

<b>Ania v Ramirez-Melara</b>
2011 NY Slip Op 32647(U)
July 22, 2011
Supreme Court, Nassau County
Docket Number: 20671/08
Judge: F. Dana Winslow
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SWAN

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**THOMAS ANIA and CHRISTOPHER ROSINO,**

**TRIAL/JAS, PART 4  
NASSAU COUNTY**

**Plaintiffs,**

**-against-**

**INDEX NO.: 20671/08**

**MOTION SEQ. NO.: 001, 002**

**K.C. RAMIREZ-MELARA and VICTOR  
RAMIREZ,**

**MOTION DATE: 5/17/11**

**Defendants.**

**The following papers read on this motion (numbered 1-4):**

**Notice of Motion.....1**  
**Notice of Cross Motion.....2**  
**Affirmation in Opposition.....3**  
**Reply Affirmation.....4**

The motion by plaintiff THOMAS ANIA, plaintiff on a counterclaim asserted by defendants KARLA RAMIREZ s/h/a K.C. RAMIREZ-MELARA and VICTOR RAMIREZ, and cross motion by defendants for summary judgment pursuant to **CPLR §3212**, are determined as follows.

Plaintiff CHRISTOPHER ROSINO ("ROSINO"), age 39, alleges that on August 11, 2008, at approximately 12:00 p.m., he was a passenger in a motor vehicle operated by plaintiff THOMAS ANIA ("ANIA") which came into contact with a motor vehicle owned by defendant VICTOR RAMIREZ and operated by defendant KARLA RAMIREZ s/h/a K.C. RAMIREZ-MELARA (the "2008 Accident"). The 2008 Accident occurred on Glen Cove Road at or near its intersection with Voice Road, Hempstead. Plaintiff ANIA on the counterclaim asserted by defendants, moves for an order dismissing ROSINO's complaint pursuant to **CPLR §3212** on grounds that ROSINO failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)**. Defendants cross move and join in ANIA's application. The motions are determined as follows.

**Insurance Law §5102(d)** provides that a "serious injury means a personal injury

which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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" (numbered by the Court). The Court's consideration in this action is confined to whether ROSINO's injuries constitute a permanent consequential limitation of use of a body organ or member (7), significant limitation of use of a body function or system (8), or a medically determined injury which prevented ROSINO from performing all of the material acts constituting his usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of his motion for summary judgment, ANIA submits (1) an affirmed report of examination, dated October 8, 2010, of orthopedist Michael J. Katz, MD, covering an examination of that date; (2) affirmed report of radiologist David A. Fisher, MD, dated October 20, 2010, covering a review of an MRI of ROSINO's lumber spine conducted on October 22, 2008; (3) unaffirmed and uncertified records of South Nassau Communities Hospital in connection with a subsequent accident in July 2009 involving a fall; (4) physical therapy progress notes from an unidentified facility covering treatment for injuries sustained in the 2008 Accident; and (5) an affirmed report of examination, dated September 30, 2009, of orthopedist Richard L. Parker, MD, covering an examination of ROSINO conducted on that date for injuries sustained in a motorcycle accident which occurred on September 19, 2009 (the "2009 Accident");

Using a goniometer, Dr. Katz reported that physical examination of ROSINO's cervical and lumbar spines, revealed normal range of motion results, comparing the results to norms. With respect to ROSINO's right shoulder, Dr. Katz reported active abduction of the shoulder to be five degrees less than the normal range. All other tests performed by Dr. Katz revealed normal results. Dr. Katz diagnosed "cervical strain - resolved; lumbosacral strain - resolved; subsequent injury to the right shoulder... requiring surgery." Dr. Katz stated that with respect to ROSINO's right shoulder, "[ROSINO] does have a deficit in range of motion" which Dr. Katz attributes to the 2009 Accident. Dr. Katz states that ROSINO himself attributes the need for surgery to the 2009 Accident. Dr. Katz also noted that ROSINO had a dirt bike accident in 1989 resulting in injuries to his wrist with multiple surgeries, and a motor vehicle accident in 1992 resulting in injuries to his back. As there is evidence of a prior accident in 1998 rather than 1992, Dr. Katz's reference to 1992 is most likely a typo.

Dr. Fisher reviewed an MRI of ROSINO's lumbar spine performed on October 22, 2008, approximately two and one half months post accident. Dr. Fisher opined that "there are no disc herniations or bulges" or "radiographic evidence of traumatic or causally related injury to the lumbar spine."

In addition, ANIA submits the deposition testimony of ROSINO conducted on August 18, 2010. ROSINO testified that he was involved in two prior accidents. In 1988 or 1989, he injured his back in a work related incident and treated with a chiropractor for approximately eight months, and on November 10, 1998, he injured his wrist and neck and treated with a chiropractor also for approximately eight months. In addition, ROSINO testified that as a result of the 2009 Accident when he was "run over on [his] motorcycle by a taxicab", he injured his right knee, neck and back, and was admitted to the hospital for five days. ROSINO testified that he a result of the 2009 Accident, ROSINO stated that he saw a chiropractor from September 2009 until June 2010, who treated his right knee, right shoulder, and upper and lower back. ROSINO consulted with a surgeon in June 2010, who ROSINO claims, wants to operate on his right rotator cuff and right knee. ROSINO testified that in connection with the 2009 Accident, he had MRIs of his right knee, right shoulder and upper back. ROSINO also testified that he had completed treatment for the 2008 Accident prior to the 2009 Accident.

With respect to the 2008 Accident, ROSINO testified that he treated for six to eight months and that he stopped treating because the facility closed. His treatment at that facility was covered by no-fault, and after it closed, he did not see any other providers due to lack of medical insurance and has no future appointments for injuries sustained in that accident. ROSINO testified that as a result of the 2008 Accident, he cannot go to the gym, it is difficult for him to work on cars, if he bends for too long his lower back cramps and he has stiffness in his back if it rains.

The Court finds that the reports of ANIA's and defendants' physicians are sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examinations to satisfy the Court that an "objective basis" exists for their opinions. Accordingly, the Court finds that ANIA and defendants have made a *prima facie* showing, that plaintiff CHRISTOPHER ROSINO did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. With that said, the burden shifts to ROSINO to come forward with some evidence of a "serious injury" sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

In opposition, ROSINO submits (1) an uncertified and unaffirmed no-fault insurance law denial of claim form, dated December 15, 2008; (2) uncertified and unaffirmed treatment notes from Halesite Medical, PLLC ("Halesite") from September 2008; (3) affirmation of

physiatrist Joseph Gregorace, DO, dated May 10, 2011, covering an examination of ROSINO conducted on March 31, 2011; (4) affirmed report of examination of Dr. Gregorace, covering his March 31, 2011 examination; (5) unaffirmed and uncertified treatment notes from Halesite and unidentified medical providers covering the period September to December 2008; (6) affirmation of radiologist Stephen B. Losik, MD, dated March 9, 2011, affirming his report of an MRI of ROSINO's lumbar spine conducted on October 22, 2008; (7) affirmation of Boris Kleyman, MD, PhD, dated April 14, 2011, affirming his report of an EMG and NCS study of ROSINO's upper extremity, conducted on October 24, 2008; and (8) affidavit of ROSINO, sworn to on May 10, 2010.

The Court notes at the outset that the report of a physician which is not affirmed, or subscribed before a notary or other authorized official, or a hospital record which is not certified, is not competent evidence. **CPLR 2106; Grasso v. Angerami**, 79 NY2d 814; **D'Orsa v. Bryan**, 83 AD3d 646; **McCloud v. Reyes**, 82 AD3d 848; **Husbands v. Levine**, 79 AD3d 1098; **Vasquez v. John Doe # 1**, 73 AD3d 1033; **Lozusko v. Miller**, 72 AD3d 908. Accordingly, the Court can only consider the reports and affirmations of Drs. Gregorace, Losik and Kleyman, and not the insurance company no-fault claim form, records from Halesite Medical and medical treatment records from various providers.

At his examination of ROSINO conducted on March 31, 2011, Dr. Gregorace performed range of motion testing on ROSINO, and found loss of range of motion in ROSINO's lumbar spine and a 2% loss of range of motion in one movement of ROSINO's cervical spine. Dr. Gregorace diagnosed "lumbar spine derangement with bulging disc L4/5 HNP L5/S1 with spasms" and "right C5,6 radiculopathies." Dr. Gregorace states in his affirmation that ROSINO reported to him that "he had no lower back pain for several years prior to the motor vehicle accident of August 11, 2008, and that he was still experiencing pain in his back just prior to his September 19, 2009 motorcycle accident." Dr. Gregorace opined that ROSINO has a significant limitation of use of his lower back and that these lumbar injuries are causally related to the 2008 Accident and are partially permanent.

Dr. Losik's report covering an MRI of ROSINO's lumbar spine conducted on October 22, 2008, sets forth findings of L3-4 and L4-5 disc bulges, small posterior central disc protrusion/herniation which mildly compress the anterior thecal sac and straightening of the lumbar lordosis. Dr. Kleyman's report covering an EMG and NCS study of ROSINO's upper extremity conducted on October 24, 2008, finds evidence of "acute C5-C6 radiculopathy on the right."

It is the determination of this Court that ROSINO has failed to submit *objective* medical evidence (of either a quantitative or qualitative nature) sufficient to raise a triable issue as to whether or not ROSINO sustained a "serious injury" within the meaning of

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**Insurance Law §5102(d).**

The findings by Drs. Losik and Kleyman are insufficient by themselves to establish that ROSINO suffered a serious injury. It is well established that the existence of a radiologically confirmed disc injury or a radiculopathy alone will not suffice to defeat summary judgment. See **Pommells v. Perez**, 4 NY3d 566 at 574; **Keith v. Duval**, 71 AD3d 1093; **Casimir v. Bailey**, 70 AD3d 994; **Pompey v. Carney**, 59 AD3d 416; **Kilakos v. Mascera**, 53 AD3d 527; **Marrache v. Akron Taxi Corp.**, 50 AD3d 973. In addition, the affirmations of Drs. Losik and Kleyman fail to express an opinion as to causation of ROSINO's alleged spine injuries. See **Knox v. Lennihan**, 65 AD3d 615; **Ferber v. Madorran**, 60 AD3d 725; **Garcia v. Lopez**, 59 AD3d 593; **Luizzi-Schwenk v. Singh**, 58 AD3d 811; **Sapienza v. Ruggiero**, 57 AD3d 643; **Collins v. Stone**, 8 AD3d 321. Dr. Losik also fails to address the opinion by ANIA's radiologist, Dr. Fisher, that the MRI of ROSINO's lumber spine revealed no evidence of herniated or bulging discs. The Court notes that the EMG finding of cervical spine radiculopathy is not corroborated by an MRI or by any examination results.

The Court finds the affirmation and examination report of Dr. Gregorace to be insufficient to establish that ROSINO suffered a serious injury as a result of the 2008 Accident. Although Dr. Gregorace reported normal range of motion of ROSINO's cervical spine (with only one de minimis loss of 2% in one range of motion finding), his finding of a cervical spine radiculopathy is seemingly based solely on another physician's EMG study. "In any event, a [2%] limitation in range of motion is insignificant within the meaning of the no-fault statute." **McCloud v. Reyes**, *supra* at 849. Dr. Gregorace also fails to reconcile the lumbar spine MRI findings of Dr. Losik and his own examination results, with the statement in his examination report that a lower EMG/NCS report dated October 24, 2008 (not in the record) was normal. Further, it is unclear whether Dr. Gregorace reviewed the actual MRI films. See **Umanzor v. Pineda**, 39 AD3d 539; **Friedman v. U-Haul Truck Rental**, 216 AD2d 266. The Court notes that Dr. Gregorace also fails to address ROSINO's alleged injury to his right shoulder as claimed in his bill of particulars.

Most significantly, the examination report and affirmation of Dr. Gregorace are based on an examination conducted on March 31, 2011. As such, they do not constitute objective medical evidence contemporaneous with the accident. See **D'Orsa v. Bryan**, *supra*; **Capriglione v. Rivera**, 83 AD3d 639; **Foley v. Liloia**, 82 AD3d 832; **Husbands v. Levine**, *supra*; **Torchon v. Oyezole**, 78 AD3d 929; **Posa v. Guerrero**, 77 AD3d 898; **Srebnick v. Quinn**, 75 AD3d 637; **Delarosa v. McLedo**, 74 AD3d 1012. In addition, ROSINO fails to proffer any other affirmed medical reports contemporaneous with the accident. ROSINO has thus failed to set forth the extent and duration of his alleged injuries. See **Kuchero v. Tabachnikov**, 54 AD3d 729; **Ferraro v. Ridge Car Services**, 49 AD3d 498; **King v. Islam**,

[\* 6]  
43 AD3d 1001.

“Even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury—such as a gap in treatment, an intervening medical problem or a pre-existing condition—summary dismissal of the complaint may be appropriate.” **Pommells v. Perez**, 4 NY3d 566 at 572. Dr. Gregorace makes a statement causally relating the 2008 Accident to ROSINO’s alleged lumbar spine injuries. Given the lack of other competent medical evidence, Dr. Gregorace’s claim that the 2008 Accident is a “competent cause” of ROSINO’s herniated and bulging discs and ongoing pain in his lumbar spine, is insufficient to demonstrate a causal connection between the 2008 Accident and ROSINO’s injuries. *See Pommells v. Perez*, Id. Moreover, Dr. Gregorace’s statements of causation are likewise speculative in light of Dr. Gregorace’s failure to address the report of examination of Dr. Parker with respect to ROSINO’s injuries following the 2009 Accident wherein Dr. Parker found injuries to ROSINO’s lumbar spine. “Plaintiff had the burden to come forward with evidence addressing defendant’s claimed lack of causation.” **Pommells v. Perez**, 4 NY3d 566, 580.

The Court also finds that the “gap in treatment” is fatal to ROSINO’s claim that the evidence submitted is sufficient to raise a triable issue as to whether or not ROSINO sustained a “serious injury” within the meaning of **Insurance Law §5102(d)**. There is no competent medical evidence in the record of any treatment other than ROSINO’s one visit to Dr. Gregorace on March 31, 2011.

Further, there is insufficient evidence that ROSINO’s alleged injuries are permanent **§5102(d)((7))**. Dr. Gregorace’s assertion that ROSINO’s lumbar injuries are ‘partially permanent’ is conclusory as he fails to offer any evidence of permanency. “Mere repetition of the word ‘permanent’ in the affidavit of a treating physician is insufficient to establish ‘serious injury’ and [summary judgment] should be granted for defendant where plaintiff’s evidence is limited to conclusory assertions tailored to meet statutory requirements.” **Lopez v. Senatore**, 65 NY2d 1017, 1019. *See Gaddy v. Eyler*, 79 NY2d 955; **Lincoln v. Johnson**, 225 AD2d 593; **Orr v. Miner**, 220 AD2d 567. ROSINO’s claims of the permanency of his injuries are conclusory and not supported by the record. ROSINO testified at his deposition on March 31, 2011, that he “still cannot” go to the gym, that it is difficult to work on cars and that he has trouble bending. In his affidavit, ROSINO states that he is restricted in many physical activities, including bending, lifting and running. In any event, given that ROSINO suffered injuries in a subsequent accident (the 2009 Accident) which occurred prior to his deposition testimony, it is not clear that these claimed limitations were causally related to 2008 Accident.

ROSINO has also failed to submit competent medical evidence that the injuries that

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he sustained rendered him unable to perform all of his usual and customary daily activities for ninety days of the first one hundred eighty days following the accident. *See McCloud v. Reyes, supra*; *Posa v. Guerrero*, 77 AD3d 898; *Riley III v. Randazzo*, 77 AD3d 647; *Baena v. Almonte*, 74 AD3d 1262; *Vasquez v. John Doe #1*, 73 AD3d 1033; *Casimir v. Bailey*, 70 AD3d 994; *Pacheco v. Connors*, 69 AD3d 818; *Sainte-Aime v. Ho*, 274 AD2d 569.

Further, the Court finds ROSINO's affidavit is self serving and insufficient to raise an issue of fact. *See Riley III v. Randazzo*, 77 AD3d 647; *Villante v. Miterko*, 73 AD3d 757; *Lozusko v. Miller*, 72 AD3d 908; *Stevens v. Sampson*, 72 AD3d 793; *Keith v. Duval*, 71 AD3d 1093; *Singh v. City of New York*, 71 AD3d 1121; *Larson v. Delgado*, 71 AD3d 739; *Acosta v. Alexandre*, 70 AD3d 735. ROSINO's complaints of subjective pain do not by themselves satisfy the "serious injury" requirement of the no-fault law. *See Scheer v. Koubek*, 70 NY2d 678; *Calabro v. Petersen*, 82 AD3d 1030; *Catalano v. Kopman*, 73 AD3d 963; *Sham v. B & P Chimney Cleaning & Repair Co., Inc.*, 71 AD3d 978; *Ambos v. New York City Transit Authority*, 71 AD3d 801; *Acosta v. Alexandre, supra*; *Dantini v. Cuffie*, 59 AD3d 490; *Ranzie v. Abdul-Masih*, 28 AD3d 447.

Based on the foregoing, it is

ORDERED, that the motion by plaintiff THOMAS ANIA, on a counter claim asserted by defendants KARLA RAMIREZ s/h/a K.C. RAMIREZ-MELARA and VICTOR RAMIREZ, for summary judgment pursuant to CPLR §3212 dismissing the complaint of plaintiff CHRISTOPHER ROSINO, on the grounds that CHRISTOPHER ROSINO failed to sustain a "serious injury" within the meaning of Insurance Law §5102(d) is granted; and it is further

ORDERED, that the cross motion by defendants for summary judgment pursuant to CPLR §3212 dismissing the complaint of plaintiff CHRISTOPHER ROSINO, on the grounds that CHRISTOPHER ROSINO failed to sustain a "serious injury" within the meaning of Insurance Law §5102(d) is granted.

This constitutes the Order of the Court.

Dated: July 22, 2011



J.S.C.

**ENTERED**

OCT 06 2011

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**