

**Borrero v Torres**

2020 NY Slip Op 35643(U)

April 21, 2020

Supreme Court, Bronx County

Docket Number: Index No. 26983/2017E

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 15

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SARA BORRERO

Index No. 26983/2017E

-against-

Hon. MARY ANN BRIGANTTI

W, M. MOYA TORRES

Justice Supreme Court

-----X

The following papers numbered 1 to 4 were read on this motion ( Seq. No. 001 )  
for SUMMARY JUDGMENT DEFENDANT noticed on September 16, 2019.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1,2
Answering Affidavit and Exhibits	No(s).	3,4,
Replying Affidavit and Exhibits	No(s).	

Upon the foregoing papers, the defendant W. M. Moya Torres (“Defendant”) moves for summary judgment dismissing the complaint of the plaintiff Sara Borrero (“Plaintiff”) on the grounds that she has failed to satisfy the “serious injury” threshold as defined by New York Insurance Law Sec. 5102(d). Plaintiff opposes the motion.

When a defendant seeks summary judgment alleging that a plaintiff does not meet the “serious injury” threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v. Plameri*, 1 N.Y.3d 536 [2003]). “Such evidence includes ‘affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim’ ” (*Spencer v. Golden Eagle, Inc.*, 82 A.D.3d 589, 590 [1st Dept. 2011][internal quotations omitted]). A defendant may also meet his or her summary judgment burden with sufficient medical evidence demonstrating that the plaintiff’s injuries are not causally related to the accident (see *Farrington v. Go On Time Car Service*, 76 A.D.3d 818 [1st Dept. 2010], citing *Pommels v. Perez*, 4 N.Y.3d 566, 572 [2005]). Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof {see *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 [2002]}.

In this matter, Defendant carried his initial summary judgment burden with respect to Plaintiff’s claimed cervical and lumbar spine injuries. Defendant’s radiologist reviewed Plaintiff’s cervical and lumbar spine MRIs and opined that they only disclosed degenerative non-traumatic conditions unrelated to the accident (see *Walker v. Whitney*, 132 A.D.3d 478 [1<sup>st</sup> Dept. 2015]). Defendant’s orthopedist noted the

existence of limitations in those body parts but he opined that the restrictions were related to degenerative conditions. Defendant also established that Plaintiff sustained no significant or permanent injury to the shoulders, as his orthopedist found full range of motion and negative objective diagnostic testing (*Ahmed v. Cannon*, 129 A.D.3d 645 [1<sup>st</sup> Dept. 2015]). Defendant, however, failed to demonstrate that Plaintiff's left knee injuries were either resolved or unrelated to the accident. Defendants' orthopedist noted a 20% limitation in flexion, which belies his contention that the knee examination was "normal" (*see Feaster v. Boulabat*, 77 A.D.3d 440 [1<sup>st</sup> Dept. 2010]). Defendant also provided no support whatsoever for the orthopedist's contention that those limitations were related to age-related arthritis (*see Frias v. James*, 69 A.D.3d 466, 467 [1<sup>st</sup> Dept. 2010]).

In opposition, Plaintiff raised a triable issue of fact as to whether she sustained a "permanent consequential" or "significant" limitation to her cervical and lumbar spine. Plaintiff presents records detailing contemporaneous limitations and treatment to her neck and back which commenced shortly after the accident, and affirmed MRI reports demonstrate, inter alia disc bulging and herniations in the cervical and lumbar spine. The unaffirmed treatment and therapy records may be considered because they do not constitute the sole basis of Plaintiff's opposition (*see Pietropinto v. Benjamin*, 104 A.D.3d 617 [1<sup>st</sup> Dept. 2013]). Plaintiff further submits a sworn report from a physician who found continuing limitations in the cervical and lumbar spine at a recent examination and noted the positive MRI findings. The doctor noted that Plaintiff was symptomatic prior to the accident and he opined that there was a causal connection between the spine injuries and the accident, and moreover, the injuries were permanent in nature (*see Ortiz v. Boamah*, 169 A.D.3d 486, 488 [1<sup>st</sup> Dept. 2019]).

Plaintiff presented no admissible evidence of ongoing limitations to her shoulders as a result of this accident. Nevertheless, if a jury finds that Plaintiff sustained a "serious injury" to her spine or knee, she may recover damages for all injuries related to the accident, even those not meeting the "serious injury" threshold (*Rubin v. SMS Taxi Corp.*, 71 A.D.3d 548, 549 [1<sup>st</sup> Dept. 2010]).

Plaintiff adequately explained any gap or cessation in treatment by alleging in an affidavit that her insurance company stopped paying, and she could not afford her doctor bills out of pocket (*see Ramkumar v. Grand Style Transp. Enterprises, Inc.*, 22 N.Y.3d 905 [2013]).

Defendant failed to carry his initial summary judgment burden with respect to Plaintiff's "90/180 day" injury claim. Defendant's doctors did not examine Plaintiff or opine about his condition during the relevant time period. Defendant did not identify any deposition testimony of Plaintiff that was relevant or related to this claim. Defendant, therefore failed to disprove Plaintiff's allegation in his verified bill of

particulars that she sustained a "90/180 day" injury as a result of this accident (*see Seepersaud v. L&M Bus Corp.*, 140 A.D.3d 579 [1<sup>st</sup> Dept. 2016]).

Plaintiff's bill of particulars establishes that she did not sustain a "fracture" as a result of this accident, therefore that claim is dismissed.

Accordingly, it is hereby

ORDERED, that Defendant's motion for summary judgment is granted only to the extent of dismissing Plaintiff's claims that she sustained a "fracture" category of injury, or a "serious injury" to her shoulders as a result of this accident, and it is further,

ORDERED, that Defendant's motion for summary judgment is otherwise denied.

This constitutes the Decision and Order of this Court.

Dated:

4/21/20

Hon.

Mary Ann Brignante  
J.S.C.

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- 1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY     CASE STILL ACTIVE
  - 2. MOTION IS.....  GRANTED     DENIED     GRANTED IN PART     OTHER
  - 3. CHECK IF APPROPRIATE.....  SETTLE ORDER     SUBMIT ORDER     SCHEDULE APPEARANCE
  - FIDUCIARY APPOINTMENT     REFEREE APPOINTMENT