

Romero v Hill

2020 NY Slip Op 34715(U)

February 27, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 16-607029

Judge: Vincent J. Martorana

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SHORT FORM ORDER

INDEX No. 16-607029

CAL. No. 18-02216MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY

PRESENT:

Hon. VINCENT J. MARTORANA
Justice of the Supreme Court

MOTION DATE 5-2-19
ADJ. DATE 6-6-19
Mot. Seq. # 003 - MD
004 - MD

-----X
ROBERTO ROMERO,

Plaintiff,

- against -

LINDA M. HILL and BREANNA M. TORRES,

Defendants.
-----X

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Upon the following papers numbered 1 to 50 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-24; 25-38; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 39-46; Replying Affidavits and supporting papers 49-50; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendant Linda Hill and the motion by defendant Breanna Torres are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Linda Hill seeking summary judgment dismissing the complaint is denied; and it is further

ORDERED the motion by defendant Breanna Torres, improperly denominated as a cross motion, seeking summary judgment dismissing the complaint is denied.

Plaintiff Roberto Romero commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Middle Country Road and Crown Acres Drive in the Town of Brookhaven on December 3, 2015. The accident allegedly occurred when the vehicle owned and operated by defendant Linda Hill failed to stop at the red traffic light and entered the aforementioned intersection against the traffic light controlling her direction of travel, striking the front right side of the vehicle owned and operated by defendant Breanna Torres and propelling the Torres vehicle into the rear of the vehicle operated by plaintiff. As a result of the impact between the Torres' vehicle and plaintiff's vehicle, plaintiff's vehicle was pushed

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into the rear of the vehicle ahead. At the time of the accident, defendant Hill was traveling southbound on Crown Acres Road, defendant Torres was traveling westbound on Middle Country Road, and plaintiff was stopped in traffic in the eastbound lane of Middle Country Road. By his bill of particulars, plaintiff alleges that he sustained various personal injuries as a result of the subject collision, including a fracture of the proximal first metacarpal of the left wrist; tears of the scapholunate ligament and ulnar triangular fibrocartilage of the left wrist; and aggravation and/or exacerbation of pre-existing injury of the right wrist.

Defendant Hill now moves for summary judgment on the basis that the injuries alleged to have been sustained by plaintiff as a result of the subject accident fail to meet the serious injury threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendant Hill submits copies of the pleadings, plaintiff's deposition transcript, the uncertified reports of the radiological studies of plaintiff's wrists, spine, and right eye taken on March 3, 2016, and the sworn medical reports of Dr. Rashid Altafi and Dr. Matthew Skolnick. At defendant Hill's request, Dr. Skolnick conducted an independent orthopedic examination of plaintiff on June 18, 2018. In addition, Dr. Altafi conducted an initial independent orthopedic examination of plaintiff on December 8, 2015. Defendant Torres also moves for summary judgment on the issue of serious injury and relies on the same evidence as submitted by defendant Hill. Plaintiff opposes the motions on the grounds that defendants failed to meet their prima facie burden, and that the evidence submitted in opposition demonstrates that he sustained a serious injury within the "limitations of use" and the "90/180" categories of the Insurance Law. In opposition to the motion, plaintiff submits photographs of his vehicle following the subject accident, and the sworn medical reports of Dr. Syeda Asad, Dr. Mahvash Rafii, Dr. Eliyahu Engelsohn, and Dr. Edmond Knopp.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (*Dufel v Green*, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (see *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Porcano v Lehman*, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; *Nolan v Ford*, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "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 seeking summary judgment on the ground that a plaintiff's negligence claim is barred under 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 Sys.*, *supra*; *Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (see *Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; *Torres*

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v *Micheletti*, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Where a plaintiff has alleged an aggravation/and or exacerbation of a pre-existing injury or condition, a defendant may demonstrate his or her entitlement to summary judgment by submitting an expert's findings showing no deficits in range of motion in the alleged exacerbated/aggravated body part or by showing that the findings in the radiological studies were pre-existing and not caused by the subject accident (see *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Kendig v Kendig*, 115 AD3d 438, 981 NYS2d 411 [1st Dept 2014]; *Brand v Evangelista*, 103 AD3d 539, 962 NYS2d 52 [2d Dept 2013]; *Spencer v Golden Eagle*, 82 AD3d 589, 920 NYS2d 24 [1st Dept 2011]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (see *Dufel v Green*, *supra*; *Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; *Pagano v Kingsbury*, *supra*).

Here, defendant Hill, through the submission of plaintiff's deposition transcript and competent medical evidence, established a prima face case that plaintiff did not sustain an injury within the meaning of Section 5102 (d) of the Insurance Law (see *Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, *supra*; *Davis-Hassan v Siad*, 101 AD3d 932, 957 NYS2d 205 [2d Dept 2012]; *Torres v Ozel*, 92 AD3d 770, 938 NYS2d 469 [2d Dept 2012]). Defendant Hill's examining orthopedist, Dr. Skolnick, used a goniometer to test the ranges of motion in plaintiff's spine, shoulders and wrists, and compared his respective findings to the normal range of motion values for each region (see e.g. *Cantave v Gelle*, 60 AD3d 988, 877 NYS2d 129 [2d Dept 2009]; *Staff v Yshua*, 59 AD2d 614, 874 NYS2d 180 [2d Dept 2009]; *Desulme v Stanya*, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). Dr. Skolnick states in his medical report that an examination of plaintiff reveals full range of motion in his spine, shoulders and wrists, that there is no evidence of spasms, or paraspinal or trapezii tenderness upon palpation of the paraspinal muscles, that there is no evidence of atrophy of the intrinsic muscles, and that throughout the upper and lower extremities sensory responses were intact. Dr. Skolnick states that plaintiff is able to walk on his heels and toes with good balance, that the straight leg raising test is negative, bilaterally, and that neither an antalgic gait or limp is observed. Dr. Skolnick states that there was no evidence of tenderness to palpation of the shoulders or wrists, that there was no crepitus noted, and that the impingement and Tinel's signs, and Phalen's and O'Brien's tests were negative. Dr. Skolnick opines that the strains and sprains to plaintiff's spine and wrists, which he suffered as a result of the subject accident, have resolved, and that plaintiff is capable of performing all tasks of his daily living, as well as, maintaining full employment without restrictions.

Furthermore, plaintiff's deposition testimony establishes that he did not sustain an injury within the 90/180 category of the Insurance Law (see *Pryce v Nelson*, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; *Knox v Lennihan*, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009]; *Rico v Figueroa*, 48 AD3d 778, 853 NYS2d 129 [2d Dept 2008]). Plaintiff testified at an examination before trial that following the subject accident he was confined to his bed for approximately three days, that he did not miss any days from his employment as a deli associate as a result of the injuries he sustained in the accident, and that he continued to work 40 hours per week and perform the same duties, with the exception of requiring assistance to lift very heavy items, as he did prior to the accident. He testified that he received physical therapy and chiropractic treatments for approximately six months, but ceased all treatment once his No Fault benefits were terminated, and that he currently does not have any treatments scheduled. Plaintiff further testified that he was involved in two prior accidents, a construction accident in 2010, where he fell from a roof and sustained numerous injuries to his right wrist, hand and face, requiring surgery and the placement of a titanium implant in his face, and a motor vehicle accident in 2013, which did not cause any injuries.

Defendant Hill, having made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of the statute, shifted the burden to plaintiff to come forward with evidence to overcome defendant Hill's

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submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained (*see Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see Ferraro v Ridge Car Serv.*, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; *Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). “Whether a limitation of use or function is ‘significant’ or ‘consequential’ (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part” (*Dufel v Green*, *supra* at 798). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott*, *supra*). To prove the extent or degree of physical limitation with respect to the “limitations of use” categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be 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* at 350; *see also Valera v Singh*, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; *Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see Perl v Meher*, *supra*; *Paulino v Rodriguez*, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition to defendant Hill’s prima facie showing, plaintiff has raised a triable issue of fact as to whether he sustained an injury within the limitations of use category of the Insurance Law as a result of the subject collision (*see Garafano v Alvarado*, 112 AD3d 783, 977 NYS2d 316 [2d Dept 2013]; *David v Caceres*, 96 AD3d 990, 947 NYS2d 990 [2d Dept 2012]; *Williams v Fava Cab Corp.*, 90 AD3d 912, 935 NYS2d 90 [2d Dept 2011]; *Compass v GAE Transp., inc.*, 79 AD3d 1091, 914 NYS2d 255 [2d Dept 2010]). Plaintiff has submitted the affidavit of Dr. Syeda Asad, his treating orthopedist. Dr. Asad, in his affidavit, concludes, based upon his contemporaneous and recent examinations of plaintiff, that the injuries to his spine and wrists are permanent, and that the observed range of motion deficits were significant (*see Vaughan-Ware v Darcy*, 103 AD3d 621, 959 NYS2d 698 [2d Dept 2013]; *Bykova v Sisters Trans, Inc.*, 99 AD3d 654, 952 NYS2d 95 [2d Dept 2012]; *Kanard v Setter*, 87 AD3d 714, 928 NYS2d 782 [2d Dept 2011]; *Dixon v Fuller*, 79 AD3d 1094, 913 NYS2d 776 [2d Dept 2010]). Dr. Asad further states that the injuries to the plaintiff’s spine, and wrists, and the range of motion limitations are causally related to the subject accident (*see Harris v Boudart*, 70 AD3d 643, 893 NYS2d 631 [2d Dept 2010]).

In addition, Dr. Asad states that plaintiff had a prior existing injury to his right wrist, which was asymptomatic prior to the subject accident, but that the subject accident exacerbated an otherwise asymptomatic condition. Thus, plaintiff has sufficiently addressed the prior injury to his right wrist and is not obliged to do more to overcome defendant Hill’s motion for summary judgment (*see e.g. Linton v Nawaz*, 14 NY3d 821, 900 NYS2d 239 [2d Dept 2010]; *Jilani v Palmer*, 83 AD3d 786, 920 NYS2d 424 [2d Dept 2011]; *Harris v Boudart*, *supra*). Contrary to plaintiff’s argument, although Dr. Asad’s report refers to Dr. Rashid Altafi’s examinations of plaintiff, including his opinions and conclusions, he has included the sworn medical reports of Dr. Altafi with his report, thereby making the report admissible (*see Grasso v Angerami*, 79 NY2d 813, 588, 580 NYS2d 178 [1991]; *Irizarry v Lindor*, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]; *Joseph v Livery*, 58 AD3d 688, 871 NYS2d 663 [2d Dept 2009]). Furthermore, defendant Hill also submitted a sworn copy of Dr. Altafi’s medical report, dated December 8, 2015, showing that plaintiff sustained significant range of motion limitations to his spine and wrist contemporaneous to the subject accident (*see Vaughan-Ware v Darcy*, 103 AD3d 621, 959 NYS2d 698 [2d Dept 2013]). Consequently, Dr. Asad’s affidavit is sufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury to his spine and right wrist within the limitations of use categories of the Insurance Law

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as a result of the subject accident (see *Young Chool Yoi v Rui Dong Wang*, 88 AD3d 991, 931 NYS2d 373 [2d Dept 2011]; *Gussack v McCoy*, 72 AD3d 644, 897 NYS2d 513 [2d Dept 2010]).

Thus, plaintiff has presented medical evidence that conflicts with that of defendant Hill’s expert, who found that the injuries sustained by plaintiff were resolved. “Where conflicting medical evidence is offered on the issue of whether a plaintiff’s injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury” (*Noble v Ackerman*, 252 AD2d 392, 395, 675 NYS2d 86 [1st Dept 1998]; see *Johnson v Garcia*, 82 AD3d 561, 919 NYS2d 13 [1st Dept 2011]; *LaMasa v Bachman*, 56 AD3d 340, 869 NYS17 [1st Dept 2008]; *Ocasio v Zorbas*, 14 AD3d 499, 789 NYS2d 166 [2d Dept 2005]; *Reynolds v Burghezi*, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]). Moreover, “where [a] plaintiff establishes that at least some of his injuries meet the ‘no-fault’ threshold, it is unnecessary to address whether his proof with respect to other injuries he allegedly sustained would have been sufficient to withstand defendant’s motion for summary judgment” (*Linton v Nawaz*, 14 NY3d 821, 822, 900 NYS2d 239 [2010]; see *Rubin v SMS Taxi Corp.*, 71 AD3d 548, 898 NYS2d 110 [1st Dept 2010]). Accordingly, defendant Hill’s motion for summary judgment dismissing the complaint is denied.

Having determined that defendant Hill failed to sustain her prima facie burden to demonstrate that plaintiff did not sustain an injury within the limitations use category of the Insurance Law, defendant Torres’ motion for summary judgment on the same grounds and relying on the same evidence as defendant Hill also is denied.

Dated: Riverhead, New York
February 27, 2020



VINCENT J. MARTORANA, J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION