Rodriguez v Castillo
2015 NY Slip Op 31736(U)
August 10, 2015
Supreme Court, Bronx County
Docket Number: 309004-12
Judge: Fernando Tapia
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SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: Part 13

JOSÉ L. RODRÍGUEZ

Plaintiff,

v. **Index No. 309004-12**

MANUEL D. CASTILLO and MIGUEL CASTILLO,

Defendants.

DECISION

On or about November 25, 2010, approximately 12:30 p.m., Plaintiff was a restrained driver of a 2005 Lincoln Town Car when he sustained injuries from a two-car motor vehicle accident [MVA].

Defendants, through counsel, move for summary judgment under CPLR 3212(b), based on lack of serious injuries pursuant to NY Insurance Law § 5102(d).

After careful review of the motion papers, this Court hereby decides the following:

- Defendants' threshold motion is **DENIED;**[1]
- Plaintiff to properly serve its Note of Issue/Certificate of Readiness, and to provide HIPAA authorizations for Plaintiff's medical records for trial purposes.

Material issues of fact exist regarding this threshold motion. There is also the ancillary issue of the Note of Issue, which is discussed below.

Summary Judgment And Its High Threshold

Under CPLR 3212(b), a motion for summary judgment must be supported by affidavit, a copy of its pleadings, and any other available proof. Regarding the affidavit, not only must it have a recitation of material facts, but it must also show that there is no defense to the action, or that the defense is meritless. One of the recognized purposes of a summary judgment motion is to determine if any material facts exist. *Marshall, Bratter, Greene, Allison & Tucker v. Mechner*, 53 AD2d 537 (App Div, 1st Dept 1976).

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[1] This Court previously granted Plaintiff's liability motion in its Decision dated 8 May 15.

Because a motion for summary judgment has an extremely high burden ["as a matter of law"], it is a drastic remedy for any movant to use. *Rotuba Extruders v. Ceppos*, 46 NY2d 223, 231 (App Ct 1978). It is therefore the movant's burden to produce evidence as would be required in a trial. *Oxford Paper Co. v. S.M. Liquidation Co., Inc.*, 45 Misc2d 612, 614 (Sup Ct, NY Cty 1965); see also *Pirrelli v. Long Island Rail Road*, 226 AD2d 166 (App Div 1st Dept 1996) (the purpose of the motion court is issue-finding, and not issue-determination). Lastly, a summary judgment motion cannot be defeated by a "shadowy semblance of an issue." *Hatzis v. Belliard*, 13 AD3d 106 (App Div, 1st Dept 2004).

The issue of whether an injury falls within the statutory definition of "serious injury" is a question of law for courts, which may therefore decide the issue on a summary judgment motion. *Perez v.* Rodríguez, 25 AD3d 506, 507 (App Div, 1st Dept 2006). Serious injury is a threshold issue and is therefore a necessary element of a plaintiff's prima facie case. *Toure v. Harrison*, 6 AD3d 270, 272 (App Div, 1st Dept 2004).

Here, this Court finds that there is a material issue of fact regarding the extent of Mr. Rodríguez's injuries, based on a simple comparison between competing health care professionals' range of motion [ROM] findings.

Mr. José Rodríguez, Driver

Cervical spine	**Naunihal Sachdev Singh, M.D.[2] [DOE: 27Aug14]**	**Rafael Abramov, D.O.[3] [DOE: 17Feb15]**
Flexion	50/50	30/70
Extension	60/60	20/45
Bilateral flexion	45/45	-
Bilateral rotation	80/80	30/80

In *López v. Senatore*, 65 NY2d 1017, 1020 (App Ct 1985), the Court of Appeals denied the defendant's motion for summary judgment on the ground that the plaintiff's physician's affirmation,

[2] See Hung Aff. at Exh. D. The ROM was measured with a goniometer. Dr. Singh performed an independent neurological exam. Findings are patient-to-normal.

[3] See Faraldo Opp. at Exh. A, p. 5.

supported by exhibits setting forth the injuries and course of treatment identifying ROM limitations, is enough of a basis to deny the defendant's motion [cervical limitation of ten degrees found to be enough significant limitation].

Here, there are glaring discrepancies between the two healthcare professionals' cervical spine ROM findings, taken within six [6] months from each other. On the one hand, Defendants contend that Plaintiff did not meet the serious injury threshold; on the other hand, Plaintiff counters that he indeed suffered serious injuries, as defined under Categories 6-9, based on objective medical testing. To reconcile these opposing views, summary judgment is denied so that the case can be resolved at trial, should the parties not settle.

The 90/180 Category

According to *Licari*, the words "substantially all" should be construed to mean that the person has been curtailed from performing his/her usual activities to a great extent rather than some slight curtailment. *Licari v. Elliott*, 57 NY2d 230, 236 (App Ct 1985). In addition, where there is conflicting medical evidence regarding whether the plaintiff's injuries are permanent or significant in nature, it will be up to the fact-finder to decide because it is an issue of fact. *LaMasa v. Bachman*, 56 AD3d 340 (App Div, 1st Dept 2008).

Here, regarding the 90/180 rule, Mr. Rodríguez asserts that his back woes caused curtailment of daily activities and work as a taxi driver, post-MVA. See Rodríguez Tr. at p. 55, lines 14-23; p. 59. Although Movants' attorney argues that Mr. Rodríguez failed to meet the 90/180 rule because he returned after four weeks after the MVA and because Dr. Sidhwani's February 16, 2011 write-up did not state that Mr. Rodríguez cannot work,[4] nevertheless, Mr. Rodríguez was unable to work in the same capacity as before. Accordingly, this branch of the motion will also be resolved at trial.

[4] See Reply at ¶ 10.

Note of Issue

As Movants' attorney affirmed, the Note of Issue was sent to the wrong address. See Reply at ¶ 5. Furthermore, Movants seek HIPAA authorizations so that they can cull any and all material and necessary medical information in preparation for trial. Such a request is not unduly burdensome or far-fetched whatsoever. *Muñoz v. 147 Corp.*, 309 AD2d 647, 648 (App Div, 1st Dept 2003). Since Plaintiff's attorney affirmed that Plaintiff would comply with furnishing HIPAA authorizations for trial purposes, such authorizations will be given to Movants within thirty calendar days from Notice of Entry, along with proper service of the Note of Issue/Certificate of Readiness.

WHEREFORE the threshold summary judgment motion raised by Defendants is **DENIED** -- material issues of fact exist.

This constitutes the Decision and Order of this Court.

Dated: August 10, 2015
Bronx, NY

Hon. Fernando Tapia, J.S.C.