

Salce v Gul Servs. Inc.
2020 NY Slip Op 33547(U)
September 21, 2020
Supreme Court, Bronx County
Docket Number: 26657/2017e
Judge: Veronica G. Hummel
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 31**

-----X
JASON SALCE,

Plaintiff,

-against -

**Index No. 26657/2017e
DECISION/ORDER
Motion Seqs. 2,3**

GUL SERVICES INC., KHALID USMAN, AYLEEN GUZMAN,
and TONI MCKNIGHT,

Defendants.

-----X
VERONICA G. HUMMEL, A.S.C.J.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF, in support of and in opposition to the motions of defendants GUL SERVICES INC., and KHALID USMAN (the Gul defendants) [Mot. Seq. 2] and defendants AYLEEN GUZMAN, and TONI MCKNIGHT (the Guzman defendants) [Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff JASON SALCE (plaintiff) has not sustained a "serious injury" as defined by Insurance Law 5102(d) and plaintiff's cross-motion, made pursuant to CPLR 3212, for an order granting plaintiff partial summary judgment on the issue of liability and dismissing defendants' affirmative defense of comparable negligence as against all defendants.

This action arises out of a two-car motor vehicle accident between a 2005 Lincoln and a 2002 Ford that occurred on December 11, 2015, on the Bronx River Parkway at or near its intersection with Boston Road, in the County of Bronx. In terms of the two vehicles involved in the collision, defendant Khalid Usman was the operator and defendant Gul Services was the owner of the 2005 Lincoln (the Gul vehicle). Co-defendant Toni McKnight was the operator and co-defendant Ayleen Guzman was the owner of the 2002 Ford (the Guzman vehicle). Plaintiff was a passenger in the back seat of the Guzman vehicle. The court will address the liability issue first.

Plaintiff's cross-motion for partial summary judgment as to liability against all defendants.

At the time of the accident, plaintiff was in the backseat of the Guzman vehicle, and was not wearing a seat belt. Plaintiff testified that the accident happened near a stop sign, but he did not remember if the car he was in, the Guzman vehicle, was stopped at the time of the accident. Plaintiff also testified that the Guzman vehicle was making a right turn off of the relevant ramp and was in the process of turning when the Gul vehicle turned onto the ramp

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into the wrong lane and collided with it. [NYSCEF No. 75, p31]. Plaintiff also submits a certified copy of the police report¹.

Plaintiff, a passenger, now cross-moves for an order granting him partial summary judgment on the issue of liability against the defendants and dismissing the defendants' affirmative defenses based on comparative negligence. Only plaintiff has been deposed. The Gul defendants are precluded from testifying based on a court order dated October 10, 2020 [NYSCEF No. 28].

Plaintiff's proof established that he was an innocent passenger without fault (see *Guzman v Desantis*, 148 AD3d 580 [1st Dept 2017]; *Oluwatayo v Dulinayan*, 142 AD3d 113 [1st Dept 2016]). As defendants submit no evidence contradicting this fact, plaintiff is entitled to a summary judgment finding of no culpable conduct by him on the issue of liability and the defendants' affirmative defenses based on comparative negligence are dismissed² (see *Guzman v Desantis*, *supra*). To the extent that the defendants oppose plaintiff's cross-motion on the ground that plaintiff testified that he was not wearing a seat belt at the time of the accident, "[t]he assertion of a seat belt defense goes to the determination of damages, as a potentially mitigating factor, and not to liability" (*Davis v Turner*, 132 AD3d 603, 603 [1st Dept 2015]).

As for the issue of defendants' liability, plaintiff's deposition testimony that the Gul defendants were driving in the wrong direction in his lane and hit the Guzman vehicle head-on sets forth a *prima facie* showing of negligence on the part of those defendants as a violation of the Vehicle and Traffic Law constitutes negligence *per se* (*Drummond v Perez*, 146 AD3d 645 [1st Dept 2017]; see *Lebron v Mensah*, 161 AD3d 972 [2d Dept 2018]), and plaintiff's testimony shows that the Gul defendants' violation of the standard of care proximately caused the accident (see *Drummond v Perez*, *supra*; see *Davis v Turner*, 132 AD3d 603 [1st Dept 2015]; *Flores v City of New York*, 66 AD3d 599 [1st Dept 2009]).

Under the circumstances, the burden shifted to the Gul defendants to "produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a

¹ Therein, the driver of the Gul vehicle is quoted as reporting that he was travelling on the parkway when the Guzman vehicle failed to stop at a stop sign, causing the accident. In contrast, the driver of the Guzman vehicle reported that he was driving east on the Bronx River Parkway in the east lane, the Gul vehicle was also in the eastbound lane, and struck the Guzman vehicle head-on. Despite the fact that the police report is certified, the report is not appropriately considered on this motion to determine the liability of the defendants. A police accident report made by a police officer who was not an eyewitness containing hearsay statements regarding the ultimate issues of fact may not be admitted into evidence for the purpose of establishing the cause of the accident in question (*Jenkins v Maggie's Paratransit Corp.*, 151 AD3d 484 [1st Dept 2017]).

² Hence, the Gul defendants' second affirmative defense and the Guzman defendants' first affirmative defense are dismissed.

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trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 554 [1st Dept 2010]). Here, the Gul defendants fail to generate an issue of fact as to their liability as they do not submit a supporting affidavit or deposition transcript from a person with knowledge as to the cause of the accident and are in fact precluded from offering testimony at trial. Furthermore, plaintiff's lack of knowledge as to whether the Guzman vehicle was stopped at impact fails to generate a question of fact as to whether the Gul defendants' negligence was a cause of the accident (see *Delgado v Marinez Family Auto*, 113 AD3d 426 [1st Dept 2014]). Any potential issue of comparative negligence between the defendants does not restrict plaintiff's right to partial summary judgment against the Gul defendants (*Davis v Turner, supra*). As such, plaintiff is granted partial summary judgement as to liability against the Gul defendants.

In contrast, plaintiff's evidence fails to set forth a *prima facie* case as against the Guzman defendants. Plaintiff's testimony that he did not know if the Guzman vehicle was stopped does not prove that the Guzman defendants acted with negligence, and, in fact, there is no submitted competent evidence showing negligence on their part. Plaintiff's motion as directed to the Guzman defendants is therefore denied.

Accordingly, plaintiff's motion for an order granting him partial summary judgment on the issue of liability is granted only as against the Gul defendants. That part of the motion pursuant to which plaintiff seeks an order dismissing defendants' affirmative defenses of comparable negligence is granted as against all defendants.

The motions of the Gul defendants [Mot. Seq. 2] and the Guzman defendants [Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff has not sustained a "serious injury" as defined by Insurance Law 5102(d).

Plaintiff had MRIs taken of his cervical and lumbar spine nine days before the accident (on December 2, 2015) (the pre-accident MRIs). This was apparently after being involved in an accident on July 30, 2015, where he allegedly injured his neck, back, and left ankle.

On December 11, 2015, the date of the accident, plaintiff was seated in the rear of the Guzman vehicle. Plaintiff claims that when the accident occurred, he was thrown forward, causing injuries to his back and both knees. He took a taxi from the accident scene to Jacobi Medical Center where he was evaluated in the Emergency Room complaining of neck, back, and knee pain. An X-ray of his right knee was taken which was negative for fractures or dislocations and he was released. He thereafter went for physical therapy three times a week for a month.

Plaintiff was seen by physicians and MRIs of his knees and lumbar spine were taken on March 17, 2016 (the March 2016 MRIs). He testified that he was "confined" to home after

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the collision for three weeks. He claims that he continues to suffer from neck, back, and knee pain.

Defendants now move for summary judgment dismissing the complaint as against plaintiff on the ground that, as a matter of law, plaintiff has not demonstrated, by competent medical evidence, that he sustained a serious injury, as defined in Insurance Law 5102. In support of their respective positions on the motion for summary judgment, the parties have submitted copies of the pleadings, the bills of particular, plaintiff's deposition transcript, police report, attorney affirmations, medical records, and medical expert reports and affirmations. In the verified bill of particulars plaintiff alleges injury to the cervical and lumbar spine and left and right knee.

In support of the motion, the Gul defendants submit the affirmed report of Dr. David Fisher (radiologist), dated September 7, 2018, and the affirmed examination report of Dr. Steven Renzoni (orthopaedic surgeon), dated January 13, 2020. The Guzman defendants in their motion adopt the arguments made by the Gul defendants, but do not submit their own expert report. Neither defendant submitted reply papers.

In terms of the lumbar spine, Fisher compared the pre-accident lumbar MRI with the post-accident March 2016 lumbar MRI. As for the pre-accident MRI, it showed normal results with degenerative changes throughout the low thoracic and lumbar spine. The March 2016 MRI revealed no change from the first MRI, and the doctor found, once again, that there were mild degenerative changes throughout the lower thoracic and lumbar with stable mild bulges from T11/12 through L5/S1. There are no disc herniations, spinal stenosis or fractures. He concluded that:

"Impression:

No interval change. Mild degenerative changes redemonstrated.

Summary:

At your request, I have reviewed an MRI that was performed three months following the date of loss and compared it with a prior study performed 9 days pre-accident. Both studies show mild diffuse degenerative changes. There are no disc herniations or fractures. There is no radiographic evidence of traumatic or causally related injury to the lumbar spine".

With regards to plaintiff's knees, Fisher found the March 2016 MRIs of plaintiff's left and right knees, three months post-accident, to be a normal studies, with no joint effusion or evidence of bone marrow edema or fracture.

The Gul defendants also submit the affirmed examination report of Dr. Steven Renzoni dated January 13, 2020. As to the cervical spine, Renzoni found, in sum and substance, that plaintiff's range of motion was within normal parameters. The orthopedic tests were negative. The upper extremities were also negative for deficiencies.

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In terms of the lumbar spine, Renzoni found that plaintiff's flexion was greater than normal (90 degrees verses 60 degrees average) and the remaining range of motion was normal. The orthopedic tests were negative. The lower extremities were normal in terms of neurological exam, muscle mass, tendon reflexes and touch sensation.

His examination of the knees revealed normal range of motion and orthopedic tests revealed no deficiencies.

Renzoni concluded that the cervical spine, lumbar spine, and both knees were sprain/strains that resolved. He opined that there were no findings which would result in orthopedic limitations in use of the examined body parts, and plaintiff is capable of participating in normal activities of daily living.

In opposition, plaintiff submits the affirmed reports and records of Dr. Joyce Goldenberg (physical medicine and Rehabilitation, dated 12/16/15 and 3/16/20), Dr. David Milbauer (radiologist), Dr. Nirmal Patel (pain management), medical records from Central Park Physical Medicine and Rehabilitation Records, the records of Jacobi Hospital, and the affirmation of Dr. John Himelfarb (radiologist). Plaintiff argues that, at a minimum, the submissions generate an issue of fact as to whether plaintiff suffered a serious injury in the form of "a permanent consequential limitation or use and/or a significant limitation of use" of the lumbar spine and both knees.

In his report, dated June 15, 2020, Himelfarb interprets only the pre-accident cervical and lumbar spine MRIs. As for the lumbar spine, he found slight right convex thoracolumbar scoliosis with loss of normal lordosis, posterior disc herniation at the L-5-S1 levels, and posterior disc bulges at the T-11-12 through L4-5 levels, most prominent at the L-2-3 through L4-5 levels.

Plaintiff submits the reports of Goldenberg (Medicine and Rehabilitation). Goldenberg examined plaintiff five days after the accident, on December 16, 2015. In her notes she states that plaintiff states that he was involved in a motor vehicle accident on July 30, 2015, injuring his back. Her examination of the lumbar spine found a significant loss of range of motion in flexion, extension, right side bends, left side bends, right rotation and left rotation. In addition, the right knee was tender, with positive objective tests, and a 50% loss in flexion. As for the left knee, there was tenderness, positive objective tests, and a loss of flexion (90 degrees verses normal of 135 degrees). Goldenberg's impression was lumbar sprain and spasms, possible lumbar radiculopathy, and internal derangement of the bilateral knees. She does not include an opinion as to the cause of plaintiff's complaints.

On February 29, 2016, Goldenberg performed an electromyography study and, on March 7, 2016, performed a motor and sensory studies on plaintiff's back. Goldenberg

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concluded that the electrodiagnostic study reveals evidence of a bilateral L4 and L5 lumbar radiculopathy. The report does not include an opinion as to cause of plaintiff's injury. Goldenberg also conducted a lower somatosensory study on March 30, 2016, which produced normal results.

Plaintiff submits records relied on by his treating physician Patel that include a report from Lenox Hill Radiology, dated March 28, 2016, wherein Milbauer compares the pre-accident MRI of the lumbar spine with the post-accident March 2016 lumbar MRI and finds no definite interval change. [NYCEF No. 65]. His impression was:

"Broad-based posterior disc protrusion/herniation at L5-S1 2. Diffuse posterior disc bulges with encroachment upon the neural foramina noted at L4-5 and, to a lesser extent, L2-3 and L3-4 3. Small posterior disc bulge at L1-2. No significant interval change is noted".

Plaintiff also submits the later report of Milbauer (dated March 11, 2020) interpreting the post-accident March 2016 MRIs of plaintiff's lumbar spine and both knees. In the lumbar spine, he again finds no change from the pre-accident MRI. In the right knee, Milbauer finds a medial meniscal tear, chondral fissuring within the femoral trochlea centrally and small joint effusion. As for the left knee, Milbauer opines that the March 2016 MRI showed a peripheral undersurface tear of the medial meniscus and small joint effusion and cyst. He did not give an opinion on the cause of these injuries.

Plaintiff provides the affirmation (dated February 2020) of Dr. Patel (pain management) certifying his reports dated April 21, 2016, and April 29, 2016, pertaining to bilateral L4-L5, L5-S1 Transforaminal Epidural Steroid Injections after Epidurogram performed on plaintiff. Patel does not comment on the cause of plaintiff's alleged injuries in the submissions.

The next report by Goldenberg is dated March 16, 2020. Goldenberg notes that plaintiff states that he was involved in a slip and fall accident on July 30, 2015, injuring his neck, back and left ankle. She finds the lumbar spine has reduced flexion, extension, right side bends, left side bends and left rotation. As for the right knee, the compression tests were positive, and the active range of motion for flexion was decreased. The left knee also produced positive results on the compression tests and demonstrated a loss of flexion. All of these losses were lower than the losses reported in Goldenberg's December 2015 report. She opines that:

"FINAL DIAGNOSIS:

Based upon my physical examination, diagnostic test results and the history provided by the patient, my impression is:

1. Lumbar sprain 2. Lumbar radiculopathy bilaterally at the level of L4 3. Lumbar myofascial pain syndrome / muscle spasms 4. Right knee medial meniscal tear involving the root of the anterior horn and peripheral undersurface tear of the body of the medial meniscus/localized chondral fissuring within the femoral trochlea centrally/small joint effusion and popliteal cyst 5. Left knee peripheral undersurface tear of the body of the medial meniscus/small joint effusion and small popliteal cyst

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CAUSAL RELATIONSHIP:

To a reasonable degree of medical certainty, the accident of December 11, 2015 described above is the competent producing cause of Mr. Salce's injuries and limitations to his lumbar spine and bilateral knees as indicated in this report".

Goldenberg opines that plaintiff sustained a serious injury in that he has incurred a "permanent consequential limitation" of use of his lumbar spine and bilateral knees. In her opinion, stated with a reasonable degree of medical certainty, plaintiff's injuries include a permanent partial loss of use of his lumbar spine and bilateral knees. These injuries are now and are expected to continue to be, the source chronic pain and with moderate loss of the normal ranges of motion overall. She opines that the injuries sustained by plaintiff are the direct result of the accident and are causally connected and that given the current status of his clinical presentation and diagnostic studies performed to date, he will never fully recover and will continue to have pain, consequential loss of use and limitation of motion of his lumbar spine and bilateral knees. Goldenberg concludes that plaintiff has permanent impairment and disability, due to the injuries sustained in the accident.

On a motion for summary judgment it is the obligation of the court to determine whether or not there are issues of fact that militate against granting that relief to either plaintiff or defendant. It is not the court's function on a motion for summary judgment to assess credibility (*Varela v Rohif*, 176 AD3d 651 [1st Dept 2019]; *Rawls v Simon*, 157 AD3d 418 [1st Dept 2018]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]) The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]).

Applying these governing legal principles here, the court finds that defendants met the *prima facie* burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) as a result of the subject accident by submitting the medical findings and the opinions of the experts (*Perl v Meher*, 18 NY3d 208 [2011]; *Toure v Avis Rent A Car, Inc.*, 98 NY2d 345 [2002]; *DeJesus v Pauino*, 61 AD3d 605 [1st Dept 2009]).

In opposition, plaintiff raises an issue of fact as to whether he sustained a serious injury based on his claimed injuries through the medical expert affirmations and submitted medical records with regards to his knee injuries. Plaintiff's doctor noted significant range-of-motion restrictions shortly after the accident and recently, and the MRI findings disclose the existence of partial tears in both knees (*Rodriguez v Konate*, 161 AD3d 565 [1st Dept 2018]; see *Encarnacion v Castillo*, 146 AD3d 600, 601 [1st Dept 2017]). Of note, in his post-accident MRI report Milbauer found meniscal tears in both knees (*Rodriguez v Konate, supra*; see *Collazo v Anderson*, 103 AD3d 527 [2013]). Furthermore, while she did not discuss causation in her first report, in the most recent report, Goldenberg causally connected the knee injuries to the

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accident. Since defendants did not present any evidence of preexisting torn menisci in plaintiff's own medical records, nothing further was required of plaintiff in opposition to their motion (*Aquino v Alvarez*, 162 AD3d 451 [1st Dept 2018]; *Malloy v Matute*, 70 AD3d 584 [1st Dept 2010]; see *Jallow v Siri*, 133 AD3d 1391 [1st Dept 2015]).

In contrast, plaintiff fails to generate an issue of a fact as to the alleged lumbar injury. The MRI reports comparing the pre-accident and post-accident MRIs do not find any change in the condition of the lumbar spine, and the defendants' expert opined that the MRIs only showed mild degenerative changes throughout the lower thoracic and lumbar spine. Defendants therefore establish *prima facie* that any injury to plaintiff's lumbar spine was not casually related to the accident (*Vaughan v Leon*, 94 AD3d 646 [1st Dept 2012]).

The MRI reports submitted by plaintiff do not contradict the defendants' experts' findings of preexisting degenerative changes. Furthermore, while in her reports Goldenberg found a significant loss of range of motion in the lumbar spine and opined that plaintiff's condition was directly related to the accident, Goldenberg fails to address the degenerative findings in plaintiff's own MRIs. Moreover, Goldenberg mentions plaintiff's July 2015 accident and the pre-accident MRIs, but does not explain or address the potential impact of the earlier recent accident on plaintiff's condition. Hence, plaintiff's MRI reports showed degenerative findings which plaintiff's experts failed to address or explain (*Deneen v Bucknor*, 178 AD3d 461 [1st Dept 2019]; *Bonilla v Bathily*, 177 AD3d 407 [1st Dept 2019]). As such, plaintiff failed to raise an issue of fact as to whether his lumbar injuries were causally related to the accident (*Maraj v Fletcher*, 180 AD3d 621 [1st Dept 2020]). Accordingly, plaintiff cannot recover for injuries to his lumbar spine, regardless of whether it is found that he sustained some other "serious injury" (see *Bianchi v Mason*, 179 AD3d 567 [1st Dept 2020]; *Taylor v Delgado*, 154 AD3d 620 [1st Dept 2017]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motions of defendants GUL SERVICES INC. and KHALID USMAN (the Gul defendants) [Mot. Seq. 2] and defendants AYLEEN GUZMAN, and TONI MCKNIGHT (the Guzman defendants) [Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff JASON SALCE (plaintiff) has not sustained a "serious injury" under the Insurance Law 5102(d) insofar as premised upon injuries to his lumbar spine are granted; and it is further

ORDERED that the remainder of the motions [Mot. Seqs. 2 & 3] by defendants are denied; and it is further

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ORDERED that the part of plaintiff's cross-motion, made pursuant to CPLR 3212, that seeks an order granting plaintiff partial summary judgment on the issue of liability as against the Gul defendants is granted; and it is further

ORDERED that the part of plaintiff's cross-motion, made pursuant to CPLR 3212, that seeks an order granting plaintiff partial summary judgment on the issue of liability as against the Guzman defendants is denied; and it is further

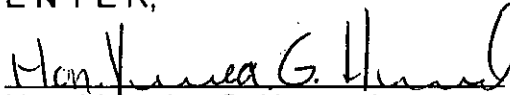
ORDERED that the part of plaintiff's cross-motion, made pursuant to CPLR 3212, that seeks an order dismissing the affirmative defenses of comparable negligence as against all defendants is granted.

The parties are reminded that this action is scheduled for a compliance conference on October 27, 2020.

The foregoing constitutes the decision and order of the court.

Dated: September 21, 2020

ENTER,


Hon. Veronica G. Hummel