Falcon v Aversano
2017 NY Slip Op 31955(U)
August 28, 2017
Supreme Court, Suffolk County
Docket Number: 22774/2014
Judge: William B. Rebolini

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Herminio Falcon and
Lucia Noemi Arriaza-Molina,

Plaintiffs,

-against-

Nicholas J. Aversano and Nicholas Aversano,

Defendants.

Motion Sequence No.: 002; MD
Motion Date: 3/2/17
Submitted: 6/7/17

Index No.: 22774/2014

Attorney for Plaintiffs:

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Clerk of the Court

Upon the following papers numbered 1 to 22 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 10; Answering Affidavits and supporting papers, 11 - 20; Replying Affidavits and supporting papers, 21 - 22; it is

ORDERED that this motion by defendants, Nicholas J. Aversano and Nicholas Aversano, for an order granting summary judgment dismissing the complaint on the ground that the plaintiffs, Herminio Falcon and Lucia Noemi Arriaza-Molina, did not sustain a "serious injury" within the meaning of N.Y. Insurance Law § 5102(d) is denied.

Plaintiffs commenced this action to recover damages for personal injuries allegedly sustained on March 5, 2013 as the result of a motor vehicle accident. Plaintiff Falcon testified at his deposition through a translator that Spanish is his first language and that he speaks English "[o]nly a little bit" but does not read or write English. He testified that on the day of the accident he was the operator of a sedan in which plaintiff Arriaza-Molina was one of two passengers. Contact was made to the passenger side of his vehicle, but the air bags did not deploy. Plaintiff drove his vehicle from the

scene of the accident to the emergency room, but he did not receive any treatment. He returned to the emergency room the following day, however, where he was treated and released. The next day, he sought treatment at a medical center in Brentwood with complaints of pain in his left shoulder, lower back and neck. He was not confined to bed or home after the accident, and he and was unemployed as of the date of deposition, having last worked in 2012. Falcon also testified that he had previously injured his neck and back in 2001 as the result of a motor vehicle accident. In the bill of particulars, plaintiff claims to have sustained a tear of the intra-articular biceps tendon and the glenoid labrum of the left shoulder as well as multiple disc herniations and other soft tissue injuries.

Plaintiff Arriaza-Molina testified at her deposition with the assistance of a translator that she occupied the rear seat of Falcon's vehicle and was treated in the emergency room and released after the accident. She sought further treatment at the medical center in Brentwood. She also testified that she was not confined to bed or home after the accident. Plaintiff claims in the bill of particulars that she sustained a "disc injury" at T6-7, disc bulges at C3-4, C4-5 and C5-6 and other injuries. She had been working full-time as an assembly worker for Power Connector in Bohemia since 2007, and she missed three or four months from work. It was also her testimony, however, that she never returned to Power Connector but, instead, she began working for We Cellular in West Babylon on September 5, 2013. She is not making a claim for lost earnings.

In order to effectuate the purpose of no-fault legislation to reduce litigation, a court is required to decide, in the first instant, whether a plaintiff has made out a *prima facie* case of "serious injury" sufficient to satisfy the statutory requirements (***Licari v Elliott,*** 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [1982]; ***Brown v Stark,*** 205 AD2d 725, 613 NYS2d 705 [2d Dept 1994]). If it is found that the injury sustained does not fit within the definition of "serious injury" under Insurance Law § 5102(d), then the plaintiff has no judicial remedy and the action must be dismissed (***Licari v Elliott,*** *supra,* at 57 NY2d 238; ***Velez v Cohan,*** 203 AD2d 156, 610 NYS2d 257 [1st Dept 1994]). A "serious injury" is defined 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 constitutes 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" (Insurance Law § 5102 [d]).

In support of their motion, defendants submitted the affirmed medical report of Richard A. Weiss, M.D., an orthopedic surgeon who examined plaintiff Falcon on February 23, 2016. Range of motion as tested with a goniometer showed full range of motion of the cervical and thoracic areas of the spine. There was also full range of motion of the lumbar area of the spine and straight leg raising was normal. There was no tenderness on palpation of the left shoulder, and range of motion was 170/180 degrees in forward flexion, 170/180 degrees in abduction, 80/90 degrees in external rotation, and 70/80 degrees in internal rotation. Impingement sign was negative. The doctor concluded that there was no evidence of orthopedic disability. The doctor also opined that while there was decreased range of motion of the left shoulder exhibited, "this is a subjective

response that was not substantiated by objective findings and ranges of motion displayed are compatible with normal function and consistent with age."

