

**Soriano v Rijo**

2016 NY Slip Op 30994(U)

March 24, 2016

Supreme Court, New York County

Docket Number: 150393/14

Judge: Leticia M. Ramirez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 22

-----X  
FELIX SORIANO,  
Plaintiff(s),

Index #: 150393/14  
Mot. Seq: 01

-against-

DECISION/ORDER

HON. LETICIA M. RAMIREZ

CARLOS W. RIJO and DINA MAYASARI,  
Defendant(s).  
-----X

Defendants' motion, pursuant to CPLR §3212, for summary judgment on the basis that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) is denied.

It is well settled that summary judgment is a drastic remedy and cannot be granted where there is any doubt as to the existence of triable issues of fact or if there is even arguably such an issue. *Hourigan v. McGarry*, 106 A.D.2d 845, appeal dismissed 65 N.Y.2d 637 (1985); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The function of a court in deciding a summary judgment motion is to determine whether any issues of fact exist which preclude summary resolution of the dispute between the parties on the merits. *Consolidated Edison Co. v Zebler*, 40 Misc.3d 1230A (Sup. Ct. N.Y. 2013); *Menzel v. Plotnick*, 202 A.D.2d 558 (2nd Dept. 1994). Furthermore, in deciding motions for summary judgment, the Court must accept, as true, the non-moving party's recounting of the facts and must draw all reasonable inferences in favor of the non-moving party. *Warney v Haddad*, 237 A.D.2d 123 (1st Dept. 1997); *Assaf v Ropog Cab Corp.*, 153 A.D.2d 520 (1<sup>st</sup> Dept. 1989); *Menzel v. Plotnick*, *supra*. It is also well settled that the finder of fact must resolve conflicts in expert medical opinions. *Ugarriza v. Schmider*, 46 N.Y.2d 471 (1979); *Andre v. Pomeroy*, *supra*.

Additionally, a bulging or herniated disc may constitute evidence of a serious injury within the meaning of Section 5102 of the New York State Insurance Law. *Newman-Bachhuber v. Hu*, 744 N.Y.S.2d 48 (2nd Dept. 2002); *Lewis v. White*, 274 A.D.2d 455 (2nd Dept. 2000).

In *Lewis v. White*, the Court, in holding that there was an issue of material fact as to whether the plaintiff suffered a serious injury, stated that

“[t]he Supreme Court properly denied the defendants’ separate motions. In support of their respective motions the appellants relied on a Magnetic Resonance Image of the plaintiff’s lumbar spine which revealed a herniated disc at level L5-S1. A disc herniation may constitute a serious injury within the meaning of the Insurance Law. The appellants submitted reports of two doctors who both failed to establish that the disc herniation was not causally related to the subject accident. Moreover, after performing straight left raising tests on the plaintiff, one of the defendants’ doctors found a 20 degree limitation in range of motion. This same doctor causally related these injuries to the subject accident.” *Lewis v. White*, 713 N.Y.S.2d at 121, 122.

In this action, there remain triable issues of fact as to whether plaintiff sustained lumbar disc bulges at L4-5 and L5-S1 as a result of the subject accident and whether plaintiff sustained a “significant” or a “permanent consequential” limitation of his lumbar spine as a result of the subject accident, that preclude the grant of summary judgment in favor of defendants.

In his Bill of Particulars, plaintiff alleges, inter alia, the following injuries as a result of the subject accident of December 12, 2013: lumbar disc bulges at L4-5 and L5-S1.

Defendants contend that plaintiff’s alleged injuries were caused by pre-existing injuries/conditions, stemming from four prior motor vehicle accidents, which allegedly occurred in 2008, September 2010, October 2011 and October 2012. To support this contention, defendants submitted, inter alia, a unsworn report from I.D.F. Medical Diagnostic, P.C. regarding lumbar spine MRI undergone by plaintiff on November 10, 2010 and an affirmed report from radiologist, Dr. Steven Mendelsohn of MRI CT Radiology Consultants, P.C. regarding a lumbar spine MRI undergone by plaintiff on March 1, 2011. The report of the lumbar spine MRI of November 10, 2010 revealed marked straightening of the usual lordosis and “a disc bulge at the L3-4 level where disc material approximates the ventral thecal sac. At this level, there is a contour abnormality of the thecal sac due to encroachment by the annulus fibrosus of the disc.”

However, in his report regarding the lumbar spine MRI of March 1, 2011, Dr. Mendelson states that, although the radiologist from I.D.F. Medical Diagnostic, P.C. on the report of plaintiff’s lumbar spine MRI conducted on November 10, 2010 reported bulging at L3-4, he “feel[s] the bulging is actually at the L4-5 disc. He concluded that plaintiff had “mild age related

degenerative changes” at the L4-5 disc and that his MRI did not reveal any evidence of a focal herniation or any abnormal causality related to the accident of September 26, 2010.

As these MRI reports are conflicting, and as the reports do not address the L5-S1 disc level, the reports only serve to raise triable issues of fact for jury determination. *Hourigan v. McGarry*, 106 A.D.2d 845, appeal dismissed 65 N.Y.2d 637 (1985); *Ugarriza v. Schmider*, 46 N.Y.2d 471 (1979); *Andre v. Pomeroy*, *supra*.

In further support of their motion, defendants submitted the affirmation of neurologist, Dr. Adam Bender, who examined plaintiff on June 9, 2015. Upon his examination, Dr. Bender found that plaintiff had full range of motion of his lumbar spine and opined that plaintiff did not have a neurological disability as a result of the subject accident. Dr. Bender did not definitively state whether plaintiff sustained a lumbar disc bulge as a result of the subject accident. Notably, in his affirmation, Dr. Bender summarizes various medical records and reports that he reviewed relating to three of plaintiff’s four prior accidents. In his summary, Dr. Bender mentions that plaintiff underwent an EMG in November 2010 that indicated, *inter alia*, left L5-S1 radiculopathy and a lumbar spine MRI revealing L2-3, L3-4 and L4-5 disc bulges. The date of this MRI, and the facility at which it was conducted, is not stated. It was presumably after plaintiff’s October 2012, as it is under the subheading for that accident within of Dr. Bender’s summary. However, defendants did not submit the stated MRI report EMG report in support of their motion.

Although defendants can demonstrate the lack of a “serious injury” with plaintiff’s own unsworn medical records/reports, the medical records/reports must be submitted in support of the summary judgment motion and not merely summarized within defendants’ doctor’s affirmation. Therefore, Dr. Bender’s summarization of these medical records/reports have no probative value, since the medical records/reports were not submitted in support of defendants’ motion. *Newton v Drayton*, 305 A.D.2d 303 (1<sup>st</sup> Dept. 2003); *Pagano v Kingsbury*, 182 A.D.3d 268 (2<sup>nd</sup> Dept. 1992).

To rebut defendants’ contentions that plaintiff did not sustain disc bulges at L4-5 and L5-S1 or a “significant” or “permanent consequential” limitation” as a result of the subject accident, plaintiff submitted the affirmation of radiologist Dr. Thomas Kolb dated January 14, 2016 and the affirmed report of Dr. Brian Haftel of Multi-Specialty Pain Management dated October 9,

2015. In his affirmation, Dr. Kolb affirmed his report of plaintiff's lumbar spine MRI conducted on February 20, 2014 at Precision Imaging of New York, which revealed small posterior disc bulges at L4-5 and L5-S1. Dr. Kolb opined that the disc bulges were traumatic in nature and not degenerative.

In his report of Dr. Haftel stated that, upon his examination, he found restricted ranges of motion of plaintiff's lumbar spine, to wit: flexion was to 65 degrees (normal is 90 degrees), extension was to 10 degrees (normal is 35 degrees), left rotation was to 65 degrees (normal is 80 degrees) and right rotation was to 55 degrees (normal is 80 degrees). Dr. Haftel diagnosed plaintiff with, inter alia, lumbar disc bulges at L4-5 and L5-S1; lumbar sprain/strain; and lumbar radiculopathy as a result of the subject accident and opined that the plaintiff's lumbar spine restrictions are permanent.

When viewing the evidence in the light most viewable to plaintiff, this Court finds that there remain triable issues of fact as to whether plaintiff sustained lumbar disc bulges at L4-5 and L5-S1 as a result of the subject accident and as to whether plaintiff sustained a "significant" or "permanent consequential" limitation of his lumbar spine as a result of the subject accident. *Assaf v Ropog Cab Corp., supra.*; *Zuckerman v City of New York, 49 N.Y.2d 557 (1980)*; *Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985)*. *Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986)*;

Accordingly, defendants' summary judgment motion is denied, in its entirety.

This constitutes the Decision/Order of the Court.

Dated: March 24, 2016  
New York, New York

  
HON. LETICIA M. RAMIREZ, J.S.C.