

**Ramos v Rifin**

2018 NY Slip Op 33806(U)

October 23, 2018

Supreme Court, Queens County

Docket Number: 700423/2016

Judge: Leslie J. Purificacion

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

FILED  
NOV -8 2018  
COUNTY CLERK  
QUEENS COUNTY

Part 39

-----X  
EDITH RAMOS

Plaintiff,

Index Number: 700423/2016

--against--

DESONE RIFIN and JOSEPH ELIAKIM

Defendants,

DECISION/ORDER

-----X  
DENOSE RIFIN and JOSEPH ELIAKIM  
Third-Party Plaintiffs

-against-

Motion Sequence (1) & (2)

DELTA AIRLINES, INC. and ISAK S.  
DAVYDOV

Third-Party Defendants  
-----X

The following papers numbered 1 to 17 read on defendants Desone Rifin and Joseph Eliakim's motion pursuant to CPLR §3212 dismissing the complaint of the plaintiff on the grounds that plaintiff's alleged injuries fail to meet the serious injury threshold requirement of Insurance Law §5102(d) and third-party defendants Delta Airlines, Inc. and Isak S. Davydov's motion for the same relief.

Papers  
Numbered

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Upon the foregoing papers, it is ordered that these motions are consolidated for determination as follows:

This is an action to recover for personal injuries allegedly sustained by plaintiff on February 15, 2013. In her verified bill of particulars, plaintiff alleges injuries to her cervical spine, lumbar spine, left elbow, left shoulder and right shoulder. Plaintiff asserts that as a result of the accident she suffered: "a permanent loss of use of a body organ, member, function or system"; "a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and "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 90 days during the 180 days immediately following the occurrence of the injury or impairment" (Insurance Law §5102[d]).

Defendants Desone Rifkin and Joseph Eliakim now move for summary judgment dismissing the complaint on the grounds that plaintiff's alleged injuries do not meet the threshold requirement of Insurance Law §5102(d). Third-party defendants also move for summary judgment and adopt the arguments of defendants Rifkin and Eliakim.

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 eliminate any material issues of fact (see CPLR §3212[b]; Alvarez v Prospect Hosp., 68 N.Y.2d 320; Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851; Zuckerman v City of New York, 49 N.Y.2d 557). The question of whether plaintiff sustained a "serious injury" as defined by Insurance Law §5102(d) is one of law that can be disposed of by summary judgment and a defendant in seeking same has the burden to show that plaintiff's injuries do not rise to the level of those set forth in the statute (see Gaddy v Eyler, 79

N.Y.2d 955; Licari v Elliot, 57 N.Y.2d 230). This may be accomplished through submission of plaintiff's deposition testimony and/or affidavits, affirmations or sworn reports of medical experts who examine the plaintiff and conclude that no objective medical findings support the plaintiff's claim (see Grossman v Wright, 268 A.D.2d 79; Toure v Avis Rent A Car Sys., 98 N.Y.2d 345).

In support of their application, defendants submit the properly affirmed report of radiologist Audrey Eisenstadt, M.D., DABR; the properly affirmed report of neurologist Edward Weiland, M.D.; the properly affirmed report of orthopedist Thomas Nipper, M.D.; the properly affirmed report of emergency medicine physician Jay M. Walshon, M.D., FACEP; plaintiff's bill of particulars and plaintiff's examination before trial testimony.

In her report dated, March 28, 2015, Dr. Audrey Eisenstadt reviewed the MRI of the plaintiff's left shoulder taken on February 24, 2013. Dr. Eisenstadt found there was degenerative joint disease with hypertrophic bony spurring. Dr. Eisenstadt also noted degenerative cyst formation and narrowing of the subacromial space. Dr. Eisenstadt opined that the deformities of plaintiff's left shoulder were degenerative in nature and predate the accident.

On December 13, 2016, Dr. Weiland performed a neurological examination of the plaintiff. Dr. Weiland found normal ranges of motion for the cervical, lumbar and thoracic spine. He noted that there were subjective complaints of pain with light palpation over the mid and lower lumbar, as well as mid cervical and paraspinous region. Dr. Weiland also examined plaintiff's left shoulder noting well-healed portal scars consistent with a prior arthroscopic procedure. There were no signs of active tissue inflammation or soft tissue swelling. Dr. Weiland noted that there were subjective complaints of pain with range of

motion activities but he did not provide any range of motion findings. Dr. Weiland concluded that there is no neurological residual or permanency based upon the examination findings.

Dr. Nipper performed an orthopedic evaluation of plaintiff on December 8, 2016. The court notes that Dr. Nipper's report contains several errors with respect to plaintiff's history and current complaints. Dr. Nipper performed range of motion testing on the plaintiff's cervical spine, lumbar spine, left shoulder and right elbow. Dr. Nipper found that all range of motion testing was normal. All other testing was also normal. Dr. Nipper opined that the plaintiff's neck, lower back, left shoulder and right elbow sprain/strains have resolved. In addition, Dr. Nipper found that there was no evidence that the plaintiff sustained an acute traumatic injury to the left shoulder.

With respect to the plaintiff's neck, back and left shoulder, the court finds that the affirmations of defendants' doctors establish prima facie that the plaintiff did not sustain "a permanent loss of use of a body organ, member, function or system"; "a permanent consequential limitation of use of a body organ or member; or a significant limitation of use of a body function or system" as a result of this accident. Thus, the burden shifts to the plaintiff to come forward with sufficient evidence that she sustained serious injuries to these body parts (see, Gaddy v Eyler, 79 NY2D 955).

The court further finds that the defendants have failed to establish their prima facie entitlement with respect to the plaintiff's left elbow as none of the defendant's doctors examined that body part. The defendants have also failed to sustain their burden with respect to the 90/180 category. Plaintiff's examination before trial testimony

indicates that she missed three months of work following the accident and another several months following her shoulder surgery within the relevant time period.

In opposition to the motion, plaintiff submits the properly affirmed narrative report of her orthopedic surgeon Mark Bursztyn, M.D. FAAOS. Dr. Bursztyn first examined the plaintiff's left shoulder and left elbow on March 21, 2013 and noted diminished ranges of motion, tenderness and pain. Dr. Bursztyn reviewed the MRI of plaintiff's left shoulder and opined that plaintiff had a partial-thickness tear involving the supraspinatus tendon. Dr. Bursztyn began a course of treatment with the plaintiff and examined her once a month for approximately 16 months. On July 26, 2013, Dr. Bursztyn performed arthroscopic surgery of plaintiff's left shoulder, where plaintiff required debridement of a partial-thickness bursal-sided rotator cuff tear, debridement of partial subscapularis tendon tear and type I SLAP lesion. Dr. Bursztyn reexamined the plaintiff on November 15, 2017 and found that plaintiff continued to have pain and diminished range of motion in her left shoulder. Dr. Bursztyn opined that plaintiff's injury to her left shoulder is permanent and causally related to the accident. He further stated that plaintiff may need to undergo further surgical intervention and physical therapy.

The court finds that the reports of plaintiff's treating doctor is sufficient to raise a triable issue of fact with respect to whether plaintiff has sustained a permanent loss of use of a body organ, member, function or system, a permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function or system with respect to her left shoulder.

Accordingly, the motions are granted to the extent that plaintiff's claim that she suffered "a permanent loss of use of a body organ, member, function or system"; "a

permanent consequential limitation of use of a body organ or member; or a significant limitation of use of a body function or system" to her cervical spine, lumbar spine and right shoulder is dismissed.

In all other respects, the motion is denied.

This is the decision and order of the court.



Date:

OCT 23 2018

Hon. Leslie J. Purificacion, J.S.C.

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