Quito v Paje
2011 NY Slip Op 32667(U)
October 7, 2011
Supreme Court, New York County
Docket Number: 108433/2009
Judge: George J. Silver
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SCANNED ON 10/14/2011
[* 1]

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______ FOR THE

PRESENT: Hon. George J. Silver, Justice | **PART 22**

VICTOR QUITO and MARIA QUITO

vs.

HENRY PAJE and MARIA PAJE

INDEX NO. ~~110843/2009~~ 108493/2009

MOTION DATE ______

MOTION SEQ. NO. ~~002~~ 002

MOTION CAL. NO. ______

The following papers, numbered 1 to 2 were read on this motion to/for SUMMARY JUDGMENT

	Papers Numbered
Notice of Motion/Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ■ No

FILED
OCT 12 2011
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident, Defendants Henry and Maria Paje (collectively "Defendants") move pursuant to CPLR §3212 for an order granting summary judgment and dismissing Plaintiffs Victor and Maria Quito's ("Plaintiffs") on the grounds that they did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d). Under New York Insurance Law §5102(d), a "serious injury"is defined 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 medically determined injury use of a body organ or member; significant limitation of use of a body function or system; 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.

"[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law §5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.* at 84). The Plaintiff is required to present nonconclusory

1. Check one: ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ☐ GRANTED ☐ DENIED ■ GRANTED IN PART ☐ OTHER
3. Check as appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

Plaintiff Victor Quito

In support of this motion, Defendants submit the expert reports of Dr. Robert April and Dr. Maurice Carter. Plaintiff Victor Quito alleges in his Verified Bill of Particulars that, as a result of the accident, he sustained serious injuries including partial tear of the left shoulder distal supraspinatus tendon, left shoulder bony impingment and joint effusion, C5-C6, L3-L4 and L4-L5 disc bulges, L5-S1 disc herniation, left shoulder pain and left knee pain. Dr. April conducted a neurological examination of Plaintiff on or about April 13, 2010. He performed range of motion testing using an orthopedic protractor. Dr. April did not find any limitations in Plaintiff's range of motion for the neck, lumbar spine and upper limbs, when compared to normal. He also reported that straight leg raising was negative to 80 degrees bilaterally without pain and was normal. Dr. April's expert report satisfies Defendants' burden of establishing prima facie that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]).

Dr. Carter examined Plaintiff on April 13, 2010. He conducted range of motion testing on Plaintiff's shoulders, but did not state what objective testing he used, nor did he compare his results to normal. Dr. Carter stated that "straight leg raising signs were negative seated and reported positive for knee pain at about 70 degrees on the left." He also conducted range of motion of the knees and neck, but once again did not state what objective testing he utilized, nor did he compare his results to normal. As such Dr. Carter's expert report is insufficient to establish Defendants' *prima facie* entitlement to summary judgment (*Beazer v Webster*, 2010 NY Slip Op 1584 [1st Dept]).

Dr. Carter also concluded that Plaintiff's shoulder impingement was secondary to arthritic changes and unrelated to trauma. He further states that there is no full thickness rotator cuff, but does not explain what these results are based upon. Dr. Carter does appear to review Plaintiff's MRI reports, however, he does not sufficiently state that he relied upon the results within these reports when forming his conclusions.

In order to rebut defendant's *prima facie* case, plaintiff must submit objective medical evidence establishing that the claimed injuries were caused by the accident, and "provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration" (*Noble v Ackerman*, 252 AD2d 392, 394 [1st Dept 1998]; *Toure v Avis Rent A Car Sys*., Inc., 98 NY2d 345, 350 [2002]). Under the permanent consequential limitation and significant limitation categories of New York Insurance Law §5102(d), Plaintiff must 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" (*Gorden v. Tibulcio*, 2008 NY Slip Op 3382 [1st Dept] *quoting John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]). Such medical proof should be contemporaneous with the accident, showing what quantitative restrictions, if any, plaintiff was afflicted with (*see Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]). The medical proof must also be based on a recent examination of plaintiff, unless an explanation otherwise is provided (*see Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Nunez v Zhagui*, 60 AD3d 559, 560 [1st Dept 2009]).

In opposition to Defendant's motion, Plaintiff submits the expert reports of Dr. Yolande Bernard, Dr. Arden Kaisman, Dr. David Neuman, Dr. Aric Hausknecht and Dr. Robert Scott Schepp. Dr. Bernard first examined Plaintiff on January 13, 2009. At this visit, she conducted range of motion testing using a goniometer and found limitations in Plaintiff's range of motion for his lumbosacral spine, cervical spine and left shoulder. Dr. Bernard referred Plaintiff for physical therapy 2-3 times a week for approximately 32 weeks. Dr. Bernard referred Plaintiff for cervical spine, lumbosacral spine and left shoulder MRIs. Dr.

Bernard states that the MRI results are consistent with her clinical findings, correlating to traumatically induced acute injuries. She most recently examined Plaintiff on March 17, 2011. At this visit, Dr. Bernard once again conducted range of motion testing and found significant limitations in Plaintiff's cervical and lumbosacral spine's range of motion. However, Dr. Bernard does not state what objective testing mechanism she utilized to obtain these results, nor does she compare Plaintiff's range of motion to normal. As such, the results from the March 17, 2011 examination are insufficient to rebut Defendants' *prima facie* evidence. Dr. Bernard referred Plaintiff to orthopedic surgeon, Dr. Neuman. Dr. Neuman examined Plaintiff on March 16, 2009 and March 30, 2009. He conducted range of motion testing, finding limitations in Plaintiff's shoulders and left knees. However, Dr. Bernard did not state what objective testing he utilized to obtain range of motion measurements, nor did he compare Plaintiff's results to normal. Therefore, this report is insufficient to rebut Defendants' *prima facie* entitlement to summary judgment (*Page v Rain Hacking Corp.*, 52 AD3d 229, 859 NYS2d 159 [1st Dept 2008]).

Dr. Kaisman first examined Plaintiff on May 28, 2009 for epidural steroid injections. At that appointment, Dr. Kaisman conducted range of motion testing using a goniometer and found limitations in Plaintiff's range of motion for his cervical and lumbar spine when compared to normal. On July 15, 2009 and August 12, 2009, Dr. Kaisman treated Plaintiff for cervical radiculopathy and C5-C6 disc bulging with epidural injections. On February 25, 2009, Dr. Hausknecht performed a neurological examination of Plaintiff. Range of motion testing was conducted using an arthrodial protractor and a gonimeter. He found limitations in Plaintiff's cervical spine and lumbosacral spine. Dr. Hausknecht also states that Plaintiff is totally disabled and is advised to restrict his activities. Dr. Schepp supervised and interpreted the taking of Plaintiff's cervical and lumborsacral MRI films. He reported that Plaintiff's films showed a L5-S1 herniated disc, L3-L4 and L4-L5 disc bulges and a C5-C6 disc bulge. Though Dr. Schepp's report reveals positive findings, he did not opine as to the causation of these findings, making his affirmation insufficient to defeat defendants' *prima facie* showing (*see Valentin*, 59 AD3d 184 [1st Dept 2009]).

Plaintiff also attaches uncertified records from Noyes Memorial Hospital, Medical records and reports by examining and treating doctors that are not sworn to or affirmed under penalties of perjury are not evidentiary proof in admissible form, and are therefore not competent and inadmissible (*See Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992]). Thus, these records are not sufficient to defeat a motion for summary judgment (*See Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]).

While Plaintiff submits a plethora of evidence, the only report based on a recent examination is Dr. Bernard's examination of Plaintiff's spine on March 17, 2011. Though Dr. Bernard's report sets forth range of motion limitations, she does not proffer the objective tests used, nor compare Plaintiff's results to normal. As such, Plaintiff has not offered sufficient evidence of a recent examination (*Thompson v. Abbasi*, 15 AD3d 95 [1st Dept 2005] *quoting Grossman v Wright*, 268 AD2d 79, 84, 707 NY2d 233 [2000]; *Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Nunez v Zhagui*, 60 AD3d 559, 560 [1st Dept 2009]). Further, Plaintiff does not offer any evidence of a recent examination of Plaintiff's left shoulder or left knee. Therefore, Plaintiff has not met his burden.

Plaintiff Maria Quito

In support of this motion, Defendants submit the expert reports of Dr. Robert April and Dr. Maurice Carter. Plaintiff Maria Quito alleges in her Verified Bill of Particulars that, as a result of the accident, she sustained serious injuries including left partial rotator cuff tear, C3-C6, L4-L5 and L5-S1 disc bulges, neck, back and shoulder pain. Dr. April examined Plaintiff on or around April 13, 2010. He conducted range of motion using an orthopedic caliper and found no limitations in motion for Plaintiff's neck and low back. However, Dr. April did find a limitation in extension of Plaintiff's left shoulder. However, he did not explain the significance of this limitation, and concluded that there was no objective evidence of any disability. Dr. Carter also examined Plaintiff on April 13, 2010. He conducted range of motion testing and found no limitations in Plaintiff's range of motion when compared to normal. Further, Dr. Carter did not state what

objective testing he utilized to determine range of motion measurements. Therefore, as reported, Dr. April and Dr. Carter reached differing conclusions regarding Plaintiff's left shoulder range of motion. As such, this discrepancies are material factual questions as to whether Plaintiff suffered a serious injury within the permanent consequential limitation and/or significant limitation categories of Insurance Law §5102(d) and cannot be resolved in the context of a summary judgment motion (*see Cassagnol v Williamsburg Plaza Taxi*, 234 AD2d 208 [1st Dept 1996]; *Williams v Lucianatelli*, 259 AD2d 1003 [4th Dept 1999]; *Bitici v New York City Transit Auth.*, 245 AD2d 157 [1st Dept 1997]).

Defendants have failed to present evidence sufficient to meet their initial burden of establishing a *prima facie* case for summary judgment as to whether Plaintiff Maria Quito's alleged injuries constituted a permanent consequential limitation of use a body organ or member and/or a significant limitation of a body function or system. Therefore, it is unnecessary to consider Plaintiffs' opposition to the motion (*see Offman v Singh*, 27 AD3d 284 [1st Dept 2006]).

Permanent Loss Category

To qualify under the "permanent loss of use of a body organ, member, function or system," the loss must not only be permanent, but must be a total loss of use (*Gaddy v. Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]. Plaintiffs have not demonstrated that they sustained a permanent and total loss as a result of the accident. Therefore, Defendants' summary judgment motion as to Plaintiffs' permanent loss claim under New York Insurance Law §5102(d) is granted.

90/180 Category

With respect to Plaintiffs' claim under the 90/180 category of Insurance Law §5102(d), Plaintiffs' injuries must restrict them from performing "substantially all" of their daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiffs' Bill of Particulars states that both Plaintiffs were confined to bed and home for approximately 90 days following the accident. However, Plaintiff Victor Quito testified that there was no period of time when he was bed-ridden or confined to his home. Plaintiff Maria Quito testified that she missed five weeks of work as a result of the accident. Further, Plaintiffs do not raise any opposition to Defendants' motion as to the 90/180 category. As such, Plaintiffs' submissions do not raise a question of fact with respect to their claim under the 90/180 day category of Insurance Law § 5102 [d] (*see Grossman v Wright*, 268 AD2d at 84; *Santiago v Bhuiyan*, 2010 N.Y. Slip Op. 1890 [1st Dept 2010]).

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment is denied as to Plaintiff Maria Quito's claim under permanent consequential limitation and significant limitation categories of Insurance Law §5102(d); and it is further

ORDERED that Defendants' motion for summary judgment is granted as to Plaintiff Victor Quito's claim under permanent consequential limitation and significant limitation categories of Insurance Law §5102(d); and it is further

ORDERED that Defendants' motion for summary judgment is granted as to Plaintiff Maria Quito and Plaintiff Victor Quito's claims under the permanent loss category of Insurance Law §5102(d); and it is further

ORDERED that Defendants' motion for summary judgment is granted as to Plaintiff Maria Quito and Plaintiff Victor Quito's claims under the 90/180 category of Insurance Law §5102(d); and it is further

ORDERED that Plaintiff Victor Quito's complaint is dismissed in its entirety with costs and disbursements to said Defendants as taxed by the Clerk, and the Clerk is directed to enter judgment accordingly; and it is further

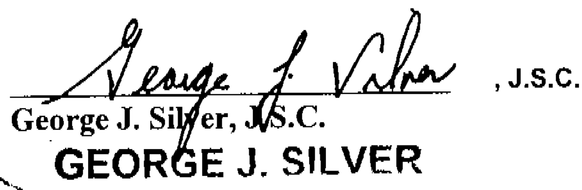
ORDERED that the action is severed and continued against the remaining Plaintiff Maria Quito; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that Defendants are to serve a copy of this order, with Notice of Entry upon all parties, within 30 days.

This constitutes the decision and order of the court.

Dated: OCT 07 2011
New York, New York



, J.S.C.
George J. Silver, J.S.C.
GEORGE J. SILVER

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