Tuberman v Hall
2007 NY Slip Op 34478(U)
November 30, 2007
Sup Ct, Bronx County
Docket Number: 8196/2005
Judge: Betty Owen Stinson
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

NEW YORK SUPREME COURT - COUNTY OF BRONX
IAS PART 08

--X

STEVEN TUBERMAN and ROSALBA LOPEZ,

Plaintiffs,

INDEX No. 8196/2005

-against-

ANDREA HALL, TREVOR A. HALL and GREGORY BLACKWELL,

Defendants.

Present:
HON. BETTY OWEN STINSON
J.S.C.

--X

The following papers numbered 1 to 6 read on this motion and cross-motion for summary judgment, Noticed on 03-02-07 and submitted as No. 53 on the Calendar of 08-17-07

	PAPERS NUMBERED
Notice of Motion -Exhibits and Affidavits Annexed..	1, 2
Order to Show Cause - Exhibits and Affidavits Annexed..................................	
Answering Affidavits and Exhibits..	3, 4
Replying Affidavits and Exhibits...	5, 6
Sur-reply Affidavits and Exhibits..	
Stipulations – Referee's Report – Minutes...	
Memorandum of Law..	

Upon the foregoing papers this motion and cross-motion are decided per annexed memorandum decision.

Dated: November 30, 2007
Bronx, New York

BETTY OWEN STINSON, J.S.C.

Filed On - 12/10/2007 9:39:35 AM Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

--X

STEVEN TUBERMAN and ROSALBA LOPEZ,

Plaintiffs,

INDEX № 8196/2005

-against-

DECISION/ORDER

ANDREA HALL, TREVOR A. HALL and GREGORY BLACKWELL,

Defendants.

--X

HON. BETTY OWEN STINSON:

This motion by defendant Gregory Blackwell ("Blackwell") for a summary judgment finding of liability on the part of co-defendants Andrea Hall and Trevor A. Hall (collectively, "Hall") is granted. Cross-motion by co-defendants Hall for summary judgment dismissing the complaint of plaintiff Steven Tuberman ("Tuberman" or "plaintiff" herein) for failure to demonstrate a serious injury is granted.

On November 19, 2004, plaintiff Tuberman was a passenger in a Honda Civic driven by defendant Blackwell. The Civic was stopped at a traffic light at the end of an exit ramp off the Hutchinson River Parkway when a Dodge Stratus, driven by defendant Andrea Hall and owned by defendant Trevor A. Hall, struck the Civic from behind. Andrea Hall told police at the scene that she stopped behind the Civic at the red light. The Civic then began to make a right turn, but stopped and the Dodge Stratus, rolling forward, hit the Civic in the rear. (Police Accident Report, November 19, 2004.) Tuberman and Blackwell both testified that the Civic did not move at all before being struck by the Stratus. Andrea Hall stated it was possible to make a right turn after

Filed On - 12/10/2007 9:39:35 AM Bronx County Clerk

stopping at a red traffic light in that area and that she followed the Civic into the right turn where it came to an "abrupt" stop, causing her to "move" into it. (Deposition of Andrea Hall, January 19, 2007, pp. 16-19.)

Summary judgment is appropriate when there is no genuine issue of fact to be resolved at trial and the record submitted warrants the court as a matter of law in directing judgment (*Andre v. Pomeroy*, 35 NY2d 361 [1974]). A party opposing the motion must come forward with admissible proof that would demonstrate the necessity of a trial as to an issue of fact (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 [1979]).

A rear-end collision with a stopped vehicle establishes a *prima facie* case of negligence against the driver of the moving vehicle unless the driver of the moving vehicle can provide a non-negligent explanation, in evidentiary form, for the collision (*Figueroa v. Luna*, 281 AD2d 204 (1st Dept 2001]). A claim that the driver of the lead vehicle stopped short, standing alone, is insufficient to rebut the presumption of negligence (*Campbell v. City of Yonkers*, 37 AD3d 750 [2nd Dept 2007]).

Andrea Hall's explanation is not sufficient to rebut the *prima facie* evidence of her negligence. Summary judgment is therefore granted in favor of defendant Blackwell and, consequently, to the plaintiffs as well on the issue of liability in the happening of the accident as against Andrea Hall and Trevor A. Hall.

After the accident, Tuberman went to the hospital with Blackwell in the Honda Civic, but only to wait for co-plaintiff Rosalba Lopez who had been transported there by ambulance. About a week later, he sought medical treatment from Boston Road Medical Service, P.C. Tuberman had four physical therapy treatments for his back and right knee and then decided to have

Filed On - 12/10/2007 9:39:35 AM Bronx County Clerk

arthroscopic surgery for his knee. After that surgery in January 2005, Tuberman returned to physical therapy for four or five weeks and then stopped because he did not feel it was helping him. (Deposition of Steven Tuberman, June 8, 2006, p. 80). He had no more medical treatment for his injuries after that date.

Plaintiffs brought this action against the defendants alleging that plaintiff Tuberman suffered injuries as a result of the subject accident including a torn medial meniscus of the right knee, a tear of the right knee anterior cruciate ligament ("ACL"), herniated discs at L4-5 and L5-S1, bulging discs at C4-5, C5-6, L2-3 and L3-4, sprain and strain of both shoulders and of the cervical and lumbar spine. Defendants Hall cross-moved for summary judgment dismissing Tuberman's complaint against them for failure to demonstrate that he had suffered a serious injury.

In order to recover for non-economic loss resulting from an automobile accident under New York's "No-Fault" statute, Insurance Law § 5104, the plaintiff must establish, as a threshold matter, that the injury suffered was a "serious injury" within the meaning of the statute. "Serious injury" is defined by Insurance Law § 5102(d) to include, among other things not relevant here, a "permanent loss of use of a body organ, member, function or system", a "permanent consequential limitation of use of a body organ or member", a "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 constitutes such person's usual and customary activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment."

The initial burden on a threshold motion is upon the defendants to present evidence

Filed On - 12/10/2007 9:39:35 AM Bronx County Clerk

establishing that plaintiff has no cause of action, i.e.: that no serious injury has been sustained. It is only when that burden is met that the plaintiff would be required to establish *prima facie* that a serious injury has been sustained within the meaning of Insurance Law § 5102(d) (*Franchini v. Palmieri*, 1 NY3d 536 [2003]; *Licari v. Elliot*, 57 NY2d 230 [1982]).

To make out a *prima facie* case of serious injury, a plaintiff must produce competent medical evidence that the injuries are either "permanent" or involve a "significant" limitation of use (*Kordana v. Pomelito*, 121 AD2d 783 [3rd Dept 1986]). A finding of "significant limitation" requires more than a mild, minor or slight limitation of use (*Broderick v. Spaeth*, 241 AD2d 898, *lv denied,* 91 NY2d 805; *Gaddy v. Eyler*, 167 AD2d 67, *aff'd,* 79 NY2d 955). A permanent loss of use must be "total" in order to satisfy the serious injury threshold (*Oberly v. Bangs Ambulance*, 96 NY2d 295 [2001]; *Hock v. Aviles*, 21 AD3d 786 [1st Dept 2005]). Strictly subjective complaints of a plaintiff unsupported by credible medical evidence do not suffice to establish a serious injury (*Scheer v. Koubek*, 70 NY2d 678 [1987]). To satisfy the requirement that plaintiff suffered a medically determined injury preventing her from performing substantially all of her material activities during 90 out of the first 180 days, a plaintiff must show that "substantially all" of her usual activities were curtailed. (*Gaddy*, 167 AD2d 67). The "substantially all" standard "requires a showing that plaintiff's activities have been restricted to a great extent rather than some slight curtailment" (*Berk v. Lopez*, 278 AD2d 156 [1st Dept 2000], *lv denied*, 96 NY2d 708). Allegations of sprains and contusions do not fall into any of the categories of serious injury set forth in the statute (*Maenza v. Letkajornsook*, 172 AD2d 500 [2nd Dept 1991]).

"Proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a

Filed On - 12/10/2007 9:39:35 AM Bronx County Clerk

serious injury" (*Pommels v. Perez*, 4 NY3d 566 [2005]). A plaintiff's subjective complaints of pain are insufficient, without more, to establish that herniated discs constitute a serious injury *Pierre v. Nanton*, 279 AD2d 621 [2nd Dept 2001]).

The defendant may rely on medical records and reports prepared by plaintiff's treating physicians to establish that plaintiff did not suffer a serious injury causally related to the accident (*Franchini*, 1 NY3d 536). Once the burden has shifted however, an affidavit or affirmation by the person conducting a physical examination of the plaintiff is necessary to establish a serious injury, unless plaintiff is offering unsworn reports already relied upon by the defendant (*Grossman v. Wright*, 268 AD2d 79 [3rd Dept 2000]; *see also Zoldas v. Louise Cab Co.*,108 AD2d 378 [1st Dept 1985]). The affirmation must set forth the objective medical tests and quantitative results used to support the opinion of the expert (*Grossman*, 268 AD2d 79). "An expert's *qualitative* assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (cite omitted)" (*Toure v. Avis Rent A Car Systems*, 98 NY2d 345 [2002]). A conclusory affidavit of the doctor does not constitute medical evidence (*Zoldas*, 108 AD2d 3778; *see also Lopez v. Senatore*, 65 NY2d 1017 [1985] [conclusory assertions tailored to meet statutory requirements insufficient to demonstrate serious injury]).

In support of the cross-motion, Hall offered the plaintiff's bill of particulars, his deposition testimony and the affirmed reports of Dr. Barbara Freeman, Dr. Steven Schwartz and Dr. A. Robert Tantleff. The bill of particulars listed the injuries set forth above.

Plaintiff testified that he did not spend any time in bed as a result of the accident. (Deposition of Steven Tuberman, June 8, 2006, p. 48). He missed a week of work. (*id.* at 7). At

Filed On - 12/10/2007 9:39:35 AM Bronx County Clerk

the time of the accident he was 6' 5" tall and weighed about 310 pounds. (*id.* at 68). At the time of his deposition he weighed 350 pounds. (*id.*). Before the accident he used to lift weights, do push-ups, jumping jacks and sit-ups. (*id.* at 55). Since the accident he can no longer do squats. (*id.* at 54). It is difficult to work on cars as he used to do. (*id.* at 54, 57). He gets numbness in his hands periodically. (*id.* at 69). He no longer engages in any sports. (*id.* at 57). He has a hard time sitting through a movie because his knee starts to "throb". (*id.* at 54). The same is true of standing. (*id.*). The pain in his right knee did not improve with surgery. (*id.* at 79-80). The pain in his back improved "slightly". (*id.* at 80).

Dr. Freeman, orthopedist, examined the 34-year-old plaintiff on September 22, 2006. He complained of back pain "all the time". He reported that the pain in his right knee "comes and goes". Dr. Freeman found range of motion in plaintiff's shoulders and cervical and lumbar spine to be normal with no spasm or tenderness. Straight leg raising test was negative in both sitting and supine positions. There was no impingement sign, but slight subacromial tenderness in the right shoulder. Both knees demonstrated range of motion from 0 to 135 degrees with normal being 140. Dr. Freeman found no swelling, tenderness or instability. Lachman's and McMurray's tests were negative. Dr. Freeman found no orthopedic disability and no residuals from the subject motor vehicle accident.

Dr. Schwartz, neurologist, examined plaintiff on September 22, 2006. He complained of occasional tingling in his hands and numbness in his legs, occasional pain in his right knee and extreme back pain from his neck to the lumbar region. Dr. Schwartz found all range of motion to be within normal limits in plaintiff's cervical and lumbar spine, shoulders and knees, except for extension in his shoulders, which measured 20 degrees out of a normal 50. Based on the history

Filed On - 12/10/2007 9:39:35 AM Bronx County Clerk

provided, review of plaintiff's medical records and the findings in the physical examination, Dr. Schwartz concluded that plaintiff had no objective evidence of any neurological deficits, disability or functional impairment.

Dr. Tantleff, radiologist, reviewed MRI studies of plaintiff's cervical and lumbar spine, performed on December 7, 2004, three weeks after the subject accident, and plaintiff's right knee, performed on December 14, 2004, four weeks after the accident. Dr. Tantleff found the films reviewed to be of "variable" quality with degraded image detail and resolution, creating phantom images and "faux abnormalities" due to the motion artifact.

Based on the images submitted, Dr. Tantleff found chronic degenerative disc disease and dessication of the C4-5 and C5-6 intervertebral discs with loss of disc height and regional facet arthropathy. The findings were associated with diffuse bulging of the annulus beyond the disc space. Dr. Tantleff stated that bulging of a disc is due to desiccation and degeneration and develops over the course of many years. Dr. Tantleff also found endplate spurring at C4 through C6. Acute traumatic injuries such as falls or motor vehicle accidents are not causative of disc bulging. Of asymptomatic individuals aged 20 to 39, more than one third manifest disc bulges on MRI or CAT examinations. Dr. Tantleff found no evidence of edema, muscle spasm or contusion. There was no evidence of mass effect on the cervical cord or exiting nerve roots. The findings were chronic and longstanding, consistent with the individual's age and were not causally related to the traumatic event of November 19, 2004.

Dr. Tantleff found a degenerative focal disc herniation at L4-5, contacting the thecal sac but not compromising the exiting or traversing nerve roots, as well as a degenerative focal disc protrusion of no consequence at L5-S1 which did not contact the thecal sac. Dr. Tantleff found

Filed On - 12/10/2007 9:39:35 AM Bronx County Clerk

degeneration and desiccation of all the visualized intervertebral discs with endplate spurring and regional facet arthropathy. There was no evidence of edema, muscle spasm or contusion. There was no evidence of posterior endplate fractures to suggest whiplash. The findings were chronic and longstanding, requiring years to develop, and not causally related to the traumatic event of November 19, 2004.

Dr. Tantleff found chronic and long standing osteochondral defects of the distal medial femur and medial tibial plateau of plaintiff's right knee. There was no evidence of recent trauma; no evidence of bony contusion, soft tissue swelling, edema or hematomas. Dr. Tantleff observed loss of compartmental height of the medial and lateral joint compartment and mild degenerative changes of the patella with chronic lateral patella subluxation. There was degenerative tendinosis and internal degenerative fraying of the anterior cruciate ligament consistent with the overall degeneration of the knee. There was a degenerative complex tear of the medial meniscus, consistent with fraying and precedent degeneration. The osteoarthritic changes to the articular surfaces of the joint were consistent with the chronic, pre-existing and long standing nature of the findings.

In opposition to the cross-motion, plaintiff offered unaffirmed narrative reports by Dr. Sholom M. Gootzeit, affirmations by Dr. David H. Stemerman, the affirmation of Dr. Irving Liebman and an affirmation by Dr. Jacob Lichy. Dr. Gootzeit, a chiropractor, first saw plaintiff on November 26, 2004, one week after the subject accident. Plaintiff complained of constant pain in his neck, low back and right knee, the latter aggravated by bending, squatting, prolonged walking and standing. Dr. Gootzeit found restricted range of motion in plaintiff's cervical and lumbar spine, both shoulders and right knee. Anterior Drawer sign and Lachman's tests were

Filed On - 12/10/2007 9:39:35 AM Bronx County Clerk

positive. Initial diagnosis was cervical and lumbar and bilateral shoulder sprain/strain and right knee contusion injury. Dr. Gootzeit recommended MRI and NCV/EMG studies and prescribed a physical therapy program. The electrodiagnostic studies of plaintiff's lower extremities were consistent with a normal study, findings of the upper extremities were consistent with bilateral carpal tunnel syndrome. Dr. Gootziet saw plaintiff again on January 3, 2005. Plaintiff reported improvement in his pain and Dr. Gootzeit recommended continued physical therapy.

Dr. Stemerman performed the MRI studies of plaintiff's cervical and lumbar spine and right knee. He found the herniations and bulges listed in the bill of particulars and a tear of the medial meniscus of plaintiff's right knee, "possible" partial tear of the ACL and joint space narrowing consistent with arthritic disease.

Dr. Liebman performed surgery on plaintiff's right knee on January 24, 2005, consisting of a diagnostic arthroscopy, a partial right medial and lateral meniscectomy, a chondroplasty of the medial femoral condyle, a chondroplasty of the lateral tibial plateau and a partial synovectomy. Dr. Liebman did not offer his post-operative report. Sutures were removed on February 21, 2005 and the plaintiff was referred back to Dr. Gootzeit for further physical therapy. Dr. Liebman next examined plaintiff on May 31, 2007 after the instant motion was made. He stated that "measurements were made" of plaintiff's cervical and lumbar and right knee range of motion and all were restricted. There was a positive straight leg raising test. Dr. Liebman recited the numerical restrictions in degrees and compared them to the normal, but did not say that he himself made the measurements or that they were objective measurements. In his affidavit dated June 4, 2007, Dr. Liebman concluded that the disc bulges and herniations were the result of the subject motor vehicle accident. He stated that plaintiff "also sustained" the above-noted injuries to his

Filed On - 12/10/2007 9:39:35 AM Bronx County Clerk

knee, but it was not clear if he attributed the knee injuries to the subject accident as well. In view of plaintiff's complaints and physical findings, Dr. Liebman concluded that plaintiff was left with a "permanent disability" of his cervical and lumbar spine and right knee.

Dr. Lichy examined the MRI report of plaintiff's right knee on August 6, 2007 and found tears of the medial and lateral menisci, a full-thickness tear of the ACL, a sub-chondral fracture of the medial tibial plateau and a joint effusion. He found no osteoarthritic spurring in any of the knee compartments.

Defendants Hall have demonstrated their entitlement to summary judgment which plaintiff has not refuted with admissible evidence. Defendants met their burden with the affirmations of Drs. Freeman, Schwartz and Tantleff, finding no orthopedic or neurological disability, but rather pre-existing and long standing degenerative conditions accounting for the MRI findings of bulging and herniated discs and meniscal tears. Plaintiff's own deposition testimony was sufficient to show he did not suffer a medically-determined injury preventing him from performing substantially all his customary daily activities for 90 out of the first 180 days following the accident. He testified that he missed only a week of work as a result of the accident.

Plaintiff offered only unaffirmed reports of his treating chiropractor, but even admissible they would be insufficient to defeat summary judgment. The latest was dated less than a month and a half after the accident. No reports of plaintiff's physical therapy treatments subsequent to his knee surgery were offered. Dr. Stemerman offered no opinion regarding causation with respect to the cervical and lumbar bulges and herniations. Dr. Stemerman did make note of the arthritic condition of plaintiff's right knee. Plaintiff's surgeon, Dr. Liebman, did not treat plaintiff's neck and back, and his conclusion that restricted range of motion in that area was

Filed On - 12/10/2007 9:39:35 AM Bronx County Clerk

caused by the subject accident is vague and unsupported by his report. It is not even clear from the report that Dr. Liebman assessed range of motion himself instead of relying on Dr. Gootzeit's reports. Dr. Liebman was silent as to whether the injuries treated in plaintiff's knee included an arthritic condition or not. The MRI report of Dr. Stemerman which was provided to Dr. Liebman clearly made reference to an arthritic condition. Dr. Lichy's findings are inadmissible inasmuch as they conflict with the findings of plaintiff's own radiologist and were sought out only after four adjournments of the instant motion. Furthermore, Dr. Lichy's findings also conflict with those of Dr. Liebman, who actually was able to visualize the interior of plaintiff's right knee, who made no mention of either a sub-chondral fracture or tear of the ACL and who studiously avoided any commentary in his affirmation regarding the arthritic condition found by Dr. Stemerman. It is notable that plaintiff did not offer Dr. Liebman's post-operative report which might have resolved the conflict between plaintiff's own experts. Plaintiff's subjective complaints of pain and limitations such as difficulties working with cars and sitting through movies, are vague and insufficient in any event to show a significant injury. Finally, plaintiff testified that he himself terminated physical therapy after only four or five weeks because he "just didn't feel it was doing anything" for him. This was the beginning of April 2005 at the latest, a year before his deposition in June 2006, and more than a year and a half before the instant motion was made in January 2007. He has sought no attention at all for his claimed injuries since April 2005: an insufficiently explained gap and cessation of treatment (*see Berette v. Ford Motor Credit Company*, 29 AD3d 452 [1st Dept 2006], *citing Pommels v. Perez*, 4 AD3d 566 [defendant's summary motion granted where, even if plaintiff's opposition had been supported by nonconclusory medical opinion, plaintiff failed to explain cessation of treatment]; *Rubenscastro v. Alfaro*, 29 AD3d 436 [1st Dept

Filed On - 12/10/2007 9:39:35 AM Bronx County Clerk

2006] [complaint dismissed when plaintiff's expert failed to explain or even address 18-month gap in treatment]). Plaintiff Tuberman's complaint is, therefore, dismissed.

Movant is directed to serve a copy of this order on the Clerk of Court who shall amend the caption to delete the names of Steven Tuberman as a party plaintiff and Gregory Blackwell as a party defendant.

This constitutes the decision and order of the court.

Dated: November 30, 2007
Bronx, New York

BETTY OWEN STINSON, J.S.C..

Filed On - 12/10/2007 9:39:35 AM Bronx County Clerk