Duarte v Ocasio
2014 NY Slip Op 32724(U)
October 15, 2014
Supreme Court, Suffolk County
Docket Number: 12-20213
Judge: Daniel Martin

[* 1]

SHORT FORM ORDER

INDEX No. 12-20213
CAL No. 14-00074MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 5-13-14 (#001)
MOTION DATE 6-10-14 (#002)
ADJ. DATE 7-15-14
Mot. Seq. # 001 - MD
002 - MD

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CARLOS DUARTE and ROSSBELL DUARTE,

Plaintiffs,

- against -

ALICIA OCASIO and JUAN OCASIO,

Defendants.

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Upon the following papers numbered 1 to 28 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-10; (002) 11-19 ; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 20-23; Reply Affidavits and supporting papers 24-26; 27-28; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by defendants Alicia Ocasio and Juan Ocasio pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Rossbell Duarte, did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied; and it is further

ORDERED that motion (002) by plaintiff on the counterclaim, Carlos Duarte, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Rossbell Duarte, did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

Rossbell Duarte seeks damages for personal injuries allegedly sustained in a motor vehicle accident on October 10, 2011[1], on 1490 5th Avenue at or near its intersection with Spur Drive North in the Town of Islip, Suffolk County, New York, while a passenger in the vehicle operated by his stepfather Carlos Duarte, when their vehicle was struck in the rear by a vehicle operated by Alicia Ocasio, and owned by Juan Ocasio.

In support of motion (001), defendants submitted, inter alia, an attorney's affirmation, copies of the summons and complaint, answer with counterclaim asserted against plaintiff Carlos Duarte, answer to counterclaim, plaintiffs' verified bill of particulars; unsigned but certified transcript of the examination before trial of Rossbell Duarte; reports of Matthew Skolnick, M.D. dated August 20, 2013 concerning his independent orthopedic examination of Rossbell Duarte, and Stephen W. Lastig, M.D. dated March 1, 2014 concerning his independent review of the MRI study dated December 21, 2011 of Rossbell Duarte's lumbar spine.

In support of motion (002), the plaintiff on the counterclaim submitted, inter alia, an attorney's affirmation; and copies of the summons and complaint, answer with counterclaim asserted against plaintiff Carlos Duarte, answer to counterclaim, plaintiffs' verified bill of particulars; unsigned but certified transcript of the examination before trial of Rossbell Duarte; reports of Teresa Habacker, M.D. dated September 10, 2013 concerning her independent orthopedic examination of Rossbell Duarte, and Stephen W. Lastig, M.D. dated March 1, 2014 concerning his independent review of the MRI study dated December 21, 2011 of Rossbell Duarte's lumbar spine.

Pursuant to Insurance Law § 5102 (d), " '[s]erious injury' means 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 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 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the

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[1]The complaint sets forth the date of the accident as October 10, 2011, whereas the bill of particulars sets forth October 28, 2011 as the date of the accident.

burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

By way of his verified bill of particulars, Rossbell Duarte alleges that as a result of this accident, he sustained injuries consisting of: 80% limitation of cervical range of motion; 75% limitation of lumbar range of motion; disc herniations at T10-11 through L1-2; disc herniations at L3-4; annular bulge at L3-4; cervical radiculopathy; lumbar radiculopathy; and constant and severe headache pain.

Expert testimony is limited to facts in evidence (*see* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]). Both Dr. Matthew Skolnick and Dr. Teresa Habacker set forth that they reviewed plaintiff's cervical MRI report of December 21, 2011, NCV/EMG studies from December 1, 2011 to January 5, 2012, orthopedic evaluations reports from Liberty Orthopedics and Orthomed Care, as well as other medical records, however, none of these reports and records have been provided by the moving parties, and they are not in evidence. Failure to provide such medical records and reports raise factual issues concerning their contents and findings.

Dr. Skolnick does not indicate that he reviewed Mr. Duarte's lumbar MRI or shoulder MRI and does not rule out a causal relationship between the findings contained in the report, the injuries claimed by the plaintiff, and the accident. Although Dr. Skolnick diagnosed the plaintiff with cervical, thoracic and lumbar sprains, he does not provide a basis for such diagnosis and does not opine that plaintiff's injuries are not causally related to the accident.

Dr. Habacker reviewed plaintiff's right shoulder MRI of March 16, 2012, but has not set forth the findings, and a copy of the study has not been provided to this court. The plaintiff testified that surgery has been recommended for his right shoulder, but neither Dr. Habacker nor Dr. Skolnick have commented upon the shoulder MRI study, and do not opine as to whether or not the plaintiff is a

candidate for surgery, raising a factual issue. Moreover, it is noted that Dr. Skolnick and Dr. Habacker report different normal lumbar spine range of motion values to which they compared their findings, leaving this court to speculate as to which range of motion values are the normal.

Dr. Lastig has not commented upon plaintiff's cervical MRI study, raising further factual issues and leaving this court to speculate as to the contents in the reports of plaintiff's treating physicians. In his report concerning Rossbell Duarte's lumbar spine, Dr. Lastig opined in a conclusory and unsupported opinion that there is degenerative disc disease with disc desiccation and mild smooth annular bulging at the L3-4 level with no focal disc herniations; however, he does not describe what he means by degenerative disc disease or how long said degenerative disease has been present (***Estella v Geico Insurance Company***, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]; ***Partlow v Meehan***, 155 AD2d 647, 548 NYS2d 239 [2d Dept 1989]). Thus, factual issues exist to whether Rossbell Duarte had degenerative disc disease and, if so, for what duration.

Although the plaintiff has pleaded cervical radiculopathy; lumbar radiculopathy, and constant and severe headache pain as injuries sustained in the subject accident, a report from a neurologist who examined the plaintiff on behalf of the moving defendants has not been submitted, raising further factual issues which preclude summary judgment (*see* ***McFadden v Barry***, 63 AD3d 1120, 883 NYS2d 83 [2d Dept 2009]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Lawyer v Albany OK Cab Co.***, 142 AD2d 871, 530 NYS2d 904 [3d Dept 1988]; ***Faber v Gaugler***, 2011 NY Slip Op 32623U, 2011 NY Misc Lexis 4742 [Sup Ct, Suffolk County, 2011]).

Additionally, the defendants' examining physician did not examine the plaintiffs during the statutory period of 180 days following the accident, thus rendering defendants' physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether plaintiff was able to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the examining physicians do not comment on this period, precluding summary judgment on this category of injury as well.

Rossbell Duarte testified that at the accident scene, he felt pain in his shoulder. He took a week off from work to rest from his injuries. He began chiropractic care and treatment following the accident, three times a week for about six or seven months, and still attends once a month. He had MRI studies of his neck, back and right shoulder due to the pain he continued to experience. He also attended physical therapy about three times a week for approximately six or seven months, and still attends once a month. His treating doctor has suggested surgery for his right shoulder. He was employed by Metro PCS as a salesperson. Because he had to leave work early to attend physical therapy, his employment was terminated about two months after the accident. He has had no prior and no subsequent injuries to those parts of his body he claims to have injured in the subject accident. Prior to the accident, he swam a lot, and he is not able to swim the distance that he was previously able to swim. He played soccer, tennis, and volleyball but can no longer participate in those sports. Prior to the accident, he painted, did repairs at home, and mowed the lawn for his mother and father, but can no longer perform those activities

without difficulty. He used to attend the gym and lifted weights, but he cannot now. He gained weight due to his back injuries, and he still experiences pain in his right shoulder, neck and back.

The foregoing issues raised in the respective moving papers preclude summary judgment. The moving parties failed to satisfy the burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving parties failed to establish prima facie entitlement to judgment as a matter of law, it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, motions (001) and (002) for dismissal of the complaint on the basis that the plaintiff Rossbell Duarte has failed to meet the serious injury threshold defined in Insurance Law §5102 (d) is denied.

Dated: October 15, 2014

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**