Rexhaj v Mondal
2013 NY Slip Op 32152(U)
September 12, 2013
Supreme Court, Queens County
Docket Number: 21968/11
Judge: Bernice Siegal

Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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Dardan Rexhaj,

Plaintiff,

-against-

Ruhul Islam Mondal and Alcides Gomez,

Defendants.

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Index No.: 21968/11
Motion Date: 6/11/13
Motion Cal. No.: 101
Motion Seq. No.: 1

The following papers numbered 1 to 12 read on this motion for an order pursuant to CPLR §3212 granting summary judgment in favor of defendants, thereby dismissing plaintiff's complaint on the grounds that he did not sustain a "serious injury" as defined by Insurance Law §5102(d).

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 9
Reply Affirmation.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendants, Ruhul Islam Mondal and Alcides Gomez (hereinafter collectively as "defendants") move for an order pursuant to CPLR 3212 granting summary judgment in favor of defendants thereby dismissing plaintiff's complaint.

In the Bill of Particulars, Plaintiff alleges that as a result of the accident, Dardan Rexhaj ("Plaintiff" or "Rexhaj") suffered serious injuries to his ribs and right wrist and arm.

Facts

The within action arises from a motor vehicle accident that occurred on October 13, 2010 when Plaintiff was riding a bicycle. Following the accident, plaintiff was confined to bed and home for approximately two days after the accident and two weeks following wrist surgery. Plaintiff also asserts that he missed two days of work following the accident.

The day after the accident, Plaintiff went to the hospital complaining of pain in his right wrist and ribs, then to Dr. Delman at DHD Medical where he was placed on a physical therapy regime and given cortisone injections in his right wrist. Several months later plaintiff was treated by Dr. Salvatore Lenzo, a hand specialist, who also gave plaintiff cortisone injections, and then, on August 17, 2011, Dr. Lenzo performed surgery on plaintiff's right wrist. All medical treatment ceased in July/August of 2012.

Analysis

Defendants' motion for summary judgment pursuant to CPLR §3212 dismissing Plaintiff's cause of action is granted as more fully set forth below.

Threshold

Defendants move for summary judgment in its favor on the ground that Plaintiff did not sustain a "serious injury" within the meaning of the Insurance Law § 5102(d). The statutory provision states, in pertinent part that a "serious injury" is defined as:

> A personal injury which results in...significant disfigurement;...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 party from performing substantially all of the material acts which constitute such a person's customary daily activities for not less than ninety

days during one hundred eighty days immediately following the occurrence of the injury or impairment.

Insurance Law § 5102(d)

It has been well established that in a motion for summary judgment the proponent must tender evidentiary proof in admissible form to eliminate any material issues of fact, and if the proponent succeeds, the burden then shifts to the party opposing the motion to submit evidentiary proof in admissible form. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980].) Accordingly, when moving for summary judgment on threshold, the burden is on the defendant to make a prima facie showing that the injuries plaintiff sustained as a result of the subject accident are not serious as defined within the meaning of Insurance Law § 5102(d). *(Toure v. Avis Rent A Car Sys*., 98 N.Y.2d 345 [1982]; *Lewis v. John*, 81 A.D.3d 905 [2nd Dept. 2011].) Where the defendant fails to meet his or her prima facie burden, the motion will be denied, and the court need not review plaintiff's paper's in opposition. (*Cosica v. 938 Trading Corp*. 283 A.D.2d 538 [2nd Dept. 2001].)

While the parties dispute plaintiff's range of motion following the surgery, it should be noted that "a significant limitation [of use of a body function or system] need not be permanent in order to constitute a serious injury." Therefore, the failure to find a significant range of motion finding in a recent examination is not dispositive by itself in determining whether a plaintiff has raised a triable issue of fact in opposing a defendant's prima facie evidence under the "significant limitation" category.

Defendants contend that plaintiff did not sustain a serious injury based on the medical report of Kenneth Seslowe, an Orthopedic Surgeon. The issue of whether plaintiff sustained a serious injury

is a matter of law to be determined in the first instance by the court. (*Licari v. Elliott*, 57 N.Y.2d 230 [1982]; *Porcano v. Lehman*, 255 A.D.2d 430, 431 [2nd Dept. 1998]; *Brown v. Stark*, 205 A.D.2d 725 [2nd Dept. 1994]). The burden is on the defendant to make a prima facie showing that plaintiff's injuries are not serious (*Toure v. Avis Rent A Car Sys*., 98 N.Y.2d 345 [2002]; *Sealy v. Riteway-1, Inc.*, 54 A.D.3d 1018 [2nd Dept. 2008]; *Meyers v. Bobower Yeshiva Bnei Zion*, 20 A.D.3d 456 [2nd Dept. 2005]). A defendant can meet his or her prima facie burden by submitting the affidavits or affirmations of medical experts, who, through objective medical testing, conclude that plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d). (*see Magarin v. Kropf*, 24 A.D.3d 733 [2nd Dept. 2005]; *see also Gaddy v. Eyler*, 79 N.Y.2d 955, 956 [1992]; *Morris v. Edmond*, 48 A.D.3d 432 [2nd Dept. 2008]).

Defendants met their initial burden of establishing that Plaintiff did not sustain a serious injury through the submission of the affirmation of Dr. Seslowe based on an orthopaedic examination on December 10, 2012, wherein he concludes that Rexhaj has no objective evidence of a causally related disability. Dr. Seslowe found that Rexhaj's range of motion in his right wrist to be normal.

Therefore, defendants made a prima facie showing that Rexhaj did not sustain a serious injury within the meaning of insurance law § 5102(D). The burden now shifts to Plaintiff to demonstrate the existence of a triable issue of fact as to whether she sustained a serious injury. (*Matthews v. Cupie Transp. Corp.*, 302 A.D.2d 566, 567 [2nd Dept. 2003]; *see also Gaddy*, 79 N.Y.2d at 957; *Greene v. Miranda*, 272 A.D.2d 441 [2nd Dept. 2000].)

In opposition, Plaintiff failed to raise a triable issue of fact. Plaintiff submitted affirmed medical reports of Dr. Salvatore Lenzo, Orthopedic Surgeon, and David Delman, MD, Internal

Medicine. Dr. Lenzo performed the surgery on Rexhaj's right wrist and states, that as of his most recent examination on April 26, 2013, Rexhaj has range of motion at extension and flexion to 60 degrees (75 being normal) and normal range of motion at pronation and supination. Dr. Delman examined plaintiff following the accident and found significant limitations in his range of motion.

However, Dr. Lenzo's report dated May 24, 2011, states that plaintiff has extension and flexion to 70 degrees (75 being normal) which constitutes merely a 6-7% loss of range of motion. On August 9, 2011, Dr. Lenzo found full range of motion for Rexhaj at extension and flexion. On January 19, 2012, Dr. Lenzo found that "[t]here is nearly full extension and flexion of the wrist..." These reports conflict with Dr. Lenzo's reprt dated April 26, 2013 which found a 20% loss of range of motion at extension and flexion. It is well established that slight limitations in range of motion are insufficient to raise a triable issue of fact. (*Ibragimov v Hutchins*, 8 A.D.3d 235 [2nd Dept 2004][holding that loss of range of motion of 10 to 15% and 15% was insignificant]; *Trotter v Hart*, 285 A.D.2d 772 [2nd Dept 2001]; *Cabri v Myung-Soo Park*, 260 A.D.2d 525 [2nd Dept 1999].) Here, the court has various reports from Dr. Lenzo, pre-dating his April 26, 2013 report (which was prepared for trial or in opposition to within motion), that indicate that plaintiff had either full range of motion or very slight limitations in his range of motion. It is incredible that Dr. Lenzo, on the eve of a summary judgment motion, found significant limitations in plaintiff's range of motion. (see *Williams v. Horman*, 95 A.D.3d 650 [1st Dept 2012][holding that plaintiff failed to create an issue of fact when they failed to explain why treating physician indicate no restriction of motion while second physician found restrictions] see also *Jno-Baptiste v. Buckley*, 82 A.D.3d 578 [1st Dept 2011].)

Conclusion

For the reasons set forth above, Defendants' motion for summary judgment on the issue of "serious injury" is granted and the complaint is dismissed.

Dated: September 12, 2013

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Bernice D. Siegal, J. S. C.