Rosado v Deidra Trans Inc.

2008 NY Slip Op 31461(U)

May 16, 2008

Supreme Court, New York County

Docket Number: 0116159/2004

Judge: Deborah A. Kaplan

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SCANNED ON 5/21/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: DEBORAH A. KAPLAN J.S.C.
Justice

PART 22

Index Number : 116159/2004

ROSADO, KENNETH

VS

DEIDRA TRANS

Sequence Number : 002

SUMMARY JUDGEMENT

Cal # 105

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

his motion to/for ____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits ____

Replying Affidavits ____

FILED
MAY 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

defendants motion for summary judgement dismissing the complaint of Kenneth Rosado is denied; the defendants motion for summary judgement dismissing the complaint of Velasquez is severed and granted; and plaintiff's cross-motion for summary judgement on liability is granted to the extent set forth in the attached memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: May 16, 2008

MAY 16 2008

DEBORAH A. KAPLAN J.S.C. , J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

KENNETH ROSADO and LILLIAN VELAZQUEZ,

Index No.: 116159/04

Plaintiffs,

-against-

DEIDRA TRANS INC. and JOHN DOE,

Defendants.

FILED
MAY 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

KAPLAN, J.:

This action for damages for personal injuries arises out of a motor vehicle accident, which occurred on July 1, 2003, in the vicinity of the FDR Drive in New York, New York. Defendants Deidra Trans Inc. (Deidra) and John Doe (Doe) (together, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs Kenneth Rosado (Rosado) and Lillian Velazquez's (Velazquez) (together, plaintiffs) complaint on the ground that plaintiffs have not met the serious injury threshold as defined by New York's No-Fault Law (Insurance Law § 5102 [d]). Plaintiffs cross-move, pursuant to CPLR 3212, for summary judgment in their favor on the issue of liability.

BACKGROUND

On the date of plaintiffs' accident, Rosado was driving northbound on the FDR Expressway with Valezquez as passenger in the front seat of their vehicle. Due to traffic conditions ahead of them, plaintiffs' vehicle was either stopped or in the process of stopping when defendant Doe, who was driving a yellow cab owned by defendant Deidra (the cab), struck the rear end of plaintiffs' vehicle, causing plaintiffs' injuries. Specifically, Rosado testified, in pertinent part:

Q. When the accident happened, were you moving or stopped?

A: Stopped.

Q. Why?

A. Because there were cars in front of us, and everyone was stopped.

Q. Were you actually fully stopped or in the process of stopping?

A. Process of [s]topping

(Defendants Notice of Motion, Exhibit K, Rosado Deposition, at 14).

Following the accident, Velazquez took down the cab's license plate number, which was 4K83B. She and Rosado subsequently reported the accident to the police and filled out an accident report. Specifically, plaintiffs' MV104 report identifies the vehicle bearing the license plate number 4K83B as the vehicle that struck plaintiffs' vehicle. In addition, it should be noted that, on November 1, 2007, the parties stipulated that defendant Deidra owned the vehicle bearing said license plate number on the date of the accident (see Plaintiffs' Notice of Cross Motion, Exhibit G, November 1, 2007 Stipulation).

DISCUSSION

"'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 from the case'" (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept 2006], quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; DeRosa v City of

[* 4]

New York, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corporation, 298 AD2d 224, 226 [1st Dept 2002]).

LIABILITY ISSUE

"Drivers must maintain safe distances between their cars and cars in front of them (Vehicle and Traffic Law § 1129 [a]) and this rule imposes on them a duty to be aware of traffic conditions, including vehicle stoppages" (Johnson v Phillips, 261 AD2d 269, 271 [1st Dept 1991]). " It is established that a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the operator of the second vehicle" (id. at 271 [unrebutted evidence established that the car in which plaintiff was a passenger was stopped for approximately five seconds before it was struck in the rear by defendant's vehicle]; Garcia v Bakemark Ingredients (East) Inc., 19 AD3d 224, 224 [1st Dept 2005]). This rule has been applied when the front vehicle stops suddenly in slow-moving traffic, even if the sudden stop is repetitive [internal citations omitted]" (id.). "When such a rear-end collision occurs, the injured occupants of the front vehicle are entitled to summary judgment on liability, unless the driver of the following vehicle can provide a non-negligent explanation, in evidentiary form, for the collision" (id.; Somers v Condlin, 39 AD3d 289, 289 [1st Dept 2007]; Grimes-Carrion v Carroll, 13 AD3d 125, 126 [1st Dept 2004] [operator/owner of automobile failed to offer any nonnegligent explanation for the collision]).

Summary judgment has also been properly granted where the evidence demonstrated that the defendant hit plaintiffs' vehicle from behind "while the plaintiff was stopped, or very nearly stopped, on the roadway during stop-and-go traffic," and the defendant "failed to offer an nonnegligent explanation for the accident, or point to any evidence that plaintiff bore any comparative fault" (Somers v Condlin, 39 AD3d at 289). "Moreover, it is well settled that the right of an innocent passenger to

summary judgment is not in any way restricted by potential issues of comparative negligence as between defendant and the driver of the vehicle in front" (Johnson v Phillips, 261 AD2d at 272).

Here, as evidence in the record demonstrates, defendant Doe, while driving a cab owned by defendant Deidre, hit plaintiffs' vehicle from behind while the plaintiff was stopped or in the process of stopping, on the roadway during stop-and-go traffic," and, as defendants have failed to offer a sufficient nonnegligent explanation for the accident, or point to any evidence that plaintiffs bore any comparative fault evidence in the record, plaintiffs are entitled to summary judgment in their favor on the issue of liability.[1]

In addition, contrary to their contention, defendants are not entitled to additional discovery on this issue, "[s]ince defendant[s] [are] the party with knowledge of the factual circumstances as to how he collided with the front vehicle, discovery would serve no purpose" (Johnson v Phillips, 261 AD2d at 272). In addition, "[t]he mere hope by the plaintiff that he might be able to uncover some evidence during the discovery process was insufficient to deny summary judgment to the defendant'" (Moukarzel v Montefiore Medical Center, 235 AD2d 239, 240 [1st Dept 1997], quoting Jones v Gameray, 153 AD2d 550, 551 [1989]).

SERIOUS INJURY THRESHOLD ISSUE

"Every car owner must carry automobile insurance, which will compensate injured parties for 'basic economic loss' occasioned by the use or operation of that vehicle in New York State, irrespective of fault" (Pommells v Perez, 4 NY3d 566, 571 [2005]; Insurance Law § 5102 [a]; § 5103). "Only in the event of 'serious injury' as defined in the statute, can a person initiate suit against the car owner or driver for damages caused by the accident" (id.; Insurance Law § 5104 [a]).

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[1]-It should be noted that, despite having stipulated prior that Deidra owned the vehicle involved in plaintiffs' accident, defendants now submit a bill of sale as evidence that they did not own said vehicle at the time of the accident. However, the bill of sale submitted by defendants belongs to an unrelated vehicle, which has no bearing on the facts or issues in this case.

Defendants move for summary judgment dismissing plaintiffs' complaint insofar as asserted against them on the ground that the plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Section 5102 (d) of New York State's Insurance Law defines the term "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.

"On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the No-Fault Law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action" (Wadford v Gruz, 35 AD3d 258, 258 [1st Dept 2006]). The burden then shifts to the plaintiff to raise a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (id.; Yagi v Corbin, 44 AD3d 440, 440 [1st Dept 2007]).

ROSADO

In their bill of particulars, plaintiffs alleged that Rosado sustained the following physical injuries as a result of the automobile accident: Hill-Sachs fracture in the right shoulder, herniation of the L3-4 and L5-S1 lumbar discs, tear of anterior and posterior lips of glenoid labrum in right shoulder, lumbar radiculitis, lumbar sprain/strain and pain in the right arm, right shoulder, lower back and neck. To this effect, plaintiffs assert that Rosado's injuries fall under the category which include fractures, as well as under the last three categories; permanent consequential limitation of use of a body

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organ or member, significant limitation of use of a body function or system and the 90/180-day category.

In support of their motion for summary judgment dismissing that part of plaintiffs' complaint as to liability for Rosado's injuries, defendants submitted the medical affirmations of Dr. Michael Rafiy (Dr. Rafiy), an orthopedist who also examined plaintiff Rosado, Dr. Norman Sobol (Dr. Sobol), a neurologist who also examined Rosado and Dr. Howard Hirsch, a radiologist who reviewed Rosado's MRI films.

Upon examination of Rosado's cervical spine and right shoulder, Dr. Rafiy reported that Rosado complained of occasional neck and right shoulder pain, and that Rosado reported having missed two weeks of work due to his injuries. Dr. Rafiy also compared Rosado's ranges of motion with normal limits, finding that all Rosado's ranges of motion were within normal limits. Based upon his examination, Dr. Rafiy concluded that,

> Mr. Rosado is not disabled at this time from an orthopedic point of view. He can work and can carry on his regular daily activities without any restrictions or limitations ... There is no permanency or residuals. Based on my examination, there is no treatment needed from an orthopedic viewpoint. Therefore, there is no need for orthopedic visits or physical therapy and further treatment would be considered excessive

(Defendants' Notice of Motion, Exhibit E, Dr. Rafiy Report of August 9, 2007, at 3)

However, it should be noted that, in his examination and subsequent report of Rosado, Dr. Rafiy did not address any of Rosado's objective tests, which plaintiffs maintain were available upon request, such as Rosado's MRIs (see Wadford v Gruz, 35 AD3d at 258 [defendant was not entitled to summary judgment on issue of whether the plaintiff sustained serious injury, where, although defendant's examining physician reportedly found no evidence of any neck or back injury, he failed to address

plaintiff's objective tests, such as MRI and EMG reports, that were indicative of serious injury]).

Dr. Sobol also noted that Rosado complained of neck and shoulder pain, and compared Rosado's ranges of motions with normal limits, finding that all Rosado's ranges of motion were within normal limits, and concluded that Rosado was not disabled from a neurological point of view. It should also be noted that Dr. Sobol stated that no authenticated medical records were available for review at the time of his examination of Rosado.

Dr. Hirsch did review objective medical evidence in the form of Rosado's September 13, 2003 MRI exam of the lumbar spine, and reported, in pertinent part:

> Vertibral body height is well maintained with no evidence of acute fracture, subluxation or bone contusion ... minimal physiologic disc bulging at L3-4 and L5-S1 is considered to be within normal limits and of no significance. There is no evidence of lumbar disc herniation, spinal stenosis, neuroforaminal compromise or nerve root impingement

(Defendants' Notice of Motion, Exhibit G, Dr. Hirsch Report). Dr. Hirsch also noted that pre-existent degenerative changes and stated that "[t]here is nothing in this exam to be considered causally related to the incident of 7/1/03" (id.).

As defendants have produced some objective medical evidence in admissible form to demonstrate that plaintiff Rosado has not suffered a serious injury under New York State Insurance Law, the burden shifts to plaintiffs to present evidence to the contrary (see Gaddy v Eyler, 79 NY2d 955, 957 [1992]; Engles v Claude, 39 AD3d 357, 357 [1st Dept 2007]; Shinn v Catanzaro, 1 AD3d 195, 197 [1st Dept 2003]).

In response to defendants' prima facie showing of entitlement to judgment as a matter of law, as set forth above, plaintiff Rosado Rosado submitted the affirmation of Dr. Jacob Lichy, a certified radiologist. Dr. Lichy noted that on September 15, 2003, Rosado underwent two MRIs at Lenox Hill Radiology & Medical Imaging

Associates, P.C. in New York, New York, and that the MRI of Rosado's shoulder revealed that, in addition to suffering a midline and bilateral posterolateral herniation of the L3-L4 and L5-S1 discs, Rosado "suffered a small Hill-Sachs fracture as well as a tear of the anterior and posterior lips of the glenoid labrum" (Plaintiffs' Notice of Cross Motion, Exhibit H, Lichy Affirmation).

Therefore, as evidence of a fracture is sufficient to establish a serious injury, plaintiffs have established that Rosado sustained a serious injury under the Insurance Law (see Joyce v Lacerra, 41 AD3d 236, 237 [1st Dept 2007] [a fracture of the plaintiff's knee as a result of the accident was, by itself, sufficient to establish a serious injury under the Insurance Law]). Plaintiff has not offered any evidentiary details as to any of his other alleged injuries. As such, the court need not address whether Rosado sustained serious injuries under the permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system and the 90/180-day categories. Thus, defendants are not entitled to summary judgment dismissing plaintiff's complaint on the ground that Rosado did not sustain serious injury under the Insurance Law.

VELAZQUEZ

In their bill of particulars, plaintiffs alleged that Velazquez sustained the following physical injuries as a result of the automobile accident: multiple cervical disc herniation, lateral lumbar disc bulges at L4-5 and L5-S1, tear of supraspinatus tendon in left shoulder, tear of anterior lip of glenoid labrum in left shoulder, mayofascitis of neck and shoulder, cervical sprain/strain and lumbar sprain/strain, post traumatic stress disorder, muscle spasms, headaches, insomnia. To this effect, plaintiffs assert that Velazquez's injuries fall under the last three categories; permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system and the 90/180-day category.

"Specifically, under the permanent consequential limitation and significant limitation categories, plaintiffs [are] required to submit medical proof containing

objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member function or system [internal quotations omitted]" (Felton v Kelly, 44 AD3d 1217, 1218-1219 [3d Dept 2007]; Toure v Avis Rent A Car System, Inc., 98 NY2d 345, 353 [2002]; Silva v Vizcarrondo, 31 AD3d 292, 292 [1st Dept 2006] [affirmation of plaintiff's treating physician included her findings of limited ranges of motion in the lumbar and cervical spine and right elbow, which she assigned specific percentages and compared to the normal range, thus meeting the minimal standard required to substantiate a claim of serious injury]; Shinn v Catanzaro, 1 AD3d at 197).

While a "significant limitation" need not be permanent in order to constitute a "serious injury," the Court of Appeals has warned that "a minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute" (Partlow v Meehan, 155 AD2d 647, 647-648 [2d Dept 1989]; Booker v Miller, 258 AD2d 783, 784 [3d Dept 1999]). "Any assessment of the 'significance' of a bodily limitation necessarily requires consideration not only of the extent or degree of the limitation, but of its duration as well (Partlow v Meehan, 155 AD2d at 648 [in failing to come forward with any medical evidence indicating the duration of her bodily limitation, plaintiff had not established a prima facie case that she suffered more than a minor or mild limitation of use]). Thus, if a bodily limitation is substantial in degree, but only fleeting, it should not qualify as a "serious injury" (id.).

In support of defendants motion for summary judgment dismissing that part of plaintiffs' complaint as to liability for Velazquez's injuries, defendants submitted the affirmations of Dr. Rafiy, who performed an orthopedic examination of Valzquez, Dr. Edward Weiland (Dr. Weiland), who conducted a neurologic examination, and Dr. Hirsch, who examined Velazquez's MRI exams.

In his report, Dr. Rafiy stated that Velazquez did not sustain any fractures, lacerations or a loss of consciousness as a result of the accident. Dr. Rafiy also noted

that Velazquez did not provide any information regarding her past medical history, current complaints or treatment, though the plaintiffs' bill of particulars indicated that Velazquez had been treated at the emergency room of Beth Israel Hospital after the accident.

Dr. Rafiy performed a physical examination of Velazquez's cervical spine, lumbar spine and left shoulder, measuring and comparing Velazquez's degree of flexion in those areas to that of what would be considered normal. Dr. Rafiy also noted that "[s]pecific tests for extensor hallux longus were normal" (Defendants' Notice of Motion, Exhibit H, Dr. Rafiy Report). Thus, based upon his examination of Velazquez, Dr. Rafiy concluded that "there is no treatment needed from an orthopedic viewpoint. Therefore, there is no need for orthopedic visits or physical therapy and further treatment would be considered excessive" (id.).

Also at defendants' request, Velazquez was examined by neurologist Dr. Weiland. In his report, Dr. Weiland noted that Velazquez told him that, in addition to undergoing various x-rays, MRIs and multiple nerve tests, she had undergone a course of physical therapy, chiropractic spine care, as well as acupuncture treatments for approximately five to six months after the accident. However, Dr. Weiland noted that, with the exception of the bill of particulars and accident report, no medical records were made available for his exam. In addition, Velazquez was unwilling to respond to questions as to whether or not she had experienced any prior musculoskeletal trauma or any new musculoskeletal trauma since the accident under review. Dr. Weiland noted that Velazquez continues to complain of diffuse pain throughout her spine, hips and ankles.

Dr. Weiland performed a detailed neurologic examination and noted in his report that:

> Cognitive functions were intact, without evidence of aphasia or apraxia. Funduscopic examination failed to reveal signs of raised intracranial pressure. The corneal reflex was intact. The extraocular movements

were full, without evidence of nystagmus. Air conduction was greater than bone conduction bilaterally. The Weber test was midline. The headtilt maneuver failed to identify any evidence of nystagmus

(Defendants' Notice of Motion, Exhibit I, Dr. Weiland Report).

After also performing a range of motion test on Velazquez's neck and shoulders, of which he compared degrees of rotation and flexion to those considered in the normal range, Dr. Weiland concluded that Velazquez's cervical, thoracic and lumbosacral sprains had been resolved, and that he had found "no evidence of any lateralizing neurological deficits at the present time that could be explained on the basis of a physiologic mechanism to any traumatic injury to the nervous system" (id.).

Dr. Weiland also stated in his report, "I see no reason why the claimant should not be able to perform activities of daily living and seek gainful employment activities, without restrictions, from a neurologic perspective (id.). In addition, as there was no finding of neurological residual or permanency based upon his examination of Velazquez, Dr. Weiland did not feel that any further neurological investigational studies nor treatments were warranted.

Dr. Hirsch reviewed Velazquez's cervical spine MRI dated November 2, 2004, and noted that the MRI showed virtually no change from the earlier study of August 7, 2003. Dr. Hirsch found no evidence of bony or surrounding soft tissue edema, swelling or hematoma. He also noticed degenerative disc disease and disc bulging. However, he explained that "this combination of factors represents chronic longstanding disc bulge-bony ridge complexes" (Defendants' Notice of Motion, Exhibit J, Dr. Hirsch Report). Dr. Hirsch also stated that "[t]hese findings have developed over many years and in no way should be considered causally related to the incident of 7/1/03" (id.).

Dr. Hirsch also reviewed Velazquez's lumbar spine MRI dated October 7, 2003,

wherein he noted that he observed no evidence of fracture, bony or adjacent soft tissue contusion or appreciable disc degeneration. He also noticed no evidence of disc bulge or disc herniation or neural impingement. Notably, Dr. Hirsch stated that he observed nothing that should be considered causally related to the accident.

Dr. Hirsch also reviewed Velazquez's left shoulder MRI dated November 13, 2004. He noted that there were no appreciative degenerative changes, nor evidence of fracture, bone or soft tissue contusion, though minimal subacromial bursitis and tendonitis was present. In addition, a tiny partial thickness tear involving the rotator cuff was present, though he stated that these findings are not uncommon and frequently seen without any precipitating trauma.

As defendants have produced objective medical evidence in admissible form to demonstrate that plaintiff Velazquez has not suffered a serious injury under New York State Insurance Law, the burden shifts to plaintiffs to present evidence to the contrary (see Gaddy v Eyler, 79 NY2d at 957; Engles v Claude, 39 AD3d at 357; Shinn v Catanzaro, 1 AD3d at 197). In response to defendants' prima facie showing of entitlement to judgment as a matter of law, plaintiff Velazquez submitted the report of Dr. Thomas Kolb (Dr. Kolb), a radiologist who explained that the MRI of Velazquez's left shoulder revealed that "she suffered a tear of the supraspinatous tendon, joint effusion and a tear of the anterior lip of the glenoid labrum." In addition, Dr. Kolb also noted that the MRI of Velazquez's lumbar spine revealed lateral disc bulges at L4-L5 and L5-S1. Further, Dr. Kolb stated that the MRI of Velazquez's cervical spine revealed posterior disc herniations, one of which directly impinges upon the spinal cord, as well as a posterior bulge at the C3-C5 level.

However, although plaintiffs have submitted objective medical evidence of Velazquez's physical injuries, plaintiffs have not submitted objective evidence to demonstrate that such injuries constitute serious injuries for the purposes of the Insurance Law. For example, "[p]roof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical

limitations, is not alone sufficient to establish a serious injury" (Pommells v Perez, 4 NY3d at 574). In fact, the First Department has held that "[a] bulging or herniated disc may very well be a serious injury withing the meaning of the statute, and a CT scan or MRI constitutes objective medical evidence to support subjective complaints of such a painful condition. But a plaintiff must still offer some objective evidence of the extent or degree of his alleged physical limitations and their duration, resulting from the disc injury ... a minor, mild, or slight limitation of use is insufficient to constitute a serious injury within the definition of the no-fault statute [internal citations omitted]" (Arjona v Calcano, 7 AD3d 279, 280 [1st Dept 2004] [although plaintiff's expert stated that plaintiff has permanent problems standing, sitting, bending and lifting, court noted that "a minor, mild or slight limitation of use is insufficient to claim a serious injury withing the definition of the no-fault statute"]; Toure v Avis Rent A Car Systems, Inc., 98 NY2d at 353]).

In addition, a review of Velazquez's medical history reveals two interrupting factors: cessation of treatment after the accident and prior injuries that may have caused the claimed symptoms (see Pommells v Perez, 4 NY3d at 574). The Court of Appeals has held that "a plaintiff who terminates therapeutic measures following the accident, while claiming serious injury, must offer some reasonable explanation for having done so" (Pommells v Perez, 4 NY2d at 574 [plaintiff provided no explanation as to why he failed to pursue any treatment for his injuries after the initial six-month period following his accident, nor did his doctors]; DeLeon v Ross, 44 AD3d 545, 545-546 [1st Dept 2007]; Yagi v Corbin, 44 AD3d at 440; Wadford v Gruz, 35 AD3d at 259 [plaintiff explained that no-fault stopped her benefits, and she thereafter discontinued therapy, thus explaining the gap in therapy]; Toussaint v Claudio, 23 AD3d 268, 268-269 [1st Dept 2005]; Arjona v Calcano, 7 AD3d at 280 [where plaintiffs' expert was not the treating physician, and his only examination took place approximately two to two and a half years after their last treatment for their injuries, his opinion as to the permanence and significance of plaintiffs' injuries was rejected as

"conclusory and speculative, and seemingly tailored to meet the statutory definition"]).

Here, the court finds the excuse to explain the gap in treatment unsubstantiated and inadequately explained (see Baker v Elite Ambulette Service, Inc., 44 AD3d 496, 497 [1st Dept 2007] [holding that an excuse for a gap in plaintiff's treatment should be adequately explained and supported by the record]).

Furthermore, Valazquez does not adequately explain the relationship between her prior injuries from a prior motor vehicle accident she was involved in in 2001, in which she injured her neck and back, as well as several other motor vehicle accidents prior to 2001, and her current condition (see Pommells v Perez, 4 NY2d at 574 [plaintiff failed to address the effect of his kidney disorder on his claimed accident injuries]; Yagi v Corbin, 44 AD3d at 440 [plaintiff failed to meet burden because he had a preexisting shoulder injury, which was not sufficiently addressed]; Wadford v Gruz, 35 AD3d at 259). Thus, plaintiffs have failed to prove Velazquez was seriously injured under the permanent consequential limitation and significant limitation categories.

In regard to the 90/180-day category, "in order to sufficiently raise a triable issue of fact, plaintiffs are required to submit objective evidence of a 'medically determined injury or impairment of a non-permanent nature which prevent[ed] [plaintiff] from performing substantially all of the material acts which constitute [her] usual and customary daily activities' for at least 90 of the 180 days immediately following the accident" (Felton v Kelly, 44 AD3d at 1219]).

Initially, it should be noted that, as to the 90/180-day section of the Insurance Law, the gap in Velazquez's treatment is of no consequence (see Gomez v Ford Motor Credit Company, 10 Misc 3d 900 [Sup Ct, NY County 2005] [court noted that a gap or cessation of treatment was irrelevant, as a "serious injury" claim of the 90/180-day category by its terms does not have a duration element beyond the 180-day period set forth by Insurance law § 5102, making plaintiff's current condition irrelevant as to

whether the plaintiff was unable to carry out her normal and customary activities during the statutory period]).

Defendants maintain that, even if it is determined that plaintiffs have submitted medical proof in an admissible form to substantiate a medically determined injury, which is causally related to the accident in question, plaintiffs still fail to demonstrate that "substantially all" of Velazquez's daily activities were curtailed. To this effect, defendants note that Velazquez testified that she was not confined to bed or home for a period of time, and that she only missed three weeks of school as a result of the accident. Velazquez further testified that she only is limited in such activities as exercising at home and some recreational sports.

"When construing the statutory definition of a 90/180-day claim, the words 'substantially all' should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment" (Thompson v Abbasi, 15 AD3d 95, 100-101 [1st Dept 2005]).

Here, since Velazquez stated that she only missed 3 weeks of school as a result of her accident, and thereafter resume her usual life, with the exception of exercising at her home and playing various recreational sports, plaintiffs failed to establish a prima facie case that she sustained a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of her injury (see Amato v Fast Repair Inc., 42 AD3d 477, 478 [2d Dept 2007] [plaintiff failed to establish a prima facie case under the 90/180-day rule where plaintiff acknowledged that he missed only one day of work as a result of the accident and thereafter returned to his usual duties]). Thus, plaintiffs have failed to demonstrate that Velazquez was seriously injured under the 90/180-day category.

Thus, defendants are entitled to summary judgment dismissing plaintiff's complaint as to Velazquez on the ground that Velazquez did not sustain serious injury

under the Insurance Law.

Finally, plaintiffs argue that, as defendants have asserted frivolous arguments to the effect that plaintiffs' vehicle was stopping, and not fully stopped, at the time of the accident, and that, despite a stipulation to the contrary, defendants asserted in their motion papers that Deidre did not own the cab involved in the accident, plaintiffs are entitled to sanctions against defendants.

An imposition of costs and financial sanctions for commencing a frivolous action is available under 22 NYCRR 130-1.1 (Matter of Ferraro v Gordon, 1 AD3d 595, 598 [2d Dept 2003][under the circumstances of the case, as the primary purpose of the proceeding was to harass, the Court held that the proceeding was frivolous within the meaning of 22 NYCRR 130-1.1]; Nyitray v New York Athletic Club in City of New York, 274 AD2d 326, 327 [1st Dept 2000]; Doone v Reiser, 272 AD2d 368, 369 [2d Dept 2000]). In order to support the legislative intent to prevent the waste of judicial resources, once there is a finding of frivolousness, sanctions are mandatory (Nyitray v New York Athletic Club in City of New York, 274 AD2d at 327]). However, as plaintiffs have not established that plaintiff's suit was commenced or continued in bad faith, without any reasonable basis in law or fact, plaintiffs are not entitled to sanctions from defendants.

CONCLUSIONS

For the foregoing reasons, it is hereby

ORDERED that the part of defendants Deidra Trans Inc. (Deidra) and John Doe's (Doe) (together, defendants) motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs Kenneth Rosado (Rosado) and Lillian Velazquez's (Velazquez) (together, plaintiffs) complaint on the ground that plaintiff Rosado has not met the serious injury threshold as defined by Insurance Law § 5102 [d] is denied; and it is further

ORDERED that the part of defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint on the ground that plaintiff

Velazquez has not met the serious injury threshold as defined by Insurance Law § 5102 [d] is granted, and the complaint is severed and dismissed as to Velazquez's claims; and it is further

ORDERED that plaintiffs' cross motion, pursuant to CPLR 3212, for summary judgment in their favor on the issue of liability is granted; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court.

DATED: May 16, 2008

MAY 16 2008

FILED
MAY 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

Deborah A. Kaplan
J.S.C.

DEBORAH A. KAPLAN
J.S.C.

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