

**Reyes v Dixon**

2021 NY Slip Op 33578(U)

September 28, 2021

Supreme Court, Rockland County

Docket Number: Index No. 035719/2019

Judge: Robert M. Berliner

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF ROCKLAND  
HON. ROBERT M. BERLINER, J.S.C.

To commence the statutory  
time period 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.

-----X  
FABIAN BUGLIONE REYES and DANIELA  
DIAZ CHAPARRO,

Plaintiffs,

DECISION AND ORDER

-against-

Index No.: 035719/2019

RICHARD A. DIXON and RICHARD J. DIXON,  
  
Defendant.

Motion Sequences #5 and #6

-----X

The following papers, filed on NYSCEF, were read on Defendants' motion for summary judgment dismissing Plaintiffs' Complaint and Plaintiff Fabian Buglione Reyes's cross-motion for summary judgment dismissing Defendants' counterclaim as asserted against him:

Notice of Motion/Statement of Material Facts/Affirmation/Exhibits(A-I)/Memorandum of Law in Support/Affidavit.....	NYSCEF Doc. Nos. 46-59
Notice of Cross0Motion/ Affirmation in Support/Affirmation in Good Faith .....	63-65
Affirmation in Opposition to Motion/Exhibits(A-B).....	66-68
Affirmation in Opposition to Cross-Motion/Exhibits(A-B) .....	71-73
Reply Affirmation.....	75

Upon the foregoing papers, it is ORDERED that these motions are disposed of as follows:

This action arises out of a motor vehicle accident between Plaintiffs and Defendants on September 14, 2019. Plaintiffs commenced this case against Defendants for their alleged injuries sustained as a result of the accident. The Complaint alleges that Plaintiff Fabian Reyes was operating a vehicle, with Plaintiff Daniela Chaparro riding as a passenger, when Defendant Richard J. Dixon struck Plaintiffs with a vehicle he was driving, owned by Defendant Richard A. Dixon. Plaintiffs are married and both seek damages for negligence and loss of consortium. In response, Defendants asserted an affirmative defense through a counterclaim against Plaintiff Reyes, alleging that his negligent operation of the vehicle contributed to Plaintiffs' injuries. Now,

before the Court are Defendants' summary judgment motion on the ground that Plaintiffs did not sustain serious injuries within the meaning of the New York Insurance Law § 5102(d) and Plaintiff Reyes's motion seeking summary judgment on Defendants' counterclaim based upon the same arguments in Defendants' motion.

In support of their motion, Defendants submit, *inter alia*, both Plaintiffs' deposition transcripts, independent medical examination ("IME") reports, and radiology records. The medical reports and deposition transcripts show that Plaintiff Reyes complains of weakness in his left hand and right knee pain and Plaintiff Chaparro complains of pain in her right shoulder. Rene Elkin, M.D., performed the IME of both Plaintiffs. Based upon her evaluation of Plaintiff Reyes, Dr. Elkin opined that:

"There is no evidence for neurological injury that would explain the persistence of his symptoms and his ongoing limitations. There are no objective findings for any structural neurological injury that would prevent him from functioning fully at his pre-accident level without restrictions. There are no objective findings for accident-related neurological permanency or disability. The plaintiff did not sustain a significant limitation of use, permanent consequential limitation of use, or was prevented from primary daily activities during the first 90 out of 180 days following the accident." Affirmation in Support, Exhibit E, Rene Elkin, M.D.'s IME Report of Reyes at 3.

Similarly, Dr. Elkin opined that for Plaintiff Chaparro:

"The claimant continues to work in her usual capacity. There is no evidence for neurological injury that would explain the persistence of her symptoms and her reported limitations. The claimant is working and continues to work in her usual capacity. There is no evidence for any neurological injury resulting from this accident that would prevent her from performing all her usual activities of daily living, including her occupation, without restrictions. The plaintiff did not sustain a significant limitation of use, permanent consequential limitation of use, or was prevented from primary daily activities during the first 90 out of 180 days following the accident. Affirmation in Support, Exhibit H, Rene Elkin, M.D.'s IME Report of Chaparro at 3.

Defendants alleges that Plaintiffs' medical records, the IME Reports, and their deposition testimony establish that they did not suffer a serious injury as required under Insurance Law § 5102(d).

In opposition, Plaintiffs argue that Defendants failed to establish their prima facie burden entitlement to summary judgment. They argue that Dr. Elkin's IME Reports are insufficient to establish Defendants' prime facie burden for summary judgment because the reports: (1) determine

that Plaintiff Reyes had limited range of motion in his neck, left wrist, and right knee; (2) determine that Plaintiff Chaparro had limited range of motion in her right shoulder; (3) defers an opinion to the appropriate specialist as to the etiology of Plaintiffs' injuries because their injuries are not neurological in nature. Moreover, Plaintiffs submitted narrative reports by Scott Gottlieb, M.D., who states that the Plaintiffs pain are casually related to the motor vehicle accident at issue and that Plaintiff Reyes has a marked disability, while Plaintiff Chaparro has a partial moderate disability. Therefore, according to Plaintiff, this creates a triable issue of material fact as to whether she sustained a serious injury resulting from the motor vehicle accident.

“Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact. Issue finding, not issue determination, is the key to summary judgment.” *Anyanwu v Johnson*, 276 AD2d 572, 572-73 [2d Dept 2000][internal citations omitted]. In deciding such a motion, the Court must view the evidence in the light most favorable to the non-moving party. *See Kutkiewicz v Horton*, 83 AD3d 904, 904-905 [2d Dept 2011]. 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.”

On a motion for summary judgment, the defendant bears the prima facie burden of establishing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident. *See Toure v Avis Rent A Car System.*, 98 NY2d 345, 352 [2002]. The burden then shifts “to plaintiff to come forward with sufficient evidence to overcome defendant's motion by demonstrating that she sustained a serious injury within the meaning of the No-Fault Insurance Law.” *Gaddy v Eycler*, 79 NY2d 955, 957 [1992][internal quotations omitted]. Summary judgment is not appropriate where conflicting medical reports of the parties' respective experts raise triable issues of fact as to whether the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d). *Garcia v Long Island MTA*, 2 AD3d 675, 675 [2d Dept 2003]; *see*

also *Wilcoxon v Palladino*, 122 AD3d 727, 728 [2d Dept 2014]. “However, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact.” *Lowe v Japal*, 170 AD3d 701, 702 [2d Dept 2019][internal citations omitted].

Here, the Court finds that Defendants’ submissions are insufficient to establish, prima facie, that neither Plaintiff sustained a serious injury, within the meaning of Insurance Law § 5102(d), as a result of the subject motor vehicle accident Defendants’ motion heavily relies on the IME Reports by Dr. Elkin. However, Dr. Elkin found that Plaintiffs had some range limitations and deferred the same and their symptoms of pain to the “appropriate specialist.” Specifically, Dr. Elkin opined that Plaintiff Reyes’s

“symptoms with reference to the left wrist and left elbow are musculoskeletal in etiology and are not associated with any neurological deficit that might be attributed to this accident. The neck pain is noted. Symptoms referable to the neck are musculoskeletal in etiology and I am unable to determine any neurological basis for his reported neck pain, and the observed restriction of range of motion. I defer an opinion with regard to the left wrist, left elbow, left shoulder and right knee to the appropriate specialist since these symptoms are musculoskeletal in etiology and not caused by any neurological injury that might have resulted from the subject accident.” Affirmation in Support, Exhibit E, Rene Elkin, M.D.’s IME Report of Reyes at 3.

Meanwhile, with respect to Plaintiff Chaparro, Dr. Elkin’s report states that “There are no abnormal neurological findings referable to the cervical and lumbar spines. Examination of the right shoulder reveals restriction of range of motion that is a non-neurological finding that I defer to the appropriate specialist.” Affirmation in Support, Exhibit H, Rene Elkin, M.D.’s IME Report of Chaparro at 3. As argued by Plaintiffs, Dr. Elkin’s evaluations found no evidence of neurological injuries resulting from the accident at issue as she only conducted neurological examinations on both Plaintiffs. *See Rodgers v Duffy*, 95 AD3d 864 [2d Dept 2012]. Additionally, the Court notes that while Plaintiff Reyes may have had suffered a pre-existing condition to his right knee, this does not foreclose a finding that his injuries were casually related to the accident. Dr. Elkin’s evaluation merely states “[p]rior right knee pai [sic] is documented in the records.” Affirmation in Support, Exhibit E, Rene Elkin, M.D.’s IME Report of Reyes at 3. Based upon the foregoing, Defendants failed to establish their entitlement to summary judgment based upon the lack of any serious injury. Accordingly, Plaintiff Reyes’s cross-motion for summary judgment,

which relies on the arguments made in Defendants' motion, also fails to establish his entitlement to judgment as a matter of law. As such, the Court does not need to determine whether Plaintiffs' submissions in opposition are sufficient to raise a triable issue off fact. *See Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011].

Based upon the foregoing, it is

ORDERED that Defendants motion for summary judgment dismissing the Complaint is denied in its entirety; and it is further

ORDERED that Plaintiff Reyes's motion for summary judgment dismissing Defendants' counterclaim is denied in its entirety; and it is further

ORDERED that the parties are advised of the virtual pre-trial conference scheduled for **October 14, 2021 at 10:30 am.**

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York  
September 28, 2021

ENTER



HON. ROBERT M. BERLINER, J.S.C.

To:

Counsel of Record (via NYSCEF)