Ramos v Baez
2019 NY Slip Op 30523(U)
February 28, 2019
Supreme Court, New York County
Docket Number: 155224/2017
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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FELIX RAMOS,

Plaintiff,

- v -

ISABEL BAEZ, NILMA BAEZ

Defendant.

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INDEX NO. 155224/2017

MOTION DATE 01/16/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 41, 42, 43, 44, 45, 46
were read on this motion to/for JUDGMENT - SUMMARY.

Before the Court is defendants' motion for summary judgment, for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendants 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. Plaintiff opposes the motions.

This matter stems from a motor vehicle incident which occurred on April 7, 2017, at the intersection of Broadway and West 192nd Street in the County, City and State of New York, when a vehicle operated by defendant Nilma Baez and owned by defendant Isabel Baez struck a vehicle operated by plaintiff Felix Antonio Ramos which allegedly led to his serious injury.

Summary Judgment (Serious Injury)

Defendant's motion for summary judgment, pursuant to CPLR 3212, against plaintiff 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"]).

Here, defendants allege that plaintiff 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 prior and subsequent accidents and that plaintiff suffers from pre-existing degenerative conditions. In support of their motion, defendants submit plaintiff's own deposition testimony, the medical reports of Dr. Arnold T. Berman, Dr. Joseph Yellin, and Dr. Scott S Coyne (Mot, Exh E, H, I, & J).

Defendants note that plaintiff's prior medical records indicate that he was involved in two prior motor vehicle accidents: one on February 5, 2014 in which he sustained injuries to his neck, left shoulder, lumbar spine and head and another on December 19, 2012 in which he sustained injuries to his neck, right shoulder, lumbar spine, and cervical spine (Mot, Exh H at 2). Further,

plaintiff testified at deposition that he was involved in an accident on April 5th, 2014, when a ceiling collapsed on top of him at a supermarket (*id*, Exh E at 151-152). Plaintiff testified that he sustained to his head, neck and left shoulder in connection with the 2014 supermarket accident (*id.*).

In a May 24, 2018 medical report Dr. Berman "reviewed numerous MRI's of the left shoulder, right shoulder, lumbar spine, and cervical spine that were performed in 2013 and 2014 that demonstrated degenerative disc and joint changes" (*id.*, Exh H at 2). Dr. Berman notes that while plaintiff did have cervical spine, lumbar spine and shoulder strains, "[t]here was no aggravation to the pre-existing conditions and no aggravation to the prior injuries" (*id.*, at 6-7). Dr. Berman concludes that "Mr. Ramos has no functional loss and no disability as a result of the accident on 04/07/2017" (*id.*, at 7). Defendants have made a prima facie showing that plaintiff did not suffer a "serious injury" and the burden shifts to plaintiff.

In opposition, plaintiffs responding medical submissions fail to raise a triable issue of fact. 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 cervical spine, lumbar spine and shoulder. In opposition, plaintiff attaches the affirmation of Dr. David Adin, Dr. Mary Hu, Dr. Jogn T. Rigney, and Dr. Jing Huie Xie in

attempt to raise an issue of fact (Aff in Op, Exh B-D). None of plaintiff's doctors explicitly mention the degenerative conditions of plaintiff's left shoulder, right shoulder, lumbar spine, and cervical spine. Dr. Adin diagnosed plaintiff as of July 27, 2017 with having "exacerbated" injuries to the cervical spine and lumbar spine (*id.*, Exh, ¶21). Dr. Adin concludes "that the injuries, impairment, and disability sustained by the patient were causally related to the motor vehicle accident of April 7, 2017" (*id.*, ¶22). The Court finds that such assertions are conclusory and fail to raise an issue of fact.

The First Department Appellate Division has found that summary judgment on the issue of serious injury is appropriate where it has been confirmed that "plaintiff suffered from degenerative disc disease of the cervical and lumbar spine. Her treating neurologist's report failed to address defendant's prima facie showing that her cervical and lumbar spine conditions were degenerative, preexisting and arthritic (*Kendig v Kendig*, 115 AD3d 438, 439 [1st Dep't 2014] [internal citations omitted]). The report in *Kendig* noted clinical findings consistent with an 'exacerbation of multilevel cervical and lumbar disc bulges and protrusion' but provided no basis for determining the extent of any such exacerbation" (*Kendig*, 115 AD3d 438 citing *Brand v Evangelista,* 103 AD3d 539, 540 [1st Dep't 2013; *Nova v Fontanez*, 112 AD3d 435, 436 [1st Dep't 2013]).

The case at bar mirrors *Kendig*; here, plaintiff's treating doctor also notes that plaintiff has an exacerbation of disc bulges but provides no basis for determining the extent of any such exacerbation. Plaintiff's doctor merely states that the injuries have been exacerbated and that they are causally related to the underlying accident. Absent a proper explanation of said exacerbation and causality of the injuries to the accident at issue, plaintiff has failed to raise an issue of material fact precluding summary judgment. Thus, defendants' motion for summary

judgment for an order that plaintiff Felix Antonio Ramos has not sustained a "serious injury" as defined in 5102(d) of the Insurance Law, is granted

Accordingly, it is

ORDERED that defendants' motion for summary judgment, on the grounds that plaintiff Felix Antonio Ramos has not sustained a "serious injury" as defined in 5102(d) of the Insurance Law, is granted; and it is further

ORDERED that 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, defendants shall serve a copy of this decision/order upon plaintiff with notice of entry.

This constitutes the Decision/Order of the Court.

2/28/2019
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	[X] CASE DISPOSED		[ ] NON-FINAL DISPOSITION	
	[X] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE