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| <b>Martinez v Moreno</b>                                                                                                                                                                                                       |
| 2018 NY Slip Op 32800(U)                                                                                                                                                                                                       |
| October 31, 2018                                                                                                                                                                                                               |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 157281/2015                                                                                                                                                                                                     |
| Judge: Adam Silvera                                                                                                                                                                                                            |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

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

-----X  
NICOLE MARTINEZ, YISELL ALCANTARA, JOSE GARCIA

INDEX NO. 157281/2015

Plaintiff,

MOTION DATE 10/17/2018,  
10/17/2018

- v -

FABIOLA MORENO, JOHN DOE,

MOTION SEQ. NO. 004 005

Defendant.

**DECISION AND ORDER**

-----X  
HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 44, 45, 46, 47, 53, 54, 55, 56, 57, 58, 61, 62, 65, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 89

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER

The following e-filed documents, listed by NYSCEF document number (Motion 005) 48, 49, 50, 51, 59, 63, 66, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 90

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER

Upon the foregoing papers, it is ordered that defendant's motions are denied for the reasons set forth below. Before the court are two motions, motion sequence 004 and motion sequence 005.

Defendant's motion, motion sequence 004, is for an order for summary judgment to dismiss the complaint of plaintiff, Nicole Martinez and plaintiff, Yisell Alcantara, on the grounds that plaintiffs' injuries do not constitute a "serious injury" as defined by Insurance Law § 5102(d).

Plaintiff, Nicole Martinez, and plaintiff, Yisell Alcantara, oppose the motion.

Plaintiff, Jose Garcia, cross-moves for an order for summary judgment to dismiss the complaint of plaintiff, Nicole Martinez, and plaintiff, Yisell Alcantara, on the grounds that plaintiffs' injuries do not constitute a "serious injury" as defined by Insurance Law § 5102(d).

Defendant's motion, motion sequence 005, is for an order for summary judgment to dismiss the complaint of plaintiff, Jose Garcia, on the grounds that plaintiff, Nicole Martinez, and plaintiff, Yisell Alcantara's injuries do not constitute a "serious injury" as defined by Insurance Law § 5102(d). Plaintiff, Nicole Martinez, and plaintiff, Yisell Alcantara, oppose the motion.

### **BACKGROUND**

The suit at bar stems from an incident which occurred on July 4, 2013, on the Major Deegan Expressway, between Fordham Avenue and 230<sup>th</sup> Street in the County of Bronx, City and State of New York County, City, and State of New York, when a vehicle operated by defendant, Fabiola Moreno and/or defendant, "John Doe", the name being fictitious, struck a vehicle operated by plaintiff, Jose Garcia, and transporting plaintiff, Nicole Martinez, and plaintiff, Yisell Alcantara, which allegedly led to the "serious injury" of all three plaintiffs.

The action was commenced through the filing and service of a Summons and Complaint dated July 15, 2015. Issue was joined on behalf of the defendant, Fabiola Moreno, by service of an Answer dated October 20, 2015. Defendant filed counterclaim in response against plaintiff Jose Garcia, to be held liable to defendant for any judgment recovered by plaintiffs against defendant, Moreno. Defendant's counterclaim alleges that if plaintiffs were caused damages through negligence, carelessness and recklessness, other than that of their own doing, said damages were caused by plaintiff Garcia.

### **DISCUSSION**

#### **Mot. Seq. 004 & 005 Summary Judgment (Serious Injury)**

Defendant's motion, for summary judgment, pursuant to CPLR 3212, in favor of defendant on the issue of "serious injury" as defined under Section § 5102(d) of the Insurance

Law is denied. “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”]).

Under 5102(d), a serious injury is defined as:

“(9) (a) a medically determined injury or impairment of a non-permanent nature (b) which prevents the injured person from performing substantially all of the material acts (c) which constitute such person’s usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence.”

**Plaintiff Nicole Martinez**

Here, defendant alleges that plaintiff Martinez has failed to demonstrate the existence of a “serious injury” as defined under Section 5102(d) of the Insurance Law. In support of their argument, defendant submits the affirmations of Dr. Stuart Hershon and the deposition of

plaintiff Martinez. In an April 13, 2017, report, Dr. Hershon recorded that plaintiff did not suffer from any loss of range of motion or any disability (Mot, Exh F). Further, defendant claims that plaintiff's deposition, where she testified to having missed only five days of school, demonstrate that she has not been prevented from carrying out her usual daily activities for more than 90 days during the 180 days immediately following the occurrence. Thus, defendant has made a prima facie showing of entitlement to summary judgment and the burden shifts to plaintiffs.

In opposition, plaintiffs submit the August 7, 2018, report of Dr. Albert Villafuerte who concludes that plaintiff "has partial permanent injury and the prognosis for a full and complete recovery is poor" (Aff in Op, Exh 1). Dr. Villafuerte recorded losses of range of motion in the lumbar spine ranging from 17% to 22% (*id.*). Thus, plaintiffs have raised an issue of fact precluding defendant's motion for summary judgment as to "serious injury" of plaintiff Martinez under the Insurance Law.

#### **Plaintiff Yisell Alcantara**

Here, defendant alleges that plaintiff Alcantara has failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law. In support of their argument, defendant submits the affirmations of Dr. Stuart Hershon and Dr. Evan Mair. In an April 13, 2017, report, Dr. Hershon recorded that plaintiff did not suffer from any loss of range of motion or any disability (Mot, Exh G). Further, in a March 27, 2017, report, Dr. Evan Mair recorded that plaintiff Alcantara has multilevel degenerative disc desiccation, narrowing and bulging, and absence of disc tear or herniation which are not causally relayed to the accident at issue (*id.*, Exh H). Thus, defendant has made a prima facie showing of entitlement to summary judgment and the burden shifts to plaintiffs.

In opposition, plaintiffs submit the June 15, 2018, report of Dr. Albert Villafuerte who concludes that plaintiff “has partial permanent injury and that prognosis for a full and complete recovery is poor” (Aff in Op, Exh 3). Dr. Villafuerte recorded losses of range of motion in the lumbar spine ranging from 20% to 33% loss (*id.*). Thus, plaintiffs have raised an issue of fact precluding defendant’s motion for summary judgment as to “serious injury” of plaintiff Alcantara under the Insurance Law.

**Plaintiff Jose Garcia**

Here, defendant alleges that plaintiff Alcantara has failed to demonstrate the existence of a “serious injury” as defined under Section 5102(d) of the Insurance Law. In support of their argument, defendant submits plaintiff, Garcia’s deposition and the affirmations of Dr. Stuart Hershon and Dr. Evan Mair. In a February 22, 2018, report, Dr. Hershon affirmed that plaintiff had a full range of motion in the cervical spine, thoracic spine, lumbar spine, left shoulder and left arm (Mot 005, Exh E). Further, in a February 2, 2018, report, Dr. Evan Mair recorded that plaintiff, Alcantara, has multilevel degenerative disc desiccation and bulging, and absence of disc tear or herniation which are not causally relayed to the accident at issue (*id.*, Exh H). Thus, defendant has made a *prima facie* showing of entitlement to summary judgment and the burden shifts to plaintiffs.

In opposition, plaintiffs submit the affidavit of a chiropractor, Dr. Henry Hall, Dr. who treated plaintiff Garcia until November 14, 2013, when he determined plaintiff “to have reached maximum medical improvement and that any further treatment would be palliative in nature” (Aff in Op 005, Exh 4, ¶4). Dr. Hall treated plaintiff previously for a prior accident which occurred in 1999 and concluded that the prior injuries were not a cause of the injuries for which Dr. Hall found him to have sustained as a result of the accident at issue (*id.*, ¶ 5). Dr. Hall

attaches copies of his report, dated February 8, 2014 which report details from a July 12, 2013 as well as a November 14, 2013 examination. Further, Dr. Hall attaches a report dated August 6, 2018 which reports details of the most recent examination of plaintiff in which Dr. Hall found restrictions to plaintiff Garcia's cervical spine and lumbar spine (*id.*, ¶¶ 9-6). Plaintiffs have raised an issue of fact precluding defendant's motion for summary judgment as to "serious injury" of plaintiff Garcia under the Insurance Law.

#### **Garcia Cross-Motion**

Pursuant to the aforementioned reasons, plaintiff on the Counter-claim, Jose D Garcia's cross motion for an order for summary judgment to dismiss the complaint of plaintiffs, Nicole Martinez and Yisell Alcantara, on the grounds that plaintiff's injuries do not constitute a "serious injury" as defined by Insurance Law § 5102(d) is denied.

#### **Conclusion**

Defendant's motions, motion sequence 004 and motion sequence 005 and plaintiff Jose Garcia's cross-motion are denied in their entirety as plaintiffs have demonstrated issues of fact as to plaintiff Garcia, plaintiff Alcantara and plaintiff Martinez precluding summary judgment on the issue of the plaintiffs' serious injuries.

Accordingly, it is

ORDERED that Defendant's motion, motion sequence 004, is for an order for summary judgment to dismiss the complaint of plaintiffs, Nicole Martinez and Yisell Alcantara, on the grounds that plaintiffs' injuries do not constitute a "serious injury" as defined by Insurance Law § 5102(d) is denied; and it is further

ORDERED that Defendant's motion, motion sequence 005, is for an order for summary judgment to dismiss the complaint of plaintiff, Jose Garcia, on the grounds that plaintiffs'

injuries do not constitute a “serious injury” as defined by Insurance Law § 5102(d) is denied; and

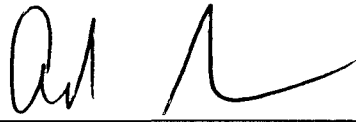
it is further

ORDERED that plaintiff Jose Garcia’s motion for an order for summary judgment to dismiss the complaint of plaintiff, Nicole Martinez, and plaintiff, Yisell Alcantara, on the grounds that plaintiffs’ injuries do not constitute a “serious injury” as defined by Insurance Law § 5102(d) is denied; and it is further

ORDERED that all parties appear for a compliance conference on November 5, 2018, at 9:30AM in room 103 of 80 Centre Street; and it is further

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

This constitutes the Decision/Order of the Court.

|                       |                                                                             |                                                                                      |                                    |
|-----------------------|-----------------------------------------------------------------------------|--------------------------------------------------------------------------------------|------------------------------------|
| <u>10/31/2018</u>     |                                                                             |  |                                    |
| DATE                  |                                                                             | ADAM SILVERA, J.S.C.                                                                 |                                    |
| CHECK ONE:            | <input type="checkbox"/> CASE DISPOSED                                      | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION                            |                                    |
|                       | <input type="checkbox"/> GRANTED <input checked="" type="checkbox"/> DENIED | <input type="checkbox"/> GRANTED IN PART                                             | <input 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 |