

Castro v Aquino

2017 NY Slip Op 32699(U)

October 24, 2017

Supreme Court, Suffolk County

Docket Number: 14-60231

Judge: Joseph Farneti

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ORIGINAL

SHORT FORM ORDER

INDEX No. 14-60231

CAL. No. 16-01888MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 3-23-17

ADJ. DATE 5-11-17

Mot. Seq. # 003 - MD
004 - MD

-----X
FRANCISCO CASTRO and ANA CASTRO,

Plaintiffs,

CANNON & ACOSTA, LLP
Attorney for Plaintiffs
1923 New York Avenue
Huntington Station, New York 11746

- against -

MARTYN, TOHER, MARTYN and ROSSI
Attorney for Defendant
330 Old Country Road, Suite 211
Mineola, New York 11501

NELLY A. AQUINO,

Defendant.
-----X

RUSSO, APOZNANSKI & TAMBASCO
Attorney for Plaintiff Castro on Counterclaim
115 Broad Hollow Road, Suite 300
Melville, New York 11747

Upon the following papers numbered 1 to 47 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-19; 20-37; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 38-45; Replying Affidavits and supporting papers 46-47; Other ____; it is,

ORDERED that the motion (seq. #003) by defendant Nelly Aquino for summary judgment and the motion (seq. #004) by plaintiff Francisco Castro for summary judgment hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant Nelly Aquino for summary judgment dismissing the complaint on the ground that plaintiffs Francisco Castro and Ana Castro's injuries failed to meet the serious injury threshold requirement of Insurance Law § 5102(d) is denied; and it is further

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ORDERED that the motion by plaintiff Francisco Castro for summary judgment dismissing the counterclaim against him on the ground that plaintiff Ana Castro's injuries failed to meet the serious injury threshold requirement of Insurance Law § 5102 (d) is denied, as moot.

Plaintiffs Francisco Castro and Ana Castro commenced this action to recover damages for injuries they allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Fifth Avenue and Spur Drive South, Bay Shore, New York, on December 19, 2012. It is alleged that the accident occurred when the vehicle owned and operated by defendant Nelly Aquino was struck in the rear by the vehicle owned and operated by plaintiff Francisco Castro when the Castro vehicle attempted to avoid another vehicle that ran a red traffic light. At the time of the accident, plaintiff Ana Castro was riding as a front seat passenger in the vehicle operated by her husband, plaintiff Francisco Castro. By their bill of particulars, plaintiffs alleges that Francisco Castro sustained various personal injuries as a result of the subject collision, including disc herniations at levels C3 through C6 and levels T11-T12, and L4-L5, and disc bulges at levels C4 through C7, and L1 through S1. In addition, plaintiffs also allege that Ana Castro sustained numerous personal injuries due to the subject accident, including a compression fracture at level T3, disc herniations at levels T2-T3 and C2 through C7, and a disc bulge at level C7-T1.

Defendant now moves for summary judgment on the basis that plaintiffs' alleged injuries do not meet the serious injury threshold requirement of Section 5102 (d) of the Insurance Law. In support of the motion, defendant submits copies of the pleadings, plaintiffs' deposition transcripts, and the sworn medical reports of Dr. Teresa Habacker and Dr. Jonathan Luchs. At defendant's request, Dr. Habacker conducted an independent orthopedic examination of plaintiffs on February 24, 2015. Also at defendant's request, Dr. Jonathan Luchs performed an independent radiological review of the magnetic resonance images ("MRI") films of Francisco Castro's cervical and lumbar regions of his spine taken on March 3, 2013, and of Ana Castro's right knee taken on November 14, 2013, and her brain taken on January 21, 2013. In addition, Dr. Luchs performed an independent radiological review of the MRI films of Ana Castro's cervical spine taken on August 30, 2012, and on January 21, 2013. Plaintiff Francisco Castro also moves for summary judgment dismissing the counterclaim against him on the basis that plaintiff Ana Castro has not sustained a serious injury within the meaning of the Insurance Law as a result of the subject accident. Plaintiff Francisco Castro relies upon the same evidence as defendant in support of the motion for summary judgment.

Plaintiffs oppose the motion on the grounds that defendant failed to make a *prima facie* showing that they did not sustain a serious injury as a result of the subject collision, and that the evidence submitted in opposition demonstrates that they sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law. In opposition to the motion, plaintiffs submit Ana Castro's deposition transcript, photographs of their vehicle and of Ana Castro following the accident, and the sworn medical reports of Dr. Steven Winter, Dr. Nicholas Martin, and Dr. Harold Tice.

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries,

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to be decided by a jury would defeat the statute's effectiveness (*see Licari v Elliott, supra*). Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see Insurance Law § 5104 [a]; Martin v Schwartz, 308 AD2d 318, 766 NYS2d 13 [1st Dept 2003]*). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*see Pommells v Perez, 4 NY3d 566, 797 NYS2d 380 [2005]; Gaddy v Eyler, 79 NY2d 955, 582 NYS2d 990 [1992]; Martin v Schwartz, supra*).

Insurance Law § 5102 (d) defines a "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 seeking summary judgment on the ground that a plaintiff's negligence claim is barred under 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., supra; Gaddy v Eyler, 79 NY2d 955, 582 NYS2d 990 [1992]*). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], 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 may also establish entitlement to summary judgment, using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see Fragale v Geiger, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; Grossman v Wright, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; Vignola v Varrichio, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; Torres v Micheletti, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]*). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see Dufel v Green, 84 NY2d 795, 622 NYS2d 900 [1995]; Tornabene v Pawlewski, 305 AD2d 1025, 758 NYS2d 593 [2d Dept 2003]; Pagano v Kingsbury, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]*). However, if a defendant does not establish a *prima facie* case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see Burns v Stranger, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; Rich-Wing v Baboolal, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; see generally Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 487 NYS2d 316 [1985]*).

Here, defendant failed to establish that plaintiff Francisco Castro did not sustain an injury within the meaning of the serious injury threshold requirement of Insurance Law § 5102 (d) as a result of the subject accident (*see Toure v Avis Rent A Car Sys., supra; Gaddy v Eyler, supra; Chul Koo Jeong v Denike, 137 AD3d 1189, 28 NYS3d 393 [2d Dept 2015]*). Despite defendant's examining radiologist,

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Dr. Luchs, stating in his medical reports that Francisco Castro suffers from longstanding pre-existing degenerative changes in his spine, defendant's examining orthopedist, Dr. Habacker, opined that Francisco Castro was mildly disabled for approximately three to six months following the subject accident, that it was reasonable for restrictions to be placed upon heavy lifting, pushing and pulling by his doctors, and that the relationship between Francisco Castro's diagnosed injuries and the subject accident were causally related. In addition, Dr. Habacker, during her examination of Francisco Castro, which occurred approximately three years after the subject accident, found significant range of motion limitations in his cervical spine, although she concluded that the strains and sprains to his spine were resolved, that his prognosis was good, and that he did not have orthopedic disability (*see Goldman v Tilitz*, 79 AD3d 1097, 914 NYS2d 905 [2d Dept 2010]; *Ortiz v S&A Taxi Corp.*, 68 AD3d 734, 891 NYS2d 112 [2d Dept 2009]; *Delayhaye v Caledonia Limo & Car Serv., Inc.*, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]).

Defendant also failed to show that plaintiff Ana Castro did not sustain a serious injury within the meaning of Section 5102 (d) of the Insurance Law as a result of the subject accident (*see Charles v Howard*, 78 AD3d 879, 912 NYS2d 407 [2d Dept 2010]; *Guzman v Joseph*, 50 AD3d 741, 855 NYS2d 638 [2d Dept 2008]; *Joseph v Hampton*, 48 AD3d 638, 852 NYS2d 335 [2d Dept 2008]). Defendant relies upon the affirmed medical report of Dr. Habacker, her examining orthopedist, who examined plaintiff Ana Castro approximately three years after the subject accident on February 24, 2015. During her examination of Ana Castro, Dr. Habacker found significant limitation in the range of motion of Ana Castro's cervical spine and shoulders despite stating that the cervical and left shoulder strain/sprain that she sustained as a result of the subject accident were resolved, and that she could continue her normal activities of daily living without restrictions, including working her regular duties (*see Rhodes v Stoddard*, 79 AD3d 997, 912 NYS2d 908 [2d Dept 2010]; *Kjono v Fenning*, 69 AD3d 581, 893 NYS2d 157 [2d Dept 2010]; *Held v Heideman*, 63 AD3d 1105, 883 NYS2d 246 [2d Dept 2009]). Following this examination of Ana Castro, Dr. Habacker submitted an addendum to her original affirmed medical report, dated January 27, 2017, in which she opined that her original opinions remain unchanged, although the additional medical records that she reviewed were an MRI examination of Ana Castro's cervical spine, which showed a disc bulge at C7-T1 and cervical spine straightening, and an MRI study of Ana Castro's lumbar spine, which revealed degenerative changes involving the lumbar spine, most prominent at level L4-L5. However, Ana Castro, in her bill of particulars, has not alleged any injuries to her lumbar spine as a result of the subject accident, and she has alleged more than just injury to level C7-T1 of her cervical spine as a result of the subject collision (*see e.g. Greenidge v Righton Limo, Inc.*, 43 AD3d 1109, 841 NYS2d 791 [2d Dept 2007]; *DeVille v Barry*, 41 AD3d 763, 839 NYS2d 216 [2d Dept 2007]).

Moreover, notwithstanding the fact that defendant's examining radiologist, Dr. Luchs, states in his medical report that a review of the MRI films of plaintiff Ana Castro's cervical spine fail to show any evidence of a fracture, Ana Castro's cervical spine MRI reports, dated January 21, 2013 and March 5, 2013, demonstrate that she sustained a compression fracture of the T3 vertebra, which was not present on her prior MRI study of August 30, 2012.

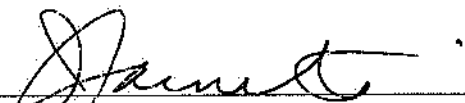
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Thus, defendant's experts' findings are in conflict with each other, and as a result it cannot be said that defendant has eliminated all triable issue of fact or demonstrated that the alleged injuries sustained by plaintiffs are not causally related to the subject accident (*see Kearney v Garrett*, 92 AD3d 725, 938 NYS2d 349 [2d Dept 2012]; *Kelly v Ghee*, 87AD3d 1054, 929 NYS2d 763 [2d Dept 2011]; *Ocasio v Zorbas*, 14 AD3d 499, 789 NYS2d 166 [2d Dept 2005]).

Since defendant failed to meet her *prima facie* burden, the Court need not address the sufficiency of whether plaintiffs' papers submitted in opposition raised a triable issue of fact as to whether they sustained a serious injury within the meaning of the Insurance Law (*see Smith v Hartman*, 73 AD3d 736, 899 NYS2d 648 [2d Dept 2010]; *Quiceno v Mendoza*, 72 AD3d 669, 897 NYS2d 643 [2d Dept 2010]). Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

Having determined that defendant failed to establish that plaintiff Ana Castro did not sustain a serious injury as a result of the subject accident, plaintiff Francisco Castro's motion for summary judgment dismissing the counterclaim against him on the same grounds is denied, as moot.

Dated: October 24, 2017



Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION NON-FINAL DISPOSITION