

Soto v Linares

2019 NY Slip Op 30625(U)

March 14, 2019

Supreme Court, New York County

Docket Number: 155376/2017

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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CALVIN SOTO, KATHERINE NUNEZ-BATISTA
Plaintiff,

- v -

FRANCISCO MARTINEZ LINARES, W. PEREZ-MANCEBO,
Defendant.

INDEX NO. 155376/2017
MOTION DATE 01/23/2019,
01/23/2019
MOTION SEQ. NO. 001 002

DECISION AND ORDER

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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, 35, 39, 41, 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 76

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 36, 40, 42, 45, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for JUDGMENT - SUMMARY

Before the Court are two motions motion sequence 001 and 002. In motion sequence 001, defendant Francisco Martinez Linares and defendant W. Perez-Mancebo move for an Order pursuant to CPLR § 3212 granting summary judgment in favor of defendants and against plaintiffs Calvin Soto and Katherine Nunez-Batista for failure to breach the “serious injury” threshold requirement of Insurance Law § 5102(d). Plaintiffs oppose the motion.

In motion sequence 002, third party defendant Calvin Soto, adopting the arguments of defendants on the issue of plaintiff Nunez-Batista in motion sequence 001, moves for an Order pursuant to CPLR § 3212 granting summary judgment against plaintiff Katherine Nunez-Batista for failure to breach the “serious injury” threshold requirement of Insurance Law § 5102(d).

Plaintiffs opposes the motion.

The case at bar stems from a motor vehicle incident which occurred on June 23, 2015, on Broadway and 158th Street in the County, City and State of New York when a vehicle operated defendant Francisco Javier Martinez Linares and owned by defendant W. Perez-Mancebo came into contact with a vehicle operated by plaintiff Calvin Soto and transporting passenger plaintiff Katherine Nunez-Batista, and allegedly seriously injured both plaintiffs.

Plaintiffs filed complaint on June 13, 2017 and issue was joined by service of Answer with a counterclaim by defendants against plaintiff Soto alleging that any injuries were caused by the wrong doing, fault, negligence, recklessness or failure of due care of plaintiff Soto and that plaintiff should be held liable for any amount of damages caused to plaintiff Katherine Nunez-Batista.

Plaintiff Katherine Nunez-Batista.

Here, the movants of both motion sequence 001 and 002 allege that plaintiff Katherine Nunez-Batista failed to breach the threshold requirement of Insurance Law § 5102(d). Movants allege that plaintiff Nunez-Batista was examined by an orthopedic surgeon, Dr. Steven A. Renzoni, who found that plaintiff did not suffer a serious injury (Mot, Exh E). In a July 3, 2018 report, Dr. Renzoni concludes that “there is no evidence of disability” (*id.*). However, Dr. Renzoni’s report records that plaintiff suffers from a decrease in range of motion to the left shoulder and right knee (Mot, Exh E at 5). As defendants have submitted a finding of limited range of motion as to plaintiff Nunez Batista’s right shoulder, the branch of plaintiff’s motion seeking to dismiss plaintiff Nunez Batista’s complaint is denied.

A defendant fails to meet its initial burden when one of its examining physicians finds a limited range of motion (*Servones v Toribio*, 20 AD3d 330 [1st Dep’t 2005] citing *McDowall v Abreu*, 11 Ad3d 590 [2d Dep’t 2004] [finding that “defendants’ examining doctor found that the

plaintiff continued to have restrictions in motion of her lower back ... in light of this finding by the defendants' expert, the defendants did not meet their initial burdens"). Thus, defendants have failed to meet their burden precluding summary judgment for dismissal; however, defendants have satisfied their burden as to plaintiff Nunez Batista's cervical spine.

Defendants attach the radiological review report completed by Dr. Jonathan Lerner which notes that plaintiff suffers from degenerative disc disease in the cervical spine and found "no causal relationship between the claimants alleged accidents and the finding on this MRI examination" (*id.*, Exh F at 2-3). Thus, defendants have satisfied their burden solely as to plaintiff Nunez Batista's cervical spine and the burden shifts to plaintiff to raise an issue of fact.

In opposition, plaintiff submits the affidavit of Dr. Thomas J. Tesi, who avers that he reviewed medical records from plaintiff's initial consultation at Innovative Medical on June 24, 2015 (Aff in op, Exh L). Dr. Tesi notes that plaintiff suffered a loss of range of motion to the cervical and lumbar spine (*id.*, ¶6). Further, Dr. Tesi examined plaintiff on September 26, 2018 and found loss of range of motion to the lumbar spine and cervical spine and concludes that plaintiff's "condition is directly related to the accident of June 23, 2015" (*id.*, ¶15). Plaintiff's opposition does not sufficiently address defendants' assertion that plaintiff suffers from degenerative disc disease in the cervical spine. Plaintiff's physicians simply conclude that plaintiff has suffered a loss of range of motion in the cervical spine and that her injuries are causally related to the accident at issue.

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.*). Defendants have demonstrated that plaintiff did not suffer a serious injury only as to the cervical spine. Defendants have failed to demonstrate that plaintiff did not suffer a serious injury to both the lumbar spine and right shoulder. Thus, defendants and third-party defendant Calvin Soto’s motions to dismiss are denied in part and granted solely as to dismiss plaintiff’s claim that she suffered a serious injury to the cervical spine.

Plaintiff Katherine Nunez-Batista.

Here, defendant Francisco Javier Martinez Linares and defendant W. Perez-Mancebo allege that plaintiff Calvin Soto failed to breach the threshold requirement of Insurance Law § 5102(d). Movants allege that plaintiff Soto was examined by an orthopedic surgeon, Dr. Steven A. Renzoni, who found in a July 3, 2018 report, that plaintiff’s cervical spine, thoraco-lumbar spine, and left hand have normal ranges of motion (Mot, Exh G). Dr. Renzoni concludes that “there is no evidence of disability or orthopedic residuals based on today’s examination. Decreased motion of the left shoulder or left knee are considered subjective in light of negative objective findings” (*id.*). The Court notes that, Dr. Renzoni’s report makes mention of decreased range of motion to both the left shoulder and left knee (*id.*, at 5-6). As defendants’ motion contains evidence of a restriction in plaintiff’s range of motion as to the left shoulder and left knee, the branch of plaintiff’s motion seeking to dismiss plaintiff Nunez Batista’s complaint is denied.

A defendant fails to meet its initial burden when one of its examining physicians finds a limited range of motion (*Servones v Toribio*, 20 AD3d 330 [1st Dep’t 2005] citing *McDowall v*

Abreu, 11 Ad3d 590 [2d Dep't 2004] [finding that "defendants' examining doctor found that the plaintiff continued to have restrictions in motion of her lower back ... in light of this finding by the defendants' expert, the defendants did not meet their initial burdens"]). Thus, defendants have failed to meet their burden precluding summary judgment for dismissal; however, defendants have satisfied their burden as to plaintiff Nunez Batista's cervical spine, thoraco-lumbar spine, and left hand.

Defendants attach the radiological review report of August 15, 2018, completed by Dr. Jonathan Lerner who reviewed MRI's of the left wrist and cervical spine (*id.* Exh H). Dr. Lerner notes that there is no causal injury between the left wrist, the cervical spine, and the accident at issue (*id.*). Further, Dr. Lerner notes that plaintiff suffers from degenerative disc disease in the cervical spine and found "no causal relationship between the claimants alleged accidents and the finding on this MRI examination" (*id.*, Exh H at 2-3). Thus, defendants have satisfied their burden solely as to plaintiff's cervical spine and left wrist and the burden shifts to plaintiff.

In opposition, plaintiff submits the affidavit of Dr. Thomas J. Tesi, who avers that he reviewed medical records from plaintiff's initial consultation at Innovative Medical on June 24, 2015 and notes that plaintiff suffered a loss of range of motion to the cervical and lumbar spine (Aff in op, Exh E, ¶5). A July 9, 2015, MRI revealed a decrease in range of motion to plaintiff's lumbar spine (*id.*, ¶12). Dr. Tesi examined plaintiff on September 26, 2018 and found loss of range of motion to the lumbar spine and cervical spine and concludes that plaintiff's "condition is directly related to the accident of June 23, 2015" (*id.*, ¶13). Plaintiff's opposition does not address the left wrist nor does it sufficiently address defendants' assertion that plaintiff suffers from degenerative disc disease in the cervical spine. Plaintiff's physicians simply conclude that plaintiff has suffered a loss of range of motion in the cervical spine.

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.*). Thus, defendants have demonstrated that plaintiff did not suffer a serious injury only as to the cervical spine and left wrist. Defendants have failed to demonstrate that plaintiff did not suffer a serious injury to both the left shoulder, left knee, and lumbar spine. Thus, defendants' motion to dismiss is denied in part and granted solely as to plaintiff's claim that he suffered a serious injury to the cervical spine and left wrist.

Accordingly, it is

ORDERED that the branch of defendants Francisco Javier Martinez Linares and W. Perez-Mancebo's motion sequence 001, and the branch of third-party defendant Calvin Soto's motion sequence 002, for an Order pursuant to CPLR § 3212, granting summary judgment in favor of defendants and against plaintiff Katherine Nunez-Batista and to dismiss the complaint with prejudice for failure to breach the "serious injury" threshold requirement of Insurance Law § 5102(d) is denied; and it is further

ORDERED that the branch of motion sequences 001 and 002 for an Order pursuant to CPLR § 3212, granting summary judgment in favor of defendants and against plaintiff Katherine Nunez-Batista for failure to breach the "serious injury" threshold requirement of Insurance Law

§ 5102(d) is granted solely to dismiss plaintiff’s claim that she suffered a serious injury to the cervical spine; and it is further

ORDERED that the branch of defendants Francisco Javier Martinez Linares and W. Perez-Mancebo’s motion sequence 001, for an Order pursuant to CPLR § 3212, granting summary judgment in favor of defendants and against plaintiff Calvin Soto and to dismiss the complaint with prejudice for failure to breach the “serious injury” threshold requirement of Insurance Law § 5102(d) is denied; and it is further

ORDERED that the branch of motion sequences 001 for an Order pursuant to CPLR § 3212, granting summary judgment in favor of defendants and against plaintiff Calvin Soto for failure to breach the “serious injury” threshold requirement of Insurance Law § 5102(d) is granted solely to dismiss plaintiff’s claim that he suffered a serious injury to the cervical spine and left wrist; and it is further

ORDERED that all parties appear for a compliance conference on April 22, 2019 in room 103 of 80 Centre Street at 9:30AM; and it is further

ORDERED that within 30 days of entry, plaintiffs shall serve a copy of this Decision/Order upon defendants with notice of entry. This constitutes the Decision/Order of the Court.

3/14/2019
DATE


ADAM SILVERA, J.S.C.

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