

Nadal v Orange Transp.
2012 NY Slip Op 33006(U)
December 7, 2012
Supreme Court, Queens County
Docket Number: 12148/10
Judge: Bernice Daun Siegal
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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTYPresent: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19

Justice

-----X
Juan Nadal, Eda Nadal and Jose Agrait,

Plaintiff,

-against-

Index No.: 12148/10
Motion Date: 10/10/12
Motion Cal. No.: 17
Motion Seq. No.: 01

Orange Transportation and Larry Mason,

Defendants.
-----X

The following papers numbered 1 to 17 read on this motion for an order pursuant to CPLR §3212 granting summary judgment and dismissing the complaint of Plaintiffs, Juan Nadal and Eda Nadal, in as much as Plaintiffs cannot meet the serious injury threshold requirement mandated by Insurance Law §5104(a).

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Support.....	5 - 9
Memorandum of Law in Support of Motion.....	10 - 11
Affirmation in Opposition.....	12 - 14
Reply.....	15 - 17

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Facts

The defendants Orange Transportation and Larry Mason (collectively as “Defendants”) move for summary judgment pursuant to CPLR §3212 on the grounds that plaintiffs Juan Nadal (“Juan”) and Eda Nadal (“Eda”) (collectively as “Plaintiffs”) did not sustain a serious injury under Insurance Law §5102(d). Plaintiff on the counter-claim, Juan Nadal, joins in defendants motion for summary judgment dismissing plaintiffs’ complaint for failure to meet threshold. Plaintiffs were involved in

a motor vehicle accident with defendants on February 1, 2010. The Bill of Particulars allege that as a result of the accident, Juan suffered injury to his cervical spine, lumbar spine and internal derangement of the left hip and Eda suffered injury to her cervical spine, lumbar spine, and tenderness and edema to the right knee.

Analysis

Defendants' motion for summary judgment pursuant to CPLR §3212 dismissing plaintiffs' cause of actions is denied as more fully set forth below.

Threshold

Defendants move for summary judgment in their favor on the ground that Juan Nadal and Eda Nadal did not sustain a "serious injury" within the meaning of the Insurance Law. That statutory provision states, in pertinent part, that a "serious injury" is defined 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's customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

(Insurance Law §5102(d).)

1. Juan Nadal

Defendants contend that Juan did not sustain a serious injury based on the medical report of Robert Tantleff, MD, Radiologist, Jean-Robert Desrouleax, MD, Neurologist and Lisa Nason, MD, Orthopedist. The issue of whether Nadal sustained a serious injury is a matter of law to be

determined in the first instance by the court. (*Licari v. Elliott*, 57 N.Y.2d 230 [Ct App. 1982]; *Porcano v. Lehman*, 255 A.D.2d 430, 431 [2nd Dept. 1998]; *Brown v. Stark*, 205 A.D.2d 725 [2nd Dept. 1994]). 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 [Ct App. 2002]; *Sealy v. Riteway-I, Inc.*, 54 A.D.3d 1018 [2nd Dept. 2008]; *Meyers v. Bobower Yeshiva Bnei Zion*, 20 A.D.3d 456 [2nd Dept. 2005].) A defendant can meet his or her prima facie burden 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). (see *Magarin v. Kropf*, 24 A.D.3d 733 [2nd Dept. 2005]; see also *Gaddy v. Eyler*, 79 N.Y.2d 955, 956 [Ct. App. 1992]; *Morris v. Edmond*, 48 A.D.3d 432 [2nd Dept. 2008].)

Defendants met their initial burden of establishing that Juan Nadal did not sustain a serious injury through the submission of the affirmation of Dr. Nason. Dr. Nason used a goniometer to test Juan Nadal's range of motion, which found that Nadal's range of motion for his cervical spine, lumbar spine and left hip were within normal limits and that Nadal was not disabled. (*Staff v. Yshua*, 59 A.D.3d 614 [2nd Dept 2009].)

Through the submission of the affirmed medical reports of defendants' experts, defendants established that Juan Nadal did not sustain a serious injury within the meaning of Insurance Law § 5102(d). (See, *Pommells v. Perez*, 4 N.Y.3d 566 [2005].) Defendants' evidence being sufficient to make a prima facie showing that Ayala did not sustain a serious injury. (See, *id.*)

However, in opposition to the within motion, Juan Nadal, has raised a triable issue of fact as to whether he sustained a serious injury to his cervical and lumbar spine through, inter alia, the affirmed medical report of Juan Nada's treating physician, Jean Claude Demetrius, MD.

Plaintiff relies on the affirmation of Dr. Demetrius, who examined the plaintiff following the accident on February 9, 2010 and again on July 25, 2012, specified the decreased ranges of motion in Juan's cervical spine and lumbar spine as evidenced by objective testing and findings. Dr. Demetrius, in his report, also concluded that Juan's injuries and limitations were permanent, and causally related to the subject accident. This evidence is sufficient to raise a triable issue of fact as to whether Juan Nadal sustained a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. (*Lim v. Tiburzi*, 36 A.D.3d 671 [2nd Dept 2007]; *Shpakovskaya v. Etienne*, 23 A.D.3d 368 [2nd Dept 2005].)

Defendants argue that the MRI reports are unsworn and therefore inadmissible. However, MRI reports were referred to by the defendant's examining neurologist and therefore, are properly before the court. (*Ayzen v. Melendez*, 299 A.D.2d 381 [2nd Dept 2002]; *Perry v. Pagano*, 267 A.D.2d 290 [2nd Dept 1999].)

Plaintiff also adequately explained the gap in treatment by testifying that he stopped treatment because his no-fault benefits terminated. (*Jean-Baptiste v. Tobias*, 88 A.D.3d 962 [2nd Dept 2011]; *Park v. He Jung Lee*, 84 A.D.3d 904 [2nd Dept 2011].)

For the reasons set forth above, defendants' motion for summary judgment as to Juan Nadal on the issue of "serious injury" is denied.

2. Eda Nadal

Defendants contend that Eda did not sustain a serious injury based on the medical report of Robert Tantleff, MD, Radiologist, Jean-Robert Desrouleax, MD, Neurologist and Lisa Nason, MD, Orthopedist. The issue of whether Eda sustained a serious injury is a matter of law to be determined in the first instance by the court. (*Licari v. Elliott*, 57 N.Y.2d 230 [Ct App. 1982]; *Porcano v.*

Lehman, 255 A.D.2d 430, 431 [2nd Dept. 1998]; *Brown v. Stark*, 205 A.D.2d 725 [2nd Dept. 1994]). 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 [Ct App. 2002]; *Sealy v. Riteway-1, Inc.*, 54 A.D.3d 1018 [2nd Dept. 2008]; *Meyers v. Bobower Yeshiva Bnei Zion*, 20 A.D.3d 456 [2nd Dept. 2005].) A defendant can meet his or her prima facie burden 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). (*see Magarin v. Kropf*, 24 A.D.3d 733 [2nd Dept. 2005]; *see also Gaddy v. Eyler*, 79 N.Y.2d 955, 956 [Ct. App. 1992]; *Morris v. Edmond*, 48 A.D.3d 432 [2nd Dept. 2008].)

Defendants met their initial burden of establishing that Eda did not sustain a serious injury through the submission of the affirmation of Dr. Nason. Dr. Nason used a goniometer to test Eda's range of motion, which found that Eda's range of motion for her cervical spine, lumbar spine and left hip were within normal limits and that Eda was not disabled. (*Staff v. Yshua*, 59 A.D.3d 614 [2nd Dept 2009].)

Through the submission of the affirmed medical reports of defendants' experts, defendants established that Eda did not sustain a serious injury within the meaning of Insurance Law § 5102(d). (*See, Pommells v. Perez*, 4 N.Y.3d 566 [2005].) Defendants' evidence being sufficient to make a prima facie showing that Ayala did not sustain a serious injury. (*See, id.*)

However, in opposition to the within motion, Eda, has raised a triable issue of fact as to whether she sustained a serious injury to his cervical and lumbar spine through, inter alia, the affirmed medical report of Eda's treating physician, Jean Claude Demetrius, MD.

Plaintiff relies on the affirmation of Dr. Demetrius, who examined the plaintiff following the

accident on February 9, 2010 and again on July 25, 2012, specified the decreased ranges of motion in Eda's cervical spine and lumbar spine as evidenced by objective testing and findings. Dr. Demetrius, in his report, also concluded that Eda's injuries and limitations were permanent, and causally related to the subject accident. This evidence is sufficient to raise a triable issue of fact as to whether Eda sustained a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. (*Lim v. Tiburzi*, 36 A.D.3d 671 [2nd Dept 2007]; *Shpakovskaya v. Etienne*, 23 A.D.3d 368 [2nd Dept 2005].)

Defendants argue that the MRI reports are unsworn and therefore inadmissible. However, the MRI reports were referred to by the defendant's examining neurologist and therefore, are properly before the court. (*Ayzen v. Melendez*, 299 A.D.2d 381 [2nd Dept 2002]; *Perry v. Pagano*, 267 A.D.2d 290 [2nd Dept 1999].)

Plaintiff also adequately explained the gap in treatment by testifying that she stopped treatment because his no-fault benefits terminated. (*Jean-Baptiste v. Tobias*, 88 A.D.3d 962 [2nd Dept 2011]; *Park v. He Jung Lee*, 84 A.D.3d 904 [2nd Dept 2011].)

For the reasons set forth above, defendants' motion for summary judgment as to Eda Nadal on the issue of "serious injury" is denied.

Conclusion

Defendants' motion for summary judgment pursuant to CPLR §3212 dismissing plaintiffs cause of actions is denied.

Dated: December 7, 2012

Bernice D. Siegal, J. S. C.