

<b>Rodriguez v Tavarez</b>
2021 NY Slip Op 32932(U)
March 31, 2021
Supreme Court, Westchester County
Docket Number: Index No. 50793/2019
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X  
ENMANUEL E. RODRIGUEZ,

Plaintiff,

**DECISION & ORDER**  
Index No. 50793/2019  
Motion Sequence 2

-against-

DIONICIO MOISES REYES TAVAREZ AND SARAH  
ANNE LACARRUBBA

Defendants.

-----X

The following papers were read on the motion (Sequence#2) for an order, pursuant to CPLR 3212 and Article 51 of the Insurance Law of the State of New York granting summary judgment in favor of the defendant Sarah Anne Lacarrubba, dismissing the verified complaint:

- Notice of Motion/Affirmation in Support/Exhibits A-H
- Affirmation in Opposition/Exhibits A-F
- Reply Affirmation

Factual and Procedural Background

The plaintiff, Enmanuel E. Rodriguez (“Rodriguez/the plaintiff”), commenced this action on January 11, 2019, seeking damages for alleged serious injuries sustained on March 5, 2017, near the intersection of Devoe Avenue and McLean Avenue in Yonkers, New York, when a vehicle owned and operated by the defendant, Sarah Anne LaCarrubba (“LaCarrubba/the defendant”) collided with a vehicle in which Rodriguez was a passenger, owned and operated by the defendant, Dionicio Moises Reyes Taveras. The parties completed discovery and the plaintiff filed the note of issue.

Rodriguez’s bill of particulars alleges that he suffered the following serious and severe personal injuries: post-traumatic acute cervical myofascial strain; post-traumatic neck pain; post-traumatic left knee pain; post-traumatic cervicalgia; post-traumatic paracervical spasms; post-traumatic severe 8-9/10 constant sharp ache and intermittently stabbing in the low back radiating to the buttocks and upper thighs; post-traumatic paravertebral neck area pain radiating down to the shoulder level; post-traumatic pain increased by extension and lateral rotation, exertion, prolonged sitting, bending, fatigue,

lifting, pulling, prolonged standing and walking; post-traumatic pain radiating from the low lumbar paravertebral neck area to the buttocks and thighs; post-traumatic discomfort sitting; post-traumatic transition from sit to stand is with pain and difficulty post traumatic severe tenderness at the upper trapezius muscle and periscapular region and also paravertebral over the right and left C2-3, C3-4, C4-5, C5-6, C6-7, C7-T1 cervical facet joints; post-traumatic cervical facet syndrome of right and left C2-3, C3-4, C4-5, C5-6, C6-7, C7-T1 requiring bilateral cervical facets steroid injection; post-traumatic extension and lateral rotation with axial compression: positive on the right and left side; post-traumatic severe tenderness on palpation paravertebral over the right and left L3-4, L4-5, and L5-S1 lumbar facet joints requiring bilateral lumbar facets steroid injections; post-traumatic lumbar facet syndrome at right and left L3-4, L4-5 and L5-S1 lumbar facet joints; post-traumatic sacroiliac joints arthropathy/sacroiliitis requiring bilateral sacroiliac joint steroid injections; post-traumatic tenderness on palpation over right and left sacroiliac joints; post-traumatic loss of range of motion, use and function of neck and back; pain and suffering.

The plaintiff also alleges severe anxiety, concern about possible further complications, depression, humiliation, self-consciousness, feelings of helplessness, frustration, feelings of hopelessness, feelings of victimization and vulnerability, flashbacks, fear, anger, desperation, distraction, decreased concentration, exasperation, sadness, melancholy, feelings of invalidism, social inhibition and psychic trauma.

LaCarrubba, by her attorney, now files the instant motion, arguing that the objective medical evidence on the record establishes that the injuries claimed by Rodriguez, do not fall within any one of the nine categories of serious injury specified in Section 5102[d] of the No-Fault Law. .

The plaintiff, by his attorney, opposes the motion arguing that LaCarrubba has not made a prima facie showing that he did not suffer a serious injury and has failed to shift the burden of proof to the plaintiff for rebuttal. The plaintiff's attorney argues that the defendant failed to present sufficient evidence to support the position that the plaintiff did not sustain a significant limitation of use of a body function or system or a permanent injury to his cervical spine and lumbar spine, thereby missing at least one category of serious injury specified in Section 5102[d] of the No-Fault Law. The attorney contends that the defendant's own IME doctor found range of motion restrictions and the defendant failed to have the plaintiff's MRI films independently reviewed. The attorney asserts that the evidence submitted is sufficient to meet the threshold requirements and that the plaintiff has established that he sustained an exacerbation of and aggravation of asymptomatic pre-existing injuries and a new cervical spine injury, with range of motion limitations.

In reply, LaCarrubba's attorney points out that the plaintiff's bill of particulars does not allege cervical or lumbar herniations or bulges, nor does it allege aggravation or exacerbation of a pre-existing condition. The attorney further points to issues with the affirmations of the doctors' affirmations submitted in support and argues that the plaintiff has failed to raise an issue of fact to defeat the summary judgment motion.

## Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). If a sufficient prima facie showing is made, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR 3212[b]); *see also*, *Vermette v Kenworth Truck Company*, 68 NY2d 714, 717 [1986]). The parties' competing contentions are viewed in the light most favorable to the party opposing the motion. (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]).

Insurance Law §5104(a) provides in pertinent part that:

Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use of operation of a motor vehicle in this state, there shall be no right to recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss....(McKinney's Insurance Law §5104[a])

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. (McKinney's Insurance Law §5102[d])

"The determination of whether [a] plaintiff sustained a serious injury within the meaning of the statute is, as a rule, a question for the jury." (31 N.Y.Prac., New York Insurance Law § 32:32 [2015-2016 ed.]; *see also*, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]). "[O]n a motion for summary judgment the defendant has the burden to show that the plaintiff has not sustained a serious injury as a matter of law" (*Id.*).

The degree or seriousness of an injury may be shown in one of two ways: either by an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or by an expert's qualitative assessment of a plaintiff's condition provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357 [2002]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of New York State Insurance Law § 5102(d), by the submission of an affirmed medical report from a medical expert who has examined the plaintiff and has determined that there are no objective medical findings to support the plaintiff's alleged claim (*see Rodriguez v Huerfano*, 46 AD3d 794 [2d Dept 2007]).

In this case, the plaintiff did not suffer death, dismemberment, significant disfigurement, fracture or loss of a fetus. Therefore, those categories of the Insurance Law § 5102(d) can be eliminated. Therefore, the plaintiff would be claiming a permanent loss of use of a body organ, member, function or system; a 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 prevented him from performing substantially all of the material acts which constitute his 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. The defendant argues that the plaintiff had pre-existing injuries not causally related to the incident.

In support of the motion, LaCarrubba submits the report of Richard N. Weinstein, M.D., a board certified orthopedic surgeon, license to practice in New York, who performed an independent medical examination on Rodriguez on November 6, 2019. Dr. Weinstein notes in his report that Rodriguez reported that he had been involved in a prior accident in 2015 and according to the records, that accident took place on February 27, 2015, causing him to sustain injuries to his neck, back, right shoulder and right knee. The records also indicate that Rodriguez underwent left temporomandibular joint articular disc disorder/internal derangement surgery on September 30, 2015, as a result of that accident. Dr. Weinstein states that the record from Jason R. Baynes, M.D. indicated that Rodriguez underwent right knee and right shoulder surgery on July 16, 2015.

Dr/ Weinstein reports that at the time of examination, Rodriguez had complaints to his neck and back only. He notes decreased range of motion, but states that the range of motion testing is actively performed by Rodriguez at his own volition and therefore, the findings can be considered subjective in nature. He states that there is no objective evidence of cervical or lumbar radiculopathy and that neurologically, he is intact, with no full muscle strength and normal sensation throughout his bilateral upper and lower extremities. Dr. Weinstein opines that there is no objective evidence of disability.

Dr. Weinstein reports that at the time of the examination, Rodriguez did not have any complaints with regard to his left knee and the records do not indicate ongoing

treatment or diagnostic with regard to his knee. Dr. Weinstein further reports that Rodriguez currently has no objective evidence of any ongoing disability and opines that he is able to work full duty without orthopedic restrictions and is capable of performing his normal activities of daily living without orthopedic restrictions. He opines that there is no objective evidence of permanency as a result of the alleged injuries from the accident.

La Carrubba's attorney also asserts that the plaintiff's claims are belied by the x-ray of his lumbar spine, dated February 27, 2015, which showed abnormalities of transverse processes, most likely congenital. The attorney refers the Court to the plaintiff's prior cervical spine MRI dated March 4, 2015 and his prior lumbar spine MRI, dated March 5, 2015, which showed that he had previously sustained injuries to his cervical and lumbar spine. LaCarrubba's attorney argues that the conditions in Rodriguez's neck and back were the result of his prior motor vehicle accident of February 27, 2015, which injuries remained unresolved and that at the most, Rodriguez sustained soft-tissue injuries to his cervical and lumbosacral spine, all of which have resolved and none of which qualify as serious within the meaning of the Insurance Law.

Upon review and viewing the facts in the light most favorable to the plaintiff, this Court finds that LaCarrubba has failed to make a prima facie showing of entitlement to judgment as a matter of law with respect to the plaintiff suffering a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; and significant limitation of use of a body function or system.

Dr. Weinstein's own examination, using a goniometer, revealed decreased range of motion in the plaintiff's cervical spine and thoracolumbar spine. Dr. Weinstein dismissed such limitation by stating that the resting is subjective, however, he performed the testing with a goniometer, which is an objective test. The plaintiff also reported pain in his next and lower back to the doctor. Further, Dr. Weinstein failed to review the MRIs performed subsequent to the March 5, 2017 accident and did not address the causal relationship between the plaintiff's pain and limited range of motion and the subject accident.

Although, the defendant is correct that the plaintiff failed to allege exacerbation or aggravation of injuries in the bill of particulars, the defendant's evidence was insufficient to even require the plaintiff to address this, in that, Dr. Weinstein failed to show that the limitations were the result of the prior accident.

Since, the defendant has failed to make a prima facie showing, the Court need not address the adequacy of the plaintiff's opposition.

However, with regard to any claims of alleged injuries that prevented the plaintiff from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following his alleged injury, such is denied.

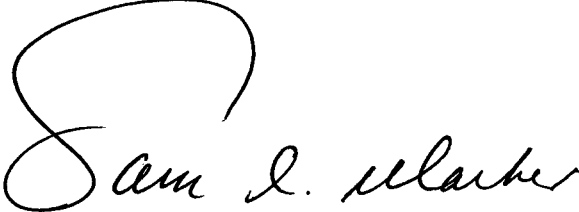
To sustain impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment, a plaintiff must present objective evidence of "a medically determined injury or impairment of a non-permanent nature" (see *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 357 [2002]). Curtailment of recreational and household activities is insufficient to meet the burden (*Omar v Goodman*, 295 AD2d 413 [2d Dept 2002]). The plaintiff did not offer any medical evidence to support a claim that he was unable to perform substantially all of his usual and customary activities under this category. Therefore, there is no evidence to show that Rodriguez sustained an injury in this category.

Accordingly, based on the foregoing, it is hereby;

ORDERED that the motion for summary judgment is denied in part and granted in part.

The parties are directed to appear before the Settlement Conference Part on a date to be determined. The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York  
March 31, 2021



HON. SAM D. WALKER, J.S.C.