Palacios v Kochmann
2018 NY Slip Op 33396(U)
December 18, 2018
Supreme Court, Suffolk County
Docket Number: 32390/2012
Judge: Jr., Paul J. Baisley
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Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 32390/2012
CALENDAR NO.: 201701837MV
MOTION DATE: 7/19/18
MOTION SEQ. NO.: 003 MG; CASEDISP
MOTION SEQ. NO.: 004 MD

---X
FELIPA PALACIOS and ASUNCION VASQUEZ-MENDOZA,

Plaintiffs,

-against-

COURTNEY KOCHMANN and COREEN A. SALERNO,

Defendants.
---X

PLAINTIFFS' ATTORNEY:
Sanford L. Piroton, P.C.
323 Madison Street
Westbury, New York 11590

DEFENDANTS' ATTORNEYS:
Nicolini, Paradise, Ferretti & Sabella, PLLC
114 Old Country Road
P.O. Box 9006
Mineola, New York 11501

Martyn, Toher, Martyn & Rossi, Esqs.
Attorney for Plaintiff on the Counterclaim,
Asuncion Vasquez-Mendoza
330 Old Country Road, Suite 211
Mineola, New York 11501

Upon the following papers numbered 1 to 40 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; 16 - 24 ; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 25 - 30; 31 - 34 ; Replying Affidavits and supporting papers 35 - 37; 38 - 40 ; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the following motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion (motion sequence no. 003) of defendants for an order granting summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a "serious injury" as defined in Insurance Law §5102 (d) is granted; and it is further

ORDERED that the motion (motion sequence no. 004) of plaintiff/defendant on the counterclaim, Asuncion Vasquez-Mendoza, for summary judgment dismissing the counterclaim against him on the ground that plaintiff Felipa Palacios did not sustain a "serious injury" as defined in Insurance Law §5102 (d) is denied, as moot.

This is an action to recover damages for personal injuries allegedly sustained by plaintiffs when their vehicle collided with a vehicle owned by defendant Coreen Salerno and operated by

defendant Courtney Kochmann. The accident allegedly occurred on September 24, 2012, in a parking lot in Setauket, New York. At the time of the accident, plaintiff Felipa Palacios (hereinafter referred to as "Palacios") was a passenger in the vehicle operated by plaintiff/defendant on the counterclaim Asuncion Vasquez-Mendoza (hereinafter referred to as "Vasquez-Mendoza"). By the bill of particulars, Palacios alleges that, as a result of the accident, she sustained various serious injuries and conditions, including herniated discs in the lumbar region, cervical and lumbar radiculopathy, and sprains in the thoracic and lumbar regions. Vasquez-Mendoza alleges that, as a result of the accident, he sustained various serious injuries and conditions, including herniated and bulging discs in the lumbar region, and a lateral meniscus tear in the left knee.

Defendants move for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a "serious injury" as defined in Insurance Law §5102 (d).

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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Cebron v Tuncoglu*, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

On a motion for summary judgment, the defendant has the initial burden of making a *prima facie* showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102 (d) (*see Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos*, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining

physician (*see Moore v Edison*, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; *Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, *supra*; *Boone v New York City Tr. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendants made a *prima facie* showing that Palacios did not sustain a serious injury within the meaning of Insurance Law §5102 (d) through the affirmed report of their examining physician (*see Bailey v Islam*, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; *Sierra v Gonzalez First Limo*, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). On April 3, 2014, approximately one year and six months after the subject accident, moving defendants' examining orthopedist, Dr. Isaac Cohen, examined Palacios and performed certain orthopedic and neurological tests, including the compression test, the Spurling test, the Tinel test, the Phalen test, the Hawkins test, the Neer test, and the straight leg raising test. Dr. Cohen found that all the test results were negative or normal, and that there was no spasm or tenderness in Palacios' spine and left wrist. Dr. Cohen also performed range of motion testing on Palacios' spine, left wrist, left shoulder, and left elbow, using a goniometer to measure her joint movement. Dr. Cohen found that Palacios exhibited normal joint function. Dr. Cohen opined that Palacios had no orthopedic disability at the time of the examination (*see Willis v New York City Tr. Auth.*, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]).

Further, at her deposition, Palacios testified she was unemployed at the time of the accident. She testified that no physicians advised her to be confined to her bed or house, and that there is no activity that she is unable to perform because of the accident. Palacios' deposition testimony established that her injuries did not prevent her from performing "substantially all" of the material acts constituting her customary daily activities during at least 90 out of the first 180 days following the accident (*see Burns v McCabe*, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; *Curry v Velez*, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]).

Thus, defendants met their initial burden of establishing that Palacios did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that she was not prevented from performing substantially all of her usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law §5102 (d) (*see Gonzalez v Green*, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]).

The burden, therefore, shifted to Palacios to raise a triable issue of fact (*see Gaddy v Eyler*, *supra*). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see Ferraro v Ridge Car Serv.*, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; *Mejia v DeRose*, 35 AD3d 407, 825

NYS2d 772 [2d Dept 2006]; *Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of the plaintiff or a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see Perl v Meher, supra*; *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott, supra*; *Cebron v Tuncoglu, supra*). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (*Pommells v Perez*, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see Vasquez v John Doe #1*, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; *Rivera v Bushwick Ridgewood Props., Inc.*, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]).

Palacios opposes the motion, arguing moving defendants' expert report is insufficient to meet their burden on the motion. Palacios also argues that the affirmation of her treating physician, Dr. Farhana Ahmed, raises a triable issue as to whether she suffered injury within the "significant limitation of use" category of Insurance Law §5102 (d). In opposition, Palacios submits, *inter alia*, the sworn affirmation of Dr. Ahmed.

Here, Dr. Ahmed's affirmation set forth Palacios' complaints and the findings, including significant limitations in her cervical and lumbar regions and left shoulder joint function measured during range of motion testing performed at her initial consultation on June 4, 2018, approximately five years and eight months after the subject accident. However, Dr. Ahmed failed to provide any medical evidence concerning Palacios' condition contemporaneous to the accident (*see Sukalic v Ozone*, 136 AD3d 1018, 269 NYS3d 188 [2d Dept 2016]; *Griffiths v Munoz*, 98 AD3d 997, 998, 950 NYS2d 787 [2d Dept 2012]). A contemporaneous doctor's report is important to proof of causation (*see Perl v Meher, supra*), and the absence of a contemporaneous medical report invites speculation as to causation (*see Griffiths v Munoz, supra*). Dr. Ahmed's affirmation, therefore, is insufficient to raise a triable issue of fact.

Moreover, Palacios failed to offer competent evidence that she sustained nonpermanent injuries that left her unable to perform substantially all of her normal daily activities for at least 90 of the 180 days immediately following the accident (*see John v Linden*, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; *Il Chung Lim v Chrabaszcz*, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; *Rivera v Bushwick Ridgewood Props., Inc., supra*). Thus, the branch of the motion by defendants for summary judgment dismissing the claim of Palacios on the ground that her injuries failed to meet the serious injury threshold of Insurance Law §5102 (d) is granted.

Likewise, defendants made a *prima facie* showing that Vasquez-Mendoza did not sustain

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a serious injury within the meaning of Insurance Law §5102 (d) through the affirmed report of their examining physician (*see Bailey v Islam, supra*; *Sierra v Gonzalez First Limo, supra*; *Staff v Yshua, supra*). On November 28, 2012, approximately two months after the subject accident, an independent examining orthopedist, Dr. Teresa Habacker, examined Vasquez-Mendoza and performed certain orthopedic and neurological tests, including the straight leg raising test and the McMurry test. Dr. Habacker found that all the test results were negative or normal, and that there was no spasm in Vasquez-Mendoza's lumbar region, although there was a tenderness in his left knee. Dr. Habacker also performed range of motion testing on Vasquez-Mendoza's lumbar region, left hip and left knee. Dr. Habacker found that Vasquez-Mendoza exhibited normal joint function. Dr. Habacker opined that Vasquez-Mendoza had no orthopedic disability at the time of the examination, and that he may continue with his activities of daily living (*see Willis v New York City Tr. Auth., supra*). On May 27, 2015, approximately two years and eight months after the subject accident, Dr. Cohen examined Vasquez-Mendoza and performed certain orthopedic and neurological tests, including the compression test, the Spurling test, the straight leg raising test, and the McMurry test. Dr. Cohen found that all the test results were negative or normal, and that there was no spasm or tenderness in Vasquez-Mendoza's spine and knees. Dr. Cohen also performed range of motion testing on Vasquez-Mendoza's spine and knees, using a goniometer to measure his joint movement. Dr. Cohen found that Vasquez-Mendoza exhibited normal joint function. Dr. Cohen opined that Vasquez-Mendoza had no orthopedic disability at the time of the examination (*see id.*).

Further, at his deposition, Vasquez-Mendoza testified that at the time of the accident, he was employed as a food preparer at a restaurant, and that following the accident he stopped working. Although Vasquez-Mendoza claimed that Dr. Arthur Thompson, who performed his knee surgery on December 4, 2012, instructed him to stop working, he testified that he first saw Dr. Thompson within a month before the surgery. He testified there is no activity that he is unable to perform because of the accident, except for lifting something over 25 pounds. Vasquez-Mendoza's deposition testimony established that his injuries did not prevent him from performing "substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident (*see Burns v McCabe, supra*; *Curry v Velez, supra*).

Thus, defendants met their initial burden of establishing that Vasquez-Mendoza did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that he was not prevented from performing substantially all of his usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law §5102 (d) (*see Gonzalez v Green, supra*).

Vasquez-Mendoza opposes the motion, arguing moving defendants' expert reports are insufficient to meet their burden on the motion. Vasquez-Mendoza also argues that the affirmation of Dr. Ahmed raises a triable issue as to whether he suffered injury within the

"significant limitation of use" category of Insurance Law § 5102 (d). In opposition, Vasquez-Mendoza submits, *inter alia*, the sworn affirmation of Dr. Ahmed.

Here, Dr. Ahmed's affirmation set forth Vasquez-Mendoza's complaints and the findings, including significant limitations in his lumbar spine joint function measured during range of motion testing performed at his initial consultation on June 4, 2018. However, Dr. Ahmed failed to provide any medical evidence concerning Vasquez-Mendoza's condition contemporaneous to the accident (*see Sukalic v Ozone*, *supra*; *Griffiths v Munoz*, *supra*). Dr. Ahmed's affirmation, therefore, is insufficient to raise a triable issue of fact.

Finally, Vasquez-Mendoza failed to offer competent evidence that he sustained nonpermanent injuries that left him unable to perform his normal daily activities for at least 90 of the 180 days immediately following the accident (*see John v Linden*, *supra*; *Il Chung Lim v Chrabaszcz*, *supra*; *Rivera v Bushwick Ridgewood Props., Inc.*, *supra*). Thus, the branch of the motion by defendants for summary judgment dismissing the claim of Vasquez-Mendoza on the ground that his injuries failed to meet the serious injury threshold of Insurance Law §5102 (d) is granted.

Accordingly, Vasquez-Mendoza's motion for summary judgment dismissing the counterclaim against him on the ground that Palacios did not sustain a "serious injury" as defined in Insurance Law §5102 (d) is denied, as moot.

Dated: December 18, 2018

HON. PAUL J. BAISLEY, JR.

J.S.C.