

Nieves v Kolenovic
2018 NY Slip Op 31631(U)
July 16, 2018
Supreme Court, New York County
Docket Number: 156222/2014
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22

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LISA NIEVES, DANIELLE LALUZ, AN INFANT UNDER THE AGE OF EIGHTEEN YEARS OLD BY HER MOTHER NATURAL GUARDIAN LISA NIEVES, NEVAEHA LALUZ, AN INFANT UNDER THE AGE OF FOURTEEN YEARS OLD BY HER MOTHER NATURAL GUARDIAN LISA NIEVES, JAYDA LALUZ, AN INFANT UNDER THE AGE OF FOURTEEN YEARS OLD BY HER MOTHER NATURAL GUARDIAN LISA NIEVES

INDEX NO. 156222/2014
MOTION DATE 06/06/2018
MOTION SEQ. NO. 002

Plaintiff,

- v -

DECISION AND ORDER

SULJO KOLENOVIC, AZEMINA KOLENOVIC,

Defendant.

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that defendants motion for summary judgment, pursuant to CPLR 3212, in favor of defendants on the issue of damages and for any possible claim of economic loss is granted in part and denied in part. Plaintiffs Lisa Nieves, plaintiff D.L, an infant under the age of eighteen years old by her Mother and Natural Guardian Lisa Nieves, N.L., an infant under the age of fourteen years by her Mother and Natural Guardian Lisa Nieves, and J.L., an infant under the age of fourteen years by her Mother and Natural Guardian Lisa Nieves (hereinafter "the plaintiffs") allege that the plaintiffs were seriously injured on October 9, 2013, at or near the intersection of 30th Street and Broadway in the County of Queens, City and State of New York, when a vehicle operated by defendant Azemina Kolenovic and owned by defendant Suljo Kolenovic struck a vehicle operated by plaintiff Lisa Nieves that was

transporting the plaintiffs. This decision and order addresses defendants' motion for summary judgment in favor of defendants against the plaintiffs for failure to show the existence of a serious injury as defined under Insurance Law 5102(d). The decision and order are as follows:

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the “serious injury” threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a “permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system”]).

The Court of Appeals has found that a defendant's motion for summary judgment as to serious injury may be denied where a plaintiff provides a treating doctors affidavit which states that plaintiff's injuries include a limitation of only 10 degrees (*Lopez v Senatore*, 65 NY2d 1017, 1020 [1985] [finding that such a limitation combined with the physician's opinion that there was a significant limitation of use of body function or system is sufficient to deny defendants summary judgment]).

The Court notes that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dep’t 1992], citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1st Dep’t 1990]). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence (*See Ugarriza v Schmieder*, 46 NY2d 471, 475-476 [1979]).

Plaintiff Lisa Nieves Alleged Injuries

Here, defendants allege that plaintiff Lisa Nieves injuries are not casually related to the alleged accident and arose due to a chronic degenerative process. Defendants provide the sworn report by Dr. Stuart J. Hershon who opines that plaintiff Lisa Nieves has a normal range of motion in the cervical spine, lumbar spine, right shoulder, left shoulder, right wrist and left wrist. Dr. Hershon’s report found that while an MRI of plaintiff’s right wrist revealed a tendinosis and tear, that plaintiff’s injuries to the wrist “suggest a chronic degenerative process as opposed to an acute traumatic event. Evaluation of this MRI examination reveals no causal relationship between the claimant’s alleged accident and the findings on this MRI examination” (Mot. Exh M). Thus, defendants have satisfied their burden as to D.L. and the burden shifts to the plaintiffs to demonstrate an issue of fact.

The plaintiffs, in opposition, proffer the affirmation of Dr. Bodega Negrea who examined plaintiff over 4 years after the incident at issue. Dr. Negrea found that to this day plaintiff’s injuries prevail and are considered serious and permanent in nature. Dr. Negrea affirmed that it is his expert medical opinion within a reasonable degree of medical certainty that the injuries

sustained by Lisa Nieves are causally related to the incident at issue. Dr. Negrea's affirmation report compares the normal range of motion of an average patient to that of the plaintiff and affirmed that, plaintiff, at present, suffers from a 17% loss of extension, 13% loss of right rotation, and 13% left rotation to her cervical spine (Exh B, ¶ 4). Thus, having demonstrated that an issue of fact exists as to the range of motion of plaintiff's cervical spine and a causal link of the incident to said injuries, the plaintiffs have satisfied their burden and defendants motion is denied as to plaintiff Lisa Nieves.

Plaintiff D.L.'s Alleged Injuries

As to plaintiff D.L., defendants allege that plaintiff's alleged complaints of cervical and lumbar spine sprains do not meet the threshold of serious injury. Defendants provide the report of Dr. Stuart J. Hershon, who opines that plaintiff D.L. has a normal range of motion and that the injuries having been resolved are not of a permanent nature (Mot, Exh J). Thus, defendants have satisfied their burden as to D.L. and the burden shifts to the plaintiffs to demonstrate an issue of fact. In opposition, the plaintiffs fail to raise an issue of fact and point to the affirmation of Dr. Bogdan Negrea who finds that plaintiff D.L. merely suffered a loss of 4% range of motion to the cervical spine and 5% loss of range of motion to the lumbar spine. Dr. Negrea's affirmation fails to demonstrate normal range of motion and compare it to plaintiff D.L.'s range of motion. Thus, plaintiff has failed to raise an issue of fact and defendants motion is granted as to plaintiff D.L.

Plaintiff J.L.'s Alleged Injuries

As to plaintiff J.L. defendants allege that plaintiff has not suffered a serious injury and has no decreased range of motion to his cervical spine and lumbar spine. Plaintiff initially complained of a cervical sprain and a lumbar sprain. Dr. Hershon examined plaintiff and affirms that plaintiff's cervical spine and lumbar spine have the range of motion of that of a normal

person, plaintiff's injury is resolved and is not permanent in nature (Mot, Exh L at 2). Thus, defendants have satisfied their burden as to J.L. and the burden shifts to the plaintiffs to demonstrate an issue of fact.

In opposition, the plaintiffs provide the affirmation of Dr. Negrea in which he states that J.L. suffered a loss of 4% to range of motion. This diagnosis reveals a minimal loss in range of motion and does not compare plaintiff to that of the average normal person. Dr. Negrea states that J.L. suffers from lumbosacral disc syndrome, lower back pain, and lumbosacral myofascitis but does not specify how he came to his conclusion and nor explain what type of limitation the conditions created. This affidavit is conclusory and such an affidavit has been found by the Appellate Division First Department to be insufficient to raise a triable issue of fact (*Fernandez v Mercedes*, 45 AD3d 385, 386 Dep't 2007) [finding that absent description of the objective nature of a physician's findings, a party's doctor's affidavit must be viewed as conclusory and is insufficient to establish a serious injury]). Thus, plaintiff has failed to raise an issue of fact and the branch of defendants' motion for summary judgment in favor of defendant as to the serious injury of plaintiff J.L. is granted.

Plaintiff N.L.'s Alleged Injuries

Finally, defendants argue that plaintiff N.L. has not suffered a serious injury and has normal cervical and lumbar spine range of motion. Defendants submit the sworn medical report of Dr. Hershon which states that the plaintiff has a normal range of motion and suffered a cervical and lumbar spine sprain at the time of the incident which has since fully healed (Mot, Exh L). Thus, defendants have satisfied their burden as to N.L. and the burden shifts to the plaintiffs to demonstrate an issue of fact.

In opposition, the plaintiffs provide the affirmation of Dr. Negrea in which he states that N.L suffered a loss of 5% to range of motion in the lumbar spine (Aff in Op, Exh C). This diagnosis reveals a minimal loss in range of motion and while Dr. Negrea states that he used a JTECH Tracker ROM to perform tests, he does not compare plaintiff to that of the average normal person (*id.*) Dr. Negrea states that N.L. suffers from tenderness and has injuries that are of a permanent nature which exhibit limitation of motion to the lumbar spine (*id.*) This affidavit is conclusory and as demonstrated above, such an affidavit is insufficient to raise a triable issue of fact (*Fernandez v, 45 AD3d at 386*). Thus, plaintiff has failed to raise an issue of fact and the branch of defendants' motion for summary judgment in favor of defendant as to the serious injury of plaintiff N.L. is granted.

Accordingly, it is

ORDERED that the branch of defendants' motion for summary judgment in favor of defendants against plaintiff Lisa Nieves for failure to show the existence of a serious injury as defined under Insurance Law 5102(d) is denied; and it is further

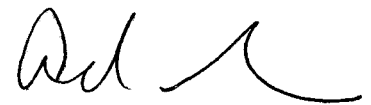
ORDERED that the branch of defendants' motion for summary judgment in favor of defendants against plaintiff N.L., plaintiff D.L., and plaintiff J.L. for failure to show the existence of a serious injury as defined under Insurance Law 5102(d) is granted; and it is further

ORDERED that the causes of action alleged in the Complaint by plaintiff N.L., plaintiff D.L. and plaintiff J.L. are herein dismissed and that the caption of this action be amended to reflect the sole remaining plaintiff as plaintiff Lisa Nieves; and it is further

ORDERED that within 30 days of entry the defendants shall serve a copy of this decision/order upon the County Clerk and the Clerk of Trial Support at room 148 of 60 Centre Street, New York, NY, who shall amend the caption to reflect the remaining plaintiff; and it is further

ORDERED that within 30 days of entry, the defendants shall serve a copy of this decision/order upon the plaintiffs with notice of entry.

This constitutes the Decision/Order of the Court.



ADAM SILVERA, J.S.C.

7/16/2018
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE