

Rolle v Evans
2015 NY Slip Op 32314(U)
December 8, 2015
Supreme Court, New York County
Docket Number: 156936/12
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22**

Index No.: 156936/12

Mot. Seq. 001

Clifford Rolle and Donett Rolle,

Plaintiffs,

-against-

DECISION/ORDER

Portia Evans and James Evans

Defendants.

HON. ARLENE P. BLUTH, JSC

Defendants' motion for summary judgment dismissing the claims of plaintiffs Clifford and Donett Rolle on the ground that they both failed to satisfy the serious injury threshold as defined by Insurance Law §5102(d) is granted only to the extent that the 90/180-day claims of both plaintiffs are dismissed; the motion is otherwise denied.

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Rodriguez v Goldstein*, 182 AD2d 396 [1992]). Such evidence includes "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003], *quoting Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert affidavits indicating that plaintiff's injury was caused by a pre-existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818 [1st Dept 2010], *citing Pommells v Perez*, 4 NY3d 566 [2005]). In order to establish prima facie entitlement to summary judgment under the 90/180 category of the statute, a defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the

accident (*Elias v Mahlah*, 2009 NY Slip Op 43 [1st Dept]). However, a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*id.*).

Once the defendant meets his or her initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury (*see Shinn*, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Further, where the defendant has established a pre-existing condition, the plaintiff's expert must address causation (*see Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]).

Plaintiff Clifford Rolle

In the verified bill of particulars, Clifford Rolle alleges that the subject January 3, 2011 accident aggravated/exacerbated his cervical disc herniations and lumbar disc bulges, and that he sustained a left wrist injury and left shoulder pain.

In support of their motion, defendants submits the affirmed report of Dr. Nason, an orthopedist, who examined Clifford Rolle and measured full ranges of motion in his cervical and lumbar spine, and left wrist and shoulder. Dr. Nason opined that plaintiff had resolved sprains in his neck, back and shoulder and a resolved wrist contusion; she also notes that Clifford Rolle had

lumbar spine surgery in 2008 and a low back injury in 2004.

As for any 90/180 claim, defendants refer to Clifford Rolle's bill of particulars where he indicated only that he was confined to hospital for one day.

Based on the foregoing, defendants have satisfied their burden of establishing prima facie that Clifford Rolle did not suffer a serious injury, and the burden shifts to plaintiff to raise a triable factual question.

In opposition, Clifford Rolle submits the affirmation of Dr. Burshteyn who first examined him 10 days after the accident, and most recently on November 30, 2014, when he measured numerous range of motion restrictions in his cervical and lumbar spine. Dr Burshteyn opined that these injuries are causally related to the subject accident and not to plaintiff's prior spinal surgery and/or work related accident based on his review of plaintiff's records.

Thus, Clifford Rolle raised a triable issue of fact as to his claimed injuries, and the jury must decide which expert(s) to believe. *See Diaz v Guzman*, 115 AD3d 448, 982 NYS2d 21 (1st Dept 2014). However, because defendants demonstrated that plaintiff did not satisfy the 90/180-category of serious injury and Clifford Rolle did not present any evidence sufficient to raise an issue of fact as to that category, his 90/180-day claim is dismissed. *See Arena v Guaman*, 98 AD3d 461, 949 NYS2d 688 (1st Dept 2012).

Plaintiff Donett Rolle

In the verified bill of particulars, Donett Rolle alleges that she sustained a thoracic spine strain/sprain and a cervical spine strain/sprain, aggravation of a pre-existing asymptomatic condition in her cervical and lumbar spine, and a right shoulder injury.

In support of their motion, defendants submit the affirmed report of Dr. Nason who

examined Donett Rolle and measured full ranges of motion in her cervical and lumbar spine, and right shoulder. Dr. Nason found that plaintiff had resolved sprains in her neck, back and shoulder.

As for any 90/180 claim, defendants refers to the bill of particulars wherein Donett Rolle indicated only that she was confined to hospital for one day.

Based on the foregoing, defendants have satisfied their burden of establishing prima facie that Donett Rolle did not suffer a serious injury, and the burden shifts to her to raise a triable factual question.

In opposition, Donett Rolle submits the affirmation of Dr. Burshteyn who states that plaintiff "sought treatment with his office" but he does not state on what date, and that Donett Rolle returned for a follow-up exam on 3/22/11.. Dr. Burshteyn examined Donett Rolle most recently on November 30, 2014 and found numerous range of motion restrictions in her cervical and thoracic spine and right shoulder which he causally relates to the accident (see sur-reply supplemental affirmation).

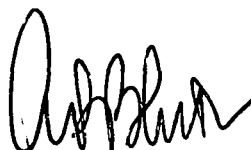
Thus, Donett Rolle raised a triable issue of fact as to her claimed injuries, and the jury must decide which expert(s) to believe. *See Diaz v Guzman*, 115 AD3d 448, 982 NYS2d 21 (1st Dept 2014). However, because defendants demonstrated that Donett Rolle did not satisfy the 90/180-category of serious injury and she did not present any evidence sufficient to raise an issue of fact as to that category, her 90/180-day claim is dismissed. *See Arena v Guaman*, 98 AD3d 461, 949 NYS2d 688 (1st Dept 2012).

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the claims of plaintiffs Clifford and Donett Rolle on the ground that they failed to satisfy the serious injury threshold as defined by Insurance Law §5102(d) is granted only to the extent that the 90/180 day claims of both plaintiffs are dismissed; the motion is otherwise denied.

This is the Decision and Order of the Court.

Dated: December 8, 2015
New York, New York



HON. ARLENE P. BLUTH, JSC