

Deodat v Ferrara Equip., Inc.
2012 NY Slip Op 32603(U)
August 8, 2012
Supreme Court, Queens County
Docket Number: 31232/10
Judge: Timothy J. Dufficy
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SHORT FORM ORDER**NEW YORK SUPREME COURT-QUEENS COUNTY**

P R E S E N T : Hon. Timothy J. Dufficy
Justice

Part 35

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SAVITRI DEODAT and
RAMDAT DEODAT,

Plaintiffs,

- against -

Index No.: 31232/10

Motion Date: 5/31/12

Mot. Cal. No.:7

Mot Seq. : 1

FERRARA EQUIPMENT, INC. and
JOSE R. NUNEZ

Defendants.

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The following papers numbered 1 to 10 read on this motion by defendants **FERRARA EQUIPMENT, INC. and JOSE R. NUNEZ** for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability in their favor and against the plaintiffs and dismissing the plaintiffs' complaint with prejudice.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Affidavits-Exhibits.....	5-7
Rely Affirmation-Exhibits.....	8-10

Upon the foregoing papers it is ordered that this motion by defendants **FERRARA EQUIPMENT, INC. and JOSE R. NUNEZ** for an order pursuant to CPLR 3212 granting summary judgment in their favor on the issue of liability and against the plaintiffs **SAVITRI DEODAT and RAMDAT DEODAT** and dismissing the plaintiffs' complaint with prejudice on the ground that the plaintiffs did not sustain a serious injury as that term is defined by Insurance Law §§ 5102(d) and (2) is denied. (see the accompanying memorandum)

Dated: August 8, 2012

TIMOTHY J. DUFFICY, J.S.C.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY

PART 35

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RAMDAT DEODAT,**

Plaintiffs,

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**FERRARA EQUIPMENT, INC. and
JOSE R. NUNEZ**

Defendants.

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This action arises out of an automobile accident that occurred on the afternoon of October 28, 2010, on Atlantic Avenue at or near the intersection of Saratoga Avenue in Kings County, New York. Plaintiff Savitri Deodat was operating a vehicle which was owned by her uncle Ramdat Deodat. The plaintiff has voluntarily discontinued all claims on behalf of Ramdat Deodat for property damage, therefore, the only claims remaining at this time are for personal injuries sustained by plaintiff Savtri Deodat.

The plaintiffs' vehicle was traveling eastbound on Atlantic Avenue and the defendants' vehicle was traveling westbound on Atlantic Avenue. Defendant Ferrara Equipment, Inc. owned the vehicle that was operated by defendant Jose R. Nunez while he was in the scope of his employment with defendant Ferrara Equipment, Inc.

The defendants now move for summary judgment on the issue of liability and dismissing the plaintiffs' complaint with prejudice on the grounds that plaintiff Savitri Deodat has not met the "serious injury" threshold requirement of §5102(d) of the New York State Insurance Law.

As the proponent of the summary judgment motion the defendants must make a *prima facie* showing of entitlement to judgment as a matter of law by offering sufficient evidence to demonstrate the absence of any material issues of fact. Alvarez v Prospect Hospital, 68 N.Y. 2d 320(1986); Zuckerman v City of New York, 49 N.Y. 2d 557 (1980.) Therefore, on this motion, the defendants bear the initial burden establishing, *prima facie*, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law. Gaddy v Eyler, 79 N.Y. 2d 955 (1992); Licari v Elliot, 57 N.Y. 2d 230 (1982); Grossman v Wright, 268 A.D.2d 79(2d Dept. 2000).

In support of their motion, the defendants submit the pleadings in this case, the testimony of the plaintiff Savatri Deodat given in her examination before trial on September 12, 2011, as well as the affirmation of Dr. Robert Orlandi regarding the October 27, 2011 examination that he conducted on plaintiff Savitri Deodat.

Dr. Orlandi concluded, in his diagnosis of plaintiff Savitri Deodat, that her cervical sprain was resolved, that her left shoulder strain was also resolved, that her lumbar strain was previously resolved, that there were no clinical residuals regarding the right knee arthroscopy, and that based upon Dr. Orlandi's review of the MRI scan and computer image review of the arthroscopy, the injury and treatment were unrelated to the accident that occurred on October 28, 2010.

Here, the defendants have satisfied their burden through legally sufficient documentary evidence from Dr. Orlandi, in his affirmed medical report, that plaintiff Savitri Deodat's injuries did not meet the threshold requirement of Insurance Law §5102(d) and that plaintiff did not sustain a "serious injury" as a result of the October 28, 2010 accident. Oberly v Bangs, 96 N.Y. 2d 295 (2001). Hence, the defendants have made out a *prima facie* case and the burden of proof shifts to the plaintiff to demonstrate the existence of a triable issue of fact. Gaddy v Eyler, *supra*. Therefore, the Court finds that the defendants' have provided proof demonstrating, *prima facie*, the absence of any condition in the plaintiff which might arguably meet the serious injury threshold of Insurance Law § 5102(d). The burden then shifts to the plaintiffs to demonstrate that there are triable issues of fact which show that plaintiff Savitri Deodat sustained a "serious injury" within the meaning of Insurance Law §5102(d) and that these injuries were sustained as a result of the subject accident. Gaddy v Eyler, *supra*; Hildenbrand v Chin, 52 AD3d 1164 (3d Dept. 2008).

In opposition to the defendants' motion, plaintiff Savitri Deodat submits the affirmed reports of Dr. Nitkin Narkhede and Dr. Surendranath Reddy, both of whom agree that plaintiff Savitri Deodat suffers from a limited range of motion in several areas of her body and that she had sustained a 25% loss of use and function of her right knee. The doctors also affirm that in their medical opinion these injuries were directly and causally related to the accident that occurred on October 28, 2010.

Plaintiff Savitri Deodat also submits the affirmed report of her knee surgeon, Dr. Diwan, regarding the surgery he performed upon her right knee on January 7, 2011, to repair a torn meniscus, as well as a chondroplasty that he conducted to remove the

traumatic chondromalacia in her right knee. Plaintiff Savitri Deodat also submits her own affirmation attesting to her treatment and surgery, and states that she continues to experience substantial limitation and pain when performing her usual and customary daily activities.

Lastly, plaintiff Savitri Deodat submits her sworn testimony given on September 12, 2011. In that testimony, plaintiff Savitri Deodat testified that she was traveling eastbound on Atlantic Avenue in the middle lane she approached the intersection of Atlantic Avenue and Saratoga with a green light in her favor. While she proceeded eastbound, she observed the defendants' eight-wheel construction truck traveling westbound on Atlantic Avenue towards the plaintiffs' vehicle. There was another vehicle in front of the plaintiffs' vehicle at that time. When the vehicle ahead of her's passed through the intersection, the defendants' truck suddenly made a left-hand turn in front of the plaintiffs' car. When the truck turned left, plaintiff Savitri Deodat testified that she slammed on her brakes but could not do anything to avoid the collision. The entire front end of the plaintiffs' vehicle slammed into the right rear side of defendants' eight-wheel truck at the wheel base of the truck. She also testified that she was traveling at about 30-35 miles per hour prior to the collision. Plaintiff Savitri Deodat stated that it was a high impact collision and the car's air bags deployed, and that the defendants' truck driver's vehicle kept moving after the impact dragging plaintiff's vehicle sideways from the middle lane to the right hand lane. After the collision occurred, plaintiff Savitri Deodat testified that she was bleeding above her eye, that she had pain in her right arm, her right wrist, her head, her left shoulder, her right knee, her neck and her lower back. She remained in her car for approximately 20-30 minutes until the ambulance arrived. Defendant Jose R. Nuno called the police and kept checking on her until the ambulance arrived. When the ambulance attendants arrived, the attendants treated her at the scene of the accident for about 20-30 minutes, and then plaintiff Savitri Deodat's boyfriend took her home while her car was towed from the scene of the accident.

About a week and a half after the accident, plaintiff Savitri Deodat sought treatment at Mill Basin Rehabilitation where she was seen by Dr. Narkhede, who recommended that plaintiff begin physical therapy which she started that week. She was also told to take over-the-counter pain killers. Plaintiff Savitri Deodat went to for physical therapy, electrical stimulation, and went to the chiropractor two to three times a week. She stated

that she suffered from and still suffers from massive migraine headaches. Plaintiff also went to for physical therapy, electrical stimulation.

On January 7, 2011, plaintiff Savitri Deodat had surgery on her right knee because her cartilage was torn as a result of the accident. The surgery was performed by Dr. Reddy at Queens Surgery Center. Plaintiff Savitri Deodat also had five or six MRI's done on separate parts of her body. She continued with physical therapy after the surgery and wore a right wrist brace and a back brace. She also has scarring on her knee as a result of the surgery she underwent. As of the time of the examination before trial, plaintiff Savitri Deodat's chief medical complaints emanated from the pain in her left shoulder and right knee and she testified that she was unable to do much with her right knee or left shoulder. She testified that she was unable to do many of the same physical activities that she could do before the accident and has difficulty driving due to the injury to her right knee.

This Court finds that plaintiff Savitri Deodat has raised triable issues of fact by submitting the affirmed medical reports of her doctors showing that she had significant limitations in range of motion both contemporaneous to the accident, as well as in recent examination. Her doctors also concluded that her limitations were significant and permanent and in fact resulted from trauma which was caused by the accident (*see, Ortiz v Zorbas*, 62 AD3d 770 (2d Dept. 2009); *Azor v Torado*, 59 AD3d 367 (2d Dept. 2009)). Therefore, the plaintiff has raised a triable issue of fact as to whether or not plaintiff has sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law §5102(d) as a result of the accident that occurred on June 9, 2010. *see, Mahmmod v Vicks*, 81 AD3d 606 (2d Dept. 2011); *Evans v Pitt*, 77 AD3d 611(2d Dept. 2010). Additionally, the Court finds that the plaintiff has adequately explained the gap in treatment by submitting her own affirmation, as well as Dr. Mun's affirmation, stating that the plaintiff's no-fault benefits had stopped and the

plaintiff's affirmation attested to the fact that she did not have private health insurance to cover the costs for continued treatment. Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 (2d Dept. 2008).

Accordingly, the defendants' motion is denied in all respects.

Dated: August 8, 2012

HON. TIMOTHY J. DUFFICY, J.S.C.