Roque-Polanco v Rodriguez
2013 NY Slip Op 32135(U)
September 9, 2013
Supreme Court, New York County
Docket Number: 111000/2011
Judge: Arlene Bluth

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART 22

Justice

Index Number : 111000/2011
ROQUE-POLANCO, PEDRO
vs.
RODRIGUEZ, PEDRO A.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for MSJ - serious injury

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1

Answering Affidavits — Exhibits _____ No(s). 2

Replying Affidavits _____ No(s). 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED

SEP 11 2013

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/9/13

_____, J.S.C.
HON. ARLENE P. BLUTH

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22

Index No.: 111000/11
Motion Seq 01

Pedro Roque-Polanco and Carlina Valenzuela,
Plaintiffs,

-against-

Pedro A. Rodriguez and Excellent Auto Trans. Corp.,
Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendants' motion for summary judgment dismissing this action on the grounds that plaintiff Pedro Roque-Polanco did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) is denied.

In this action, plaintiff alleges that on December 6, 2010 he sustained personal injuries when his vehicle was struck by defendants' vehicle which was attempting to go around a double-parked vehicle.

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Rodriguez v Goldstein*, 182 AD2d 396 [1992]). 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" (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003], *quoting Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert affidavits indicating that plaintiff's injury was caused by a pre-existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818 [1st Dept 2010], *citing Pommells v*

Perez, 4 NY3d 566 [2005]). In order to establish prima facie entitlement to summary judgment under the 90/180 category of the statute, a defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident (*Elias v Mahlah*, 2009 NY Slip Op 43 [1st Dept]). However, a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*id.*).

Once the defendant meets his or her initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury (*see Shinn*, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Further, where the defendant has established a pre-existing condition, the plaintiff's expert must address causation (*see Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]).

In the verified bill of particulars, plaintiff claims, inter alia, he suffered injury to his left shoulder (and had arthroscopic surgery to repair a partial cuff tear) and neck (exh B to moving papers).

In support of their motion, defendants submit the 1/29/12 affirmed medical report of Dr. Eisenstadt (exh C), a radiologist who reviewed MRIs of plaintiff's left shoulder and cervical

spine taken approximately two months after the accident and determined that both scans showed a normal study.

Defendants also submit the affirmed report of Dr. Montalbano, an orthopedist (exh D), who conducted an examination of plaintiff on 4/13/12 and found that while plaintiff had some limitations of range of motion in his left shoulder, he attributed this to voluntary muscle guarding; he reported that range of motion in other areas were normal. Additionally, Dr. Montalbano opined that although plaintiff had shoulder surgery, there was nothing in the surgeon's notes that would suggest the injury was caused by the motor vehicle accident, but instead was necessitated by a preexisting condition of subacromial impingement. Finally, Dr. Montalbano noted that plaintiff has a structurally normal spine, and that disc bulging is a normal condition, and not the result of a traumatic event.

In support of that branch of the motion dismissing plaintiff's 90/180-day claim, defendants cite to plaintiff's deposition transcript wherein he testified that he returned to work two days after this accident (exh K, T. at 97), noting that this contradicts his earlier testimony that he was confined to home for two months after the accident (T. at 92-93).

Based on the foregoing, defendants have satisfied their burden of establishing prima facie that plaintiff did not suffer a serious injury, and the burden shifts to plaintiff to raise a triable factual question as to whether he sustained a serious injury.

In opposition, plaintiff submits, inter alia, the affirmed report of Dr. Santos who examined plaintiff one day after the accident and noted that he complained of neck pain, left shoulder and forearm pain and headaches. Dr. Santos examined plaintiff on 2/17/11, 4/7/11, 8/4/11, 11/10/11, 12/29/11 and 1/26/12, and opines that his shoulder and cervical injuries, which continue to date and are permanent, are causally related to the subject accident. Additionally,

plaintiff submits the affirmed report of Dr. Seldes, an orthopedic surgeon, who first examined plaintiff on May 4, 2011 and then performed a procedure on plaintiff's left shoulder on August 29, 2011. Dr Seldes states that at the time of the procedure he observed evidence of trauma (tears, impingement and inflammation), and these findings, along with the fact that plaintiff had no symptoms before the accident, leads him to conclude that plaintiff's shoulder injury was caused by the accident and was not due to a degenerative condition. He further states that plaintiff still has only limited use of his left shoulder and neck.

In reply, defendants's counsel asserts that it appears that the affirmations from Dr. Seldes and Dr. Santos were drafted by plaintiff's counsel, and as such are conclusory and are insufficient to raise a triable factual question. This Court disagrees; both affirmations address plaintiff's examinations, treatment and diagnostic testing in great detail. Through his doctors' reports and findings, plaintiff has raised an issue of fact as to whether he sustained a serious injury as a result of the subject accident. It is up to the jury to decide which doctors to believe.

The Court notes that in opposition plaintiff has not demonstrated that he has a medically determined injury restricted him from performing "substantially all" of his daily activities to a greater extent rather than some slight curtailment. *See Thompson v Abbasi*, 15 AD3d 95, 788 NYS2d 48 (1st Dept 2005). Therefore, as plaintiff's injuries do not fall under the "90/180" category of serious injury as defined by the Insurance Law, defendants' motion for summary judgment must be granted as to any claim premised upon that category. However, as set forth above, the motion must otherwise be denied because plaintiff has met his burden of raising a triable issue of fact as to the "significant limitation of use of a body function or system" category of section 5012 (d) of the Insurance Law.

Accordingly, defendants' motion for summary judgment dismissing this action on the

grounds that plaintiff Pedro Roque-Polanco did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) is denied. However, said plaintiff's 90/180-day claim is dismissed.

This is the Decision and Order of the Court.

Dated: September 9, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC