

Mariduená v Pilalo

2020 NY Slip Op 31016(U)

March 9, 2020

Supreme Court, Bronx County

Docket Number: 22166/2017E

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 15

RAUL MARIDUENA, et al.

Index No. 22166/2017E

-against-

Hon. MARY ANN BRIGANTTI

LUIS PILALO, et al.

Justice Supreme Court

The following papers numbered 1 to _____ were read on this motion (Seq. No. 4)
for SUMMARY JUDGMENT noticed on July 3, 2019.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1, 2
Answering Affidavit and Exhibits (Cross-Motions)	No(s). 3, 4
Replying Affidavit and Exhibits	No(s). 5

Motion is Respectfully Referred to Justice:
Dated: _____

Upon the foregoing papers, the defendants Luis A. Pilalo and Sandra Cortez (collectively, "Defendants") move for summary judgment dismissing the complaint of the plaintiffs Raul Mariduen a ("Raul") and Isabel Mariduen a ("Isabel") for their failure to satisfy the "serious injury" threshold as defined by New York Insurance Law § 5102 (d). Plaintiffs oppose the motion.

When a defendant seeks summary judgment alleging that a plaintiff does not meet the "serious injury" threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v Plameri*, 1 N.Y.3d 536 [2003]). "Such evidence includes affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Spencer v Golden Eagle, Inc.*, 82 A.D.3d 589, 590 [1st Dept 2011]). A defendant may also meet his or her summary judgment burden with sufficient medical evidence demonstrating that the plaintiff's injuries are not causally related to the accident (*see Farrington v Go On Time Car Serv.*, 76 A.D.3d 818 [1st Dept 2010], citing *Pommells v Perez*, 4 N.Y.3d 566, 572 [2005]). Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Toure v Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 [2002]).

Raul

In this matter, Defendants carried their initial summary judgment burden of establishing that Raul did not sustain a "serious injury" to his cervical or thoracic spine or right shoulder as a result of this accident. Defendants accomplished this by submitting the sworn IME report of orthopedist Dr. Richard Weiss, who found that Raul had normal ranges of motion in his cervical and thoracic spine upon a physical

examination, and negative clinical results. The finding of limitations not exceeding 13.5% in Raul's right shoulder did not defeat Defendants' prima facie showing (*see Style v Joseph*, 32 A.D.3d 212, 214 n [1st Dept 2006] [20 degree limitation in left shoulder considered insignificant], citing *Sellitto v Casey*, 268 A.D.2d 753, 755 [3d Dept 2000] [10% limitation in left shoulder considered insignificant]; *see also Gordon v Hernandez*, — A.D.3d —, at *3 [1st Dept 2020] ["8%" limitation in "the ankle" considered insignificant], citing *Arrowood v Lowinger*, 294 A.D.2d 315 [1st Dept 2002] ["14%" limitation in "the ankle" considered insignificant]; *Sone v Qamar*, 68 A.D.3d 566 [1st Dept. 2009] [20 degree limitation in lumbar spine considered insignificant]). Therefore, Defendants have established that Raul sustained no "permanent consequential" or "significant limitation" category of injury to his cervical or thoracic spine, or right shoulder, as a result of the subject accident (*see Tejada v LKQ Hunts Point Parts*, 166 A.D.3d 436 [1st Dept 2018]; N.Y. Ins. Law § 5102 [d]).

In opposition to the motion, Raul has raised a triable issue of fact as to whether he sustained a "permanent consequential" or "significant limitation" to his cervical spine as a result of this accident. Raul accomplished this by submitting the sworn affirmation of Dr. Steve Losik, who reviewed and confirmed the accuracy of Raul's cervical and lumbar spine MRIs, which revealed, among other things, multiple herniations and bulges, and multiple bulges, respectively. Raul additionally submitted the sworn report of Dr. Henry Hall who first examined him within approximately one (1) week after the subject accident on September 1, 2016, and most recently on September 3, 2019. During his examinations, Dr. Hall continuously found, among other things, pain and range of motion limitations in Raul's cervical spine and directly related that injury to the subject accident (*see Holloman v American United Transp. Inc.*, 162 A.D.3d 423, 424 [1st Dept 2018]).

Since Dr. Hall did not examine Raul's thoracic spine or right shoulder for range of motion, Raul failed to refute the findings of Defendants' experts that his claimed injuries to those body parts had resolved (*Lopez v Morel-Ulla*, 144 A.D.3d 504, 505 [1st Dept 2016] ["Absent limitations, there is no serious injury"] [citation omitted]). Nevertheless, since Defendants did not raise any issue as to lack of causation, if the trier of fact determines that Raul sustained a serious injury to his cervical spine at trial, he may recover damages for his thoracic spine and right shoulder injuries even though they do not satisfy the serious injury threshold (*Bonilla v Vargas-Nunez*, 147 A.D.3d 461, 462 [1st Dept 2017], citing *Rubin v SMS Taxi Corp.*, 71 A.D.3d 548, 549-550 [1st Dept 2010]).

Isabel

Defendants also carried their initial summary judgment burden of establishing that Isabel did not sustain a "serious injury" to her cervical, thoracic, or lumbar spine, left shoulder or left hand, as a result of

this accident. Defendants accomplished this by submitting the sworn IME report of Dr. Weiss, who found that Isabel had normal ranges of motion in her cervical, thoracic, and lumbar spine, left shoulder and left hand, upon a physical examination, and negative clinical results (*Ahmed v Cannon*, 129 A.D.3d 645, 646 [1st Dept 2015]).

The Court notes that Dr. Weiss did not examine Isabel's alleged left hip, left knee, left foot, and right elbow injuries. Without any detailed "objective, quantitative evidence," Defendants did not meet their prima facie burden with respect to those body parts (*Gorden v Tibulcio*, 50 A.D.3d 460, 463 [1st Dept 2008]). Moreover, Isabel testified that she injured her left hip, left knee, left foot, and right elbow as a result of this accident (Pl. EBT at 28, 35-36; compare *Fludd v Pena*, 122 A.D.3d 436 [1st Dept 2014]).

Therefore, Defendants have established that Isabel sustained no "permanent consequential" or "significant limitation" category of injury to her cervical, thoracic, or lumbar spine, left shoulder and left hand, only, as a result of the subject accident (*see Tejada v LKQ Hunts Point Parts*, 166 A.D.3d 436 [1st Dept 2018]; N.Y. Ins. Law § 5102 [d]).

In opposition to the motion, Isabel has raised a triable issue of fact as to whether she sustained a "permanent consequential" or "significant limitation" to her cervical and lumbar spine as a result of this accident. Isabel accomplished this by submitting the sworn affirmation of Dr. Losik, who reviewed and confirmed the accuracy of Isabel's cervical and lumbar spine MRIs, which revealed, among other things, multiple herniations and bulges, and multiple bulges, respectively. Isabel additionally submitted the sworn report of Dr. Hall who first examined her within approximately one (1) week after the subject accident on September 1, 2016, and most recently on September 3, 2019. During his examinations, Dr. Hall continuously found, among other things, pain and range of motion limitations in Isabel's cervical and lumbar spine and directly related those injuries to the subject accident (*see Holloman*, 162 A.D.3d at 424).

Since Dr. Hall did not examine Isabel's thoracic spine, left shoulder, or left hand for range of motion, Isabel failed to refute the findings of Defendants' experts that her claimed injuries to those body parts had resolved (*Lopez*, 144 A.D.3d at 505 ["Absent limitations, there is no serious injury"] [citation omitted]). Nevertheless, since Defendants did not establish their prima facie showing with respect to Isabel's left hip, left knee, left foot, and right elbow injuries, and did not raise any issue as to lack of causation with respect to any body part, if the trier of fact determines that Isabel sustained a serious injury to her cervical or lumbar spine, left hip, left knee, left foot, or right elbow at trial, she may recover damages for her thoracic spine, left shoulder, and left hand, even though they do not satisfy the serious injury threshold (*Bonilla*, 147 A.D.3d at 462, citing *Rubin.*, 71 A.D.3d at 549-550).

"90/180-day" injury and permanency

With respect to Raul's "90/180-day" injury claim, Defendants sufficiently established their entitlement to dismissal of this claim by submitting Raul's deposition transcript wherein he admitted that he missed, at most, approximately seven to eight weeks of work (Raul EBT at 13-14; see *Moreira v Mahabir*, 158 A.D.3d 518, 519 [1st Dept 2018]; *Gomez v Davis*, 146 A.D.3d 456, 457 [1st Dept 2017]).

With respect to Isabel's 90/180-day" injury claim, Defendants sufficiently established their entitlement to dismissal of this claim by submitting Isabel's deposition transcript wherein she admitted that she was not confined to bed or home for longer than approximately one to two months (Isabel EBT at 37-38; *Moreira*, 158 A.D.3d at 519; *Gomez*, 146 A.D.3d at 457).

Finally, there is no evidence on this record that either Raul or Isabel sustained a "total loss of use" of any body part, and therefore, any claims that they sustained a "permanent loss of use" of any body part are dismissed (see *Swift v New York Tr. Auth.*, 115 A.D.3d 507, 509 [1st Dept 2014]).

Accordingly, it is hereby,

ORDERED, that Defendants' motion for summary judgment is granted to the extent that Raul's and Isabel's claims that they sustained a "90/180 day" injury as a result of this accident are dismissed, and it is further,

ORDERED, that Raul's claim that he sustained a "serious injury" to his thoracic spine and right shoulder, as a result of this accident, is dismissed, and it is further,

ORDERED, that Isabel's claims that she sustained a "serious injury" to her thoracic spine, left shoulder, and left hand, as a result of this accident, is dismissed, and it is further,

ORDERED, that Raul's and Isabel's claims that they sustained a "permanent loss of use" of any body part are dismissed, and it is further,

ORDERED, that the remaining branches of Defendants' motion are denied.

This constitutes the Decision and Order of this Court.

Dated: 3/9/2020

Hon. Mary Ann Brigantti J.S.C.
Hon. Mary Ann Brigantti

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT