Rosado v Bagnall
2008 NY Slip Op 31971(U)
July 3, 2008
Supreme Court, Queens County
Docket Number: 0005571/2006
Judge: Patricia P. Satterfield
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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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EDWARD ROSADO and IBELISSE BONILLA,

Plaintiffs,

-against-

GERALD BAGNALL and CHRISTINA BAGNALL,

Defendants.

---X

Index No.: 5571/06
Motion Date: 4/30/08
Motion Cal. No.: 27
Motion Seq. No.: 1

The following papers numbered 1 to 10 read on this motion by defendants Gerald Bagnall and Christina Bagnall for an order, pursuant to CPLR § 3212, granting summary judgment in their favor and dismissing the complaint on the grounds that (1) defendants did not breach any duty owed to the plaintiffs; and (2) that plaintiffs have not sustained a "serious injury" as defined by the New York State Insurance Law §5102(d).

	PAPERS NUMBERED
Notice of Motion-Memorandum of Law-Affidavits-Exhibits......	1 - 5
Affirmation in Opposition-Exhibit..	6 - 8
Reply Affirmation..	9 - 10

Upon the foregoing papers, it is ordered that the motion is disposed of as follows:

This is an action for personal injury in which plaintiffs Edward Rosado ("Rosado") and Ibelisse Bonilla ("Bonilla") allege that each of them sustained serious injuries on March 14, 2003, as a result of a motor vehicle accident that occurred at or near the intersection of The Queensboro Bridge, Review Avenue, Van Dam Street and Greenpoint Avenue, Queens, New York, between the vehicle operated by plaintiff Rosado and the vehicle owned by defendant Gerald Bagnall and operated by defendant Christina Bagnall ("defendants"). The accident allegedly occurred as plaintiff Rosado was attempting to make a left turn in front of the Bagnall vehicle. Defendants move for summary judgment dismissing the complaint on the grounds that defendants did not breach any duty owed to plaintiffs, and plaintiffs have not sustained a "serious injury" as defined by the New York State Insurance Law §5102(d).

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980);

Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231(1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (1985). The proponent of a motion for summary judgment "'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers' (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986] [citations omitted]." JMD Holding Corp. v. Congress Financial Corp., 4 N.Y.3d 373 (2005). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

A. Summary judgment on issue of liability

Section 1141 of the Vehicle and Traffic Law provides that "[t]he driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." Failure to yield the right of way constitutes negligence as a matter of law. See, McNamara v. Fishkowitz, 18 A.D.3d 721 (2d Dept. 2005); Ishak v. Guzman, 12 A.D.3d 409 (2d Dept. 2004); Rossani v. Rana, 8 A.D.3d 548 (2d Dept. 2004); Spatola v. Gelco Corp., 5 A.D.3d 469 (2d Dept. 2004). A driver thus is required to bring his or her vehicle to a stop and remain stationary until it is clear to proceed across an intersection [(see Breslin v. Rudden, 291 A.D.2d 471 (2d Dept. 2002); Bolta v. Lohan, 242 A.D.2d 356 (2d Dept. 1997)], and is obligated to see oncoming traffic through the proper use of her senses [(see, Bongiovi v. Hoffman, 18 A.D.3d 686 (2d Dept. 2005)]. As a corollary to these principles of law, a driver with the right of way is entitled to anticipate that an opposing driver controlled by a stop sign will obey the traffic laws requiring her to yield. Id., Gabler v. Marly Building Supply Corp., 27 A.D.3d 519 (2006).

Defendants, who, inter alia, submitted on this motion their deposition testimony and that of plaintiffs, demonstrated their prima facie entitlement to judgment as a matter of law by establishing with that evidence that plaintiff Rosado violated "Vehicle and Traffic Law § 1141 when he made a left turn directly into the path of defendants' vehicle as it legally proceeded with the right of way [(see, Moreback v. Mesquita, 17 A.D.3d 420, 793 N.Y.S.2d 148 (2d Dept. 2005); Torro v. Schiller, 8 A.D.3d 364, 777 N.Y.S.2d 915 (2d Dept. 2004); Casaregola v. Farkouh, 1 A.D.3d 306, 767 N.Y.S.2d 57; Rieman v. Smith, 302 A.D.2d 510, 755 N.Y.S.2d 256; Russo v. Scibetti, 298 A.D.2d 514, 748 N.Y.S.2d 871 (2d Dept. 2003); Agin v. Rehfeldt, 284 A.D.2d 352, 726 N.Y.S.2d 131 (2d Dept 2001); Stiles v. County of Dutchess, 278 A.D.2d 304, 717 N.Y.S.2d 325 (2d Dept.2000)]." Gabler v. Marly Bldg. Supply Corp., supra. See, also, Berner v. Koegel, 31 A.D.3d 591 (2d Dept.2006)["The plaintiff demonstrated her prima facie entitlement to judgment as a matter of law by establishing that the defendant violated Vehicle and Traffic Law § 1141 when she made a left turn directly into the path of the plaintiff's vehicle as the plaintiff's vehicle was legally proceeding into the intersection with the right-of-way."] Moreover, defendant Christina Bagnall ("Bagnall") had

the right to anticipate that defendant Rosado would obey the traffic laws which required him to yield to defendants' vehicle. Bongiovi v. Hoffman, supra.

The burden then shifted to plaintiffs to produce evidentiary proof in admissible form sufficient to raise a triable issue of fact. See Zuckerman v City of New York, supra. In opposition, plaintiffs set forth that plaintiff Rosado, in his deposition testimony, testified that at the time he attempted to make the left turn, the light for oncoming traffic had turned to red, which raises the issues of whether or not defendant Bagnall failed to yield and if defendant Bagnall went through a red light. Plaintiffs further point to defendant Bagnall's deposition testimony in which she testified that she first saw the Rosado vehicle in the middle of the intersection when she was on the Greenpoint Bridge and traveling at the speed of 25 miles per hour, and kept the vehicle in her constant vision the entire time. They conclude that if she was traveling at the stated speed, then she should have been able to bring her vehicle to a complete stop to avoid the collision, or take other steps to avoid the happening of the accident. Plaintiffs thus contend that there are questions of fact as to whether the moving defendants also are at fault for this motor vehicle accident. This Court agrees.

Plaintiff Rosado may have been negligent in failing to see that which, under the circumstances, should have been seen, and in making a left turn that crossed in front of defendant Bagnall's vehicle when it was apparently hazardous to do so. See, Sirico v. Beukelaer, 14 A.D.3d 549 (2005); Pryor v. Reichert, 265 A.D.2d 470 (2d Dept.1999); Canceleno v. Johnston, 264 A.D.2d 405 (1999). Notwithstanding, that defendant Bagnall, as the operator of the vehicle who had the right-of-way, was entitled to anticipate that plaintiff Rosado would obey the traffic laws which required him to yield [(see, Cenovski v. Lee, 266 A.D.2d 424 (2d Dept. 1999); Namisnak v. Martin, 244 A.D.2d 258 (2d Dept. 1997)], she nonetheless was required to exercise care in her handling of the vehicle. As the record here raises an issue of fact as to whether both drivers were negligent in the operation of their respective vehicles, that branch of the motion for summary judgment in favor of defendants on the question of liability must be denied.

2. Summary judgment on the issue of "serious injury"

Defendants also move for summary judgment on the ground that plaintiffs failed to meet the "serious injury" threshold requirement of section 5102(d) of the Insurance Law, which defines a "serious injury"as:

> a personal injury which results in ...significant disfigurement; ...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 party from performing substantially all of the material acts which constitute such person customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

The issue of whether plaintiff sustained a serious injury is a matter of law, to be determined in the first instance by the court. See Licari v. Elliott, 57 N.Y.2d 230 (1982). The burden is on the defendant to make a prima facie showing that plaintiff's injuries are not serious. Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345 (2002). By submitting the affidavits or affirmations of medical experts, who through objective medical testing conclude that plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d), a defendant can meet his or her prima facie burden. See Margarin v. Krop, 24 A.D.3d 733 (2nd Dept. 2005); Karabchievsky v. Crowder, 24 AD3d 614 (2nd Dept. 2005). The threshold question in determining a summary judgment motion on the issue of serious injury is the sufficiency of the moving papers, with consideration only given to opposing papers once defendants make a prima facie showing that plaintiff did not sustain a serious injury.

Defendants submitted the verified bill of particulars, in which plaintiff Rosado claimed that, as a result of the accident, he sustained, inter alia, hypertrophic changes in the acromioclavicular joint of the right shoulder with supraspinatus impingement; posterior disc bulges at L3-L4 and L4-L5; disc herniations at L5-S1; spinal stenosis at L3-L4 and L4-L5; restricted range of motion and movement of the lumbrosacral spine; and right shoulder contusion. Plaintiff Bonilla claimed that, as a result of the accident, she sustained, inter alia, disc herniations of the C2-C3, C5-C6 and at C6-C7; restricted range of motion and movement of the left shoulder, cervical spine and the lumbar spine.[1] Also submitted, with respect to plaintiff Rosado, were the affirmed orthopedic report of Richard Linwood, M.D., dated September 13, 2007; and the affirmed neurological report of C. M. Sharma, M.D., dated September 13, 2007. Dr. Linwood detailed the objective testing that he performed and concluded that plaintiff Rosado had full range of motion in areas where he complained of pain, including his right shoulder and lumbar spine, and concluded that the sprains to plaintiff's back and right shoulder were resolved, that there was no disability or need for further treatment, and that plaintiff Rosado, who is a bus driver, "returned to work three weeks after the accident and has not stopped working since." Dr. Sharma set forth that plaintiff Rosado's neurological examination was normal; that, on examination, there were no causally related neurological lesions or disabilities; and there "are no neurological limitations to usual work and activities" and "no permanent neurological problem."

Through the submission of the affirmed medical report of their expert orthopedist and neurologist, each of whom conducted a physical examination of plaintiff Rosado and each of whom found no abnormalities causally related to the accident, defendants established that plaintiff Rosado did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Pommells v. Perez, 4 N.Y.3d 566 (2005); Rodriguez v. Huerfano, 46 A.D.3d 794 (2nd Dept. 2007); Baez v. Rahamatali, 6 N.Y.3d 868 (2006); Zhang v. Wang, 24 A.D.3d 611 (2005). Additionally, that plaintiff Rosado returned to work within weeks of the accident undermines any claim that his injuries prevented him from performing substantially all of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident. See Kouros v. Mendez,

[1] Although the notice of motion seeks summary judgment on the threshold issue with respect to both plaintiff Rosado and Bonilla, the affirmation in support references plaintiff Rosado.

41 A.D.3d 786 (2nd Dept. 2007); Hasner v. Budnik, 35 A.D.3d 366 (2nd Dept. 2006). Defendants thus established their entitlement to summary judgment dismissing the complaint insofar as asserted by plaintiff Rosado by demonstrating through the reports of their examining physicians that plaintiff Rosado did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. See, Djetoumani v. Transit, Inc., 50 A.D.3d 944 (2nd Dept. 2008). The burden, thus, shifted to plaintiffs to demonstrate the existence of a triable issue of fact as to whether plaintiff Rosado sustained a serious injury. See Gaddy v. Eyler, 79 N.Y.2d 955 (1992).

In opposition, plaintiffs failed to provide an objective medical basis supporting the conclusion that plaintiff Rosado sustained a serious injury. See, Baez v. Rahamatali, 6 N.Y.3d 868 (2006). Plaintiffs submitted a medical report of Dr. Ramkumar Panhani, M.D., an Internist, dated March 21, 2003, which is of no probative value, since it was not affirmed. Rodriguez v. Huerfano, 46 A.D.3d 794 (2nd Dept. 2007). Also submitted was the affirmation of Dr. Richard Rizzuti, signed April 8, 2008, who set forth that he examined plaintiff Rosado and interpreted, on March 25, 2003, the MRI of plaintiff Rosado's lumbosacral spine.[2] Although Dr. Rizzuti's affirmation and the magnetic resonance imaging report regarding plaintiff's lumbar region of the spine, indicated disc bulges at L3-4 and L4-5, and disc herniations at L5-Sl, mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration. Pommells v. Perez, 4 N.Y.3d 566, 574 (2005); Endzweig-Morov v. MV Transp., Inc., 50 A.D.3d 946 (2nd Dept. 2008); Wright v. Rodriguez, 49 A.D.3d 532 (2nd Dept. 2008); Patterson v. N.Y. Alarm Response Corp., 45 A.D.3d 656 (2nd Dept. 2007); Waring v. Guirguis, 39 A.D.3d 741 (2nd Dept. 2007). As opined by the Appellate Division, Second Department, in Byam v. Waltuch, 50 A.D.3d 939 (2nd Dept. 2008):

> The magnetic resonance imaging reports of the plaintiff's left knee, cervical spine, and lumbar spine, as authored by Dr. Richard Rizzuti, merely established that, as of October 2004, the plaintiff showed evidence of herniated discs at C5-6 and L3-4, as well as a sprain of the anterior cruciate ligament in the left knee. The mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration (citations omitted). Strains and sprains are not considered serious injuries under Insurance Law § 5102(d) (see Washington v. Cross, 48 A.D.3d 457, 849 N.Y.S.2d 784).

Plaintiffs have wholly failed to provide objective and recent evidence of the extent or degree and

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[2]He also affirms that on March 25, 2003, plaintiff Rosado "presented himself at my office for an MRI examination of the cervical spine," and annexes the report of the MRI of the cervical spine of Ibelisse Bonilla, which sets for the impression: "Subligamentous posterior disc herniations at C2-3, C5-6 and at C6-7 impinging on the anterior aspect of the spinal canal."

duration of any claimed limitation of plaintiff Rosado's lumbar region of the spine or shoulder. See, Mejia v. DeRose, 35 A.D.3d 407, 408 (2nd Dept. 2006). Moreover, Dr. Rizzuti's projections of permanent injuries and limitations had no probative value in the absence of a recent examination. And, although the records indicate that plaintiff Rosado last received treatment for his alleged injuries in 2003, over five years ago, no explanation was proffered with respect to this lengthy gap in treatment. See, Pommells v. Perez, supra; Seebaran v. Mendonca, 51 A.D.3d 658(2nd Dept. 2008); see, also, Doherty v. Ajaib, 49 A.D.3d 800 (2nd Dept. 2008)["neither the plaintiff nor his treating physician adequately explained the discontinuance of the plaintiff's treatment in October 2002 ."].

3. Conclusion

Upon a motion for summary judgment, the court has the inherent power to search the record where appropriate (see CPLR 3212[b]). It is well-settled that "a court may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court." Dunham v. Hilco Const. Co., Inc., 89 N.Y.2d 425, 429-430 (1996); Marrache v. Akron Taxi Corp., 50 A.D.3d 973 (2nd Dept. 2008); Morris v. Edmond, 48 A.D.3d 432 (2nd Dept. 2008); see, also, Micciche v. Homes by the Timbers, Inc., 1 A.D.3d 326 (2nd Dept. 2003); Shelter v. MCM Distributors, Inc., 299 A.D.2d 332 (2nd Dept. 2002); Image Clothing v. State Natl. Ins. Co., 291 A.D.2d 377 (2nd Dept. 2002). Here, although defendants' legal arguments focus solely upon plaintiff Rosado, a review of the submissions on this motion, including the MRI report of plaintiff Bonilla's cervical spine which was submitted by plaintiffs, the same legal analysis and conclusions apply to both plaintiffs. Therefore, based upon the foregoing and a search of the record by this Court, as no serious injury was sufficiently established with competent medical evidence to raise a triable issue of fact with respect to either plaintiff [(see Rodriguez v. Huerfano, 46 A.D.3d 794 (2nd Dept. 2007); Verette v. Zia, 44 A.D.3d 747 (2nd Dept. 2007)], defendants' motion for summary judgment dismissing the complaint must be granted, and the complaint hereby is dismissed in its entirety.

Dated: July 3, 2008

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J.S.C.