Rivera v Johnson
2018 NY Slip Op 33064(U)
November 5, 2018
Supreme Court, Suffolk County
Docket Number: 18850/2015
Judge: William B. Rebolini

Short Form Order

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SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Madeline Rivera,

Plaintiff,

-against-

Robert C. Johnson,

Defendant.

Motion Sequence No.: 002; MD
Motion Date: 5/30/18
Submitted: 8/15/18

Index No.: 18850/2015

Attorney for Plaintiff:

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Clerk of the Court

Upon the following papers numbered 1 to 310 read on this application by defendant Robert C. Johnson for summary judgment dismissing plaintiff's complaint pursuant to CPLR 3212: Notice of Motion and supporting papers 1 to 210; Answering Affidavits and supporting papers 211 to 302; Replying Affidavits and supporting papers 303 to 310; it is

ORDERED that the motion by defendant Robert C. Johnson for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Madeline Rivera ("plaintiff" or "Rivera") as a result of a motor vehicle accident that occurred on August 11, 2013. Plaintiff commenced this action by the filing of a summons and complaint on October 29,

2015. Issue was joined by defendant Robert C. Johnson ("defendant" or "Johnson") on February 3, 2016. Plaintiff served a verified bill of particulars dated July 14, 2016. The verified bill of particulars alleges that plaintiff sustained various serious injuries and conditions, including "long head of biceps tenosynovitis of the left shoulder, irregularity in the appearance of the inferior glenoid centrally and extending anteriorly which may be an inferior labral tear of the left shoulder, tendinosis of the suprasinatus and infraspinatus without focal tear of the right shoulder, arthrosis along the anterior undersurface of the AC joint of the right shoulder, heterogeneous marrow signal changes within the right humerus which are consistent with red marrow reconversion of the right shoulder, C3-4, C4-5, C5-6, C5-7 disc herniations, straightening of the cervical lordosis, posterocentral disc herniation at L2-L3, which indents the ventral thecal sac, annular bulges at L3-L4 and L4-L5, slightly asymmetric toward the right with right foraminal encroachment, mild central spinal stenosis at L4-5 secondary to facet and ligmentous hypertrophy, small facet joint effusions at L3-L4 on the right and L4-L5 on the left, possible small extraspinal synovial cyst posteroinferior to the right facet joint at 11-12, transitional L5 vertebra and L5-S1 disc space." The examination before trial of plaintiff was held on May 2, 2017. On March 19, 2018 plaintiff was examined by Dr. Edward A. Toriello, Orthopedist ("Dr. Toriello"), on behalf of defendant.

Defendant now moves for summary judgment seeking an order dismissing the complaint on the ground that the objective medical evidence establishes that none of the injuries claimed by plaintiff satisfy the "serious injury" threshold requirements of the No-Fault Law as defined in Insurance Law §5102 (d) and that plaintiff's claim for non-economic loss is barred by §5104 (a) of the Insurance Law. In support of his motion, defendant submits an affirmation of counsel, a copy of the pleadings, verified bill of particulars, transcript of the examination before trial of plaintiff[1], affirmed report of Dr. Edward A. Toriello dated March 19, 2018, certified police report of December 2, 2013 motor vehicle accident, plaintiff's verified bill of particulars relative to the December 2, 2013 accident, and the evaluation and studies of Dr. Todd Goldman, plaintiff's doctor. Plaintiff opposes the motion and defendant replies. Plaintiff's counsel submitted a response to the reply affirmation, which has not been considered herein.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries (***Dufel v. Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; *see also* ***Toure v. Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v. Elliott***, 57 NY2d 230, 455 NYS2d 570

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[1]Being that both parties rely upon plaintiff's certified yet unsigned deposition transcript and counsel for defendant has provided proof that the transcript was forwarded to plaintiff but was not signed within sixty (60) days, it is admissible on this motion for summary judgment (*see* ***Thomas v City of New York,*** 124 AD3d 872, 2 NYS3d 578 [2d Dept 2015] (certified yet unsigned deposition transcripts are admissible on a motion for summary judgment where their accuracy is not being challenged); ***Franzese v. Tanger Factory Outlet Centers, Inc.,*** 88 AD3d 763, 930 NYS2d 900 [2d Dept. 2011](transcript mailed to deponent for consideration and review and not signed or returned within sixty (60) days admissible).

[1982]; ***Porcano v. Lehman***, 255 AD2d 430, 680 NYS2d 590 [1988]; ***Nolan v. Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines "serious injury" 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 constitute 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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v. Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v. Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v. Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v. Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v. Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) "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" (***Nunez v. Teel,*** 162 AD3d 1058, 75 NYS3d 541 [2d Dept. 2018]; *see also* ***Moore v. Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v. Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own expert witnesses, "those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v. Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and unsworn medical reports and records prepared by the plaintiff's own physicians (*see* ***Uribe v. Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; ***Elshaarawy v. U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***Fragale v. Geiger***, 288 AD2d 431, 733 NYS2d 901 [2001]; ***Grossman v. Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]; ***Vignola v.Varrichio***, 243 AD2d 464, 662 NYS2d 831 [1997]; ***Torres v. Micheletti***, 208 AD2d 519,616

NYS2d 1006 [1994]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v. New York Univ. Med. Ctr.***, *supra*; ***Boone v. New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]; ***Burns v. Stranger***, 31 AD3d 360, 819 NYS2d 60 [2006]; ***Rich-Wing v. Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2005]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v. Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Gaddy v. Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Beltran v. Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]; ***Tornabene v. Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2003]; ***Pagano v. Kingsbury***,182 AD2d 268, 587 NYS2d 692 [1992]).

Here, defendant has failed to show, *prima facie*, that plaintiff did not sustain serious injuries to her spine under the limitations of use categories of Insurance Law § 5102 (d) (*see* ***Garbutt v. United Parcel Serv.***, 131 AD3d 444, 13 NYS3d 897 [2d Dept 2015]; ***McDonough v. Mulligan***, 125 AD3d 616, 3 NYS3d 92 [2d Dept 2015]). In particular, the examination of Rivera conducted by defendant's independent expert, Dr. Toriello, found a significant limitation in range of motion in the lumbar region of Rivera's spine (*see* ***Nunez v. Teel,*** 162 AD3d 1058, 75 NYS3d 541 [2d Dept. 2018]; ***Ramos v. Baig***, 145 AD3d 695, 41 NYS3d 902 [2d Dept 2016], ***Cockburn v. Neal***, 145 AD3d 660, 44 NYS3d 59 [2d Dept 2016]; ***Dean v. Coffee-Dean***, 144 AD3d 1080, 41 NYS3d 750 [2d Dept 2016]; ***Mercado v. Mendoza***, 133 AD3d 833, 19 NYS3d 757 [2d Dept 2015]). Although Dr. Toriello attempts to explain his finding of significant range of motion limitations in Rivera's lumbar spine by stating that range of motion "is a subjective finding under the voluntary control of the individual being tested," he also states in his March 19, 2018 report that he used a goniometer or inclinometer to measure plaintiff's ranges of motion and the referring sources of range of motion guidelines were obtained from the "American Medical Association Guides to the Evaluation of Permanent Impairment 5th Edition, Mosby's Guide to Physical Examination 6th Edition, Seidel 2006 and A Guide to Physical Examination by Barbara Bates, M.D 9th Edition, 2007." Such evidence does not adequately explain and substantiate the belief that Rivera's limits were self-imposed (*see* ***Mercado v Mendoza***, *supra*). Moreover, Dr. Toriello does not refute the MRI findings on Rivera's cervical and lumbar spine and shoulders, which he admits as to the MRI report of the cervical spine dated September 3, 2013 revealed disc herniations from C3-C7, as to the MRI report of the left shoulder dated September 11, 2013 revealed tenosynovitis and a possible labral tear, and as to the MRI report of the lumbar spine dated October 10, 2013 revealed disc herniation at L2-3 and bulging from L3-5. Further, Dr. Toriello opined that "[i]f the history as provided by the claimant and medical records is both true and accurate then there is a relationship between the injuries sustained and the accident of 8/11/13."

Based upon the above, defendant failed to satisfy the burden of establishing *prima facie* that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see* ***Agathe v. Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Reitz v. Seagate Trucking, Inc.,*** 71 AD3d 975, 898 NYS2d 173 [2d Dept. 2010]; ***Walters v. Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]) and thus there are triable issues as to whether Rivera

injury (*see* ***Greenidge v. United Parcel Serv., Inc.***, 153 AD3d 905, 60 NYS3d 421 [2d Dept 2017]). Inasmuch as defendant failed to establish *prima facie* entitlement to judgment as a matter of law, it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see* ***McMillan v. Naparano,*** 61AD3d 943, 879 NYS2d 152 [2d Dept. 2009]; ***Yong Deok Lee v. Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v. Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v. Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]). Nevertheless, even if this Court were to find that defendant's burden had been met, plaintiff presented objective medical evidence sufficient to raise an issue of fact to be resolved at trial (*see* ***Romano v. Persky***, 117 AD3d 814, 985 NYS2d 633 [2d Dept 2014]; ***Kalpakis v. County of Nassau***, 289 AD2d 453, 735 NYS2d 427 [2d Dept 2001]).

Accordingly, the motion by defendant for summary judgment dismissing the complaint pursuant to CPLR 3212 is denied.

Dated: 11/5/2018

William B Rebolini

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

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**