

Torres v Yuqun Chen
2017 NY Slip Op 30582(U)
February 14, 2017
Supreme Court, Suffolk County
Docket Number: 10-24238
Judge: W. Gerard Asher
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compliance conference was conducted in this action on July 21, 2015, and a note of issue and certificate of readiness were filed by plaintiffs on August 11, 2015.

Defendant now moves for summary judgment dismissing the complaint on the ground Insurance Law § 5104 precludes plaintiffs from recovering for non-economic loss, as they did not suffer “serious injury” within the meaning of Insurance Law § 5102 (d). More particularly, defendant asserts the reports of his medical expert establish plaintiffs did not suffer significant or permanent limitation of use of their spine or shoulders due to the subject accident, and that plaintiffs’ own deposition testimony demonstrates they did not suffer injury within the 90/180 category of Insurance Law § 5102 (d). Defendant’s submissions in support of the motion include copies of the pleadings and the bill of particulars, the transcripts of plaintiffs’ deposition testimony, and the sworn medical reports of Dr. Mark Zuckerman, Dr. Anthony Spataro, and Dr. Jessica Berkowitz. At defendant’s request, Dr. Zuckerman, a neurologist, and Dr. Spataro, an orthopedist, performed examinations of plaintiffs in March and April of 2015, and reviewed various medical records and reports related to plaintiffs’ alleged injuries. Also at defendant’s request, Dr. Berkowitz, a radiologist, reviewed the films from magnetic resonance imaging (MRI) examinations of Torres’ cervical and lumbar regions performed in August 2007. She also reviewed the films from an MRI examination of Espinal’s right shoulder conducted in September 2007.

Plaintiffs oppose the motion, arguing that it was not properly served within the 120-day statutory period, and that defendant’s submissions are insufficient to meet his burden on the motion. Plaintiffs also assert that the medical reports prepared by their treating physician, Dr. Joseph Gregorace, raise triable issues as to whether they suffered injuries within the “limitation of use” category of the No Fault Law. In opposition, plaintiffs submit, among other things, the sworn medical reports of Dr. Gregorace, unsworn MRI reports regarding Torres’ cervical and lumbar regions, and unsworn MRI reports regarding Espinal’s cervical region and right shoulder.

Initially, the Court rejects plaintiff’s argument that the motion should be denied as untimely. CPLR 3212 (a) provides that if no date for making a summary judgment motion has been set by the court, such a motion “shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.” Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]). It is undisputed that plaintiff’s current counsel was not served with a copy of the motion papers; rather, the affidavit of service shows defendant served the instant motion on the law firm of Dell, Little, Trovato & Vecere, LLP, by putting a copy of the motion papers in the mail on December 8, 2015. Nevertheless, the application to dismiss the motion as untimely is denied absent evidence that a consent to change attorney was filed with the

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court (*see* CPLR 321 [b]).

It is for the court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established a prima facie case that he or she sustained “serious injury” and may maintain a common law tort action (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). 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.”

A defendant moving for summary judgment on the ground that a plaintiff’s negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a “serious injury” (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyer*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of a serious injury relies on the findings of the defendant’s own witnesses, “those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports” to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff’s deposition testimony and unsworn medical reports and records prepared by the plaintiff’s treating medical providers (*see Elshaarawy v U-Haul Co. of Miss.*, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; *Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see Gaddy v Eyer*, 79 NY2d 955, 582 NYS2d 990; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692; *see generally Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Defendant’s submissions are sufficient to establish a prima facie case that neither Torres nor Espinal sustained a serious physical injury as a result of the subject accident (*see Santucci v Sousa*, 131 AD3d 1036, 16 NYS3d 469 [2d Dept 2015]; *Master v Boiakhtchion*, 122 AD3d 589, 996 NYS2d 116 [2d Dept 2014]; *McIntosh v O’Brien*, 69 AD3d 585, 893 NYS2d 154 [2d Dept 2010]; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; *Rodriguez v Huerfano*, 46 AD3d 794, 849 NYS2d 275 [2d Dept 2007]). The affirmed report of Dr. Spataro states that

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Torres presented at the April 2015 examination with complaints of upper and lower back pain. It states, in relevant part, that Torres exhibited full range of motion in his cervical and lumbar regions, and that no spasm or paraspinal tenderness was detected during the spinal examination. It further states that Torres demonstrated full range of motion in both shoulders, and that clinical tests revealed no evidence of shoulder impingement. Dr. Spataro opines that Torres suffered sprains in his spine and shoulders as a result of the July 2007 accident, and that he is capable of working and carrying out the normal activities of daily living. Similarly, the affirmed report of Dr. Zuckerman states that the March 2015 examination of Torres revealed no evidence of cervical or lumbar radiculopathy or of a central nervous system dysfunction. Dr. Zuckerman concludes there was no evidence Torres suffers from a neurologic dysfunction, impairment or disability. Moreover, the report by Dr. Berkowitz states that the MRI studies of Torres' cervical spine and lumbar spine revealed no herniated or bulging discs and no evidence of traumatic injury.

Dr. Spataro's report concerning Espinal states that she presented at the examination with complaints of pain in her neck, middle back and lower back. The report states that an examination of her cervical and lumbar regions revealed no evidence of spasm or tenderness on palpation; that she had normal motor strength, reflexes and sensation in her upper and lower extremities; and that there was no muscle atrophy. The report states that Espinal exhibited normal range of motion in her cervical and lumbar regions, as well as in her right shoulder. Dr. Spataro diagnoses Espinal as having suffered sprains in her spine and right shoulder due to the accident, and states that such sprains have resolved. He asserts that his examination of Espinal revealed no evidence of any orthopedic disability. Dr. Zuckerman's report states that plaintiff's neurologic examination was normal, with no clinical evidence of cervical radiculopathy, lumbar radiculopathy or central nervous dysfunction. Dr. Berkowitz' report regarding Espinal states that an MRI examination of her right shoulder showed degenerative changes in the acromioclavicular joint, but no evidence of a fracture or other traumatic injury.

Further, the deposition testimony establishes a prima facie case that Torres and Espinal did not sustain a nonpermanent injuries within the 90/180 category (*see Ferazzoli v Hamilton*, 141 AD3d 686, 35 NYS3d 64 [2d Dept 2016]; *Marin v Ieni*, 108 AD3d 656, 969 NYS2d 165 [2d Dept 2013]; *Kreimerman v Stunis*, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]). Torres testified that he returned to his full time position three days after the subject accident, and Espinal testified she returned to her position about three weeks after the accident.

The burden, therefore, shifted to plaintiffs to raise a triable issue of fact (*see Gaddy v Eyer*, 79 NY2d 955, 582 NYS2d 990). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see Ferraro v Ridge Car Serv.*, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; *Mejia v*

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DeRose, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; *Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of the plaintiff or 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 (see *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]; *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865; *Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Cebron v Tuncoglu*, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

Here, the unsworn MRI reports prepared by Dr. Richard Rizzuti were not in admissible form and, therefore, were not considered in the determination of this motion (see CPLR 2106; *Casas v Montero*, 48 AD3d 728, 853 NYS2d 358 [2d Dept 2008]; *Legendre v Siqing Bao*, 29 AD3d 645, 816 NYS2d 495 [2d Dept 2006]; cf. *Irizary v Lindor*, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]). Moreover, the affirmed medical reports of Dr. Gregorace are insufficient to raise a triable issue as to whether Torres or Espinal suffered significant limitations in spinal function due to the accident. Dr. Gregorace’s report concerning Torres states that he treated Torres on four occasions after the subject accident: July 11, 2007, August 1, 2007, August 15, 2007, and September 12, 2007. Although he diagnoses Torres as suffering from post-traumatic disc herniations at levels C6-C7 and L4-L5, traumatic cervical and lumbar radiculopathy, and bilateral shoulder impingement syndrome due to the accident, it is clear from the report that Dr. Gregorace’s conclusions improperly are based upon the unaffirmed reports of other treating physicians (see *Kreimerman v Stunis*, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; *Vilomar v Castillo*, 73 AD3d 758, 901 NYS2d 651 [2d Dept 2010]; *Luna v Mann*, 58 AD3d 699, 872 NYS2d 467 [2d Dept 2009]; *Fiorillo v Arriaza*, 52 AD3d 465, 859 NYS2d 699 [2d Dept 2008]). Further, having examined Torres only four times during the two-month period after the accident, Dr. Gregorace’s opinion that Torres sustained permanent consequential spinal injuries due to the accident is speculative and without probative value (see *Griffiths v Munoz*, 98 AD3d 997, 950 NYS2d 787 [2d Dept 2012]; *Partlow v Meehan*, 155 AD2d 647, 548 NYS2d 239 [2d Dept 1989]).

Likewise, Dr. Gregorace’s conclusion that Espinal suffered significant injuries to her cervical region, lumbar region and right shoulder are based upon the unsworn reports of other physicians (see *Kreimerman v Stunis*, 74 AD3d 753, 902 NYS2d 180; *Vilomar v Castillo*, 73 AD3d 758, 901 NYS2d 651). Also, his conclusion that she suffered significant limitations in cervical and lumbar joint function, as well as in right shoulder joint function, due to the accident is speculative and contrary to the range of motion findings set forth in the report. More specifically, according to Dr. Gregorace’s report, range of motion testing of Espinal’s cervical

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spine performed on July 25, 2007 showed flexion to 50 degrees (60 degrees normal), extension to 50 degrees (50 degrees normal), right rotation to 64 degrees (80 degrees normal), and left rotation to 62 degrees (80 degrees normal). Range of motion testing of Espinal's lumbar spine conducted that same day revealed 74 degrees of flexion (90 degrees normal) and 24 degrees of extension (30 degrees normal), and range of motion testing of her right shoulder revealed 146 degrees of forward flexion (180 degrees normal), 50 degrees of extension (60 degrees normal), 140 degrees of abduction (180 degrees normal), 60 degrees of internal rotation (70 degrees normal), and 70 degrees of external rotations (90 degrees normal). The report indicates the next cervical range of motion test, performed in January 2008, showed plaintiff had 50 degrees of flexion, 50 degrees of extension, 74 degrees of right rotation, and 70 degrees of left rotation. At that same examination, Espinal demonstrated 160 degrees of forward flexion, 60 degrees of extension, and 170 degrees of abduction in her right shoulder. Significantly, such restrictions in cervical joint function and shoulder joint function are not significant within the meaning of Insurance Law § 5102 (d) (*see Irizzary v Lindor*, 110 AD3d 846, 973 NYS2d 296; *Il Chung Lim v Chrabaszcz*, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; *McLoud v Reyes*, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]).

Furthermore, while range of motion measurements of the cervical spine taken in February 2016 allegedly showed Espinal had 32 degrees of flexion, 34 degrees of extension, 36 degrees of right rotation and 54 degrees of left rotation, Dr. Gregorace failed to explain the contradiction between the findings that Espinal had achieved substantially normal range of motion in her cervical region by July 2008 and his findings of substantial restriction in joint function in that area in February 2016. Thus, his finding that she suffers significant restrictions in cervical joint function due to the accident is rejected as conclusory, speculative and tailored to meet the statutory requirements of the No Fault Law (*see Pou v E&S Wholesale Meats, Inc.*, 68 AD3d 446, 890 NYS2d 47 [1st Dept 2009]; *Piperis v Wan*, 49 AD3d 840, 854 NYS2d 489 [2d Dept 2008]; *Vaughan v Baez*, 305 AD2d 101, 758 NYS2d 648 [1st Dept 2003]; *Medina v Zalmen Reis & Assoc.*, 239 AD2d 394, 658 NYS2d 56 [2d Dept 1997]). The Court notes that as there is no indication in the report that Dr. Gregorace measured the amount of right and left lateral extension in Espinal's cervical region contemporaneously with the subject accident, his finding in 2016 of substantial restrictions in such movement are insufficient to raise a triable issue (*see Griffiths v Munoz*, 98 AD3d 997, 950 NYS2d 787; *Lewars v Transit Facility Mgt. Corp.*, 84 AD3d 1176, 923 NYS2d 701 [2d Dept 2011]). It also notes that though he opines Espinal suffers significant restrictions in her right shoulder as a result of the subject accident, Dr. Gregorace states she exhibited full joint function in her right shoulder at the 2016 examination. In addition, other than the initial measurements taken in July 2007, Dr. Gregorace fails to set forth any range of motion findings for Espinal's lumbar spine in his report. In fact, there is no indication in the report that Espinal was treated for an injury to her lumbar spine other than statements that during an August 2007 she reported tenderness on palpation and indicated her lower back "had been feeling better with therapy."

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Even if Dr. Rizzuti's reports concerning plaintiffs' spine were considered, such MRI reports are insufficient to defeat summary judgment. The mere existence of a herniated or bulging disc is not proof of serious injury absent objective evidence of the extent and duration of the alleged physical limitations resulting from the disc injury (see *Scheker v Brown*, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; *Pierson v Edwards*, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]; *Ranford v Tim's Tree & Lawn Serv., Inc.*, 71 AD3d 973, 897 NYS2d 245). The reports prepared by Dr. Rizzuti also do not address the issue of whether the disc herniations allegedly revealed during the MRI examinations of Torres' and Espinal's spines are causally related to the subject accident (see *John v Linden*, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; *Scheker v Brown*, 91 AD3d 751, 936 NYS2d 283; *Sorto v Morales*, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]). Finally, plaintiffs failed to offer competent evidence that they sustained nonpermanent injuries that left them unable to perform their normal daily activities for at least 90 of the 180 days immediately following the accident (see *John v Linden*, 124 AD3d 598, 1 NYS3d 274; *Il Chung Lim v Chrabaszcz*, 95 AD3d 950, 944 NYS2d 236).

Accordingly, defendant's motion for summary judgment dismissing the complaint based on plaintiffs' failure to meet the serious injury threshold is granted.

Dated: Feb. 14, 2017

W. Gerard Asher
J.S.C.

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