

Rivas v Waiching Wong
2007 NY Slip Op 31079(U)
April 26, 2007
Supreme Court, Suffolk County
Docket Number: 0005028/2005
Judge: Robert W. Doyle
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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1-17-07
ADJ. DATE 2-23-07
Mot. Seq. # 002 - MD
003 - XMD

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DAVID A. RIVAS,	:	PETER M. ZIRBES & ASSOC., P.C.	
	:	Attorneys for Plaintiff	
Plaintiff,	:	108-18 Queens Boulevard, Suite 604	
	:	Forest Hills, New York 11375	
	:		
- against -	:	ROBERT P. TUSA, ESQ.	
	:	Atty for Defts Wong & Roberts	
WAICHING WONG, DAVID J. ROBERTS and	:	898 Veterans Memorial Hwy, Suite 320	
RAMIRO A. CISNEROS,	:	Hauppauge, New York 11788	
	:		
	:	FRANK J. LAURINO, ESQ.	
Defendants.	:	Atty for Deft Cisneros	
	:	999 Stewart Avenue	
	:	Bethpage, New York 11714-3551	
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Upon the following papers numbered 1 to 13 read on this motion and cross motion for summary judgment ;
Notice of Motion/ Order to Show Cause and supporting papers 1 - 7 ; Notice of Cross Motion and supporting papers
8 - 9 ; Answering Affidavits and supporting papers 10 - 11 ; Replying Affidavits and supporting papers 12 - 13 ;
Other _____ : (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (#002) by defendants Waiching Wong and David J. Roberts for summary judgment pursuant to CPLR 3212 dismissing the action as against them on the ground that plaintiff did not sustain a serious injury pursuant to NY Insurance Law §5102(d) is denied; and it is further

ORDERED that the cross motion (#003) by defendant Ramiro A. Cisneros for summary judgment is denied.

In this negligence action, plaintiff seeks to recover for alleged serious injuries sustained in an accident on February 27, 2002 as a passenger in the vehicle owned and operated by defendant Ramiro A. Cisneros, which was struck by a vehicle owned by defendant David J. Roberts and operated by defendant Waiching Wong. Procedurally, plaintiff's motion for a default judgment as against defendant

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Cisneros was granted by order dated May 9, 2006 (Molia, J.). Subsequently, by so-ordered stipulation (Molia, J.) dated June 1, 2006, plaintiff stipulated to vacate defendant Cisneros' default. Defendants Wong and Roberts now move for summary judgment dismissing the action. Defendant Cisneros cross-moves for summary judgment and adopts codefendants' arguments.

Plaintiff alleges in the bill of particulars that he sustained the following injuries: disc herniation at C5/6 and T11/12, intraosseous disc herniations at T11/12 through L1/2, right shoulder injury, headaches and post concussion disorder. He further alleges that he sustained injuries in these serious injury categories: permanent consequential limitation of use of a body organ or member, 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Under the Insurance Law, “ ‘[s]erious injury’ means 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” (Insurance Law § 5102 [d]).

In order for plaintiff to prove that he sustained the serious injury category of permanent loss, she must demonstrate that he sustained a total loss of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). In the context of the plaintiff's claims, the term “consequential” means important or significant (*Kordana v Pomellito*, 121 AD2d 783, 503 NYS2d 198, 200 [1986], *app. dis.*, 68 NY2d 848, 508 NYS2d 425 [1986]). The term, “significant”, as it appears in the statute, has been defined as “something more than a minor limitation of use” and the term, “substantially all” has been construed to mean “that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment” (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the defendants “to present evidence, in competent form, showing that plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 397, 582 NYS2d 395, 396 [1992]). Once defendants have met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*DeAngelo v Fidel Corp. Services, Inc.*, 171 AD2d 588, 567 NYS2d 454, 455 [1991]). Such proof in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [1992]). The proof must be viewed in a light most favorable to the non-moving party (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808, 810 [1990]).

In support of the motion, defendants submit, *inter alia*, the pleadings; bill of particulars; ;

magnetic resonance imaging (“MRI”) studies of the cervical spine, lumbosacral spine and right shoulder by Michele Rubin, M.D., a radiologist; an affirmation by Michael J. Katz, M.D., an orthopedic surgeon; an affirmation by Mathew M. Chacko, M.D., a neurologist; and an affirmation by Bert R. Heyligers, M.D., a radiologist. The billing records of Dr. Hannan reveal that he treated plaintiff through May, 2002 and intermittently thereafter.

The cervical spine MRI revealed a disc herniation at C5/6 with minor spurring. The lumbar spine MRI revealed a possible compression fracture deformity of T12 and disc herniation at T11/12. In addition, Dr. Rubin noted intraosseous disc herniations at the thoracolumbar junction at T11/12 through L1/2. The MRI of the right shoulder revealed a possible impingement syndrome.

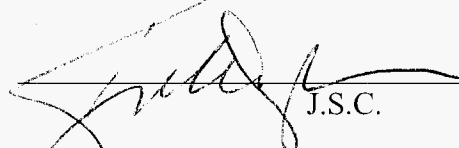
Dr. Katz avers that he examined plaintiff on August 22, 2006. He quantified plaintiff’s ranges of motion and compared them to the normal ranges in the cervical and lumbar spines. He states that straight leg raising was normal and the Patrick test was negative. He also noted normal range of motion in the right shoulder and compared the ranges to normals. He diagnosed plaintiff as having sustained cervical strain, lumbosacral strain and right shoulder contusion, resolved, with no signs of permanence.

Dr. Chacko avers that he examined plaintiff on September 5, 2006. Unlike Dr. Katz, he noted limitations in plaintiff’s range of motion in the cervical spine as compared to normal function. He noted that the lumbar spine range of motion is normal as compared to normal function but observed a limitation in straight leg raising. He opined that plaintiff sustained cervical and lumbar strains which have resolved. Dr. Heyligers avers that upon review of plaintiff’s cervical and lumbar spine MRI’s on October 13, 2002, the disc herniations discussed by Dr. Rubin are caused by degenerative disc disease, and are not causally related to the accident. He also disagreed with Dr. Rubin’s interpretation of a possible compression of T12.

The court finds that defendants have submitted contradictory proof as to whether plaintiff sustained a serious injury in the cervical spine and lumbar spine (see *Positko v Krawiec*, 6 AD3d 517, 774 NYS2d 395 [2004]). Therefore, defendants failed to make a prima facie case for judgment as a matter of law (see, *Mariaca-Olmos v Mizryh*, 226 AD2d 437, 640 NYS2d 604 [1996]). In any event, a question of credibility exists regarding the radiologists’ opinions (*Combs v Freeport*, 139 AD2d 688, 527 NYS2d 443 [1988]). Summary judgment is, therefore, not warranted. Under these circumstances, it is not necessary to consider whether plaintiff’s papers were sufficient to raise a triable issue of fact (see, *Papadonikolakis v First Fid. Leasing Group, Inc.*, 283 AD2d 470, 724 NYS2d 635 [2001]).

Accordingly, defendants’ motion and cross motion for summary judgment are denied.

Dated: APR 26 2007



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION