

**Idal v Busuio**

2015 NY Slip Op 32717(U)

May 1, 2015

Supreme Court, Rockland County

Docket Number: 030983/2012

Judge: Robert M. Berliner

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF ROCKLAND  
HON. ROBERT M. BERLINER, J.S.C.

-----x  
JEAN IDAL and DAPHNEE IDAL,

Plaintiffs,

DECISION AND ORDER

-against-

Index No.: 030983/2012

ION A. BUSUIOC and ZIRS SERVICE, INC.,

Defendants.

Motion Sequence # 1

-----x  
The following papers numbered 1 to 4 were read on Defendants' motion for summary judgment pursuant to CPLR §3212 and/or dismissal pursuant to CPLR §3211(a)(7) on the ground that Plaintiffs did not sustain a "serious injury" within the meaning of Insurance Law § 5102:

Notice of Motion/Affirmation/Exhibits(A-H).....	1-2
Affirmation in Opposition/Exhibits(A-I).....	3
Reply Affirmation.....	4

Upon the foregoing papers, it is ORDERED that this motion is disposed of as follows:

This personal injury action arises out of a motor vehicle accident that occurred on June 22, 2010 at or near the intersection of Route 59 and Saddle River Road. According to Plaintiffs, a vehicle owned by Defendant Zirs Services Inc. and driven by Defendant Ion A. Busuioc struck their vehicle. According to Plaintiff's verified bill of particulars, Plaintiff Jean Idal sustained the following injuries: herniated disc at L5-S1; bulging discs at C5-C6 and C6-C7 impinging on thecal sac; bulging disc at L4-L5 impinging on thecal sac; cervical radiculopathy; lumbosacral radiculopathy; cervical sprain/strain, lumbar sprain/strain; headaches; depression; anxiety; fear and being emotionally upset and shocked.<sup>1</sup> Plaintiff Daphnee Idal sustained the following injuries: herniated disc at L4-L5

<sup>1</sup> Verified Bill of Particulars at ¶11, annexed as Ex. D to Sep. 4, 2014 Affirmation of Anthony J. Benedict, Esq.

impinging on thecal sac; bulging discs at C6-C7 impinging on thecal sac; bulging disc at L3-L4 impinging on thecal sac; cervical radiculopathy; lumbosacral radiculopathy; cervical sprain/strain, lumbar sprain/strain; restriction of motion; headaches; depression; anxiety; fear and being emotionally upset and shocked.<sup>2</sup>

Defendants seek summary judgment and/or dismissal based upon their assertion that Plaintiffs did not sustain a “serious injury” within the meaning of Insurance Law § 5102. In support, Defendants submit the affirmed medical reports of a neurologist, Stephen R. Fromm, M.D., and a radiologist, Audrey Eisenstadt, M.D.. In their reports, Drs. Fromm and Eisenstadt opine that their examinations of Plaintiffs and pertinent medical records led them to conclude that Plaintiffs did not suffer a “serious injury” as a result of the June 22, 2010 motor vehicle accident.

Regarding Jean Idal, Plaintiffs submit affirmed medical reports of a radiologist, John S. Lyons, M.D. and a neurologist, Nicky Bhatia, M.D.. In his report, Dr. Bhatia disagrees with Dr. Eisenstadt’s findings that the cervical and lumbar spine films are due to degeneration and avers that the films reveal “bulging discs at C5-6 and C6-7 with thecal sac impingement at both in the cervical spine and central herniated disc at L5-S1 and bulging disc at L4-5 with thecal sac impingement in the lumbar spine that are causally related to his motor vehicle accident of 6/22/10 and not due to degeneration or a preexisting condition”.<sup>3</sup> Dr. Lyon’s report following his review of the MRI films and copies of his reports notes “disc bulges at C5-6 and C6-7 with thecal sac impingement at both levels”.<sup>4</sup> Plaintiffs also submit an affidavit of a chiropractor, Marie Lodie Janvier, D.C., which contains range of motion tests conducted directly after the June 22, 2010 accident and medical opinions that the injuries are causally related to this occurrence.

Drs. Bhatia, Lyon and Janvier express similar opinions regarding the injuries sustained by Daphnee Idal.

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<sup>2</sup> *Id.*

<sup>3</sup> Oct. 22, 2014 Report of Nicky Bhatia, M.D. at ¶4, annexed as Ex. F to Oct. 27, 2014 Affirmation of Mark J. Linder, Esq. .

<sup>4</sup> Sep. 18, 2014 Affirmation of John S. Lyons, M.D., annexed as Ex. C to Oct. 27, 2014 Affirmation of Mark J. Linder, Esq.

Insurance Law §5102(d) defines serious injury as

“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”.

Defendants' submissions are sufficient to meet their prima facie burden of establishing that Plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident. *See Toure v. Avis Rent A Car System.*, 98 NY2d 345 [2002]; *Gaddy v. Eyler*, 79 NY2d 955 [1992]. Given this, “[t]he burden then shifted to plaintiff to come forward with sufficient evidence to overcome defendant's motion by demonstrating that she sustained a serious injury within the meaning of the No-Fault Insurance Law (*see, Licari v Elliott*, 57 NY2d 230, 235; *Lopez v Senatore*, 65 NY2d 1017)”. *Gaddy v. Eyler*, 79 NY2d at 957 [1992]. “Although a bulging or herniated disc may constitute a serious injury within the meaning of Insurance Law § 5102(d), a plaintiff must provide objective evidence of the extent or degree of the alleged physical limitations resulting from the disc injury and its duration”. *Monette v Keller*, 281 AD2d 523, 523-24 [2<sup>nd</sup> Dept 2001].

“Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact.” *Anyanwu v Johnson*, 276 AD2d 572 [2d Dept 2000]. Issue finding, not issue determination, is the key to summary judgment. *Krupp v Aetna Casualty Co.*, 103 AD2d 252 [2d Dept 1984]. In deciding such a motion, the Court must view the evidence in the light most favorable to the non-moving party. *See Kutkiewicz v Horton*, 83 AD3d 904 [2d Dept 2011].

“The conflicting medical reports of the parties' respective experts raised triable issues of fact as to whether the plaintiffs sustained serious injuries within the meaning of Insurance Law § 5102 (d) (*see Kraemer v Henning*, 237 AD2d 492 [1997])”. *Garcia v. Long Island MTA*, 2 AD3d 675 [2d Dept 2003]; *Wilcoxon v Palladino*, 122 AD3d 727, 728 [2d Dept 2014][finding that “in light of the conflicting expert medical opinions submitted by the parties, the Supreme Court properly denied the

defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident”].

The conflicting expert opinions submitted in connection with this application, coupled with Plaintiffs’ alleged physical limitations, raise triable issues of fact as to whether Plaintiffs each sustained a “serious injury”. Accordingly, Defendants’ motion seeking summary judgment and/or dismissal is denied in its entirety.

The parties are advised that this matter is scheduled for trial at **9:30a.m. on June 22, 2015**. The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York  
May 1, 2015

ENTER



HON. ROBERT M. BERLINER, J.S.C.

To:

Counsel for Plaintiff  
Harmon, Linder & Rogowsky, Esqs.

Counsel for Defendants  
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