Defendants also submitted the affirmed report of Dr. Weiss in relation to his examination on February 23, 2016 of plaintiff Arriaza-Molina. Examination of the cervical area of the spine reportedly revealed minimal tenderness on palpation without spasm, and range of motion was full, as measured with a goniometer. Range of motion of the thoracic area of the spine was full. There were no motor or sensory deficits in the upper extremities. Range of motion of the right elbow was 140/150 degrees in flexion and 0/0 degrees in extension. Range of motion of the left wrist and hand was full, and Tinel's sign was negative. The doctor concluded that there was no evidence of orthopedic disability.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries sustained do not meet the threshold (*see* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). A defendant may satisfy this burden by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim that a serious injury was sustained as a result of the subject accident (***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]). Once this showing has been made, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Grossman v Wright***, *supra*; ***Pagano v Kingsbury***, *supra*; *see also* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*)

The defendants met their initial burden of establishing, as a matter of law, that neither plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d) (*see* ***McCauley v Ross***, 298 AD2d 506, 748 NYS2d 409 [2d Dept 2002]; *see also* ***McKinney v Lane***, 288 AD2d 274, 733 NYS2d 456 [2d Dept 2001], citing ***Gaddy v Eyler***, 79 NY2d 955, 591 NE2d 1176, 582 NYS2d 990; ***Licari v Elliott***, 57 NY2d 230, 441 NE2d 1088, 455 NYS2d 570). The defendants submitted competent medical evidence establishing that the alleged injuries to each plaintiff, as determined by specific tests performed during each examination, had resolved without disability (*see* ***Fuentes v Sanchez***, 91 AD3d 418, 936 NYS2d 151 [1st Dept 2102]). In addition, defendants established through submission of each plaintiff's deposition transcript and the bill of particulars that the plaintiffs did not sustain a serious injury under the 90/180 day category of Insurance Law § 5102 (d) (*see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]). Plaintiff Falcon testified that he was not confined to bed or home after the accident, and plaintiff Arriaza-Molina testified that she was not confined to bed but was confined to home for "[l]ike three weeks."

In opposition to the motion, plaintiffs Falcon and Arriaza-Molina submitted affidavits in English. Given the fact that each plaintiff speaks Spanish and required the services of a translator at their depositions, however, their affidavits are inadmissible. The absence of a translator's affidavit, required of foreign-language witnesses, renders the witness' English-language affidavit facially defective and inadmissible, since CPLR 2101(b) requires that affidavits of non-English-speaking witnesses be accompanied by a translator's affidavit setting forth the translator's qualifications and the accuracy of the English version (*see* ***Reyes v Arco Wentworth Mgt. Corp.,*** 83 AD3d 47, 919 NYS2d 44 [2d Dept 2011]).

In addition, plaintiff Falcon submitted the affirmed reports of Daniel Beyda, M.D., relating to MRIs taken of the cervical spine and lumbar spine on April 24, 2013. The MRI of the cervical area of the spine reportedly showed straightening of the cervical lordosis, anterior spondylosis at C3-4 with a broad-based disc herniation indenting the ventral thecal sac and touching the left ventral aspect of the spinal cord extending to the left neural foramen, a central disc bulge at C4-5, anterior spondylosis at C5-6 with a right posterolateral disc herniation extending to the right neural foramen, and anterior spondylosis at C6-7 with "a broad-based spondylitic ridge herniated disc complex." The lumbar MRI reportedly showed anterior spondylosis at L1-2, L2-3, L3-4, L4-5, and a central disc herniation at L5-S1. Although plaintiff also submitted the thoracic spine and left shoulder MRI reports of Michele Rubin, M.D., those reports are inadmissible because they were not affirmed and, thus, not in proper form (*see* ***Kreimerman v Yukobov,*** 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]).

In addition to the foregoing, plaintiff submitted the affirmed medical report of Alvin Stein, M.D. dated 3/29/13, 4/15/13, 6/27/13, 8/7/13, 9/9/13, 10/23/13, 11/20/13, 1/15/14, 2/12/14 and other records maintained by OrthoMed Care in Brentwood, along with an affidavit from Arthur Thompson, M.D., as medical records custodian, showing diminished range of motion to support the claim that plaintiff sustained cervical sprain, lumbar displacement, left shoulder derangement and sprain/strain of the left wrist with "symptoms ... causally related to the accident of March 5, 2013."

Plaintiff Falcon also submitted the affirmed medical report of Paul Lerner, M.D., a neurologist, who examined Falcon on March 29, 2017. Range of motion testing with inclinometer and arthroidal protractor showed cervical flexion at 35/50 degrees, extension at 30/60 degrees, left and right tilt at 35/45 degrees, and left and right rotation at 50/80 degrees. Thoracic range of motion was left and right tilt at 35/45 degrees, left rotation at 20/30 degrees and right rotation at 25/30 degrees. Lumbar range of motion was reportedly 40/60 degrees flexion and 15/25 degrees extension. Motor strength was 5/5 for all extremities except the left shoulder, which was "limited by complaint of discomfort with best effort 4/5." The doctor concluded that the plaintiff had sustained left shoulder pain with labral and tendon tear, cervical strain and radiculopathy with disc herniations, and thoracolumbar strain with disc herniations and bulges, which "are considered permanent" and causally related to the motor vehicle accident.

While plaintiff's submissions may fail to completely address the degenerative nature of some of the findings on the MRI reports, the evidence is sufficient to rebut defendants' *prima facie* showing. Thus, plaintiff Falcon submitted competent medical evidence raising a triable issue of fact as to whether he sustained serious injuries (*see* ***Karademir v Mirando-Jelinek,*** ___ AD3d ___, 2017

NY Slip Op 05942 [2d Dept 2017]; *see also* ***Patisso v Brady,*** 152 AD3d 782, 56 NYS3d 465 [2d Dept 2017]).

Plaintiff Arriaza-Molina submitted the affirmed report of Mark Decker, M.D., relating to an MRI taken of the cervical spine on April 9, 2013. The MRI of the cervical area of the spine reportedly showed straightening of the cervical lordosis with "mild multilevel bulging, C3-C4 through C5-C6." In addition, she submitted the affirmed report of Alvin Stein, M.D. dated 3/8/13, when she complained of headaches, cervical and thoracic pain, and left shoulder, elbow and wrist pain. Certified records of a computerized range of motion exam by Dr. Stein dated 3/18/13 reportedly showed impairment in ranges of motion of the cervical spine of 24%, the thoracic spine of 6%, the left upper extremity of 44% and the right upper extremity of 39%. Additional reports of examinations conducted by Dr. Stein on 3/22/13, 4/19/13, 5/17/13, 6/20/13, 7/25/13, 8/22/13, 9/30/13 and 1/16/14 were also submitted. In addition, affirmed reports David W. Rabinovici, M.D., dated 4/24/13, 5/8/13 and other medical records were submitted. Plaintiff Arriaza-Molina submitted the affirmed report of Paul Lerner, M.D., too, who examined her on March 29, 2017, at which time cervical range of motion measured with an inclinometer and arthroidal protractor showed flexion 40/50 degrees, extension 30/60 degrees, left and right tilt 30/45 degrees, left rotation 40/80 degrees and right rotation 45/80 degrees. Thoracic range of motion was 20/30 degrees left and right rotation and 35/45 degrees left and right tilt. Lumbar range of motion was reportedly 40/60 degrees flexion and 10/25 degrees extension. The doctor concluded that the plaintiff had sustained cervical strain with disc bulges, cranial pain "that is likely of cervical origin", thoracolumbar strain, and left thumb/hand pain and numbness.

Although a bulging or herniated disc may constitute a serious injury within the meaning of Insurance Law § 5102(d), a plaintiff must provide objective evidence of the extent or degree of the alleged physical limitations resulting from the disc injury and its duration (***Monette v Keller,*** 281 AD2d 523, 523-524, 721 NYS2d 839 [2d Dept 2001]). Here, plaintiff Arriaza-Molina submitted objective evidence sufficient to raise a triable issue of fact regarding the extent of her alleged physical limitations as well as their alleged duration.

Dated: August 28, 2017

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**