

Esposito v Anytime Constr., Inc.

2018 NY Slip Op 34280(U)

November 6, 2018

Supreme Court, Suffolk County

Docket Number: Index No. 619187/16

Judge: Vincent J. Martorana

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SHORT FORM ORDER

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**Supreme Court of the State of New York
IAS Part 23 - County of Suffolk**

PRESENT: Hon. Vincent J. Martorana

**MICHAEL A. ESPOSITO and JANINE
ESPOSITO,**

Plaintiffs,

- against-

**ANYTIME CONSTRUCTION, INC., and
MILTON C. GUEVARA,**

Defendants.

ORIG. RETURN DATE: 2/15/18

ADJOURNED DATE: 9/6/18

MOTION SEQ. NO.: 002 - MG

PLTF'S/PET'S ATTY:

**MICHAEL B. SCHULMAN & ASSOCIATES, P.C.
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DEFT'S/RESP'S ATTY:

**DAVID J. SOBEL, P.C.
811 West Jericho Turnpike, Suite 105W
Smithtown, NY 11787**

Upon the following papers read on this motion for summary judgment: Notice of Motion and supporting papers by defendants dated January 18, 2018 Notice of Cross-Motion and supporting papers Affirmation/affidavit in opposition and supporting papers by plaintiff dated August 1, 2018 Affirmation/affidavit in reply and supporting papers by defendants dated August 22, 2018 Other memorandum of law by plaintiff August 1, 2018; ~~(and after hearing counsel in support of and opposed to the motion)~~ it is,

ORDERED that Defendants' motion seeking summary judgment dismissing Plaintiff's complaint based upon Plaintiffs' failure to meet the "serious injury" threshold defined in Insurance Law §5102(d) is granted.

The within action seeks to recover damages for injuries allegedly sustained by plaintiff Michael A. Esposito whose vehicle was stopped at a red light when a vehicle owned by Defendant Anytime Construction, Inc. and driven by Milton C. Guevara hit his vehicle in the rear. Janine Esposito, Michael A. Esposito's spouse, has brought a derivative claim. Plaintiffs' bill of particulars alleges serious and permanent injuries and significant loss of a body function or part, primarily based upon a host of soft tissue injuries afflicting the spine. The accident at issue occurred in Suffolk County, New York on October 12, 2016. The within action was commenced on November 28, 2016 by filing of a summons and complaint. Issue was joined by interposition of an answer on or about December 23, 2016.

Defendants Anytime Construction, Inc. and Milton C. Guevara move for summary judgment dismissing Plaintiff's complaint on the basis that Plaintiff Michael Esposito did not sustain a "serious injury" as defined by Insurance Law §5102 (d).

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." Defendants assert that Plaintiff's Bill of

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Particulars indicates that the only categories of injury claimed by Plaintiff Michael A. Esposito under Insurance Law §5102 (d) are: (1) permanent loss of use of a body organ, member, function or system and (2) significant limitation of use of a body function or system. Plaintiffs do not refute this characterization in their opposition papers. Defendants also assert that Plaintiff Michael Esposito cannot prove that he has suffered an economic loss greater than a "basic economic" loss and has no right of recovery on this basis. This is not disputed by Plaintiffs in their opposition.

In order to recover under the "permanent loss of use" category, Plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be 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]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Cebren v Tuncoglu*, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (see *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos*, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (see *Moore v Edison*, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; *Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, *supra*; *Boone v New York City Tr. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, Defendants made a prima facie showing that Michael A. Esposito did not sustain a serious injury as defined by Insurance Law §5102(d) by submission of an affirmed medical report by Defendants' examining orthopedist along with submission of deposition testimony of the Plaintiff. (see *Bailey v Islam*, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; *Sierra v Gonzalez First Limo*, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]).

On December 4, 2017, approximately fourteen months after the accident, Dr. Edward Toriello, a Board Certified Orthopedist, examined Mr. Esposito. Dr. Toriello evaluated Plaintiff's cervical spine, right shoulder, left shoulder, right elbow, left elbow, left wrist and hand, right wrist and hand and lumbosacral spine. At the time of the exam, Plaintiff was complaining of neck and lower back issues only. Evaluation of the right shoulder, left shoulder, right elbow, left elbow, left wrist and hand and right wrist and hand were all within normal ranges of motion. With respect to the cervical spine, Dr. Toriello assessed visually as well as with the use of a hand held goniometer and inclinometer. His measurements were compared to range of motion guidelines provided by the *American Medical Association Guides to the Evaluation of Permanent Impairment 5th Edition*. Dr. Toriello took measurements of flexion, extension, bending and rotation and measured them against the AMA guidelines and found some of the measurements to be below range. He found no evidence of paracervical muscle spasm or atrophy and no motor or sensory deficits in the upper extremities. Vascular examination of the upper extremities was found to be within normal limits. Deep tendon reflexes were found to be intact and symmetrical with no muscle atrophy in

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the upper extremities. With respect to the lumbosacral spine, Dr. Toriello took measurements of flexion, extension and bending and measured them against the AMA guidelines and found some of the measurements to be below range. He found no paralumbar muscle spasm and no loss of the normal lumbar lordosis. He found deep tendon reflexes to be bilaterally symmetrical. Straight leg raising was bilaterally full and pain free, vascular examination was normal, there were no lower extremity motor or sensory deficits observed nor was there muscle atrophy. Ambulation was independent and normal and there was normal heel and toe gait. Dr. Toriello concluded that Mr. Esposito showed evidence of resolved cervical strain and resolved low back strain. He further stated that examination of Mr. Esposito revealed no objective evidence of a disability and noted that Mr. Esposito is able to return to work and normal daily activities without restriction. He further commented that the range of motion is a subjective finding under the voluntary control of the person being tested and that Mr. Esposito was not significantly limited in his usual customary daily activities for more than 90 out of 180 days immediately following the accident. He opined that the claimant's prognosis is good.

Defendants also presented Plaintiff Michael A. Esposito's deposition testimony in support of their motion. Mr. Esposito testified that his medical treatment consisted of a visit to Brookhaven Memorial Hospital two days after the accident, a visit to Dr. Faust of Orlin & Cohen two weeks after the accident where he complained of neck and back issues, and 4 ½ months of physical therapy at Orlin & Cohen. Five or six months after the accident, Plaintiff visited Dr. Nasir for pain management and he also visited an ear, nose and throat doctor once. Plaintiff had some MRIs done and surgery was not recommended. No neurological testing was conducted. Plaintiff further testified that he missed no work as a result of the accident and that he was not confined to home or bed and that he currently spends about half of his workday in the car, which is normal for his job.

Dr. Toriello found no objective evidence of disability and no limitation in Plaintiff's ability to work or perform his customary daily activities (*see Willis v New York City Tr. Auth.*, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]). This is corroborated by deposition testimony which established that injuries did not prevent him from performing "substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident (*see Burns v McCabe*, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; *Curry v Velez*, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]). Based upon the foregoing, Defendants met their initial burden in establishing that Plaintiff Michael A. Esposito did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that he was not prevented from performing substantially all of his usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see Gonzalez v Green*, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]).

As Defendants made a *prima facie* case that Plaintiff Michael A. Esposito did not meet the serious injury threshold set forth in Insurance Law §5102(d), the burden shifted to Plaintiffs to raise a triable issue of fact (*see Gaddy v Eyles, supra*). 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 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, supra; Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345,

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746 NYS2d 865 [2002]; *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, supra*; *Cebron v Tuncoglu, supra*). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (*Pommells v Perez*, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; see *Vasquez v John Doe #1*, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; *Rivera v Bushwick Ridgewood Props., Inc.*, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]).

Plaintiffs oppose Defendants' motion, arguing that Plaintiff Michael A. Esposito suffered an unspecified "serious injury" and that Defendants' expert report is insufficient. Plaintiffs claim that their doctor, Chiropractor Matthew A. Aron, tested Plaintiff "both objectively and subjectively." The affirmed chiropractor's report mentions having conducted "objective and subjective tests" but does not mention any examination undertaken other than range of motion measurements taken with a goniometer. He mentions reviewing "multiple MRI exams" but offers no specifics as to the origin of the MRIs, which body parts they imaged and what his assessments were. Dr. Aron examined Plaintiff on November 1, 2017, about a month before Defendants' physician did. Dr. Aron does not mention what standards he used to compare Mr. Esposito's range of motion measurements to normal range. His report provides no ranges, only single figures as to what he deems normal. Dr. Aron reports that there is a decreased range of motion but offers no analysis or opinion as to the nature, quality or severity of limitation. Dr. Aron's report goes on to state that, based upon his findings, Plaintiff received treatment to increase his range of motion and decrease his pain, inflammation and muscle spasms. However, Dr. Aron's report does not mention having observed muscle spasms in the course of his examination. There is no indication as to whether or not he made a medical determination that spasms were present. Additionally, Dr. Aron's affirmation does not comment on Mr. Esposito's level of disability or offer an assessment as to prognosis. It should also be noted that, based upon his deposition testimony, it appears that after initially receiving medical treatment for six months or so, Plaintiff ceased medical treatment for an extended period of time. Although this is not dispositive, it is a factor for the Court to consider and Plaintiffs offer no explanation for this lapse (see *Pommells v. Perez*, 4 NY3d 566, 830 NE2d 278 [2005]).

Plaintiffs' memorandum of law in opposition references various medical records which Plaintiffs would like the Court to consider in its analysis of the question of whether or not Plaintiff suffered a serious injury. However, Dr. Aron makes no reference to these records and they are uncertified and unaffirmed, therefore they are lacking in evidentiary value (*Vasquez v Doe*, 905 NYS2d 188; 73 AD3d 1033 [2d Dept 2010]). Plaintiffs cannot bolster their physician's report by having their counsel cite medical records which were not even mentioned by their own expert. Plaintiff has established that he is experiencing some limitation of use, however he has failed to proffer sufficient evidence to establish that such loss of use constitutes a "significant limitation of use of a body organ or member" or that his injuries constitute a "permanent consequential limitation of use of a body organ or member" (*Grotzer v. Levy*, 133 AD2d 67, 68, 518 NYS2d 629 [2d Dept. 1987]; *Licari v. Elliott*, 57 NY2d 230 [1982]).

Plaintiff Michael A. Esposito has failed in his burden to proffer competent objective medical evidence that he has suffered serious injuries within the meaning of Insurance Law §5102(d). Plaintiff Janine Esposito's claims are derivative of her spouse's claims. Therefore, Plaintiffs' complaint is dismissed in all respects.

Dated: Riverhead, New York
 November 6, 2018



 VINCENT J. MARTORANA, J.S.C.

CHECK ONE: FINAL DISPOSITION NON-FINAL DISPOSITION