Rosario v Morales
2016 NY Slip Op 30373(U)
March 3, 2016
Supreme Court, New York County
Docket Number: 157606/13
Judge: Leticia M. Ramirez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

--X

PEDRO ROSARIO,

Plaintiff (s),

-against-

DOMILTILIO MORALES,

Defendant(s).

--X

Index #: 157606/13
Mot. Seq: 02

DECISION/ORDER

HON. LETICIA M. RAMIREZ

Defendant's motion, pursuant to CPLR §3212, for summary judgment on the basis that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) is denied.

It is well settled that summary judgment is a drastic remedy and cannot be granted where there is any doubt as to the existence of triable issues of fact or if there is even arguably such an issue. *Hourigan v. McGarry, 106 A.D.2d 845*, appeal dismissed *65 N.Y.2d 637 (1985); Andre v. Pomeroy, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 (1974).* The function of a court in deciding a summary judgment motion is to determine whether any issues of fact exist which preclude summary resolution of the dispute between the parties on the merits. *Consolidated Edison Co. v Zebler, 40 Misc3d 1230A (Sup. Ct. N.Y. 2013)*. See also, *Menzel v. Plotnick, 202 A.D.2d 558, 610 N.Y.S.2d 50 (2nd Dept. 1994)*. Furthermore, in deciding motions for summary judgment, the Court must accept, as true, the non-moving party's recounting of the facts and must draw all reasonable inferences in favor of the non-moving party. *Warney v Haddad, 237 A.D.2d 123 (1st Dept. 1997)*. See also, *Menzel v. Plotnick, supra.*

While the plaintiff has the burden of proof, at trial, of establishing a prima facie case of sustaining a "serious injury" in accordance with Insurance Law §5102(d), the defendant has the burden, on a summary judgment motion, of making a prima facie showing that plaintiff has not sustained a "serious injury" as a matter of law. In doing so, the defendant must submit admissible evidence to demonstrate that there are no material issues of fact to require a trial. *Zuckerman v City of New York, 49 N.Y.2d 557 (1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Alvarez v Prospect Hosp., 68 NY2d 320 (1986).* The defendant's failure to make such a showing, regardless of the sufficiency of opposing papers, mandates the denial of a summary

judgment motion. *Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). Alvarez v Prospect Hosp., 68 NY2d 320 (1986).* Only if the defendant has met their burden, must the plaintiff then present evidence that she sustained a "serious injury" within the meaning of Insurance Law §5102(d). *Licari v. Elliot, 57 N.Y.2d 230, 455 N.Y.S.2d 570, 491 N.E.2d 1088 (1982).*

According to the plaintiff's Verified Bill of Particulars, plaintiff alleges, inter alia, a cervical spine disc displacement with radiculopathy; cervical sprain; lumbar disc displacement with radiculopathy; left shoulder sprain with radiculpathy; right shoulder sprain; right hand weakness; and headaches.

In support of his motion, the defendant submitted, inter alia, the affirmed report of neurologist, Dr. Jean-Robert Desrouleaux, who examined the plaintiff on February 19, 2015. At that time, the plaintiff complained of neck, bilateral shoulder and lower back pain. Upon his examination, Dr. Desrouleaux found that the plaintiff had full ranges of motion of his cervical and lumbar spine. He diagnosed the plaintiff with resolved "alleged headaches" and resolved "alleged injury to the cervical and lumbar spine." Dr. Desrouleaux opined that the plaintiff had no permanence or neurological disability.

In further support of his motion, the defendant submitted the affirmed report of orthopedist, Dr. Lisa Nason, who examined the plaintiff on February 19, 2015. At that time, the plaintiff complained of pain in the cervical and lumbar spine and right shoulder. Upon her examination, Dr. Nason found that the plaintiff had full ranges of motion of his cervical and lumbar spine, shoulders and right hand and wrist. She diagnosed the plaintiff with resolved "alleged injury" to the cervical and lumbar spine, shoulders and right hand. Dr. Nason opined that the plaintiff had no permanence or orthopedic disability.

