Lopez v Rivera
2013 NY Slip Op 33108(U)
November 21, 2013
Supreme Court, Queens County
Docket Number: 28609/10
Judge: Bernice D. Siegal
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Short Form Order

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

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Jenny Lopez and Julio Lopez,

Plaintiffs,

-against-

Narciso Rivera,

Defendant.

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Index No.: 28609/10
Motion Date: 8/5/13
Motion Cal. No.: 79
Motion Seq. No.: 2

The following papers numbered 1 to 15 read on this motion for an order granting defendant Narciso Rivera summary Judgment pursuant to CPLR §3212, dismissing the complaint and any and all cross claims against her on the basis that plaintiff did not sustain a "serious injury" under Insurance Law §5102(d).

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Notice of Cross-Motion.....	5 - 9
Affirmation in Opposition.....	10 - 12
Reply Affirmation.....	13 - 15

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

Facts

Narciso Rivera ("defendant") moves for summary judgment pursuant to CPLR §3212 on the grounds that Jenny Lopez ("plaintiff Jenny") did not sustain a serious injury under Insurance Law §5102(d). Plaintiff on the counterclaim, Julio Lopez ("Plaintiff Julio"), cross-moves for summary judgment dismissing Plaintiff Jenny's cause of action. Plaintiffs were involved in a

motor vehicle accident with Defendant's vehicle on September 28, 2008. In the Bill of Particulars, Plaintiff Jenny alleges that as a result of the accident she has suffered injuries to her cervical and lumbar spine. Plaintiff Julio alleges loss of consortium.

Analysis

Defendant's motion and plaintiff on the counterclaim's cross-motion for summary judgment pursuant to CPLR §3212 dismissing Plaintiffs' complaint is granted as more fully set forth below.

Threshold

Defendant moves for summary judgment in her favor on the ground that plaintiff Jenny did not sustain a "serious injury" within the meaning of the Insurance Law §5102(d). The statutory provision states, in the 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 a person's customary daily activities for not less than ninety days during one hundred eighty days immediately following the occurrence of the injury of impairment.

Insurance Law §5102(d).

It has been well established that in a motion for summary judgment the proponent must tender evidentiary proof in admissible form to eliminate any material issues of fact, and if the proponent succeeds, the burden then shifts to the party opposing the motion to submit evidentiary proof in admissible form. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980].) Accordingly, when moving for summary judgment on threshold, the burden is on the defendant

to make a prima facie showing that the injuries plaintiff sustained as result of the subject accident are not serious as defined within the meaning of Insurance Law §5102(d). (*Toure v. Avis Rent A Car Sys*., 98 N.Y.2d 345 [Ct App. 1982]; *Lewis v. John*, 81 A.D.3d 905 [2nd Dept. 2011].) A defendant may meet his or her prima facie burden by submitting affidavits or affirmations of medical experts, who, through objective medical testing, conclude that plaintiff's injuries are not serious. (*See Magarin v. Kropf*, 24 A.D3d 733 [2nd Dept. 2005]; *see also Gaddy v. Eyler*, 79 N.Y.2d 955, 956 [1992]; *Morris v. Edmond*, 48 A.D.3d 432 [2nd Dept. 2008].) Where the defendant fails to meet his or her prima facie burden, the motion will be denied, and the court need not review the plaintiff's papers in opposition. (*Cosica v. 938 Trading Corp*., 283 A.D.2d 538 [2nd Dept. 2001].)

Defendant meets her initial burden of establishing that plaintiff Jenny did not sustain a serious injury through submission of the affirmation of Dr. Robert Israel, an Orthopedic Surgeon. (*Jilani v. Palmer*, 83 A.D.3d 786, 787 [2nd Dept. 2011]; *Khaimov v. Armanious*, 85 A.D.3d 978 [2nd Dept. 2001].) Dr. Israel performed an independent medical examination of plaintiff Jenny's cervical and lumbar spine as well as her left shoulder and right leg. The ranges of motion were measured using a goniometer, and the specific measurements, when compared to the norms, were all within the normal ranges. Dr. Israel concluded that plaintiff Jenny had a resolved sprain of the cervical and lumbar spine, but no permanent disability as a result of the accident of record. Therefore, Dr. Israel's objective tests are sufficient to establish a prima facie case that there was no "significant limitation of use of a body function or system" or "permanent consequential limitation" under the meaning of Insurance Law §5102(d). (*Kasim v. Defretias*, 28 A.D.3d 611, 612 [2nd Dept. 2006]; *Staff v. Yshua*, 59 A.D.3d 614 [2nd Dept. 2009]; *Kerzhner v. N.Y. Ubu Taxi Corp.*, 17 A.D.3d 410 [2nd Dept. 2005].)

In addition, defendant provided evidence establishing, prima facie, "that during the 180-day period immediately following the subject accident, [s]he did not have an injury or impairment which, for more than 90 days, prevented [her] from performing substantially all of the acts that constituted [her] usual and customary daily activities." (*Frederique v. Krapf*, 86 A.D.3d 533 [2nd Dept. 2011].) Specifically, plaintiff Jenny testified at her deposition that she was confined to be her bed for just a period of one week following the accident yet still able to leave her house. Furthermore, she was still able to maintain her homemaker duties, such as cooking and cleaning, and was not required to hire anyone to assist her.

Through the submission of the affirmed medical report of defendant's expert, defendant established that plaintiff Jenny 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 Lopez did not sustain a serious injury, the burden of proof shifts to the plaintiff. (*Gladdy v. Eyler*, 79 N.Y.2d 955, 957 [1992]; *Attivissimo v. Kugler*, 226 A.D.2d 658 [2nd Dept. 1996].)

In opposition, plaintiff Jenny failed to meet her burden to raise a triable issue of fact as to whether she sustained a serious injury to her cervical and lumbar spine. Specifically, plaintiff Jenny fails to set forth admissible range motion findings contemporaneous with the subject accident.

Plaintiff Jenny relies on the affirmed reports of Dr. Maxim Tyorkin, an Orthopedic Surgeon, and Dr. Jonathan Kuo, a Pain Management Specialist who examined plaintiff on March 2, 2011 and March 14, 2011, respectively. Dr. Tyorkin concluded in his report that plaintiff Jenny had restricted range of motion in her cervical and lumbar spine. However, Dr. Tyorkin's report is insufficient to raise a triable issue of fact as his examination and purported treatment

took place more than two years after the subject accident. *(D'Orsa v. Bryan*, 83 A.D.3d 646 [2nd Dept 2011]; *Capriglione v. Rivera*, 83 A.D.3d 639 [2nd Dept 2011]*; Sorto v. Morales*, 55 A.D.3d 718 [2nd Dept. 2008].) It is well settled that a plaintiff is required to demonstrate restricted range of motion based on finding contemporaneous to the accident. (*Lewars v. Transit Facility Management Corp.*, 84 A.D.3d 1176 [2nd Dept. 2011]; *Stevens v. Sampson*, 72 A.D.3d 793 [2nd Dept. 2010]; *Jack v. Acapulco Car Service, Inc.* 72 A.D.3d 646 [2nd Dept. 2010].)

Plaintiff Jenny also contends that she went to Halesite Medical PLLC facility several days after the accident, where she received pain management treatment consisting of hot patches, acupuncture, and chiropractic manipulations three times a week for approximately three months. However, plaintiff Jenny has not submitted any medical reports with respect to ranges of motion of her cervical and lumbar spine immediately following the accident.

Because plaintiff Jenny failed to meet her burden to raise a triable issue of fact as to whether she sustained a serious injury to her cervical and lumbar spine, the court need not address plaintiff Julio's claim alleging loss of consortium.

Conclusion

For the reasons set forth above, defendant's motion and plaintiff on the counterclaim's cross-motion for summary judgment pursuant to CPLR §3212 dismissing plaintiffs' complaint is granted and the complaint is dismissed.

Dated: November 21, 2013

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Bernice D. Siegal, J. S. C.