Ramos v Useda-Espinal
2009 NY Slip Op 33304(U)
October 8, 2009
Supreme Court, Suffolk County
Docket Number: 08-5356
Judge: John J.J. Jones Jr
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SHORT FORM ORDER

INDEX No. 08-5356

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 3-11-09
ADJ. DATE 6-3-09
Mot. Seq. # 001 - MD

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Upon the following papers numbered 1 to 29 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 18 - 26; Replying Affidavits and supporting papers 27 - 28; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Sandra Useda-Espinal for summary judgment dismissing the complaint against her is denied.

Plaintiffs Jose Ramos and Rosa Reyes, who are husband and wife, commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred in the Town of Islip on September 16, 2007. The accident allegedly happened when a vehicle driven by defendant Sandra Useda-Espinal collided with the rear of a vehicle operated by plaintiff Jose Ramos (hereinafter Ramos). Plaintiff Rosa Reyes (hereinafter Reyes) allegedly was riding as a passenger in the vehicle driven by her husband at the time of the accident. The answer denies the allegations of negligence and interposes a counterclaim against Ramos. Plaintiffs' bill of particulars alleges Ramos suffered various injuries due to the accident, including a meniscal tear, synovitis and internal derangement of the right knee; a rupture of the medial collateral ligament and internal derangement of the right elbow; a disc herniation at level L4-L5 and a disc bulge at level L5-S1; and lumbar radiculopathy. As to Reyes, it alleges that she sustained a disc bulge at level L3-L4, cervical sclerosis,

and cervical and lumbar sprains and strains as a result of the accident. The bill of particulars also alleges that plaintiffs sustained, inter alia, significant limitations of use and medically-determined injuries of a nonpermanent nature that prevented them from performing their usual and customary activities for at least 90 days out of the 180 days immediately following the accident.

Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiffs are precluded under Insurance Law § 5104 from recovering for non-economic loss, as they did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). Defendant's submissions in support of the motion include copies of the pleadings and plaintiffs' bill of particulars; transcripts of the deposition testimony of Ramos and Reyes; and sworn medical reports prepared by Dr. Mathew Chacko and Dr. Stuart Kandel. At defendant's request, Dr. Chacko, a neurologist, and Dr. Kandel, an orthopedist, examined plaintiffs in December 2008 and reviewed medical records relating to the injuries alleged in this action. Plaintiffs oppose the motion, arguing that defendant's submissions are insufficient to show prima facie that they did not sustain a serious injury as a result of the accident. Alternatively, plaintiffs assert that medical evidence offered in opposition to the motion, particularly the affidavits of plaintiffs' treating chiropractor, Nicholas Martin, raises triable issues of fact.

Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; 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 constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The evidence submitted by defendant in support of her motion fails to establish prima facie that Ramos and Reyes did not suffer serious injury as a result of the subject accident (*see* ***Kasper v N & J Taxi, Inc.***, 60 AD3d 910, 876 NYS2d 120 [2d Dept 2009]; ***Rahman v Sarpaz***, 62 AD3d 979, 880

NYS2d 125 [2d Dept 2009]; ***Hurtte v Budget Roadside Care***, 54 AD3d 362, 861 NYS2d 949 [2d Dept 2008]; ***Jenkins v Miled Hacking Corp.***, 43 AD3d 393, 841 NYS2d 317 [2d Dept 2007]). As to Ramos, the report of Dr. Chacko states, among other things, that active range of motion testing of the cervical spine revealed 50 degrees of flexion (50 degrees normal), 40 degrees of extension (60 degrees normal), lateral rotation of 60 degrees (80 degrees normal), and lateral flexion of 30 degrees (45 degrees normal). It states that testing of the lumbar spine revealed 45 degrees of flexion (60 degrees normal), extension of 15 degrees (25 degrees normal), and lateral flexion of 15 degrees (25 degrees normal). Dr. Chacko, who examined plaintiff approximately 14 months after the subject accident, asserts in his report that while restrictions in spinal function were detected during active range of motion testing, these "voluntary movements are fully under the control of the person being examined and hence not a truly objective finding." He further opines that there is no evidence of any neurological disability, and that plaintiff is able to work and perform all the activities of daily living. However, as Dr. Chacko failed to explain or to substantiate with objective medical findings his conclusion that the restrictions measured during range of motion testing were self-imposed, this conclusion is insufficient to negate his findings of limited spinal movement (*see* ***Moriera v Durango***, __ AD3d __, 2009 NY Slip Op 06412 [2d Dept 2009]; ***Colon v Chuen Sum Chu***, 61 AD3d 805, 878 NYS2d 127 [2d Dept 2009]; ***Busljeta v Plandome Leasing, Inc.***, 57 AD3d 469, 870 NYS2d 366 [2d Dept 2008]).

Similarly, Dr. Kandel's report states, in relevant part, that Ramos, who testified at deposition that he underwent surgical procedures just months after the accident for injuries in his right knee and right elbow, had a "10 degree flexion contracture with unrestricted flexion of 150 degrees in his right elbow." Dr. Kandel, like Dr. Chacko, does not offer any other possible cause for the finding of a loss of extension in Ramos's right elbow due to a contracture, stating only that the examination of the elbow "revealed a mild restriction of extension of 10 degrees but was otherwise within normal limits" (*see* ***Letts v Bleichner***, 56 AD3d 619, 868 NYS2d 92 [2d Dept 2008]; ***Guzman v Joseph***, 50 AD3d 741, 855 NYS2d 638 [2d Dept 2008]; ***Sullivan v Johnson***, 40 AD3d 624, 835 NYS2d 367 [2d Dept 2007]). The Court notes that while Dr. Kandel states in his report that Ramos demonstrated normal movement in his lumbosacral spine during the examination, the discrepancy in the medical findings of defendant's experts regarding the degrees of spinal joint function creates a credibility issue for a jury (*see* ***Francis v Basic Metal***, 144 AD2d 634, 534 NYS2d 697 [2d Dept 1988]; *see generally* ***S.J. Capelin Assoc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]). Thus, the reports by defendants' medical experts raise triable issues as to whether Ramos suffered significant limitations of use due to injuries suffered in the accident.

As to Reyes, the medical reports of defendants' experts fail to address the claim set forth in plaintiffs' bill of particulars that she suffered serious injury within the 90/180 category. To qualify as a serious injury within the 90/180 category, there must be objective medical evidence of a medically-determined injury or impairment of a non-permanent nature, as well as evidence that plaintiff's activities were significantly curtailed due to such injury (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Hamilton v Rouse***, 46 AD3d 514, 846 NYS2d 650 [2d Dept 2007]; ***Ocasio v Henry***, 276 AD2d 611, 714 NYS2d 139 [2d Dept 2000]). In addition to demonstrating an inability to perform "substantially all" usual activities for at least 90 days of the 180 days following the accident, a plaintiff asserting a 90/180 claim must show through competent medical evidence that his or her inability to perform such activities was medically indicated and causally related to the subject accident (*see*

Penaloza v Chavez, 48 AD3d 654, 852 NYS2d 315 [2d Dept 2008]; ***Hamilton v Rouse***, *supra*; ***Roman v Fast Lane Car Serv., Inc.***, 46 AD3d 535, 846 NYS2d 613 [2d Dept 2007]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]).

Here, Reyes testified at her deposition that, with the exception of one day of work in September 2007, she was confined to home for approximately four months due to injuries suffered in the accident. She testified that she was directed not to work by her treating chiropractor, Dr. Martin, and that she received regular chiropractic treatments for back pain for more than one year. Despite such testimony, both Dr. Chacko and Dr. Kandel fail to address the claim that Reyes suffered an injury within the 90/180 category (*see* ***Takaroff v A.M. USA, Inc.***, 63 AD3d 1142, 882 NYS2d 265 [2d Dept 2009]; ***Rahman v Sarpaz***, *supra*; ***Greenidge v Righton Limo, Inc.***, 43 AD3d 1109, 841 NYS2d 791 [2d Dept 2007]; ***Sayers v Hot***, 23 AD3d 453, 805 NYS2d 571 [2d Dept 2005]). Thus, defendants failed to make a prima facie showing that Reyes's claim for damages is barred under the No-Fault Insurance Law (*see* ***Negassi v Royle***, __, AD3d __, 2009 Slip Op 06816 [2d Dept 2009]; ***Ismail v Tejeda***, 65 AD3d 518, 882 NYS2d 915 [2d Dept 2009]; ***Takaroff v A.M. USA, Inc.***, *supra*; ***Rahman v Sarpaz***, *supra*).

Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

Dated: 3 Oct. 2009

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION