Vasquez v Samuel
2011 NY Slip Op 30950(U)
April 7, 2011
Supreme Court, Suffolk County
Docket Number: 08-45976
Judge: John J.J. Jones Jr
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SHORT FORM ORDER

COPY

INDEX No. 08-45976
CAL. No. 10-01505EQ

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 10-29-10
ADJ. DATE 1-5-11
Mot. Seq. # 001 - MD
002 - MD

CECILIO VASQUEZ and SARA BLANCO, Plaintiffs, - against - MICHEL SAMUEL, Defendant.	CANNON & ACOSTA, LLP Attorney for Plaintiffs 1923 New York Avenue Huntington Station, New York 11746 RUSSO, APOZNANSKI & TAMBASCO Attorney for Plaintiffs on Counterclaim 875 Merrick Avenue Westbury, New York 11590 RICHARD T. LAU & ASSOCIATES Attorney for Defendant P.O. Box 9040 Jericho, New York 11753-9040

Upon the following papers numbered 1 to 37 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; 20 - 22; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 23 - 33; Replying Affidavits and supporting papers 34 - 35; 36 - 37; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Samuel Michel, s/h/a Michel Samuel seeking summary judgment dismissing plaintiffs' complaint and the motion by plaintiff Cecilio Vasquez seeking summary judgment dismissing the counterclaim against her hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant Samuel Michel seeking summary judgment dismissing plaintiffs' complaint is denied; and it is further

ORDERED that the motion by plaintiff Cecilio Vasquez seeking summary judgment dismissing the counterclaim asserted against him by defendant Michel Samuel is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiffs Cecilio Vasquez and Sara Blanco as a result of a motor vehicle accident that occurred in Nassau County, New York at the intersection of Prospect Avenue and Urban Avenue in New Cassel on April 13, 2008. It is alleged that as the vehicle operated by plaintiff Vasquez was crossing the aforementioned intersection, the vehicle owned

and operated by defendant Samuel Michel made an unexpected left turn, causing the Vasquez vehicle to strike the front passenger side of the Michel vehicle. Plaintiff Blanco, at the time of the accident, was a back seat passenger in the vehicle operated by plaintiff Vasquez. Defendant's answer asserts a counterclaim against plaintiff Vasquez for contribution for his proportional share of the damages if defendant is found liable to plaintiff Blanco for injuries that she sustained as a result of the accident.

Plaintiff Vasquez, by his bill of particulars, alleges that he sustained various personal injuries as a result of the subject accident, including a labrum tear and impingement of the right shoulder; disc herniations at levels C4 through T1 and L1 through L4; disc bulges at levels C3 through C7; and cervical radiculopathy. He alleges that he was confined to his bed for approximately one day immediately following the accident. Plaintiff Vasquez further alleges that as a result of the injuries that he sustained in the accident he underwent surgery on his right shoulder on July 3, 2008, which resulted in him being confined to his home for three weeks. Plaintiff Blanco alleges, by her bill of particulars, that she also sustained various personal injuries as a result of the accident, including disc bulges at level T11-T12 and L4 through S1, lumbar scoliosis, right knee sprain, and left ankle contusion/sprain. Plaintiff Blanco alleges that she was confined to her bed for approximately two weeks and to her home for approximately four weeks immediately following the accident.

Defendant now moves for summary judgment on the basis that plaintiffs did not sustain an injury within the meaning of the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendant submits a copy of the pleadings, plaintiffs' deposition transcripts, unsworn copies of plaintiffs' medical records, and the sworn medical reports of Dr. Frank Oliveto and Dr. Stephen Mendolsohn. Dr. Oliveto, at defendant's request, conducted an independent orthopedic examination of each plaintiff on January 5, 2010. Dr. Mendolsohn, at defendant's request, performed an independent radiological review of the magnetic resonance images ("MRI") examinations performed on plaintiff Vasquez's right shoulder and cervical spine on April 30 and May 13, 2008.

Plaintiff Vasquez also moves for summary judgment on the basis that plaintiff Blanco did not sustain an injury within the meaning of the serious injury threshold requirement of Insurance Law § 5102(d). Plaintiff Vasquez in support of the motion relies on the same evidence submitted by defendant on his motion for summary judgment. Plaintiffs oppose the motion on the ground that defendant failed to establish a prima facie case that the injuries they sustained do not meet the serious injury threshold requirement of Insurance Law § 5102(d). Alternatively, plaintiffs assert that they each sustained injuries within the "limitations of use" and the "90/180 days" categories of Insurance Law § 5102(d). In opposition to the motion, plaintiffs submit their deposition transcripts, excerpts of defendant's deposition transcript and photographs of plaintiff Vasquez's vehicle. Plaintiffs also submit their unsworn medical reports, the sworn medical reports of Dr. Oliveto, Dr. Christopher Durant, Dr. John Himelfarb and Dr. Sima Anand.

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 also* ***Pommells Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***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]; ***Rubin v SMS Taxi Corp.***, 71 AD3d 548, 898 NYS2d 110 [2010]; ***Charley v Goss***, 54 AD3d 569, 863 NYS2d 205 [2008]).

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."

In order to recover under the limitations of uses" category, a plaintiff must present either objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration in order to prove the extent or degree of physical limitation he or she sustained (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2009]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2005]). A sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part may also suffice (*see* ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***Dufel v Green***, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

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]). A defendant may also establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the plaintiff's deposition testimony, and the affirmed medical reports of defendant own medical experts who examined plaintiff and concluded that no objective medical findings support the plaintiff's claim of serious injury (*see* ***Ambos v New York City Tr. Auth.***, 71 AD3d 801, 895 NYS2d 879 [2010]; ***Young Hwan Park v Orellana***, 49 AD3d 721, 854 NYS2d 447 [2008] ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]). 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 [1992]). Once defendant has met this burden, 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 [2003]; ***Pagano v Kingsbury***, *supra*). However, if a defendant fails to 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* ***Pfeiffer v New York Cent. Mutual Fire Ins. Co.***, 71 AD3d 971, 900 NYS2d 71 [2010]; ***McKenzie v Redl***, 47 AD3d 775, 850 NYS2d 545 [2008]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Dr. Oliveto in his medical report, states, in pertinent part, that an examination of plaintiff Vasquez's cervical spine revealed that he exhibits flexion to 45 degrees (normal is 45 degrees), extension to 45 degrees (normal is 45 degrees), left and right lateral flexion of 45 degrees (normal is 45 degrees), and left and right rotation of 80 degrees (normal is 80 degrees). Dr. Oliveto's report states that an examination of plaintiff Vasquez's lumbar spine revealed that he exhibits flexion to 90 degrees (normal is 90 degrees), extension to 30 degrees (normal is 30 degrees), right and left lateral flexion of 30 degrees (normal is 30 degrees), and right and left lateral rotation of 30 degrees (normal is 30 degrees). Dr. Oliveto's report states that an examination of plaintiff Vasquez's right shoulder revealed forward elevation of 170 degrees (normal is 170 degrees), backward elevation of 40 degrees (normal is 40 degrees), abduction of 170 (normal is 170 degrees), adduction of 30 degrees (normal is 30 degrees), external rotation of 90 degrees (normal is 90 degrees), and internal rotation of 40 degrees (normal is 40 degrees). The report states that there is no evidence of tenderness or spasm in plaintiff Vasquez's paracervical or paralumbosacral spine, or in his right shoulder. Dr. Oliveto opines that the cervical and lumbosacral strains and the right shoulder contusion that plaintiff Vasquez sustained as a result of the subject accident have resolved. The report concludes that plaintiff Vasquez is capable of performing his duties as a custodian at the Port Washington Unified School District and his normal daily living activities, without restrictions.

Additionally, Dr. Mendolsohn, in his medical report, states that a review of plaintiff's right shoulder MRI shows that there are acromioclavicular ("AC") degenerative changes present in plaintiff's right shoulder, and that a mild secondary suprasinatus tendinitis is being produced by the developmentally downward sloping acromion that is impinging upon the suprasinatus tendon in the AC joint. Dr. Mendolsohn states that the MRI does not show a tear of the tendons in the right shoulder. Moreover, Dr. Mendolsohn states that a review of plaintiff's cervical spine MRI shows mild to moderate multilevel age related cervical degenerative changes and that there is no evidence of a focal disc herniation of any abnormality causally related to the subject accident.

Here, defendant has established, prima facie, that plaintiff Vasquez did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***DeJesus v Cruz***, 73 AD3d 539, 902 NYS2d 503 [2010]; ***Guzman v Joseph***, 50 AD3d 741, 855 NYS2d 638 [2008]). Defendant's expert orthopedist, Dr. Oliveto, tested the range of motion in plaintiff Vasquez's spine and right shoulder using a goniometer, set forth his specific measurements, and compared plaintiff's results to the norm (*see* ***Cantave v Gelle***, 60 AD3d 988, 877 NYS2d 129 [2009]; ***Staff v Yshua***, 59 AD3d 614 [2009]). Dr. Oliveto found that plaintiff had no limitation of range of motion in his cervical and lumbar regions, and in his right shoulder. Additionally, Dr. Mendolsohn's medical report demonstrates that plaintiff Vasquez had pre-existing degenerative disc disease in his cervical spine and in his right shoulder, where he alleges his injuries were sustained (*see* ***Depena v Sylla***, 63 AD3d 504, 880 NYS2d 641 [2009], *lv denied* 13 NY3d 706, 887 NYS2d 4 [2009]; ***Jean v Kabaya***, 63 AD3d 509, 881 NYS2d 891 [2009]; ***Houston v Gajdos***, 11 AD3d 514, 728 NYS2d 839 [2004]).

Defendant also established, through plaintiff Blanco's deposition testimony and the reports of his medical experts, that plaintiff Blanco did not sustain a serious injury as required by Insurance Law § 5104(d) as a result of the subject accident (*see* ***Gaddy v Eyler***, *supra*; ***Hasner v Budnik***, 35 AD3d 366, 826 NYS2d 387 [2006]). Dr. Oliveto's medical report, states, in relevant part, that an examination of

plaintiff Blanco's lumbar spine revealed flexion of 90 degrees (normal is 90 degrees), extension of 30 degrees (normal is 30 degrees), right and left lateral flexion of 30 degrees (normal is 30 degrees), and right and left lateral rotation of 30 degrees (normal is 30 degrees). Dr. Oliveto's report states that an examination of plaintiff Blanco's right knee revealed flexion of 145 degrees (normal is 145 degrees) and extension of 0 degrees (normal is 0 degrees). The report states that neither tenderness nor spasm was present upon palpation of plaintiff Blanco's paralumbar spinal musculature and that her straight leg raising test was negative. It states that there is no swelling, effusion, erythema, or instability in her right knee, and that there is no medial or joint line tenderness in her right knee. Dr. Oliveto opines that the strain to plaintiff Blanco's lumbar spine and the contusion to her right knee have resolved. The report concludes that plaintiff Blanco does not exhibit any evidence of an orthopedic disability that is causally related to the subject accident.

Moreover, plaintiffs' bills of particulars and the deposition testimony of plaintiff Vasquez that he returned to work as a custodian three days after the accident and resumed his regular duties established that plaintiffs did not sustain a medically-determined injury of a nonpermanent nature which prevented them, for 90 of the 180 days following the subject accident, from performing their usual and customary activities (*see* ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2010]; ***Furrs v Griffith***, 43 AD3d 389, 841 NYS2d 594 [2007]). Furthermore, there is no evidence that plaintiffs incurred economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a) (*see* ***Moran v Palmer***, 234 AD2d 526, 651 NYS2d 195 [1996]). Therefore, the burden shifted to plaintiffs to raise a triable issue of fact as to whether plaintiffs sustained a serious injury (*see* ***Gaddy v Eyler***, *supra*; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2005]; ***McLoyrd v Pennypacker***, 178 AD2d 277, 577 NYS2d 272 [1991]).

In opposition, plaintiff Vasquez has raised a triable issue of fact as to whether he sustained a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Evans v Pitt***, 77 AD3d 611, 908 NYS2d 729 [2010], *lv denied* 16 NY3d 736, 917 NYS2d 100 [2011]; ***Lee v McQueens***, 60 AD3d 914, 876 NYS2d 114 [2009]; ***Williams v Clark***, 54 AD3d 942, 864 NYS2d 493 [2008]). The sworn medical report of Dr. Anand reveals that plaintiff Vasquez had significant range of motion limitations in the cervical and lumbar regions of his spine and in his right shoulder contemporaneous with the subject accident, and that the significant limitations were still present when Dr. Anand examined plaintiff Vasquez on November 24, 2010. Dr. Anand opines that plaintiff Vasquez suffers from cervical myofascial derangement, lumbar derangement and right shoulder derangement, and that his injuries are permanent, and causally related to the subject accident (*see* ***Tai Ho Kang v Young Sun Cho***, 74 AD3d 1328, 904 NYS2d 743 [2010]; ***Barry v Valerio***, 72 AD3d 996, 902 NYS2d 97 [2010]; ***Paula v Natala***, 61 AD3d 944, 879 NYS2d 153 [2009]). Furthermore, Dr. Anand explained that plaintiff Vasquez was discharged from his care in 2009, even though he still was symptomatic, because he had reached his maximum medical benefit from the treatment being provided, and any additional treatment would have been palliative (*see* ***Pommells v Perez***, *supra*). This submission, therefore, is sufficient to raise a triable issue of fact as to whether plaintiff Vasquez sustained a serious injury to the cervical and lumbar regions of his spine, and in his right shoulder under the limitation of use category (*see* ***Khavosov v Castillo***, __ AD3d __, 2011 NY Slip Op 01442 [2d Dept 2011]; ***Jalloh v Bah***, __ AD3d __, 915 NYS2d 636 [2011]; ***Compass v GAE Transp., Inc.***, 79 AD3d 1091, 914 NYS2d 255 [2010]).

Moreover, "where a defendant in an action seeking damages for a "serious injury" presents

evidence that a plaintiff's alleged pain and injuries are related to a pre-existing condition, the plaintiff must come forward with medical evidence addressing the defense of lack of causation" (***Pommells v Perez***, 4 NY3d 566, 580, 797 NYS2d 380 [2005]; *see* ***Ciordia v Luchian***, 54 AD3d 708, 864 NYS2d 74 [2008]; ***Luciano v Luchsinger***, 46 AD3d 634, 847 NYS2d 622 [2007]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2005]). Dr. Anand states in his report that plaintiff Vasquez was asymptomatic prior to the subject accident, and that plaintiff Vasquez's clinical presentations contemporaneous with the accident, such as tenderness to palpation and muscle spasm, were consistent with a trauma-related injury.

In addition, plaintiff Blanco has raised a triable issue of fact as to whether she sustained a serious injury as a result of the subject accident (*see* ***Walker v Esses***, 72 AD3d 938, 899 NYS2d 321 [2010]; ***Sanevich v Lyubomir***, 66 AD3d 665, 885 NYS2d 635 [2009]). According to Dr. Anand's medical report, plaintiff Blanco had significant range of motion limitations in her lumbar spine and in her right knee contemporaneous with the accident, and that significant limitations were still present when plaintiff Blanco was re-examined over two years after the subject accident. Dr. Anand opines that these range of motion limitations, which he observed based upon his own examinations, were permanent and causally related to the subject accident (***Yeong Hee Kwak v Villamar***, 71 AD3d 762; 894 NYS2d 916 [2010]; ***Parker v Singh***, 71 AD3d 750, 896 NYS2d 437 [2010]; ***Sanevich v Lyubomir***, 66 AD3d 665, 885 NYS2d 635 [2009]).

Further, the medical reports of plaintiffs' experts conflict with those of defendant's experts, who found that neither plaintiff Vasquez nor plaintiff Blanco sustained any significant range of motion limitations in either their cervical or lumbar regions of their spines, or their right shoulder or right knee. "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, the question is one for the jury" (***Noble v Ackerman***, 252 AD2d 392, 395, 675 NYS2d 86 [1998]; *see* ***LaMasa v Bachman***, 56 AD3d 340, 869 NYS2d 17 [2008]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [1996]). Although disc bulges, herniations, and meniscal tears, standing alone are not evidence of a "serious injury" under Insurance Law § 5102 (d), evidence of range of motion limitations, when coupled with positive MRI findings and objective test results, are sufficient to defeat summary judgment (*see* ***Wadford v Gruz***, 35 AD3d 258, 826 NYS2d 57 [2006]; ***Meely v 4 G's Truck Renting Co., Inc.***, 16 AD3d 26, 789 NYS2d 277 [2005]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2005]). Inasmuch as plaintiffs established that at least some of their injuries meet the "No Fault" threshold, it is unnecessary to address whether their proof with respect to other injuries they allegedly sustained would have been sufficient to withstand defendant's motion for summary judgment (*see* ***Linton v Nawaz***, 14 NY3d 821, 900 NYS2d 239 [2010]). Accordingly, defendant's motion for summary judgment is denied. Plaintiff Vasquez's motion for summary judgment dismissing defendant's counterclaim for contribution on the basis that plaintiff Blanco failed to sustain a serious injury under Insurance Law § 5102 (d) also is denied.

Dated: 7 April 2011

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION