

Gallo v Harris

2018 NY Slip Op 34341(U)

November 20, 2018

Supreme Court, Nassau County

Docket Number: Index No. 609759-16

Judge: Steven M. Jaeger

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 35**

X

PATRICIA GALLO and MARIE IMBRIANO,

Plaintiffs,

-against-

Index #: 609759-16

Motion Sequence Nos.: 002,003,004

Mot. Submitted: 11/16/18

Present: Hon. Steven M. Jaeger

**TARIEK KWESI HARRIS, AKOSUA S. AGYEMAN
and SUSAN PASSARELLI,**

Decision & Order

XXX

Defendants.

X

Papers submitted on the motion:

Notice of Motion, Affirmation & Exhibits (002)	X
Notice of Motion, Affirmation & Exhibits (003)	X
Notice of Motion, Affirmation & Exhibits (004)	X
Plaintiffs' Affirmation in Opposition (002,003,004)	X
Plaintiff's Amended Affirmation in Opposition	X
Defendant Passarelli Reply Affirmation	X
Defendants' Harris and Agyeman Affirmation in Opposition and Reply	X

Motion (seq. no. 2) pursuant to CPLR 3212 by defendant Susan Passarelli (Passarelli) for summary judgment dismissing the complaint on the grounds that plaintiff Marie Imbriano (Imbriano) did not sustain serious injury within the ambit of Insurance Law § 5102(d) is granted.

Motion (seq. no. 3) by defendant Tariek Kwesi Harris (Harris) and his mother, defendant Akosua S. Agyeman (Agyeman), pursuant to CPLR 3212 to dismiss the complaint on the grounds that plaintiffs did not sustain serious injury within the ambit of Insurance Law § 5102(d) is granted.

which alternatively seeks summary judgment dismissing the complaint on the ground that plaintiff Patricia Gallo (Gallo) did not sustain serious injury within the ambit of Insurance Law § 5102(d) is granted.

BACKGROUND

The action arises from a two vehicle accident on December 14, 2013 at the intersection of Oceanside Road¹ and Brower/Merle Avenues. The accident occurred when the vehicle operated by defendant Passarelli, in which plaintiffs were passengers,² was in the process of completing a left turn from the eastbound lane of Merle Avenue onto northbound Oceanside Road. At that point, the vehicle operated by co-defendant Harris, which was crossing the intersection from Brower Avenue, and the Passarelli vehicle collided in the intersection. Both defendant drivers (Passarelli and Harris) allege they proceeded into the intersection, from opposite directions, with a green light in their favor.

According to their bills of particulars, plaintiff Gallo sustained injuries including, *inter alia*,

disc herniation T12-L1;
disc desiccation L2-L3, L3-L4, L4-L5, L5-S1;
lumbar disc disorder;
cervical disc disorder;
cervical lumbar radiculopathy;
thoracic spine restriction of motion;
whole person spine impairment.

¹Oceanside Road runs north and south. Merle Avenue perpendicularly intersects Oceanside Road on the west side and Brower Avenue irregularly perpendicularly intersects Oceanside Road on the east side.

²Plaintiffs Gallo and Imbriano were seated in the rear of the Passarelli vehicle: Plaintiff Gallo on the driver side and plaintiff Imbriano on the passenger side.

Plaintiff Imbriano alleges injuries, including, *inter alia*,

disc herniation L4-L5, C4-C5;
disc bulge C2-C3, C3-C4;
C6-C7 radiculopathy;
cervical and lumbar disc disorder;
cervical and lumbar spine restriction;
sacroiliac restriction of motion;
whole person spine impairment.

Plaintiff Gallo alleges she was incapacitated from her employment for approximately three days. Plaintiff Imbriano alleges she was incapacitated from her employment for approximately two months.

SERIOUS INJURY

The issue of whether a claimed injury falls within the statutory definition of serious injury, is a question of law for the court which may be decided on a summary judgment motion (*Licari v Elliott*, 57 NY2d 230, 237 [1982]; *Carter v Adams* 123 AD3d 967 [2d Dept 2014]). A defendant seeking summary judgment based on a lack of serious injury bears the initial burden of establishing that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102(d) (*Gaddy v Eycler*, 79 NY2d 955, 956-57 [1997]; *Datikashvilli v Vijungco*, 121 AD3d 637 [2d Dept 2014]).

Defendant can satisfy the initial burden by relying on either the sworn statements of defendant's examining physician, or plaintiff's sworn testimony or the unsworn reports of plaintiff's own examining physicians (*Pagano v Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992]). A defendant can demonstrate that plaintiff's own medical evidence does not indicate that plaintiff suffered a serious injury and that the alleged injuries were not, in any event, causally related to the accident (*Franchini v Palmieri*, 1NY3d 536, 537 [2003]).

Defendant's medical expert must specify the objective tests upon which his medical opinion is based and, with respect to an opinion *vis-a-vis* plaintiff's range of motion, the expert must quantify/qualify his findings and compare those findings to the ranges of motion considered normal for the particular body part tested (*Gastaldi v Chen*, 56 AD3d 420, 421 [2d Dept 2008]).

Once the defendant has made the required showing, the burden shifts to plaintiff to rebut the presumption that there is no issue of fact as to the threshold question (*Franchini v Palmieri*, *supra* at p. 537). To do this, plaintiff must submit objective and admissible proof of the nature and degree of the alleged injury in order to satisfy the threshold statutory standard for serious injury (*Dufel v Green*, 84 NY2d 795, 798 [1995]).

A plaintiff cannot defeat a motion for summary judgment, and successfully rebut a *prima facie* showing that she did not sustain a serious injury, merely by relying on documented subjective complaints of pain (*Uddin v Cooper*, 32 AD3d 270, 271 [1st Dept 2006] *lv to appeal denied* 8 NY3d 808 [2007]).

The objective evidence required to defeat a defendant's motion for summary judgment must be based upon a recent examination of the injured plaintiff (*Sham v B&P Chimney Cleaning & Repair Co.*, 71 AD3d 978, 979 [2d Dept 2010]). Evidence of contemporaneous range of motion limitations, however, is not a prerequisite to recovery under *Perl v Meher*, 18 NY3d 208, 217 (2011), where the Court of Appeals states that:

“a rule requiring ‘contemporaneous’ numerical measurements of range of motion could have perverse results. Potential plaintiffs should not be penalized for failing to seek out, immediately after being injured, a doctor who knows how to create the right kind of record for litigation. A case should not be lost because the doctor who cared for the patient initially was primarily, or only, concerned with treating the injuries. We therefore reject a rule that would make contemporaneous quantitative measurements a

prerequisite to recovery.”

Even when positive magnetic resonance imaging (MRI) findings are presented, in order to raise a triable issue of fact, such positive findings must be accompanied by objective findings of a specific percentage of the loss of range of motion, or a sufficient description of the qualitative nature of plaintiff’s limitations, based on the normal function, purpose and use of the body part tested (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]).

Plaintiff is required to demonstrate restricted range of motion based on findings both contemporaneous with the accident and upon recent examination (*Jung Hyun Yuk v Liang Chen*, 83 AD3d 1003 [2d Dept 2011]). Unlike the movant’s proof, however, unsworn reports of the plaintiff’s examining doctors and chiropractors are not sufficient to defeat a motion for summary judgment (*Grasso v Angerami*, 79 NY2d 813, 814 [1991]). Subjective complaints of pain or headache are insufficient to establish serious injury (*Downie v McDonough*, 117 AD3d 1401 [2d Dept 2014]; *Kivlan v Acevedo*, 17 AD3d 321, 322 [2d Dept 2005]).

Whether a limitation of use or function is significant or consequential relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on normal function, purpose and use of the body part (*Dufel v Green*, *supra* at p. 798). To prove the extent or degree of physical limitation with respect to the limitation 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, 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 or system (*Perl v Meher*, *supra* at p. 217; *Estrella v Geico Ins. Co.*, 102 AD3d 730,

731 [2d Dept 2013]). A mild, minor or slight limitation of use is considered insignificant within the meaning of Insurance Law § 5102(d) (*Il Chung Lim v Chrabaszcz*, 95 AD3d 950, 951 [2d Dept 2012]). The mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitation resulting from the disc injury and its duration (*Bleszcz v Hiscock*, 69 AD3d 890, 891 [2d Dept 2010]; *Sutton v Yener*, 65 AD3d 625, 627 [2d Dept 2009]; *Roman v Fast Lane Car Serv. Inc.*, 46 AD3d 535, 536 [2d Dept 2007]).

In support of her motion for summary judgment dismissing plaintiff Imbriano's claims on the threshold serious injury issue, defendant Passarelli has submitted the affirmed report of orthopedic surgeon Ronald A. Light, who examined plaintiff Imbriano on January 29, 2018. (Exhibit "F": Motion Seq. No. 2). Dr. Light documents normal ranges of motion of plaintiff Imbriano's cervical, thoracic and lumbar spines, as measured by a hand-held goniometer, and compared to normal active range of motion values according to the Guidelines to the Evaluation of Permanent Impairment (5th edition). Dr. Light notes that the MRI report of plaintiff Imbriano's cervical spine (January 19, 2004) reveals multilevel degenerative changes. An MRI of the lumbar spine (January 26, 2014) reveals foraminal disc herniation.

In his affirmation (Exhibit "G": Motion Seq. No. 2), radiologist Sheldon P. Feit, M.D., who performed an independent radiology review of MRIs of plaintiff Imbriano's lumbosacral and cervical spines, notes

degenerative spondylosis (January 1, 2014, December 20, 2015, June 11, 2017);

desiccatory change L2-L3, L3-L4, L4-5 discs (December 20, 2015;

disc bulges L3-L4, L4-L5).

Dr. Feit concludes that the three MRIs of the lumbosacral spine reveal pre-existing degenerative change. He opines that the disc bulges observed are not post-traumatic, but degenerative, and there were no abnormalities causally related to the subject accident. His impression is listed as resolved cervical, thoracic and lumbar sprain/strain.

With respect to plaintiff Gallo, Dr. Light (Exhibit "J": Motion Seq. No. 4), who examined said plaintiff on January 29, 2018, documents that the ranges of motion of her cervical, thoracic and lumbar spines are within normal limits, noting only a de minimus 5% restriction in the motion of left rotation of the thoracic spine. His impression is listed as resolved cervical, thoracic and lumbar sprain/strain. Neurological examinations of the bilateral upper and lower extremities reveal 5/5 B/L muscle strength, deep tendon reflexes at 2+ B/L and grossly intact sensation to light touch.

In support of their threshold motion, defendants Harris and Agyeman have submitted the affirmed report of orthopedic surgeon John Killian, M.D. (Exhibit "H": Motion Seq. No. 3), who examined plaintiff Gallo on January 22, 2018. Dr. Killian documents mild restrictions in the range of motion of her cervical spine; full range of motion of her thoracolumbar spine and negative bilateral straight leg raising. Dr. Killian opines that plaintiff Gallo

"has minor restriction of motion of her cervical spine due
to age related degenerative disease in the neck"
and
no restriction of motion or muscle spasm in her lower back."

He found "no neurological abnormalities" and "no impairment or disability caused by [the] subject accident." Dr. Killian concludes that plaintiff Gallo:

“is able to work at her normal capacity and perform all of her usual activities of daily living without restrictions from problems caused by injuries from the December 14, 2013 accident.”

Neurologist, Richard Lechtenberg, M.D. (Exhibit “I”: Motion Seq. No. 3), who examined plaintiff Gallo on January 22, 2018, assessed the range of motion of plaintiff Gallo’s cervical, thoracic and lumbar spines, shoulders, knees ankles/feet, elbows, wrists and hips. The quantified results were normal, as compared to the values set forth in the Guidelines to Evaluation of Permanent Impairment (5th edition).

Dr. Lechtenberg opined that plaintiff Gallo had:

“no objective, clinical neurologic deficits . . . no permanent neurologic impairments or disabilities causally related to the accident.”

He further opines that, although the bill of particulars alludes to injures to the thoracic, lumbar and cervical spine, there were no permanent impairments or disabilities causally related to the accident.

Dr. Killian (Exhibit “J”: Motion Seq. No. 3), who examined plaintiff Imbriano on January 22, 2018, notes in his report that:

“[a]ll attempts to test spinal motion elicited complaints of pain and there was volitional restriction of motion;”

“[a]ttempts to test the motion of [plaintiff’s] neck and trunk elicited complaints of significant pain.”

Dr. Killian records that a CT scan of plaintiff Imbriano’s cervical spine, done on the day of the accident, showed “multilevel degenerative disease” but “no traumatic abnormalities.” An MRI of her cervical spine showed multilevel degenerative disc disease. An MRI of her lumbar

spine showed what was described as a small right sided disc herniation at L4-L5, with no description of any significant neurologic compression. Such an abnormality is, in Dr. Killian's opinion, commonly seen "incidentally."

Although he documents significant quantified restrictions in motion of plaintiff Imbriano's lumbar and cervical spines, Dr. Killian opines that his physical examination of plaintiff Imbriano was

"remarkable for significant exaggerations and inconsistencies" and that "the apparent restriction of motion of her neck and back was obviously volitional and was contradicted by more normal motion of the neck observed during the upper extremity examination."

He concludes that plaintiff Imbriano exhibited "significant symptom magnification." He found no causal disability or lumbar impairment from the injuries of December 14, 2013.

After examining plaintiff Imbriano on January 18, 2018, Dr. Lechtenberg (Exhibit "K": Motion Seq. No. 3) found

"no consistent, objective, clinical, neurologic deficits that might reasonably be considered causally related to the accident of December 14, 2013. [Plaintiff] did not sustain any permanent neurologic impairment or disability related to the accident of December 14, 2013."

In their separate motions, defendant Passarelli and defendants Harris and Agyeman, have submitted competent medical evidence establishing, *prima facie*, that the injuries allegedly sustained by plaintiff Gallo and by plaintiff Imbriano do not constitute serious injury under the permanent consequential or significant limitation of use categories of Insurance Law § 5102(d), and, in any event, were not caused by the subject accident but, instead, were degenerative in nature. In addition, the moving defendants demonstrated that plaintiffs Gallo and Imbriano did

not sustain a serious injury under the 90/180 day category of the statute by submitting plaintiffs' deposition testimony demonstrating that plaintiff Gallo missed approximately two weeks of work and plaintiff Imbriano missed approximately seven weeks of work. As such, the burden shifted to plaintiffs to raise a factual issue sufficient to defeat defendants' respective summary judgment motions (*Franchini v Palmieri, supra* at 537). Neither plaintiff has satisfied that burden.

To meet the challenge, plaintiff Gallo relies on MRI findings, *inter alia*, of April 6, 2014 which reveal "multilevel degenerative changes of the lumbar spine" and "Grade 1 anterolisthesis at the L4-L5 level, secondary to degeneration of the articular facets with associated small disc herniation," and the affirmation of Robert Garroway, M.D. (Exhibit "R": Plaintiffs' Opposition to Motion Seq. Nos.2, 3 and 4), who did not treat or examine plaintiff Gallo but, instead, relied on the unsworn/uncertified medical records of other physicians in reaching his conclusions. As such, Dr. Garroway's affirmation lacks probative value and is insufficient to raise a triable issue of fact sufficient to defeat a motion for summary judgment (*Sorto v Morales, 55 AD3d 718, 719* [2d Dept 2008]). The various unaffirmed conclusions/opinions of each of the plaintiff's treating physicians were not submitted in the form necessary to oppose a summary judgment motion (*Irizzary v Lindor, 110 AD3d 846, 847* [2d Dept 2013]).

The affirmation of radiologist Alex Rosioreanu, M.D. (Exhibit "S": Plaintiffs' Opposition), vis-a-vis the MRI of plaintiff Gallo's lumbar spine, fails to causally relate the findings to the accident of December 14, 2013 (*Leeber v Ward, 55 AD3d 563* [2d Dept 2008]). Moreover, neither Dr. Garroway nor Dr. Rosioreanu addressed evidence of, *inter alia*, degeneration and disc herniations, nor opines as to the cause of those findings (*John v Linden, 124 AD3d 598, 599* [2d Dept 2015]; *Scheker v Brown, 91 AD3d 751, 752* [2d Dept 2012]).

With respect to plaintiff Imbriano, Dr. Garroway (Exhibit “R”: Plaintiffs’ Opposition), who examined plaintiff for the first and only time on July 25, 2018, opines that localized restricted range of motion of plaintiff Imbriano’s cervical spine, and radicular symptoms of the lumbar and cervical spine, (which he quantifies and measures against normal values) are causally related to the injuries sustained on December 14, 2013. Under the circumstances extant, however, where Dr. Garroway examined plaintiff Imbriano on only one occasion, post-accident, i.e., July 25, 2018, and fails to address the extensive generative findings in plaintiff’s own diagnostics and records, including the affirmation of radiologist Edmond Knopp, M.D., Dr. Garroway’s conclusion that plaintiff Imbriano’s limitations and injuries are causally related to the subject accident is entirely speculative (*Mensah v Badu*, 68 AD3d 945, 946 [2d Dept 2009]).

The record is devoid of any evidence to demonstrate that plaintiff Imbriano or plaintiff Gallo sustained a medically determined injury that prevented either of them from performing substantially all of his customary and daily activities for 90 of the 180 days immediately following the accident. Plaintiffs’ deposition testimony establishes that neither was confined to bed and/or home for the required period (*Seck v Bella*, 92 AD3d 543, 544 [1st Dept 2012]). Accordingly, defendants’ motions to dismiss as to both plaintiffs for failure to prove either sustained a serious injury are granted and the complaints dismissed.

LIABILITY

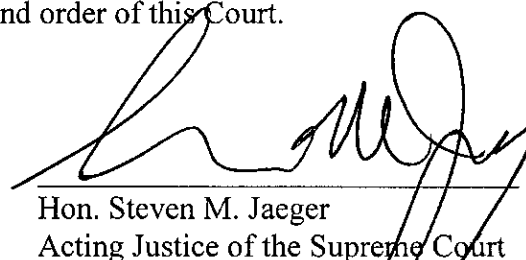
Vehicle and Traffic Law § 1141 provides with respect to left turning vehicles that:

“The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard.”

To prevail on a motion for summary judgment on the issue of liability in an action alleging negligence, a plaintiff has the burden of establishing, *prima facie*, not only that the defendant was negligent, but that movant was free from comparative fault since there can be more than one proximate cause of an accident (*Al-Mamar v Terrones*, 146 AD3d 737, 739 [2d Dept 2017]). It is well settled that even where a vehicle enters an intersection with a green light, the driver may nevertheless be found negligent if she fails to use reasonable care to avoid a collision with another vehicle when proceeding into the intersection (*Fargione v Chance*, 154 AD3d 713, 714 [2d Dept 2017]). Since there can be more than one proximate cause of an accident, the proponent of a summary judgment motion has the burden of establishing freedom from comparative fault as a matter of law (*Pollack v Margolin*, 84 AD3d 1341, 1342 [2d Dept 2011]). Here, given the conflicting testimony regarding the facts surrounding the accident, defendant Passarelli has failed to establish that she used reasonable care to avoid the accident and, thus, was free from comparative fault. The issue of comparative negligence is generally for the jury (*Twizer v Lavi*, 140 AD3d 736, 737 [2d Dept 2016]).

Defendant Passarelli's motion for summary judgment dismissing the complaint on the issue of liability is denied. The motions of all defendants to dismiss the complaint as to plaintiff Gallo and plaintiff Imbriano are granted and the complaint is dismissed.

This shall constitute the decision and order of this Court.



Hon. Steven M. Jaeger
Acting Justice of the Supreme Court

Dated: November 20, 2018
Mineola, NY

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