Landicino

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6<sup>th</sup> day of December, 2018.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

-----X

MIGUEL AVILES, MOISES PEREZ, and GIOVANNI JARAMILLO

Index No.: 508075/2016

*Plaintiff,*

DECISION AND ORDER

- against -

Motion Sequence #4,#5,#9 and #10

MIGUEL CORTEZ,

*Defendants.*

-----X

**Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:**

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	<u>1/2, 3/4, 5/6, 7/8,</u>
Opposing Affidavits (Affirmations).....	<u>9, 10,</u>
Reply Affidavits (Affirmations).....	<u>11, 12,</u>

After oral argument and a review of the papers the Court finds as follows:

Defendant Miguel Cortez' motion (motion sequence #9) and Plaintiff, on the counterclaim, Miguel Aviles' motion (Sequence #10), both relating to N.Y. State Insurance Law, Section 5102 and 5104 (the question of Serious Injury of Plaintiff Giovanni Jaramillo) are granted without opposition. The Complaint on behalf of Plaintiff Giovanni Jaramillo is accordingly dismissed.

Plaintiff on the counterclaim, Miguel Aviles' motion (motion sequence #5) for summary judgment on the issue of liability as against Defendant Miguel Cortez is granted. A hit in the rear raises a presumption of liability on the part of the rear vehicle. *See Tumminello v. City of New York*, 148 A.D.3d 1084, 1084, 49 N.Y.S.3d 739, 741 [2<sup>nd</sup> Dept, 2017]. Defendant Cortez fails to rebut this presumption. Defendant Cortez acknowledged that there was traffic on the roadway

and fails to indicate, in light of that traffic, why the alleged short stop of Plaintiff Aviles' vehicle was unexpected or unexplained. The condition of the road (traffic, weather) must be taken into consideration by the rear vehicle driver, and the rear driver must maintain a reasonable distance in light of that road condition. Further, the Defendant's contention, in relation to the brake lights on the Plaintiff's vehicle, does not serve to raise an issue of fact in relation to the comparative negligence of the two drivers. Defendant Cortez is not clear in relation to his apparent contention. He states that at the time of the collision he was looking at the traffic, not necessarily Plaintiff's vehicle, and indicates that he did not see the Plaintiff's brake lights.

Question ("Q") - Along the street that you were on where the accident happened, generally, what were the traffic conditions like?

Answer ("A") - There was a lot of traffic.

Q - Would you say stop-and-go?

A - It was congested. There was traffic.

Q - Now, the car in front of you that you came in contact with, do you know for what reason that car stopped? Was it the traffic conditions ahead of it?

A - No I don't know.

Q - Right before - - before you - - strike that. Did you see that car begin to stop? Did you see brake lights go on?

A - No.

Q - Where were you looking right before the accident happened? Were you looking straight ahead, right, left?

A - Yeah, I was looking straight at traffic.

(Affirmation in Opposition Exhibit A, Defendant's Deposition page 18.)

Defendant Cortez does not state that he was looking at Plaintiff's car and that there were no brake lights on Plaintiff's vehicle, just before the collision. As such, the Court finds that Defendant Cortez is negligent and the sole proximate cause of the accident. Accordingly, Plaintiff Aviles' motion is granted and the Defendant Cortez's counterclaim is dismissed. See, *Tumminello*. See also, *Mosquera v. Roach*, 151 A.D.3d 1056, 59 N.Y.S.3d 46 [2<sup>nd</sup> Dept, 2017].

Defendant Cortez also moves (Motion Sequence #4) for an order pursuant to CPLR 3212 granting summary judgment, and dismissing the complaint of Plaintiff Aviles. Defendant Cortez contends that Plaintiff Aviles "has not sustained a permanent loss of use of a body organ, member, function or system," that Plaintiff Aviles "has not suffered a permanent consequential limitation of use of a body organ, or member, or a significant limitation of use of a body function or system," and that Plaintiff Aviles "did not sustain any injury or impairment that prevented him from performing substantially all of the natural acts for 90 out of the 180 days after the accident." Specifically, Defendant Cortez argues that the medical report of Dr. Raghava R. Polavarapu (hereinafter "Dr. Polavarapu") established his *prima facie* burden in that none of the Plaintiff Aviles' alleged injuries satisfy the requirement of Insurance Law § 5102(d).

Plaintiff Aviles opposes this motion and argues that it should be denied as the movants have not met their *prima facie* burden. Plaintiff Aviles also argues that the reports of his treating physicians (Dr. John Shimkus, Dr. Kenneth Kamler and Dr. Joseph Stubel) raise

material issues of fact relating to the Plaintiff's injuries that should result in the denial of the motion made by the Defendant.

When making a motion for summary judgment on the grounds of threshold a defendant has the initial burden of demonstrating that the plaintiff did not sustain a "serious injury," as that term is defined by Insurance Law § 5102(d). Dr. Polavarapu, an orthopaedic surgeon, conducted an medical examination of Plaintiff Aviles on December 13, 2017. In his report, which was duly affirmed that same day, Dr. Polavarapu detailed his findings based upon his review of, among other things, Plaintiff Aviles' medical and hospital records, including information regarding Plaintiff Aviles' right hand surgery. Dr. Polavarapu reports that he conducted a physical examination of the Plaintiff's cervical spine, thoracic spine, lumbar spine, right wrist/hand and left wrist/hand. Dr. Polavarapu reports that there was full resolution in all areas. Dr. Polavarapu indicates that he used a goniometer to measure range of motion. Dr. Polavarapu provides details concerning Plaintiff's range of motion and indicates the normal range of motion for the cervical spine, thoracic spine, lumbar spine, right wrist/hand and left wrist/hand. Dr. Polavarapu finds that Plaintiff's range of motion in all areas is normal and Plaintiff has full range of motion. As to Plaintiff Aviles' right hand, Dr. Polavarapu noted normal range of motion, that the tinel sign was negative and no atrophy of the thenar muscles of the hand. Dr. Polavarapu did note a healed scar on the right hand. As for his impression, Dr. Polavarapu opines that there is no evidence of an orthopedic disability and that Plaintiff Aviles "is capable of working and can perform his activities of daily living without restrictions or limitations." (See Defendant's Motion, Examination of Dr. Polavarapu, Attached as Exhibit E).

Dr. Polavarapu does state that "there is a causal relationship between the accident of record and the claimant's symptomatology." However, the Dr. does not state that the symptoms

reflected are characteristic of a serious injury. He states that the Plaintiff complains of hand pain, had prior hand surgery and that the Plaintiff reports no serious illness. Further, the Dr.'s exam results reflect no serious injury. A causal relationship without an indication of serious injury is consistent with the *prima facie* showing the Defendant has made.

Accordingly, the Court is of the opinion that based upon the foregoing submissions, the Defendant has met his initial burden of proof. This is primarily because Dr. Polavarapu's report provided a range of motion and did "compare those findings to the normal range of motion..." *Manceri v. Bowe*, 19 A.D.3d 462, 463, 798 N.Y.S.2d 441, 442 [2<sup>nd</sup> Dept, 2005]. As the Defendant has met his initial *prima facie* burden, the Plaintiff must prove that there are triable issues of fact as to whether the Plaintiff suffered serious injuries, as defined by Insurance Law §5102 in order to prevent the dismissal of the action. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2<sup>nd</sup> Dept, 1994]; *Bryan v Brancato*, 213 AD2d 577 [2<sup>nd</sup> Dept, 1995]. In this regard, Plaintiff Aviles must submit quantitative objective findings, as well as opinions relative to the significance of the Plaintiff's injuries, as defined by statute. *See Shamsodeen v. Kibong*, 41 A.D.3d 577, 578, 839 N.Y.S.2d 765, 766 [2<sup>nd</sup> Dept, 2007]; *Grossman v Wright*, 268 AD2d 79 [2<sup>nd</sup> Dept, 2000].

In order to prove that the Plaintiff suffered a permanent consequential limitation of use of a body organ or member, and/or a significant limitation of use of a body function or system, the Plaintiff has the burden to show more than "a mild, minor or slight limitation of use." The Plaintiff must provide objective medical evidence in addition to medical opinions of the extent or degree of the limitation alleged and its duration. *See Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]; *Candia v. Omonia Cab Corp.*, 6 A.D.3d 641, 642, 775 N.Y.S.2d 546, 547 [2<sup>nd</sup> Dept, 2004]; *Burnett v Miller*, 255 AD2d 541 [2<sup>nd</sup> Dept, 1998]; *Beckett v Conte*, 176 AD2d 774 [2<sup>nd</sup>

Dept, 1991]. In the alternative, the Plaintiff must establish that he sustained a medically-determined injury or impairment which prevented him from conducting substantially all of the material acts which constituted his usual and customary daily activities for 90 out of the 180 days immediately following the accident. *See Licari v Elliott*, 57 NY2d 230 [1982].

Dr. John Shimkus provided a Physician's Affirmation dated June 19, 2018. In his Affirmation, he states that he examined Plaintiff Aviles on January 30, 2015. Dr. Shimkus states that he conducted a medical examination of Plaintiff that day and indicates that Plaintiff Aviles complained of lower back and neck pain. Plaintiff Aviles apparently also complained of hand locking and Dr. Shimkus advised him to see a hand specialist. Dr. Shimkus noted that "patient has markedly severe limited range of motion of both the cervical spine and the lumbar spine." Dr. Shimkus did not indicate whether an objective test instrument was used and did compare his findings to a normal range of motion. (See Plaintiff Aviles' Affirmation in Opposition, Examination of Dr. Shimkus, Attached as Exhibit C).

Dr. Kenneth Kamler, provided a Physician's Affirmation dated June 25, 2018. In his Affirmation, he states that he examined Plaintiff Aviles on February 9, 2015, March 2, 2015 and July 27, 2015. Dr. Kamler states that he examined the Plaintiff on those days and indicates that Plaintiff Aviles complained of "bilateral hand pain in the 3<sup>rd</sup> and 4<sup>th</sup> digits, ring finger on right hand locks, car accident on 1-07-15 [sic]." Dr. Kamler noted in his assessment and noted that "[b]ilateral flexor tenosynovium of the ring and little fingers with locking of the right ring finger." (See Plaintiff Aviles' Affirmation in Opposition, Examination of Dr. Kamler, Attached as Exhibit D).

Dr. Joseph Stubel, provided a Physician's Affirmation dated July 19, 2018. In his Affirmation, he states that he examined Plaintiff Aviles on August 6, 2015, August 31, 2015 and

September 17, 2015. Dr. Stubel indicated that he examined the Plaintiff on those days and indicates that Plaintiff Aviles “presents today with stenosing tenosynovitis of both ring fingers since a motor vehicle accident several months ago he has had cortisone injections and taking anti-inflammatories with little, if any, relief he would like surgical release.” As part of his physical examination of Plaintiff Aviles’ right hand Dr. Stubel noted that “[p]atient displays full ROM in MCP, PIP and Thumb IP noraml sensation in all five digits.” As part of Dr. Stubel’s Assessment he found “STENOSING TENOYNOVITIS.” Further, in Dr. Stubel’s annexed Report of Operation, Dr. Stubel noted that Plaintiff Aviles was “a 51 year old male who had developed a right ring trigger finger.” (See Plaintiff Aviles’ Affirmation in Opposition, Examination of Dr. Stubel, Attached as Exhibit E).

These reports, taken together, fail to raise a triable issue of fact as to whether Plaintiff Aviles satisfies the requirements set forth by Insurance Law §5102, in order to prevent the dismissal of Aviles’ action. Specifically, the Court finds that even assuming that the reports reflected a serious injury, none of these reports clearly address whether Plaintiff Aviles condition, (for example, injury to his right hand), was caused by the subject accident. *See Alexander v. Gordon*, 95 A.D.3d 1245, 1245, 945 N.Y.S.2d 397, 398 [2<sup>nd</sup> Dept, 2012]; *Heumann v. JACO Transp., Inc.*, 82 A.D.3d 1046, 1046, 919 N.Y.S.2d 198, 199 [2<sup>nd</sup> Dept, 2011]; *see generally Alvarez v. NYLL Mgmt. Ltd.*, 120 A.D.3d 1043, 1046, 993 N.Y.S.2d 1, 3 [1<sup>st</sup> Dept, 2014], *aff’d*, 24 N.Y.3d 1191, 27 N.E.3d 471 [2015]. Accordingly, Defendant Cortez’ motion (motion seq. #4) is granted.

Based upon the foregoing, it is hereby ORDERED as follows:

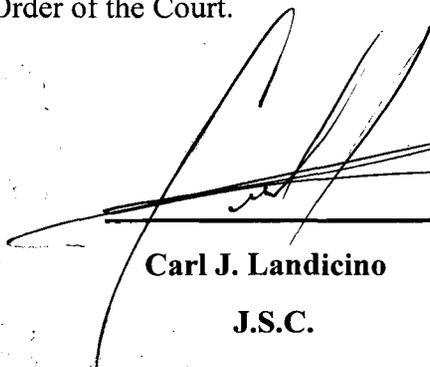
Defendant Miguel Cortez' motion (motion sequence #9), and Plaintiff on the counterclaim, Miguel Aviles' motion (Sequence #10), both for summary judgment on the issue of Plaintiff Jaramillo's serious injury, are granted. The Complaint in relation to Plaintiff Jaramillo is dismissed.

Plaintiff, on the counterclaim, Miguel Aviles' motion (motion sequence #5) for summary judgment on the issue of liability as against Defendant Miguel Cortez is granted. The Defendant's counterclaim is dismissed.

Defendant Cortez' motion (Motion Sequence #4) for an order pursuant to CPLR 3212 granting summary judgment, and dismissing the complaint as against Plaintiff Aviles on the issue of serious injury, is also granted. The complaint in relation to Plaintiff Aviles is dismissed.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

  
Carl J. Landicino  
J.S.C.

2018 DEC 24 AM 10:32  
KINGS COUNTY CLERK  
FILED