Rosario v Ebel Cab Corp.
2017 NY Slip Op 31563(U)
July 25, 2017
Supreme Court, Kings County
Docket Number: 515079/15
Judge: Debra Silber

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of July, 2017

P R E S E N T :

HON. DEBRA SILBER,

Justice.

DELPHIN ROSARIO and FRANCISCA ROSARIO,

Plaintiffs,

-against-

EBEL CAB CORP. and RAFAEL Z. GOMAR,

Defendants.

DECISION / ORDER

Index No. 515079/15
Mot. Seq. # 3
Submitted: 6/15/17

Papers numbered 1 to 16 were read on this motion:	Papers Numbered:
Notice of Motion/Order to Show Cause/Exhibits	1-10
Affirmation in Opposition/Exhibits	11-16
Reply Affirmation/Exhibits	

Defendants Ebel Cab Corp. and Rafael Z. Gomar move for summary judgment and dismissal of plaintiffs' (Delphin and Francisca Rosario) action, pursuant to CPLR Rule 3212, on the grounds that plaintiff Delphin Rosario (the claims of plaintiff

Francisca Rosario, his spouse, are purely derivative) has failed to sustain a "serious injury," pursuant to Insurance Law § 5102(d). Movants have not made a *prima facie* case with objective medical findings with regard to any of the applicable categories of injury, that is:

- ☐ 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 which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident

The defendants have failed to meet their prima facie burden of showing that the plaintiff Delphin Rosario did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. See, *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992].

The court notes, in finding that movants have not made a prima facie case for dismissal in regard to "a permanent consequential limitation of use of a body organ or member" and "a significant limitation of use of a body function or system," that defendants' Independent Medical Examination from Dr. J. Serge Parisien, an orthopedic surgeon, dated November 17, 2016, indicates that plaintiff's range of motion in his right knee was not normal; similarly, the independent examination of Dr. Naunihal Sachdev Singh, a neurologist, reveals abnormal extension, abnormal right and left lateral flexion and right and left lateral rotation in plaintiff's cervical spine, as well as an abnormal range of motion in plaintiff's lumbar spine. Dr. Singh did not examine plaintiff's knees. Plaintiff's bill of particulars claims he sustained injuries to both of his knees, which required arthroscopic surgery to both knees, and injuries to his cervical

and lumbar spine.

The papers submitted by the defendants also fail to adequately address plaintiff's claim, set forth in his bill of particulars, that he sustained "a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident." See *Che Hong Kim v Kossoff*, 90 AD3d 969, 934 [2d Dept 2011]; *Rouach v Betts*, 71 AD3d 977 [2d Dept 2010]. In arguing for dismissal of this claim, movants merely aver that the evidence supports dismissal, without offering any explanation why, other than the conclusory assertion that the evidence supports dismissal. There is nothing in plaintiff's EBT or his bill of particulars to support defendant's claim on this issue.

Since the defendants have failed to meet their prima facie burden as to all of the applicable categories of injury, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition are sufficient to raise a triable issue of fact. See, *Yampolskiy v Baron*, 2017 NY App Div Lexis 3492 [2d Dept]; *Valerio v Terrific Yellow Taxi Corp.*, 2017 NY App Div Lexis 3141 [2d Dept]; *Koutsoumbis v Pacciocco*, 2017 NY App Div Lexis 3121 [2d Dept]; *Aharonoff-Arakanchi v Maselli*, 2017 NY App Div Lexis 2898 [2d Dept]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011].

Therefore, the motion for summary judgment is denied.

This constitutes the decision and order of the court.

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court