

Vasquez v Perez-Franco
2020 NY Slip Op 34037(U)
December 7, 2020
Supreme Court, Kings County
Docket Number: 512500/2016
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of DECEMBER, 2020

P R E S E N T:

HON. RICHARD VELASQUEZ, Justice.

-----X
ELBA VASQUEZ and JOSE L. MUNOZ,

Plaintiff,

-against-

Index No.: 512500/2016
Decision and Order

RUBEN PEREZ-FRANCO and KEVIN KONG CHING LUNG

Defendants,
-----X

The following papers NYSCEF Doc #'s 46 to 132 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed_____	46-59; 98-109
Opposing Affidavits (Affirmations)_____	110-119; 120-129
Memorandum of Law_____	132

After having heard Oral Argument on DECEMBER 7, 2020 and upon review of the foregoing submissions herein the court finds as follows:

Defendant, RUBEN PEREZ-FRANCO, moves pursuant to CPLR 3212 for an order granting defendants summary judgment and dismissing the Complaint of plaintiff, as plaintiff fails to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (a). (MS#4). Plaintiff opposes the same. Defendant, KEVIN KONG CHING LUNG also moves pursuant to CPLR 3212 for an order granting defendants summary

judgment and dismissing the Complaint of plaintiff, as plaintiff fails to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (a). (MS#7). Plaintiff opposes the same.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". *CPLR* §3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.* The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. The moving party must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Zuckerman v. City of New York*, 49 NY2d 557 [1990].) Once this burden is met, the burden shifts to the opposing party to submit

proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v. Algaze*, 84 NY2d 1019 [1995]).

It is well settled, in a soft tissue injury case, a plaintiff alleging a “serious injury”, must provide objective medical evidence of a “serious injury” within the meaning of the Insurance Law § 5102(d). A defendant seeking summary judgment on the grounds that plaintiff’s injury does not meet the threshold, the defendant must show that there is no question of fact that there is no loss of range of motion.

In the present case, both defendants fail to show that there is no “serious injury” as a matter of law because the evaluating doctors find differing ranges of motion. This is similar to the situation in *Knokhinov v. Murray*, 27 Misc.3d 1211(A), 2010 WL 1542529 (N.Y.Sup.), where the evaluating doctors found differing normative values. In *Knokhinov*, the court denied summary judgment because when the findings reported by one doctor are assessed by application of the standard of “normal” stated by the other doctors, the reports present “contradictory proof”. *Id. See also Dettori v. Molzon*, 306 AD2d 308, 309 [2d Dept 2003]. As Judge Battaglia noted in *Knokhinov supra.*, in the Second Department, measuring a plaintiff’s range of motion and comparing it to a normal range of motion has become the linchpin of determining if a soft tissue injury is a “serious injury.” Therefore, in a case such as this where the ranges of motion observed by one of the doctors is less than the range of motion sworn to by another of the doctors, there are issues of fact.

Accordingly, Defendant, RUBEN PEREZ-FRANCO, motion pursuant to CPLR 3212 on the basis that plaintiff fails to meet the serious injury threshold is hereby denied, for the reasons stated above.(MS#4). Defendant, KEVIN KONG CHING LUNG,

motion pursuant to CPLR 3212 on the basis that plaintiff fails to meet the serious injury threshold is hereby denied, for the reasons stated above. (MS#7).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
December 7, 2020



HON. RICHARD VELASQUEZ