

<b>Medina v Mazariego</b>
2019 NY Slip Op 34452(U)
September 26, 2019
Supreme Court, Rockland County
Docket Number: Index No. 033780/2017
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
FLOR MEDINA and CANDELARIA QUINTEROS  
ORANTES DE MEDINA,

Plaintiffs,

-against -

DENIS MAZARIEGO and CORNELIO MAZARIEGO,

Defendants.

-----X  
CANDELARIA QUINTEROS

Plaintiff,

-against-

CARLOS A. CARETTO,

Defendant.

-----X  
HON. SHERRI L. EISENPRESS, A.J.S.C.

**DECISION/ORDER**

Index No. ~~033823/2017~~

033780/2017

ACTION #1

**(Motions #2 and 3)**

Index No. 034405/2017

ACTION #2

The following papers, numbered 1- 9, were read in connection with (i) Defendants Denis Mazariego and Cornelio Mazariego’s (collectively “Mazariego”) Notice of Motion for summary judgment and dismissal of the Complaint with respect to Plaintiff Flor Medina (“Medina”) in Action #1, on the ground that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d); and (ii) Defendants Denis Mazariego and Cornelio Mazariego’s (collectively “Mazariego”) Notice of Motion for summary judgment and dismissal of the Complaint with respect to Plaintiff Candelaria Quinteros Orante De Medina (“Quinteros”) in Action #1, on the ground that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d)

**PAPERS**

**NUMBERED**

**Motion #2**

NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS “A”-“H”

1-2

AFFIRMATION IN OPPOSITION/AFFIDAVIT OF FLOR MEDINA/EXHIBITS "A"- "E"/MEMORANDUM OF LAW IN OPPOSITION 3-5

REPLY AFFIRMATION 6

**Motion #3**

NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS "A-H" 7-8

AFFIRMATION IN OPPOSITION /AFFIDAVIT OF CANDELARIA QUINTEROS ORANTES DE MEDINA/EXHIBITS "1"- "4"

AFFIRMATION IN REPLY 9

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

The above captioned consolidated matters arise out of two separate rear-end motor vehicle accidents. Action #1 arises out of a motor vehicle accident which occurred on May 22, 2016, at the intersection of West Route 59 and Grandview Avenue in Clarkstown New York. Plaintiff Flor Medina was the operator of a motor vehicle struck in the rear by Defendants Mazariego. Plaintiff Quinteros was a passenger in the Medina vehicle. Action #2 arises out of a motor vehicle accident which took place on October 26, 2016, on 5 South Exit Ramp of the Palisades Parkway, when the vehicle being operated by Medina Quinteros was struck in the rear by the vehicle operated by Patrick Thompson. Plaintiff Quinteros was a passenger in the Medina Vehicle. By Order dated January 2, 2019, both actions were consolidated for purposes of discovery and joint trial.

**Motion #2**

In Motion #2, Defendants move for summary judgment on the ground that Plaintiff Medina cannot meet the "serious injury" threshold under the No-Fault Law. In her Verified Bill of Particulars, Plaintiff, a 24 year old woman at the time fo the accident, alleges that as a result of the accident she sustained a right rotator cuff tear requiring injections to her right shoulder; cervical disc herniations at C3-4, C4-5, C6-7, C5-6 and a lumbar disc bulge at

L5-S1, as well as injuries to her left knee.

In support of their motion, Defendants submit the affirmed medical report of Dr. Robert C. Hendler, orthopedist, who examined Plaintiff on September 22, 2018. Dr. Hendler states in his affirmed report that "[R]ange of motion testing was determined by visual measurement." He states that there "was full range of motion of the cervical spine with normal values of flexion to 60 degrees, extension to 60 degrees, right rotation to 80 degrees, left rotation to 80 degrees, right lateral side bending to 45 degrees, and left lateral side bending to 45 degrees." With respect to range of motion testing of the lumbar spine determined by visual measurement, Dr. Hendler states that "there was full range of motion of the lumbar spine with normal values being 80 degrees flexion, 25 degrees extension, 25 degrees left and right lateral bending, and 30 degrees right and left thoracolumbar rotation. With respect to both knees, also performed by visual measurement, Dr. Hendler finds range of motion to be "full with normal values of 0-140 degrees bilaterally." Lastly, with regard to examination of Ms. Medina's shoulders, range of motion determined by visual inspection, was described as full, both actively and passively, with "normal values of 180 degrees of abduction, 45 degrees of abduction, 50 of extension, 180 degrees of flexion, 80 degrees of internal rotation and 80 degrees of external rotation. Notably, Dr. Hendler does specifically compare the aforementioned measurements to normal values but instead states earlier in the report that "normal range of motion values are in accordance with the AMA Guide to the Evaluation of Permanent Impairment, 6<sup>th</sup> Ed."

Dr. Hendler finds that as a result of the accident, plaintiff sustained cervical and lumbosacral sprain, with temporary exacerbation of a pre-existing back problem, mild contusion to the right knee and mild sprain of the right shoulder, all of which are resulted. Although not discussed in detail, Dr. Hendler finds that Plaintiff did not sustain a medically determined injury or impairment which prevented claimant from performing her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence. Defendants argue that summary judgment should be granted because Plaintiff had pre-existing

injuries to her back and knees and treated those parts of her body before the accident and she has no restrictions with respect to the parts of her body she claims to have injured in the accident.

In opposition thereto, Plaintiff Medina argues that Defendants have failed to sustain their burden on summary judgment because Dr. Hendler's measurements of range of motion were not "objective" as required, in that he performed them visually and without the use of objective means such as a goniometer and/or inclinometer. Additionally, Plaintiff Medina argues that Dr. Hendler failed to state what a normal range of motion is for comparison purposes. Additionally, Plaintiff Medina argues that she has demonstrated a triable issue of fact by virtue of her certified medical records as well as the affirmed MRI report by Dr. Steven Meyerson, and affirmed narrative report of treating doctor, Scott Gottlieb M.D. Dr. Gottlieb notes that he began seeing Plaintiff on June 28, 2016, and at that time, performed range of motion tests with a goniometer and found at least 50% loss at all planes of her cervical and lumbar spines.<sup>1</sup>

Additionally, Plaintiff submits the affirmed narrative medical report of Dr. Donald Goldman, with respect his examination of Plaintiff on April 18, 2018. Dr. Goldman conducted range of motion tests with the use of a goniometer and lists in his report the normal range of motion for each measurement. While his examination reveals normal cervical flexion, he also found decreased cervical extension of 25/60 degrees (normal 0-60); Right rotation of 50/80 (normal 0-80); left rotation 40 to 45/80 degrees (normal 0-80); right lateral bending was 25/50 degrees (normal 0-50) and left lateral bending of 25/50 degrees (normal 0-50). He also found limitations in Plaintiff's range of motion in her right shoulder as follows: Abduction was 90 to 100/150 (normal 0-150); anterior elevation was 120/150 (normal 0-150); internal rotation was 80 degrees (normal 0-80) and external rotation was 60/90 degrees (normal 0-90).

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<sup>1</sup>Dr. Gottlieb's narrative report lists the specific findings in degrees and lists for each of these measurements the normal finding, in degrees.

Dr. Goldman also noted that Plaintiff had a positive O'Brien test and positive apprehension test of her right shoulder. Plaintiff Medina indicated to Dr. Goldman that her knees and lower back had improved and were no longer a concern.

Dr. Goldman diagnosed Plaintiff Medina with a rotator cuff tear of the right shoulder with acromioclavicular joint impingement, as confirmed by MRI, and cervical disk herniations at multiple levels. He opined that the accident of May 22, 2016 was the cause of both her cervical spine and right shoulder injuries, which are to be considered permanent, and recommended that she have surgery to her shoulder and epidural steroid injections for her cervical spine. At present, Dr. Goldman finds that she has a painful functional restriction of her right shoulder of more than 40% based upon objective findings.

### **Motion #3**

The Mazariego Defendants move in Motion #3 to dismiss the Complaint of Plaintiff Quinteros in Action #1 on the ground that she cannot demonstrate that she sustained a "serious injury" under the no-fault law arising out of her accident on May 22, 2016 and note that Plaintiff was involved in a subsequent motor vehicle accident which occurred on October 26, 2016 (Action #2), wherein she injured the same parts of her body. In support of their motion for summary judgment, Defendants submit a report of neurologist Dr. Aric Hausknecht who conducted a medical examination of Plaintiff Quinteros on June 29, 2017. While he finds restrictions in her neck and back, Dr. Hausknecht attributes same to the accident of October 26, 2016 and not the May 22, 2016 accident which is the subject of the action against the Mazariegos.

Defendants also submit the affirmed defense medical report of Dr. Robert Hendler. Dr. Hendler states that Plaintiff Quinteros sought physical therapy and chiropractic care after the accident of May 22, 2016, had gradual improvement of her symptoms and by September 21, 2016, had returned to work part-time as a housekeeper, approximately 4 months after the accident. Before the accident of 10/26/2016, Dr. Hendler notes that medical

records state she had no neck pain and was "feeling" great with respect to her neck. As such, Dr. Hendler opines that her injuries from the May 22, 2016 accident were almost completely resolved when the second motor vehicle accident occurred.

Dr. Hendler states in his affirmed report that "[R]ange of motion testing was determined by visual measurement." He states that there "was full range of motion of the cervical spine with normal values of flexion to 60 degrees, extension to 60 degrees, right rotation to 80 degrees, left rotation to 80 degrees, right lateral side bending to 45 degrees, and left lateral side bending to 45 degrees." With respect to range of motion testing of the lumbar spine determined by visual measurement, Dr. Hendler states that "there was full range of motion of the lumbar spine with normal values being 80 degrees flexion, 25 degrees extension, 25 degrees left and right lateral bending, and 45 degrees right and left thoracolumbar rotation. Lastly, with regard to examination of Ms. Medina's shoulder's, range of motion determined by visual inspection, was described as full range of motion both actively and passively with "normal values of 180 degrees of abduction, 45 degrees of abduction, 50 of extension, 180 degrees of flexion, 80 degrees of internal rotation and 80 degrees of external rotation. Dr. Hendler does note that x-rays taken by him on September 20, 2018 do show osteoarthritic change in the acromioclavicular joint of the right shoulder. Notably, Dr. Hendler does specifically compare the aforementioned measurements to normal values but instead states earlier in the report that "normal range of motion values are in accordance with the AMA Guide to the Evaluation of Permanent Impairment, 6<sup>th</sup> Ed." Dr. Hendler finds none of Plaintiff's injuries to be causally related to the accident of May 22, 2016, including the surgical procedure performed to her spine.

In opposition to the motion, Plaintiff points to her deposition testimony where she testified that the week before the second accident she was feeling better and improving, though she had not resumed work. Plaintiff Quinteros argues that Dr. Hendler's medical report does not address the initial period following the motor collision and but rather addresses the period

immediately preceding the second accident. Thus, he argues that Defendants have not met their initial burden on the 90/180 category.

Plaintiff Quinteros submits a no-fault examination report dated December 30, 2016, by Dr. Marc Berezin. This examination was conducted after the occurrence of both accidents/ Dr. Berezin finds limitations of range of motion in Plaintiff's cervical spine; diagnosis her with cervical strain, mid back strain and right shoulder sprain which he causally relates to the accident of May 22, 2016, with an aggravation from the additional accident of October 2016. Plaintiff then annexes a medical report dated August 11, 2011 for a Madonna Marrero, which presumably was done in error. Lastly, Plaintiff Quinteros submits an affidavit from chiropractor Ronny Hyman, dated June 17, 2019, who states that he treated plaintiff from November 2, 2016 through March 27, 2017. Dr. Hyman found loss of motion in her cervical spine and lumbar spine, which he compared to normal ranges of motion. Additionally, he opines that Plaintiff was unable to perform substantially all of the acts of daily living in excess of the first 90 days out of 180 days following her accident. Moreover, he finds her injuries to her neck, shoulder, and back to be causally related to the collision of May 22, 2016, though he does not address the subsequent accident. Moreover, there is no indication that a recent examination was performed, or what the findings were, compared to normal ranges of motion.

#### **Legal Discussion**

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a Court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v Citibank Corp., et al., 100 N.Y.2d 72 (2003) (citing Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986)). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v Gonzalez, 306 A.D.2d 250 (2d Dept 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial.

Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124 (2000). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

In order to be entitled to summary judgment it is incumbent upon the defendant to demonstrate that plaintiff did not suffer from any condition defined in Insurance Law §5102(d) as a serious injury. Healea v Andriani, 158 A.D.2d 587, 551 N.Y.S.2d 554 (2d Dept 1990). The law is clear that in order for a defendant to meet this burden where the defendant relies upon an affirmed medical report, a doctor must indicate what objective medical tests were used to quantify their findings regarding range of motion. Mosheyev v. Pilevsky, 3 A.D.3d 523, 771 N.Y.S.2d 150 (2d Dept. 2004). See also Harewood v. Aiken, 273 A.D.2d 199, 710 N.Y.S.2d 82 (2d Dept. 2000); Merisca v. Alford, 243 A.D.2d 613, 663 N.Y.S.2d 853 (2d Dept. 1997); Delgado v. Hakim, 287 A.D.2d 592, 732 N.Y.S.2d 233 (2d Dept. 2001); Sainte-Aime, v. Ho, 274 A.d.2d 569, 712 N.Y.S.2d 133 (2d Dept. 2000); Herman v. Church, 276 A.D.2d 471, 714 N.Y.S.2d 87 (2d Dept. 2000).

Additionally, in order to establish a prima facie case, the doctor must also set forth his or her numeric findings, and compare the numeric findings to what is deemed normal ranges of motion for those regions of the plaintiff's body. McLaughlin v. Rizo, 38 A.d.3d 856, 832 N.Y.S.2d 666 (2d Dept. 2007). As noted by the court in McLaughlin, "[a]bsent a comparative quantification of those findings observed in his report as to what is normal, it cannot be concluded that the range of motion in the plaintiff's right shoulder was normal, or that any limitations were mild, minor, or slight so as to be considered insignificant within the meaning of the no-fault statute." Id. at 668. In Cedillo v. Rivera, 39 A.D.3d 453, 454, 835 N.Y.S.2d 238 (2d Dept. 2007) the Court held that defendants failed to make a prima facie showing that the plaintiff did not sustain a serious injury where the neurologist merely noted that plaintiff complained of pain with 90 degrees flexion but failed to compare that finding to

normal, and did not indicate what objective testing was done to support that determination, rendering his opinion conclusory. See also Gaimmalva v. Winters, 59 A.D.3d 595, 873 N.Y.S.2d 227 (2d Dept. 2009); Cedillo v. Rivera, 39 A.d.3d 453, 835 N.Y.S.2d 238 (2d Dept. 2007); Grisales v. City of New York, 85 A.D.3d 964, 925 N.Y.S.2d 633 (2d Dept. 2011).

In the instant matter, the Court finds that Defendants have failed to sustain their burden on summary judgment with respect to both Plaintiffs. Dr. Hendler, in making specific range of motion findings, failed to set forth the objective testing that he performed. In fact, he concedes that he made such measurements based solely upon "visual measurement." In Schacker v. County of Orange, 33 A.D.3d 903, 822 N.Y.S.2d 777 (2d Dept. 2006), the Second Department found that defendant did not meet his prima facie burden because the affidavit of the same Dr. Robert Hendler, failed to set forth the objective testing he performed in order to come to the conclusion that the plaintiff did not sustain any limitation in range of motion as a result of the accident.

Additionally, Defendants did not meet their burden upon summary judgment because Dr. Hendler also failed to compare his range of motion findings to what is considered normal. Defendants argue that Dr. Hendler satisfied this requirement based upon his statement that "normal range of motion values are in accordance with the AMA Guide to the Evaluation of Permanent Impairment, 6<sup>th</sup> Ed." However, those normal ranges of motion are not indicated in the report and the court would have to refer to a document outside of the record to make the necessary comparisons. Additionally, upon a comparison of the narrative reports for Plaintiff Medina and Plaintiff Quinteros, although Dr. Hendler states that both have "normal" left and right thoracolumbar rotation, he makes a finding of 45 degrees with respect to Defendant Quinteros versus a finding of 30 degrees for Plaintiff Medina. Given this disparity, the failure to indicate normal ranges of motion in the respective narrative reports requires denial of Defendants' motion. Where defendants fail to establish their prima facie entitlement to judgment as a matter of law, the Court need not address the sufficiency of the plaintiff's

opposition papers. Coscia v. 938 Trading Corp., 283 A.D.2d 538, 725 N.Y.S.2d 349 (2d Dept. 2001).

Accordingly, it is hereby

**ORDERED** that Defendants Denis Mazariego and Cornelio Mazariego's Notice of Motion (#2) for summary judgment, pursuant to CPLR § 3212, is DENIED; and it is further

**ORDERED** that Defendant Denis Mazariego and Cornelio Mazariego's Notice of Motion (#3) for summary judgment, pursuant to CPLR § 3212, is DENIED; and it is further

**ORDERED** that this matter is scheduled for an appearance in the Trial Readiness Part on **WEDNESDAY, OCTOBER 23, 2019, at 9:30 a.m.**

The foregoing constitutes the Opinion, Decision & Order of the Court on Motions #2 and #3.

Dated: New City, New York  
September 26, 2019

  
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**HON. SHERRI L. EISENPRESS, A.J.S.C.**

TO:  
All Parties (by e-file)