

<b>Guzman v Manhattan &amp; Bronx Surface Tr. Operating Auth.</b>
2019 NY Slip Op 30263(U)
January 31, 2019
Supreme Court, New York County
Docket Number: 156792/2013
Judge: Lisa A. Sokoloff
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA ANN SOKOLOFF PART IAS MOTION 21EFM
Justice
INDEX NO. 156792/2013
MOTION DATE 08/31/2018
MOTION SEQ. NO. 003

RADAMES GUZMAN, SIMEONA GUZMAN, EDICKSON CRUZ,
PEDRO MARINE

Plaintiff,

- v -

THE MANHATTAN AND BRONX SURFACE TRANSIT
OPERATING AUTHORITY, NEW YORK CITY TRANSIT
AUTHORITY, YEVGENIY GOLUB,

Defendant.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 69, 70, 71, 72,
73, 74, 75, 76, 77, 78, 80, 81, 82, 83, 84, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96

were read on this motion to/for

JUDGMENT - SUMMARY

The four plaintiffs bring suit for personal injuries allegedly arising from an October 25,
2012 motor vehicle accident occurring at Lexington Avenue in the vicinity of East 122 Street,
involving a parked vehicle door which was opened into and struck by a passing bus.

Counsel for plaintiff Pedro Marine on the cross-claim moves for summary judgment
against plaintiff Erickson Cruz (only) to dismiss his claims and all cross-claims on the grounds
that he did not sustain a serious injury as defined by Insurance Law section 5102(d). The TA
defendants (Manhattan and Bronx Surface Transit Operating Authority, New York City Transit
Authority and bus operator Yevgeniy Golub) cross-move for the same relief.

Briefly, in support of the motion the movants note that Cruz was in no apparent pain post-
accident as he was not treated or transported by EMS. Moreover, he got married subsequently and
went on his honeymoon. Although not working at the time of accident, he was employed post-
accident in the maintenance field and could perform the activities of daily living.

They submitted the affirmed reports of three experts in support of the motion. Orthopedic Surgeon Arnold T. Berman found no objective findings relative to the date of accident. There was no atrophy of the extremities, indicating normal usage. Range of motion, tested with a goniometer, was normal. He found any alleged injuries to the cervical and thoracic spines had healed without orthopedic residuals. He also found the right shoulder to be post arthroscopic surgery that had healed without residuals. Board certified neurologist, Naunihal Sachdev Singh, found normal ROM as measured with a goniometer. He opined that plaintiff Cruz had no neurological disability and was not disabled from working or the normal activities of daily living. Mark J. Decker, a Musculoskeletal and Spine Radiologist, reviewed an MRI of the cervical spine taken at Lenox Hill in December 2012, and an MRI of the right shoulder taken in the same month at the same location. He opined that the films revealed longstanding pre-existing degenerative changes without evidence of trauma.

In opposition to the motion plaintiff Cruz submits the reports of three physicians as well. Physiatrist Joyce Goldenberg found loss of ROM as measured with a goniometer. She opined that plaintiff Cruz was disabled from work from November of 2012 until July of 2014, even though he was working a maintenance job during that time period. Her report did not refute or even address the issue of raised by Dr, Decker that Cruz had a pre-existing, degenerative condition. Orthopedist Robert Haar noted that Cruz had right shoulder arthroscopy on January 3, 2013 after the automobile accident of October 25, 2012. He found that Cruz developed sequellae including pain which the doctor opined was causally connected to the accident because Cruz denied pain pre-accident. Dr. Haar did not discuss the MRIs or address the findings of Dr. Decker. Finally, Cruz submitted in opposition the affirmation of Dr. Himelfarb who affirmed that he read the MRIs, but did not address causation or the allegations of a pre-existing, degenerative condition.

The movants established a *prima facie* showing that the motor vehicle accident in question did not cause plaintiff Cruz' alleged injuries to the cervical, thoracic spines and right shoulder through the affirmed report of their Radiologist Decker who opined that plaintiff had a long-standing pre-existing degenerative condition. *See, Garcia v Feigelson*, 130 AD3d 498 [1 Dept. 2015]; *Reyes v Brito*, 57 AD3d 395 [1 Dept. 2008]. In opposition plaintiff failed to raise a question of fact as none of the doctors, whose affirmations he submitted, attempted to rebut or even address the allegation of pre-existing injury. *Reyes, supra*.

The allegation by Dr. Goldenberg that plaintiff was disabled for 90 out of the first 180 days is unsupported by her and contradicts the plaintiff's own testimony that he honeymooned during that period. Moreover, she opined he was out disable for close to two years and only treated for one.

Upon the foregoing documents, it is

ORDERED that motions for summary judgment of plaintiff Marine on the counter-claim and the TA defendants against plaintiff Cruz *only* is granted; and it is further


ORDERED, that the action on behalf of Erickson Cruz and all related cross and counter-are hereby severed from the main action and dismissed without costs and disbursements; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to reflect the dismissal of the Cruz action only by appropriately marking the court's records; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre Street, Room 141 B), who shall mark his records to reflect the dismissal of the Cruz action only; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

1/31/2019  
DATE

  
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LISA ANN SOKOLOFF, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE