

Prophete v Ruiz-Garcia
2020 NY Slip Op 35160(U)
December 18, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 608288/2018
Judge: Joseph A. Santorelli
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ORIGINAL

SHORT FORM ORDER

INDEX No. 608288/2018CAL. No. 202000177MVSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY**PRESENT:**Hon. JOSEPH A. SANTORELLI
Justice of the Supreme CourtMOTION DATE 6/18/20 (002)MOTION DATE 6/19/20 (001)ADJ. DATE 9/24/20

Mot. Seq. # 001 MD

Mot. Seq. # 002 MD

-----X
MARY PROPHETE,

Plaintiff,

- against -

OSCAR A. RUIZ-GARCIA and JOSE
ARGUETA,Defendants.
-----XOSCAR A. RUIZ-GARCIA and JOSE
ARGUETA,

Third-Party Plaintiffs,

- against -

MARY PROPHETE and PIERRE PROPHETE,

Third-Party Defendants.
-----XEDWARD R. YOUNG & ASSOCIATES
Attorney for Plaintiff
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Upon the following papers read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by third-party defendant Prophete, dated May 20, 2020, and by defendants, dated May 21, 2020; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers by plaintiff, dated September 8, 2020; Replying Affidavits and supporting papers by third-party defendant Prophete, dated September 22, 2020, and by defendants, dated September 22, 2020; Other ____; it is

ORDERED that the motion (#001) by third-party defendant Pierre Prophete and the motion (#002) by defendants/third-party plaintiffs Oscar Ruiz-Garcia and Jose Argueta hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by third-party defendant Pierre Prophete seeking summary judgment dismissing plaintiff's complaint is denied; and it is

ORDERED that the motion by defendants/third-party plaintiffs Oscar Ruiz-Garcia and Jose Argueta seeking summary judgment dismissing plaintiff's complaint is denied.

Plaintiff Mary Prophete commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Great Neck Road and Brefini Street in the Town of Babylon on March 5, 2017. Plaintiff, by her complaint, alleges that she was riding as a front seat passenger in the vehicle operated by her husband, third-party defendant Pierre Prophete, when the vehicle owned by defendant/third-party plaintiff Jose Argueta and operated by defendant/third-party plaintiff Oscar Ruiz-Garcia crossed over the double yellow lines, striking the front passenger side of the Prophete vehicle. By her bill of particulars, plaintiff alleges, among other things, that she sustained various personal injuries as a result of the subject accident, including cervicalgia, cervical radiculopathy, and multilevel disc bulges and herniations of the cervical and lumbar spine. Thereafter, defendants/third-party plaintiffs Oscar Ruiz-Garcia and Jose Argueta commenced a third-party action against Pierre Prophete to recover damages for contribution and indemnification.

Third-party defendant Pierre Prophete now moves for summary judgment on the basis that the injuries plaintiff alleges to have sustained as a result of the subject accident fail to meet the serious injury threshold requirement of Insurance Law § 5102 (d). In support of the motion, third-party defendant submits copies of the pleadings, plaintiff's deposition transcript, and the sworn medical reports of Dr. Craig Ordway and Dr. Jean-Robert Desrouleaux. At the request of third-party defendant Prophete, Dr. Ordway performed an independent orthopedic examination of the plaintiff on November 19, 2019. Also at the request of third-party defendant Prophete, Dr. Desrouleaux conducted an independent neurologic examination of the plaintiff on November 11, 2019. Defendants/third-party plaintiffs Oscar Ruiz-Garcia and Jose Argueta (hereinafter "defendants") also move for summary judgment on the basis that the plaintiff's injuries do not come within the meaning of the serious injury threshold requirement of the Insurance Law. In support of the motion, defendants submit copies of the pleadings, plaintiff's deposition transcript, and the sworn medical report of Dr. Frank Oliveto. At the request of defendants, Dr. Oliveto conducted an independent orthopedic examination of the plaintiff on September 9, 2019.

Plaintiff opposes the motions on the grounds that third-party defendant Prophete and defendants failed to meet their prima facie burden, and that the evidence submitted in opposition demonstrates that

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she sustained injuries in the “limitations of use” and the “90/180” categories of the Insurance Law due to the subject accident. In opposition to the motion, plaintiff submits her own affidavit, a certified copy of the police accident report, the sworn medical report of Dr. James McGhee, the certified records of Perry Physical Medicine & Rehabilitation, and uncertified copies of her medical records concerning the injuries at issue.

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, 798, 622 NYS2d 900 [1995]; see *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 [1982]; *Porcano v Lehman*, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; *Nolan v Ford*, 100 AD2d 579, 473 NYS2d 516 [2d Dept], *affd* 64 NY2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a “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.”

A defendant seeking summary judgment on the ground that a plaintiff’s negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a “serious injury” (see *Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant’s own 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 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff’s deposition testimony and medical reports and records prepared by the plaintiff’s own physicians (see *Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the 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*, *supra*; *Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; *Pagano v Kingsbury*, *supra*). However, if a defendant does not establish a prima facie case that the plaintiff’s injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff’s opposition papers (see *Burns v Stranger*, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; *Rich-Wing v Baboolal*, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; see generally *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

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Based upon the adduced evidence, third-party defendant Prophete failed to establish a prima facie case that plaintiff did not sustain a serious injury as a result of the subject accident (*see Hernandez v Pagan Corp.*, 174 AD3d 513, 101 NYS3d 637 [2d Dept 2019]; *Mercado v Mendoza*, 133 AD3d 833, 19 NYS3d 757 [2d Dept 2015]; *Sanclemente v MTA Bus Co.*, 116 AD3d 688, 983 NYS2d 280 [2d Dept 2014]). Third-party defendant Prophete's examining orthopedist, Dr. Craig Ordway, during an examination of the plaintiff, approximately two years after the subject accident, found significant range of motion limitations in plaintiff's right shoulder despite concluding that "plaintiff's ranges of motion in her spine and right shoulder are within normal limits for a person of her age and body habitus" (*see Gui Hyun NA v Five Stars Trucking, Inc.*, 178 AD3d 673, 111 NYS3d 236 [2d Dept 2019]; *Farrah v Pinos*, 103 AD3d 831, 959 NYS2d 741 [2d Dept 2013]; *Borras v Lewis*, 79 AD3d 1084, 913 NYS2d 577 [2d Dept 2010]; *Grant v Parson Coach, Ltd.*, 12 AD3d 484, 784 NYS2d 647 [2d Dept 2004]). Third-party defendant Prophete's examining neurologist, Dr. Desrouleaux, who also examined the plaintiff approximately two years after the subject accident, and concluded that the spinal myofasciitis that plaintiff sustained as a result of the subject collision was resolved, failed to address plaintiff's allegations regarding her right shoulder clearly listed in her bill of particulars (*see Bitterman v Dennis*, 78 AD3d 627, 909 NYS2d 672 [2d Dept 2010]; *McMillian v Naparano*, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; *Lopez v Felton*, 60 AD3d 822, 875 NYS2d 550 [2d Dept 2009]). Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, an issue of credibility for the jury has been presented (*see Barrett v New York City Tr. Auth.*, 80 AD3d 550, 914 NYS2d 269 [2d Dept 2011]; *Jacobs v Rolon*, 76 AD3d 905, 908 NYS2d 31 [1st Dept 2010]; *Mercado-Arif v Garcia*, 74 AD3d 446, 902 NYS2d 72 [1st Dept 2010]). Thus, the reports of third-party defendant Prophete's experts submitted in support of the motion for summary judgment create an issue of fact for the jury to determine (*see O'Shea v Johnson*, 49 AD3d 614, 853 NYS2d 608 [2d Dept 2008]).

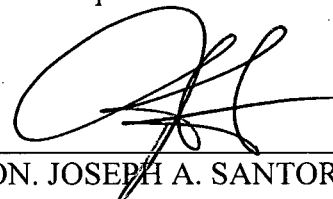
Defendants also have failed to meet their prima facie burden to establish that plaintiff's injuries do not come within the meaning of the Insurance Law (*see Konstantinov v MTLR Corp.*, 106 AD3d 1055, 966 NYS2d 183 [2d Dept 2013]; *Roc v Domond*, 88 AD3d 862, 931 NYS2d 522 [2d Dept 2011]; *Cheour v Pete & Sals Harborview Transp., Inc.*, 76 AD3d 989, 907 NYS2d 517 [2d Dept 2010]). Defendants' examining orthopedist, Dr. Oliveto, noted significant range of motion limitations in plaintiff's cervical and lumbar regions during his examination of her approximately two years after the subject accident despite concluding that the strains and sprains that plaintiff sustained to her spine were resolved (*see Cruz v Advanced Concrete Leasing Corp.*, 101 AD3d 666, 954 NYS2d 491 [2d Dept 2012]; *Scott v Gresio*, 90 AD3d 736, 934 NYS2d 351 [2d Dept 2011]; *Nelms v Khokar*, 12 AD3d 426, 784 NYS2d 572 [2d Dept 2004]). Although Dr. Oliveto indicated that plaintiff's limitations are subjective in nature, he failed to explain or substantiate with any objective medical evidence the basis for his conclusion that the observed limitations in plaintiff's spinal ranges of motion were self-imposed (*see Morafates v Macchia*, 127 AD3d 1150, 7 NYS3d 546 [2d Dept 2015]; *Raguso v Ubriaco*, 97 AD3d 560, 947 NYS2d 343 [2d Dept 2012]; *Artis v Lucas*, 84 AD3d 845, 921 NYS2d 910 [2d Dept 2011]).

Since third-party defendant Prophete and defendants failed to meet their prima facie burden, it is unnecessary for the Court to consider whether plaintiff's papers in opposition were sufficient to raise a triable issue of fact (*see Werthner v Lewis*, 120 AD3d 490, 990 NYS2d 267 [2d Dept 2014]; *Keenum v*

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Atkins, 82 AD3d 843, 918 NYS2d 547 [2d Dept 2011]). Accordingly, third-party defendant Prophete's and defendants' motions for summary judgment dismissing plaintiff's complaint are denied.

Dated: December 18, 2020



HON. JOSEPH A. SANTORELLI
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION