Vivar v Rubi
2019 NY Slip Op 34550(U)
August 21, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 16-620939
Judge: Denise F. Molia

PUBLISH

SHORT FORM ORDER

INDEX No. 16-620939
CAL. No. 18-02388MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 2-22-19 (001 & 002)
ADJ. DATE 3-29-19
Mot. Seq. # 001 - MD
002 - XMD

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PASQUAL ENRIQUEZ VIVAR,

Plaintiff,

- against -

GLEDIS RUBI and BARBARA KURZROK,

Defendants.

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Upon the following papers read on these motions for summary judgment: Notice of Motion and supporting papers by defendant Gledis Rubi, dated January 4, 2019; Notice of Cross Motion and supporting papers by defendant Barbara Kurzrok, dated January 22, 2019; Answering Affidavits and supporting papers by the plaintiff, dated March 11, 2019; Replying Affidavits and supporting papers by defendant Gledis Rubi, dated March 27, 2019; Replying Affidavits and supporting papers by defendant Barbara Kurzrok, dated March 28, 2019; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 001) by defendant Gledis Rubi, and the cross motion (seq. 002) by defendant Barbara Kurzrok, are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Gledis Rubi for summary judgment dismissing the complaint and cross claim against her is denied; and it is further

ORDERED that the cross motion by defendant Barbara Kurzrok for summary judgment dismissing the complaint and cross claim against her is denied.

This action was commenced by plaintiff Pasqual Enriquez Vivar to recover damages for injuries he allegedly sustained on January 10, 2014, when, as a passenger in a motor vehicle operated by defendant Gledis Rubi on Blydenburgh Road in Hauppauge, New York, such vehicle was struck by a motor vehicle owned and operated by defendant Barbara Kurzrok. By his bill of particulars, plaintiff claims he suffered, among other things, "traumatic right hand finger and flexor tendon adhesions and tenosynovitis with fibrosis flexor digitorum superficialis tendon necessitating right hand ring finger local tenosynovectomy, tenolysis flexor digitorum profundus and flexor digitorum superficialis tendon, partial tenotomy flexor digitorum superficialis tendon," "ulnar and radial nerve decompression neurolysis," "left shoulder partial rotator cuff tear versus tendinitis," herniated discs at levels C4-C5 and C5-C6, and disc bulges at levels L3-L4, L4-L5, and L5-S1. Defendants assert cross claims against one another for contribution and indemnification.

Gledis Rubi now moves for summary judgment in her favor, arguing that Insurance Law § 5104 precludes plaintiff from recovering for non-economic loss, as he did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). In support of her motion, Ms. Rubi submits copies of the pleadings, a transcript of plaintiff's deposition testimony, and a sworn orthopedic report by Teresa Habacker, M.D. Defendant Barbara Kurzrok also now cross-moves for summary judgment in her favor on identical grounds, incorporating the arguments and exhibits submitted by Ms. Rubi.

Plaintiff testified that at approximately 9:30 a.m. on the date in question, he was involved in a motor vehicle accident while being driven to his place of employment by Gledis Rubi. He stated that he injured his back and his right hand in the collision, but was not asked if he wanted an ambulance. Plaintiff indicated that he returned home without seeking medical attention. Plaintiff testified that around two or three days later he went to a chiropractor named Sergio and treated with him for about six months. He stated that he underwent physical therapy for 30 minutes a day, five days a week, for two or three months, after which time his sessions decreased in frequency. During such time, plaintiff also underwent diagnostic imaging. Plaintiff indicated that he was also referred to a "bone doctor" named Hector Melgar, who gave him an injection in his right hand, ordered physical therapy, and recommended he undergo surgery to his hand. He testified that he then began seeing a Dr. Branch, who gave him another injection in his right hand and, eventually, performed surgery. Plaintiff stated that the surgery caused his hand to feel better for about seven to eight months, but that it continues to hurt. He indicated that it "hurts [him] a lot" and that in the morning, he has a difficult time extending his ring finger. Upon questioning, plaintiff denied having been confined to his bed for any period of time as a result of the accident, but that he did not return to work for at least six months.

In an affirmation, Dr. Teresa Habacker states that she is an orthopedist licensed to practice in New York, and that she performed an independent orthopedic examination of plaintiff on August 22, 2018. Dr. Habacker indicates that she measured plaintiff's ranges of motion using a goniometer and compared her findings to normal values enumerated in the AMA Guidelines, 5th Edition. As to plaintiff's cervical spine, Dr. Habacker states that range of motion testing revealed the following measurements: forward flexion to 50 degrees, where normal is 50 degrees; extension to 60 degrees, where normal is 60 degrees; bilateral rotation to 80 degrees, where normal is 80 degrees; bilateral lateral bending to 50 degrees, where the normal is 45 degrees. As to plaintiff's thoracic spine, range of motion testing revealed forward

flexion to 100 degrees, where the normal range of motion is 45 degrees; extension to 25 degrees, where normal is 0 degrees; bilateral rotation to 30 degrees, where normal is 30 degrees; and bilateral lateral bending to 25 degrees, where normal is 45 degrees. As to plaintiff's lumbosacral spine, range of motion testing revealed forward flexion to 100 degrees, where the normal range of motion is 60 degrees; extension to 25 degrees, where normal is 25 degrees; and bilateral lateral bending to 25 degrees, where the normal range is 25 degrees. As to plaintiff's left shoulder, range of motion testing revealed forward flexion to 150 degrees, where the normal range of motion is 150 degrees; extension to 50 degrees, where normal is 40 degrees; abduction to 150 degrees, where the normal range of motion is 150 degrees; adduction to 50 degrees, where normal is 30 degrees; internal rotation to 90 degrees, where normal is 80 degrees; and external rotation to 90 degrees, where normal is 90 degrees. Dr. Habacker noted no tenderness on palpation, no atrophy, and no evidence of muscle spasm in the tested regions. Dr. Habacker states that she also tested the ranges of motion in both of plaintiff's hands and found them to be normal in all planes.

Based upon her examination of plaintiff, as well as her review of his medical records, Dr. Habacker diagnoses plaintiff with a cervical sprain/strain, a lumbosacral sprain/strain, a left shoulder sprain/strain, and a right hand sprain/strain, all resolved. Dr. Habacker concludes that plaintiff "does not demonstrate any objective disability and may continue normal daily living activities without restriction."

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

It is for the Court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established a prima facie case that he or she sustained "serious injury" and may maintain a common law tort action (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). 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."

A defendant moving for summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) "by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (***Nuñez v Teel***, 162 AD3d 1058, 1059, 75 NYS3d 541 [2d Dept 2018], quoting ***Grossman v Wright***, 268 AD2d 79, 83-84, 707 NYS2d 233 [2d Dept 2000]). Once a defendant meets this burden, plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute 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* ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). 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 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***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***McEachin v City of New York***, 137 AD3d 753, 756, 25 NYS3d 672 [2d Dept 2016]).

The 90/180 category of serious injury, as codified in Insurance Law § 5102 (d), requires that a plaintiff prove he or she experienced 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." Further, to qualify as a serious injury within the 90/180 category, there must be objective medical evidence of a medically-determined injury or impairment of a non-permanent nature, as well as evidence that plaintiff's activities were significantly curtailed due to such injury (*see* ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Ocasio v Henry***, 276 AD2d 611, 714 NYS2d 139 [2d Dept 2000]). In addition to demonstrating an inability to perform "substantially all" usual activities for at least 90 days of the 180 days following the accident, a plaintiff asserting a 90/180 claim must show through competent medical evidence that his or her inability to perform such activities was medically indicated and causally related to the subject accident (*see* ***Penaloza v Chavez***, 48 AD3d 654, 852 NYS2d 315 [2d Dept 2008]).

Here, defendants failed to eliminate all triable issues with regard to plaintiff's claim under the 90/180 category of Insurance Law § 5102 (d) and, therefore, did not establish a prima facie case of entitlement to summary judgment in their favor (*see* ***Vega v Moradof***, ___AD3d___, 103 NYS3d 855 [2d Dept 2019]; ***Jung Han v Dragonetti Landscaping***, 174 AD3d 791, 102 NYS3d 884 [2d Dept 2019]; ***Aiken v Liotta***, 167 AD3d 826, 90 NYS3d 146 [2d Dept 2018]; ***Levitant v Beninati***, 167 AD3d 730, 87 NYS3d 504 [2d Dept 2018]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). Plaintiff testified that he

sustained an injury to his right hand during the subject accident which caused him to miss approximately six months of work. Defendants failed to adduce any evidence, or elicit any testimony, demonstrating that plaintiff was able to perform substantially all of the material acts which constituted his usual and customary daily activities for more than 90 of the first 180 days following the subject incident.

Accordingly, the motion by defendant Gledis Rubi, and the cross motion by defendant Barbara Kurzrok, for summary judgment dismissing the complaint and cross claim against them are denied.

Dated: 8.21.19

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION