Rosa v El-Attar
2018 NY Slip Op 31096(U)
April 30, 2018
Supreme Court, Bronx County
Docket Number: 20386/2015E
Judge: Donald A. Miles
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FILED: BRONX COUNTY CLERK 05/04/2018 02:52 PM
INDEX NO. 20386/2015E
NYSCEF DOC. NO. 45
RECEIVED NYSCEF: 05/04/2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 08
---X
RUDOLPHO ROSA and ALFREDO ROSA,

Plaintiffs,

-against-

Index No: 20386/2015E

DECISION/ORDER

ABDELKRIM EL-ATTAR and
FRANK L. HERNANDEZ,

Defendants.
---X

HON. DONALD MILES:

This negligence action arises out of a motor vehicle collision that occurred on December 20, 2013, on East 77th Street between Park Avenue and Lexington Avenue in the City and State of New York. Defendants seek summary judgment dismissing the complaint on the ground that none of the alleged injuries of plaintiffs Rudolpho Rosa ("Rudolpho") and/or Alfredo Rosa ("Alfredo") satisfy the serious injury "threshold" requirements as set forth in Insurance Law § 5102(d).

The motion is determined as follows:

Defendants seeking summary judgment in an action governed by Insurance Law § 5102 must demonstrate that the plaintiffs did not sustain a "serious injury" or that the plaintiffs' injuries were not causally related to the accident at issue (*see Baez v Rahamatali*, 6 NY3d 868 [2006]; *Pommells v Perez*, 4 NY3d 566 [2005]). In the event defendants meet this burden, plaintiffs must respectively come forward with evidence demonstrating the existence of a triable issue of fact (*see Gaddy v Eyler*, 79 NY2d 955 [1992]). A plaintiff's subjective claim of pain and limitation of motion must be corroborated by verified objective medical findings (*see Stevens v Bolton*, 135 AD3d 647 [1st Dept 2016]; *see also Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Bent v Jackson*, 15 AD3d 46

[1st Dept 2005]).

The defendants submit a copy of the pleadings; the verified bill of particulars; plaintiffs' deposition transcripts; a copy of the police report; and the affirmed medical reports relating to each of the plaintiffs from Dr. John H. Buckner, an orthopedist, Dr. Mark P. Kanter, an emergency medicine specialist, and Dr. Audrey Eisenstadt, a radiologist.

Defendants' examining orthopedist, Dr. Buckner, examined Rudolpho and reviewed his verified bill of particulars, alleging that he had sustained personal injuries to the cervical spine and lumbar spine. Dr. Buckner performed objective testing and reviewed Rudolpho's Lenox Hill Hospital Emergency Room records ("ER records"), including X-Rays of the lumbar spine. Dr. Buckner found no objective evidence of causally related injury to any of the subject body parts. He concluded that Rudolpho's complaints were unrelated to the subject accident.

As to Rudolpho's alleged injuries to the cervical spine, Dr. Buckner noted that plaintiff's initial ER records indicate that plaintiff did not exhibit symptoms of having sustained a cervical spine injury. Further, no X-Rays were taken of plaintiff's cervical spine. Dr. Buckner also relies upon Rudolpho's ER records documenting that plaintiff was not immobilized, and further that, there were no complaints regarding his cervical spine. Plaintiff's records indicate an initial complaint as to his lower back; however, X-Rays taken of the lumbar spine indicated degenerative disease and confirmed that there was no evidence that Rudolpho had sustained acute trauma.

Dr. Kanter reviewed Rudolpho's verified bill of particulars and ER records, finding that the injuries alleged therein were inconsistent with plaintiff's own complaints to the ER staff and further, were unsupported by the findings, examinations and radiographic studies taken shortly after the accident occurred. Dr. Eisenstadt opined that the conditions noted in plaintiff's MRI films for the

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cervical spine and lumbar spine were degenerative with no evidence of traumatic injury.

Defendants' examining orthopedist, Dr. Buckner, examined Alfredo and reviewed his verified bill of particulars, alleging Alfredo had sustained personal injuries to the cervical spine and lumbar spine. Dr. Buckner performed objective testing and reviewed plaintiff's ER records, noting that Alfredo had no injuries other than that he entered the hospital due to an asthma attack. Dr. Buckner found no objective evidence of causally related injury to Alfredo's cervical spine or lumbar spine. He concluded that Alfredo's complaints were unrelated to the subject accident.

No X-Rays were taken of plaintiff's cervical spine and/or lumbar spine. Furthermore, Alfredo's ER records indicate that plaintiff was not immobilized. There is also no evidence that Alfredo complained of having sustained any injury to his cervical spine or to his lumbar spine. Dr. Kanter reviewed Alfredo's verified bill of particulars and confirmed Dr. Buckner's report that the injuries alleged therein were inconsistent with Alfredo's ER records. Dr. Eisenstadt opined that the conditions noted in plaintiff's MRI films for the cervical spine and lumbar spine were degenerative in origin, with no evidence of traumatic injury.

The defendants have established that, as a matter of law, neither Rudolpho nor Alfredo sustained a serious injury within the meaning of Insurance Law § 5102(d) under the categories of permanent loss, permanent consequential limitation or significant limitation (*see Malupa v Oppong*, 106 AD3d 538 [1st Dept 2013]; *Barry v Arias*, 94 AD3d 499 [1st Dept 2012]; *see also Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986], *aff'd* 69 NY2d 701 [1986]; *Rose v Tall*, 149 AD3d 554 [1st Dept 2017]). The burden now shifts to the respective plaintiffs to come forward with evidence demonstrating the existence of a triable issue of fact (*see Gaddy v Eyler*, supra). In opposition, neither plaintiff raises triable issues of fact as to whether the injuries claimed are permanent,

constitute significant limitation or both (*see Perl v Meher*, 18 NY3d 208 [2011]; *De La Rosa v Okwan*, 146 AD3d 644 [1st Dept 2017]; *Vega v MTA Bus Co.*, 96 AD3d 506 [1st Dept 2012]; *Rosa v Mejia*, 95 AD3d 402 [1st Dept 2012]).

"[I]t is well settled that the mere existence of bulging or herniated discs are not, in and of themselves, evidence of serious injury without competent objective evidence of the limitations and duration of the disc injury" (*Rubencamp v Arrow Exterminating Co.*, 79 AD3d 509 [1st Dept 2010]; *see DeJesus v Paulino*, 61 AD3d 605 [1st Dept 2009]). Medical experts for both Rudolpho and Alfredo provide only conclusory opinions that the respective plaintiffs' injuries were caused by the accident, without addressing the preexisting degenerative conditions found by defendants' radiologist in their respective MRI films. None of the medical experts' reports set forth any explanation as to why either plaintiff's current reported symptoms were not related to those preexisting conditions (*see Wenegieme v Harriott*, 157 AD3d 412 [1st Dept 2018]; *Barreras v Vargas*, 151 AD3d 620 [1st Dept 2017]; *Lee v Lippman*, 136 AD3d 411 [1st Dept 2016]; *see also Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043 [1st Dept 2014] *affd*, 24 NY3d 1191 [2015][plaintiff's surgeon failed to address defendants' experts findings of preexisting degenerative disease, which were also noted in plaintiff's own radiological reports]). The failure to address these preexisting conditions renders speculative the medical experts' conclusions regarding the respective plaintiffs that the range of motion limitations were caused by the subject accident (*see Ly Giap v Hathi Son Pham*, 2018 NY Slip Op. 015682018, --- NYS3d ---- [1st Dept 2018]; *see Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509 [1st Dept 2014], *affd.* 25 NY3d 1222 [2015]; *Lee v Lippman*, supra).

Moreover, neither plaintiff addresses the original findings of normal range of motion and/or minor limitations as noted by their respective ER records. No explanation is provided as to how their

medical experts came to the conclusion that the respective plaintiffs had sustained serious injuries causally related to the accident in light of the otherwise normal findings noted shortly after the accident occurred (*see Rose v Tall*, supra; *Khan v Goldmag Hacking Corp.*, 149 AD3d 403 [1st Dept 2017]; *Booth v Milstein*, 146 AD3d 652 [1st Dept 2017] [plaintiff failed to raise issue of fact where his chiropractor found limitations upon examination approximately two years after the accident, but did not reconcile those findings with earlier findings of normal or near normal range of motion made by another treating physician]; *see also Marino v Amoah*, 143 AD3d 541 [1st Dept 2016] [plaintiff's expert, who opined that plaintiff's torn menisci were causally related to the accident, failed to reconcile the later findings of deficits with the earlier findings of normal range of motion]).

Neither Rudolpho nor Alfredo raised a triable issue of fact as to their respective claims under the 90/180-day serious injury category (*see Stevens v Bolton*, supra; *Sougstad v Meyer*, 40 AD3d 839 [2d Dept 2007]; *Blackmon v Dinstuhl*, 27 AD3d 241 [1st Dept 2006]). A plaintiff's subjective complaints as to limitations are insufficient to satisfy this provision (*see Long v Taida Orchids, Inc.*, 117 AD3d 624 [1st Dept 2014]; *Pinkhasov v Weaver*, 57 AD3d 334 [1st Dept 2008]). Neither plaintiff submitted any competent medical evidence to support their claims that they were unable to perform substantially all of their daily activities for not less than 90 of the 180 days immediately following the accident as a result of the subject accident (*see Stevens v Bolton*, supra; *Collado v Abouzeid*, 68 AD3d 912 [1st 2009]; *Sougstad v Meyer*, supra]; *Blackmon v Dinstuhl*, supra).

For the foregoing reasons, it is hereby

ORDERED that the motion is granted in its entirety and the action is dismissed.

This constitutes the decision and order of the court.

Dated: April , 2018

APR 30 2018

DONALD MILES, J.S.C.