

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

SCAN

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AMANDA HENDERSON,

Plaintiff,

-against-

AMY ZAMBRANA and JOHN ZAMBRANA,

Defendants.

-----x
JOHN ZAMBRANA and AMY D. ZAMBRANA,

Plaintiffs,

-against-

AMANDA HENDERSON,

Defendant.

-----x
Papers Read on this Motion:

Defendant Zambranas' Notice of Motion for Summary Judgment	01
Defendant Henderson's Notice of Motion for Summary Judgment	02
Plaintiff Zambranas' Notice of Motion for Summary Judgment	03
Plaintiff Henderson's Affirmation in Opposition	xx
Defendant Zambranas' Reply Affirmation	xx
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Plaintiff Zambranas' Affirmation in Opposition of Motion	xx
Defendant Henderson's Reply Affirmation	xx

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 14
Index No.: 010840/06
Motion Seq. No.: 01
Action #1

Index No.: 16342/06
Motion Seq. Nos.: 02 & 03
Action # 2

DECISION AND ORDER

The Motion Seq. No. 01 by Amy and John Zambrana, Defendants in Action No. 1, for an order

pursuant to CPLR §3212 granting them summary judgment dismissing the complaint in Action No. 1 is **granted**.

The Cross-Motion Seq. No. 2 by Amanda L. Henderson, Defendant in Action No. 2 for an order pursuant to CPLR §3212 and Insurance Law § 5102(d), 5104(a) dismissing the complaint on the grounds that John Zambrana, the Plaintiff in Action No. 2, did not sustain a "serious injury" as required by Insurance law § 5104(a) and defined by Insurance Law § 5102(d) is **denied**.

The Cross-Motion Seq. No. 3 by Plaintiffs in Action No. 2 for an order pursuant to CPLR §3212(c) granting them partial summary judgment with respect to liability against Defendant Amanda L. Henderson is **granted**.

In these actions, the parties Amanda L. Henderson and John Zambrana seek to recover damages for personal injuries sustained in a motor vehicle accident on March 18, 2006. John Zambrana's wife Amy Zambrana seeks to recover for loss of consortium. Henderson and Zambrana's vehicles collided when Zambrana was traveling east and Henderson's vehicle was traveling west on Merritts Road in Farmingdale. Mr. Zambrana seeks summary judgment dismissing Henderson's complaint and he seeks summary judgment against Henderson with respect to liability. Henderson seeks summary judgment dismissing Zambranas' complaint on the grounds that John Zambrana did not sustain a serious injury as required by Insurance Law § 5104(a) and defined by Insurance Law § 5102(d).

"On a motion for summary judgment pursuant to CPLR §3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Sheppard-Mobley v King*, 10 AD3d 70, 74 (2d Dept 2004), *aff'd. as mod.*, 4 NY3d 627 (2005), citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). "Failure to make such *prima*

facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Sheppard-Mobley v King*, *supra*, at p. 74; *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v Prospect Hosp.*, *supra*, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See, Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521 (2d Dept 2006), citing *Secof v Greens Condominium*, 158 AD2d 591 (2d Dept 1990).

At his examination-before-trial, John Zambrana testified that he was traveling east on Merritts Road when he observed Henderson's vehicle coming toward him from his left. It veered into his lane and the passenger side of the Henderson vehicle struck the front of his vehicle.

At her examination-before-trial, Amanda Henderson testified that as she was traveling on Merritts Road, a vehicle coming down Quaker Meeting House where it intersects with Merritts Road near a slight curve in the road scared her. She feared a collision with that vehicle as a result of which she veered into the oncoming lane of traffic and collided with Zambrana's vehicle. She testified that she was traveling at 35 miles per hour at the time of the accident; that she never saw Zambrana's vehicle; and, that she could not recall whether or not she braked.

John Zambrana as Plaintiff in Action No. 2 has established his entitlement to partial summary judgment attributing complete liability to Defendant Henderson, shifting the burden to her to establish the existence of an issue of fact.

Defendant Henderson has failed to meet her burden. In her affidavit in opposition, Henderson attests that when she saw a car traveling down Quaker Meeting Road and thought that it was not going to stop, she jerked her steering wheel to the left. She then goes on to attest that "after that near-miss,

[she] brought [her] car to a full stop . . . [at which time] it was straddling the double yellow line . . . at about a 65 degree angle." She attests that she turned her head around to see if any cars were coming from behind, then looked forward and saw Henderson 's car coming toward the front of her car. She states that she attempted to wave to the driver to get his attention but to no avail. She attests that the driver drove directly into her car without breaking or changing direction. She states that she was at a full stop for approximately 10 seconds before the collision.

The version of events provided by Henderson in opposition to Zambrana's motion is completely contradictory to her testimony at her examination-before-trial. Accordingly, it "raise[s] only feigned issues of fact designed to avoid the consequence of [her] prior testimony, and [is] insufficient to defeat the motion for summary judgment. *Colucci v AFC Construction*, 54 AD3d 798, 799 (2d Dept. 2008), citing *Marchese v Skenderi*, 51 AD3d 642 (2008); *McFadden v Village of Ossining*, 48 AD3d 761, 762 (2008); *Karwowski v New York City Tr. Auth.*, 44 AD3d 826, 827 (2007); *Nieves v JHH Transp., LLC*, 40 AD3d 1060 (2007).

Zambrana's motions for summary judgment dismissing Henderson's complaint and for partial summary judgment declaring Henderson 's liability are **granted**.

As a result of this accident, Zambrana's body was caused to come into contact with the interior of his vehicle, i.e., the air bag hit his face and head and both knees struck the dashboard. Although he did not lose consciousness as a result of this impact, he felt shaken, dizzy and disoriented. He was transported via ambulance to New Island Hospital, where he was treated and released. At the hospital he complained of pain to both knees.

Following his discharge from New Island Hospital, Zambrana came under the care of Dr. Douglas Foster, D.C. He complained to Dr. Foster of head, neck and back pain, as well as pain to his

knees. He treated with Dr. Foster from March 22, 2006 through approximately August, 2006. Zambrana also had physical therapy for almost eleven months. Zambrana also sought treatment from Dr. Ronald Bailey, M.D. for pain management from May 1, 2006 through July 26, 2006; Dr. Philip Rafiy, M.D., an orthopedic, from April 20, 2006 through June 7, 2006; and Dr. Christopher Durant, M.D., an orthopedic, on or about March 27, 2006. As a result of the accident, Zambrana was completely out of work for two months and returned to work half time for another month. Thereafter, he returned to work full time and when he did, he was restricted in his duties. During the period of time he was out of work he was confined to bed and was convalescing due to extreme pain and discomfort from the injuries he sustained in this accident. Even after he returned to work he would go home and seek bed rest so he could convalesce due to the injuries he sustained in this accident. For the entire period of time from the accident up until the present, he was limited in his daily activities as he was unable to work for an extended period of time and was unable to do his normal household chores and/or activities, including social activities, without pain and discomfort.

Zambrana alleges that as a result of the accident, he suffered "posterior bulge and posterior annular tear at L3-L4; posterior midline herniation impingement of the thecal sac at L4-L5; posterior midline herniation at L5-S1 into the epidural fat abutting the anterior sac margins; posterior bulge at C3-C4 extending both to the left and more pronounced to the right of midline flattening the anterior aspect of the thecal sac and right foraminal narrowing due to the uncovertebral hypertrophy; left lumbosacral radiculopathy and cervical radiculopathy; back pain; headaches, left knee derangement, right knee derangement; right knee contusion and patellar contusion and tendinitis; left knee medial joint line tenderness, contusion and joint effusion; and rib pain." He thus alleges that he has suffered a significant limitation of use of a body organ or member and/or a medically determined injury or

impairment which prevented him from performing substantially all of his customary daily activities for not less than 90 days during the 180 days following the accident.

In support of her motion, Henderson has submitted the affirmations of Dr. Frank Hudak, an orthopedic surgeon, and Dr. Erik Entin, a neurologist.

Dr. Hudak affirms that he examined Zambrana on January 10, 2008. He measured the ranges of motion in Zambrana's cervical, dorsal and lumbosacral spines, shoulders, elbows, left and right wrists and knees. Using a goniometer and a technique of visually bisecting angles comparing Zambrana's range of motion to normal, he found all to be normal with the exception of forward flexion, which was "45 degrees at the waist [with] noted pain in his lower lumbosacral spine" with normal flexion 90 degrees or greater. Dr. Hudak also opined that his "[r]eview of [the] MRI of [Zambrana's] lumbosacral spine performed on 4/18/06 revealed significant degenerative disc disease at L3-L4, L4-L5 and L5-S1. There is posterior bulge at L3-L4 and L4-L5 and a posterior herniation noted on the lateral view at L5-S1. Dr. Hudak's diagnosis is that Zambrana is post-sprain of his cervical and lumbar spines, left hand contusion and contusion of both his right and left knees. He concludes that "[o]n examination there were no objective findings to confirm a disability or permanency regarding the claimant's accident of 3/18/06." He further concludes that "[b]ased upon a review of x-rays, the claimant has significant degenerative disc disease at L3-L4, L4-L5 and L5-S1 that predated the accident of 3/18/06. MRI revealed bulges at L3-L4, L4-L5 and herniation at L5-S1. The age of the herniation could not be determined but in the face of significant disease, it would appear to be a chronic finding."

Dr. Entin affirms that he examined Zambrana on January 8, 2008 as well as his medical records. He concluded "Zambrana has no objective neurological deficits or objective neurological disability referable to the accident of 3/18/06;" however, he deferred any determination regarding Zambrana's

localized back pain to the appropriate orthopedic consultant.

As for Plaintiff's alleged medically determined injury or impairment that prevented him from performing substantially all of his customary daily activities for not less than 90 days during the 180 days following the accident, Henderson's attorney notes that he "has returned to work on a full-time basis as a foreman in a metal shop;" "he was still capable of taking vacations, which required him to either fly or drive a vehicle in excess of six hours;" and, "he is an active member of a bowling league."

While a significant limitation in the range of motion of Zambrana's lumbar spine was found by Dr. Hudak. (see, *Volpetti v Yoon Kap*, 28 AD3d 750 [2d Dept. 2006], citing *McDowall v Abreu*, 11 AD3d 590 [2d Dept. 2004]; *Cordero v Salazar*, 10 AD3d 380 [2d Dept. 2004]) and counsel's attempt to dismiss Dr. Hudak's findings that Zambrana's forward flexion was limited to forty-five degrees by simply classifying it as "merely a subjective finding" fails for want of medical support, the limitation was found to be the result of degenerative disease, not the accident. Nevertheless, Henderson has failed to establish his entitlement to summary judgment on the grounds that Zambrana did not sustain a serious injury as Henderson has not established that Zambrana did not sustain a medically determined injury or impairment that prevented him from performing substantially all of his customary daily activities for not less than 90 days during the 180 days following the accident. See, *Volpetti v Yoon Kap*, *supra*, citing *Sayers v Hot*, 23 AD3d 453 (2d Dept 2005); *Connors v Center City, Inc.*, 291 AD2d 476 (2d Dept 2002). That Zambrana returned to work, takes trips and bowls, fails to address the critical time period relevant to such a determination. Accordingly, it is not necessary to consider Zambrana's papers in opposition. Indeed, even had Zambrana been able to "return" to work during the 90/180 day period, standing alone, that would not be fatal to his claim. *Judd v Walton*, 259 AD2d 1016 (4d Dept 1999); *Baez v Goldman*, 180 Misc2d 304 (App Term 1st Dept 1999).

Assuming, *arguendo*, that Henderson did establish her entitlement to summary judgment with respect to this issue, Zambrana has established the existence of a material issue of fact as to whether he sustained a significant limitation of use of a body organ or member as well as a medically determined injury or impairment that prevented him from performing substantially all of his customary daily activities for not less than 90 days during the 180 days following the accident.

To establish the existence of an issue of fact as to serious injury, the medical evidence submitted by the movant must include objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment based upon objective findings, comparing the Plaintiff's present limitations to the normal functioning, purpose and use of an affected body organ, member or function. *Toure v Avis Rent A Car systems*, 98 NY2d 345 (2002). 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 the injury based upon the normal functioning, purpose and use of a body part. *Toure v Avis Rent A Car Systems, supra*, at p. 353. Subjective complaints of pain and limitation of movement must be verified by objective medical findings that are based upon a recent examination of the Plaintiff. *Toure v Avis Rent A Car Systems, Inc., supra*; *Scheer v Koubek*, 70 NY2d 678 (1987); *see also, Ali v Vasquez*, 19 AD3d 502 (2d Dept 2005); *Batista v Olivo*, 17 AD3d 454 (2d Dept 2005).

Via his medical records, Zambrana has clearly established that he suffered injuries to, *inter alia*, his cervical and lumbar spines. In opposition to Henderson's motion, Zambrana has submitted the affidavit and affirmation of Dr. Rafiy who re-examined him on August 28, 2008. He found that Zambrana continued to suffer from a limited range of motion in his lateral bending, only able to do so to 45 degrees with 60 degrees being the norm. He attributes Zambrana's injuries to the motor vehicle accident and opines that he is predisposed to lumbar degenerative disease. Zambrana has also detailed

the devastating personal daily effects, particularly at his job, that the accident wreaked in his life.

Based on the foregoing, it is hereby

ORDERED, that Motion Seq. No. 01 is **granted**. It is further

ORDERED, that Motion Seq. No. 02 is **denied**. It is further

ORDERED, that Motion Seq. No. 03 is **granted** as to the issue of liability and a trial is ordered
as to damages.

This constitutes the Decision and Order of the Court.

DATED: January 15, 2009
Mineola, N.Y. 11501

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

H:\Henderson v Zambrana.wpd

ENTERED

JAN 23 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE