

Duberson v Liang

2019 NY Slip Op 30183(U)

January 23, 2019

Supreme Court, New York County

Docket Number: 153145/2015

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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JOSEPHINE DUBERSON, BIANCA ROSARIO

Plaintiff,

- v -

DANNY LIANG, DANIEL HARRIS,

Defendant.

INDEX NO. 153145/2015

MOTION DATE 11/07/2018

MOTION SEQ. NO. 004

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 91, 92, 93, 94, 95, 96, 97, 98, 99.

were read on this motion to/for

JUDGMENT - SUMMARY

Before the Court is defendant Danny Liang's motion for summary judgment, for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendant and to dismiss plaintiffs' complaint on the grounds that both plaintiffs have failed to demonstrate that they suffered a "serious injury" as defined under Section 5102(d) of the Insurance Law. Defendant Daniel J. Harris Cross-moves for the same relief and adopts the argument of defendant Liang. Plaintiffs' oppose the motions.

This matter stems from a motor vehicle incident which occurred on July 17, 2012, on the Gowanus Expressway at or near its intersection with 58th St in the County of Kings, City and State of New York, when two motor vehicles, one operated by defendant Danny Liang and the other operated by defendant Daniel J. Harris struck a vehicle operated by plaintiff Josephine C. Duberson and transporting plaintiff Bianca Rosario which allegedly led to the serious injury of plaintiffs.

Summary Judgment (Serious Injury)

Defendant's motion for summary judgment, pursuant to CPLR 3212, against plaintiffs on the issue of "serious injury" as defined under Section § 5102(d) of the Insurance Law is granted. "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 to 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"]).

Plaintiff Duberson

Defendants allege that plaintiff Josephine C Duberson has failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law. Defendants allege that the injuries plaintiff is seeking relief for stem from a prior motor vehicle

accident in 2011 and that plaintiff suffers from pre-existing conditions. In support of their motion, defendants submit doctor affirmations and plaintiff's deposition.

Defendants note that plaintiff's prior medical records indicate that Duberson underwent extensive medical treatment in connection with the 2011 accident before the underlying accident. Plaintiff's physician Dr. Feuer reported pre-existing history of headaches, prior cervical spine and lumbar spine trauma, in addition to the pre-existing cervical spine and lumbar spine disc pathology reported by Dr. Lager (Mot, ¶ 7). Plaintiff testified that she did not request medical assistance at the scene of the accident and then went to Methodist Hospital, wherein she was found to have normal range of motion and diagnosed with cervical and lumbar spine sprains (*id.*, ¶8). Plaintiff "further testified that she was not confined as the result of the subject accident" (*id.*, Exh H at 40, ¶16-23).

The X-Rays taken at the hospital were reviewed by Dr. Steven Lastig, who noted that both the X-Ray of the cervical spine and the X-Ray of the lumbar spine were normal and failed to show any acute pathology (*id.*, Exh N). Further, upon examination of plaintiff's MRI's the Court finds that lumbar spine and cervical spine X-Rays were both noted to be "unremarkable" (*id.*, Exh A). Additionally, reports conducted by Advanced Practice Nurse Tracey Hessery on September 20, 2012, Dr. Milind Patharkar's December 12, 2012, which find a decrease in plaintiff's range of motion to the cervical spine and lumbar spine are insufficient. The reports do not list the necessary normal ranges of motion required to demonstrate a decrease in range of motion under the Insurance Law.

The First Department Appellate Division has consistently held that "affirmation of plaintiff's treating physician ... [which fail to] state what objective tests, if any, were used to determine any restriction of motion" is insufficient to create questions of fact to defeat a motion

for summary judgment (*Chen v Marc*, 10 AD3d 295, 296 [1st Dep't 2004]). Thus, the reports are deficient because they "failed to identify the objective tests he employed to measure plaintiff's range of motion [and] failed to indicate what the normal range of motion would be" (*Nagbe v Minigreen Hacking Group*, 22 AD3d 326 326, (1st Dep't 2005). In opposition, plaintiff attaches the above mentioned doctor reports and MRI's. Thus, plaintiff has failed to demonstrate a serious injury and the branch of defendants' motion for summary judgment on the issue of serious injury as to plaintiff Josephine C Duberson is granted.

Plaintiff Bianca Rosario

Defendants allege that plaintiff Bianca Rosario has failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law. Defendants allege that the injuries plaintiff is seeking relief for stem from a prior motor vehicle accident in 2011 and that plaintiff suffers from pre-existing conditions. In support of their motion, defendants submit doctor affirmations and plaintiff's deposition.

Defendants note that at the time of the accident at issue plaintiff Rosario was still treating with her neurologist, Dr. Abrams and her pain management specialist, Dr. Pathakar for injuries sustained in the prior 2011 motor vehicle accident. X-Rays taken after the accident at issue on October 25, 2012 reveal degenerative conditions in both the lumbar spine and cervical spine. MRI's of plaintiff's cervical spine and lumbar spine revealed degenerative conditions (Mot, Exh O). Defendants attach the doctor report of Dr. Pathakar who notes that plaintiff has a loss of range of motion in both the lumbar spine and cervical spine. The report is insufficient to demonstrate a serious injury as it does not list the necessary normal ranges of motion required to demonstrate a decrease in range of motion under the Insurance Law. The report fails to "identify the objective tests he employed to measure plaintiff's range of motion [and] failed to indicate what the normal range of motion would be" (*See Supra Nagbe*, 22 AD3d 326).

Further, plaintiff's physician Dr. Feuer reported pre-existing history of headaches, prior cervical spine and lumbar spine trauma, in addition to the pre-existing cervical spine and lumbar spine disc pathology reported by Dr. Lager (Mot, ¶ 13). In opposition, plaintiff's responding medical submissions fail to raise a triable issue of fact. Plaintiff's medical reports fail to note that the accident at issue exacerbated plaintiff's pre-existing conditions. In *Rosa v Delacruz*, 32 NY3d 1060, 2018 N.Y. Slip Op. 07040 [2018], the Court of Appeals found that where a plaintiff's doctor opined that tears were causally related to the accident, but did not address findings of degeneration or explain why the tears and physical deficits found were not caused by the preexisting degenerative conditions, plaintiff failed to raise a triable issue of fact as it "failed to acknowledge, much less explain or contradict, the radiologist's finding. Instead, plaintiff relied on the purely conclusory assertion of his orthopedist that there was a causal relationship between the accident" (*See id.*).

Here, plaintiff's medical reports fail to address plaintiff's supposed degenerative conditions to the cervical spine and lumbar spine. Plaintiff does not address the cervical spine degenerative disease as having been exacerbated by the accident. Thus, plaintiff has failed to raise an issue of fact and the branch of defendants' motion for summary judgment on the issue of "serious injury" as against plaintiff Bianca Rosario is granted.

Accordingly, it is

ORDERED that defendant Danny Liang's motion for summary judgment, on the grounds that plaintiff Josephine C. Duberson has not sustained a "serious injury" as defined in 5102 and 5104 of the Insurance Law, is granted; and it is further

ORDERED that defendant Daniel J. Harris's cross-motion for summary judgment, on the grounds that plaintiff Josephine C. Duberson has not sustained a "serious injury" as defined in 5102 and 5104 of the Insurance Law, is granted as; and it is further

ORDERED that defendant Danny Liang's motion for summary judgment, on the grounds that plaintiff Bianca Rosario has not sustained a "serious injury" as defined in 5102 and 5104 of the Insurance Law, is granted; and it is further

ORDERED that defendant Daniel J. Harris's cross-motion for summary judgment, on the grounds that plaintiff Bianca Rosario has not sustained a "serious injury" as defined in 5102 and 5104 of the Insurance Law, is granted as; and it is further

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

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

This constitutes the Decision/Order of the Court.



1/23/2019
DATE

HON. ADAM SILVERA

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	J.S.C.
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: