

Martinez v Hasri

2015 NY Slip Op 32412(U)

November 2, 2015

Supreme Court, Queens County

Docket Number: 701854/14

Judge: Timothy J. Dufficy

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X
**PROVIDENCIA MARTINEZ and VERA
BLAND,**

Plaintiffs,

Index No.: 701854/14

Mot. Date: 10/19/15

-against-

Mot. Cal. No. 127

Mot. Seq. 6

**ABDERRAHIM HASRI and GUILLERMO
DELACRUZ,**

Defendants.

-----X
The following papers numbered EF 51 to 63, EF 65 to 76, EF 90 to 96 and EF 109 to 112 by defendant **GUILLERMO DELACRUZ** for an order pursuant to CPLR 3212 granting summary judgment in his favor on the basis that the plaintiffs did not sustain a "serious injury" under Insurance Law §5102(d) and the cross-motion by plaintiff Providencia Martinez for an order pursuant to CPLR 3025 and 3042(b) granting her leave to serve an Amended bill of Particulars.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affirmation-Exhibits	EF 51-63
Notice of Cross-Motion-Affirmation-Exhibits.....	EF 65-76
Affirmation in Opposition-Exhibits	EF 90-93
Reply Affirmation-Exhibits.....	EF 94-96
Affirmation in Opposition (to Cross-Motion)... ..	EF 109-112

Upon the foregoing papers, it is ordered that the motion and cross-motion are decided as follows:

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NOV -9 2015
COUNTY CLERK
QUEENS COUNTY

In this action seeking damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on November 22, 2013, defendant Guillermo Delacruz moves for an order granting summary judgment in his favor and dismissing plaintiff Providencia Martinez's complaint on the basis that the plaintiff Providencia Martinez did not sustain a "serious injury" under Insurance Law §5102(d).

As a general proposition, the proponent of a summary judgment motion of this type must make a prima facie showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (see Licari v Elliot, 57 NY 2d 230 [1982]; Alvarez v Prospect Hospital, 68 NY2d 320 1986]; Zuckerman v City of New York, 49 NY 2d 557 [1980]). The defendant's motion papers must demonstrate, through admissible medical evidence, which may include medical reports and records and affidavits and/or affirmed reports of medical examinations, including range-of-motion testing, that address all of the plaintiff's claims, that the plaintiff did not sustain functional limitations which would constitute either a permanent consequential limitation of use of a body organ, member, a significant limitation of use of body function or system, or a medically determined injury or impairment of a non-permanent nature that prevented the plaintiff from performing substantially all of the material, acts which constituted his or her usual customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]; Choi v Guerrero, 82 AD3d 1080 [2d Dept. 2011]; Jilani v Palmer, 83 AD3D 786 [2d Dept. 2011]). The failure to make a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see e.g. Reed v Righton Limo, Inc., 82 AD3D 1070 [2d Dept. 2011]; Joris v UMF Car & Limo Service, 82 AD3d 1050 [2d Dept. 2011]; Keenum v Atkins, 82 AD3d 843 [2d Dept. 2011]; Pero v Transervice Logistics, 83 AD3d 681 [2d Dept. 2011]).

Here, defendant Guillermo Delacruz's moving papers present proof in admissible form, inter alia, the affirmed report of the defendant's examining physician, othopedist Jonathan D. Glassman, M.D. and radiologist David A. Fisher, M.D. Based upon the foregoing, defendant Delacruz provided proof demonstrating, prima facie, the absence of any condition in plaintiff Providencia Martinez that might arguably meet the serious injury threshold of Insurance law §5102(d). Thus, the burden shifts to the plaintiff

Providencia Martinez to demonstrate the existence of a triable issue of fact. (see Gaddy v Eyler, *supra*).

In opposition, plaintiff Providencia Martinez submits the affirmed report of physician Tim Canty, M.D., dated June 18, 2015. She also submits the affirmed report of physical medicine and rehabilitation specialist, Dr. Nunzio Saulle, M.D., based upon his past treatment of the plaintiff and his recent re-examination of her on September 4, 2015. The physicians adequately document and quantify the functional impairments sustained by the plaintiff Providencia Martinez, based upon objective testing that includes quantified range-of-motion findings of deficits to the plaintiff's neck, head and back. The medical professionals quantify their findings and compare them with normative values, based upon objective range-of-motion deficits in the allegedly injured parts of the body (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 AD3d 367 [2d Dept. 2009]).

Based upon the foregoing, plaintiff Providencia Martinez amply demonstrated that there exists a triable issue of fact as to whether she sustained a serious injury, under the categories alleged under Insurance Law §5102(d), as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903 [2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]). Accordingly, defendant Guillermo Martinez's motion is denied.

Plaintiff Providencia Martinez's cross-motion to amend her bill of particulars to include cervical spine injuries is granted. Ms. Martinez testified at her deposition that, following the subject accident, her *neck*, head and back were hurting (see Martinez tr. at p. 35, lines 21-25. P. 36, lines 1-2; p. 40, lines 12-18; *emphasis supplied*). She also testified that she treated for her back, *neck* and head (see tr, p. 47, lines 15-18; *emphasis supplied*). She was told that her *neck* and back had slipped discs (see tr. p. 51, lines 12-17; *emphasis supplied*). Plaintiff Martinez provided medical records and authorizations in order to permit the defendants to examine these areas, thus there is no surprise. Any other amendments are sequelae to the injuries already alleged. Due to law office failure, the neck injuries were inadvertently omitted from plaintiff's bill of particulars. Dr. Glassman reviewed an MRI report and other records with regard to the plaintiff's cervical

- spine. However, the Court shall permit the defendant to have Dr. Glassman re-examine Ms. Martinez vis a vis her claimed cervical spine injuries, as well as having Dr. Fisher review the plaintiff's cervical spine records, and issue a report should the defendant be so inclined.

Accordingly, for all of the foregoing reasons, it is hereby,

ORDERED, that the motion by defendant Guillermo Delacruz, pursuant to CPLR 3212, granting summary judgment in his favor on the basis that plaintiff Providencia Martinez did not sustain a "serious injury" under Insurance Law §5102(d) is denied; and it is further

ORDERED, that the cross-motion by plaintiff Providencia Martinez for an order pursuant to CPLR 3025 and 3042(b) granting her leave to serve an Amended Bill of Particulars is granted.

The forgoing constitutes the decision and order of this Court.

Dated: November 2, 2015


TIMOTHY J. DUFFICY, J.S.C.

FILED
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COUNTY CLERK
QUEENS COUNTY