In opposition, the plaintiff submitted, inter alia, the affirmation of Dr. Narayan Paruchuri, who affirmed her findings on the plaintiff's lumbar spine MRI report dated June 22, 2015, to wit: reduction in disc signal intensity at L5-S1; left foraminal herniation at L5-S1 with left lateral recess stenosis and left foraminal impingement; and a central disc herniation at L5-S1 with anterior thecal sac impingement.

In addition, the plaintiff submitted the affirmed report dated July 17, 2015 of Dr. Leon Reyfman, plaintiff's treating physican. In his report, Dr. Reyfman quantifies restrictions in the ranges of motion of the plaintiff's cervical and lumbar spine. More specifically, regarding the plaintiff's cervical spine, he noted flexion to 45 degrees (normal is 60 degrees), extension to 40 degrees (normal is 60 degrees), right lateral rotation to 45 degrees (normal is 80 degrees), left lateral rotation to 50 degrees (normal is 80 degrees) and lateral bending to 30 degrees (normal is 40 degrees). Regarding his lumbar spine, Dr. Reyfman noted flexion to 60 degrees (normal is 90 degrees), extension to 15 degrees (normal is 30 degrees), right lateral bending to 20 degrees (normal is 30 degrees) and left lateral bending to 25 degrees (normal is 30 degrees). Dr. Reyfman diagnosed the plaintiff with cervical and lumbar disc herniations and lumbar radiculopathy. He opined that the plaintiff "sustained a significant permanent partial and quantifiable loss of use and function to his lower back and neck" as a result of the subject accident.

It has been established that a bulging or herniated disc may constitute evidence of a serious injury within the meaning of Section 5102 of the New York State Insurance Law. *Newman-Bachhuber v. Hu, 744 N.Y.S.2d 48 (2nd Dept. 2002); Lewis v. White, 274 A.D.2d 455 (2nd Dept. 2000).*

In *Lewis v. White*, the Court, in holding that there was an issue of material fact as to whether the plaintiff suffered a serious injury, stated that

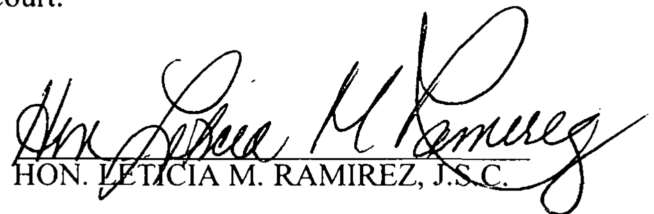
> "[t]he Supreme Court properly denied the defendants' separate motions. In support of their respective motions the appellants relied on a Magnetic Resonance Image of the plaintiff's lumbar spine which revealed a herniated disc at level L5-S1. A disc herniation may constitute a serious injury within the meaning of the Insurance Law. The appellants submitted reports of two doctors who both failed to establish that the disc herniation was not causally related to the subject accident. Moreover, after performing straight left raising tests on the plaintiff, one of the defendants' doctors found a 20 degree limitation in range of motion. This same doctor causally related these injuries to the subject accident." *Lewis v. White, 713 N.Y.S.2d at 121, 122.*

Here, the plaintiff has sufficiently raised a triable issue of fact as to whether he sustained a "significant limitation of use of a body function or system" or a "permanent consequential limitation of use of a body organ or member" as a result of the subject accident with the affirmed report of Dr. Reyfman, who conducted range of motion testing of the plaintiff's cervical and lumbar spine and determined that there were quantifiable limitations. *Licari v. Elliot, 57 N.Y.2d*

230, 455 N.Y.S.2d 570, 491 N.E.2d 1088 (1982); Decker v. Rassaert, 131 A.D.2d 626 (2nd Dept. 1987). It is well settled that the finder of fact must resolve conflicts in expert medical opinions. *Ugarriza v. Schmider, 46 N.Y.2d 471 (1979); Andre v. Pomeroy, 35 N.Y.2d 361 (1974); Moreno v. Chemtob, 706 N.Y.S.2d 150 (2nd Dept. 2000).* Accordingly, the defendant's summary judgment motion is denied, in its entirety.

This constitutes the Decision/Order of the Court.

Dated: March 3, 2016
New York, New York



HON. LETICIA M. RAMIREZ, J.S.C.