

Landron v Orellana

2021 NY Slip Op 33615(U)

October 8, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 4769/2016

Judge: William J. Condon

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SHORT FORM ORDER

PUBLISH

INDEX No. 4769/2016
CAL. No. 201902345MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 41 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM J. CONDON
Justice of the Supreme Court

MOTION DATE 2/6/20
ADJ. DATE 8/3/21
Mot. Seq. # 004 MD

<p>-----X</p> <p>RAFAEL R. LANDRON and JEFFRIES DE LA ROSA MENDOZA,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">- against -</p> <p>CARLOS ORELLANA and MARIA ESCOBAR,</p> <p style="text-align: center;">Defendants.</p> <p>-----X</p>	<p>HARMON LINDER & ROGOWSKY, ESQS. Attorney for Plaintiffs Three Park Avenue, Suite 2300 New York New York 10016</p> <p>SOBEL PEVZNER, LLC Attorney for Defendants 464 New York Avenue, Suite 100 Huntington, New York 11743</p>
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Upon the following papers read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendants, dated November 4, 2020 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers by plaintiffs, dated July 6, 2021 ; Replying Affidavits and supporting papers by defendants, dated July 21, 2021 ; Other ____; it is

ORDERED that the motion by defendants Carlos Orellana and Maria Escobar seeking summary judgment dismissing the complaint is denied.

Plaintiffs Rafael Landron and Jeffries De La Rosa Mendoza commenced this action to recover damages for injuries they allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of County Road 100 and Bergen Street in the Town of Islip on August 30, 2014. It is alleged that the accident occurred when the vehicle owned by defendant Maria Escobar and operated by defendant Carlos Orellana struck the left rear driver's side of the vehicle operated by plaintiff Landron after defendant Orellana lost control of his vehicle and crossed over the double yellow line into the Landron vehicle's lane of travel. At the time of the accident, plaintiff Mendoza was riding as a backseat passenger in the Landron vehicle. By their bill of particulars, plaintiff Landron alleges that he sustained various personal injuries as a result of the subject collision, including multilevel disc herniations and disc bulges of the cervical and thoracolumbar regions, and cervical and lumbar radiculopathy. Plaintiffs also allege, by their bill of particulars, that plaintiff Mendoza sustained numerous personal injuries due to the subject accident, including herniated discs at level L5-S1, cervical and lumbar radiculopathy.

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Defendants now move for summary judgment on the basis that neither plaintiff Landron nor plaintiff Mendoza sustained injuries within the meaning of the serious injury threshold requirement of Insurance Law § 5102 (d) as a result of the subject accident. In support of the motion, defendants submit, among other things, copies of the pleadings, plaintiffs' deposition transcripts, uncertified copies of plaintiffs' medical records concerning the injuries at issue, and the sworn medical reports of Dr. David Weissberg and Dr. Dorothy Scarpiano. At defendants' request, Dr. Weissberg, an orthopedist, conducted independent orthopedic examinations of plaintiffs Landron and Mendoza on February 5, 2019. Additionally, Dr. Scarpiano, an orthopedist, performed independent orthopedic examinations of plaintiffs Landron and Mendoza on November 11, 2014. Plaintiffs oppose the motion on the basis that defendants failed to meet their prima facie burden, and that the evidence submitted in opposition demonstrates that they each sustained injuries within the "limitation of use" and the "90/180" categories of the Insurance Law as a result of the subject accident. In opposition to the motion, plaintiffs submit their own affidavits, the sworn medical reports of Dr. Paul Lerner, Dr. Harold Tice, Dr. Steven Winter, and Dr. Frantz Jasmin.

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*see Licari v Elliott, supra*). Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see Insurance Law § 5104 [a]; Martin v Schwartz*, 308 AD2d 318, 766 NYS2d 13 [1st Dept 2003]). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*see Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Martin v Schwartz, supra*).

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 Eyler*, 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,

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707 NYS2d 233 [2d Dept 2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]). 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*, 84 NY2d 795, 622 NYS2d 900 [1995]; *Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [2d Dept 2003]; *Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). However, if a defendant does not establish a prima facie case that the plaintiff’s injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff’s opposition papers (see *Burns v Stranger*, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; *Rich-Wing v Baboolal*, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; see generally *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendants, through the submission of competent medical evidence and plaintiffs’ deposition transcripts, established a prima facie case that neither plaintiff Landron nor Mendoza sustained a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Davis-Hassan v Siad*, 101 AD3d 932, 957 NYS2d 205 [2d Dept 2012]). Defendants’ examining orthopedists, Dr. Weissberg and Dr. Scarpinato, found that each plaintiff had normal range of motion, that the alleged injuries sustained by each plaintiff had resolved, that neither plaintiff required additional orthopedic treatment or showed any evidence of permanence from the subject accident, and that each plaintiff was capable of working full time and performing his normal activities of daily living (see e.g. *Cabrera v Apple Provisions, Inc.*, 151 AD3d 594, 57 NYS3d 471 [1st Dept 2017]; *Watt v Eastern Investigative Bureau, Inc.*, 273 AD2d 226, 708 NYS2d 472 [2d Dept 2001]; compare *Marshall v Institute for Community Living, Inc.*, 50 AD3d 975, 856 NYS2d 660 [2d Dept 2008]).

Moreover, reference to plaintiff Landron’s and plaintiff Mendoza’s deposition testimony sufficiently refute the allegations that either plaintiff sustained injuries within the limitations of use categories or within the 90/180 category of the Insurance Law (see *Marin v Ieni*, 108 AD3d 656, 969 NYS2d 165 [2d Dept 2013]; *Rico v Figueroa*, 48 AD3d 778, 853 NYS2d 129 [2d Dept 2008]; *Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664, 852 NYS2d 287 [2d Dept 2008]).

Therefore, the burden shifted to plaintiffs to raise a triable issue of fact (see *Gaddy v Eyler, supra*; *Small v City of New York*, 148 AD3d 959, 49 NYS3d 176 [2d Dept 2017]). Plaintiffs failed to submit any evidence to demonstrate that either one of them sustained a serious injury within the meaning of Insurance Law § 5102 (d) (see *Knoll v Seafood Express*, 5 NY3d 817, 803 NYS2d 25 [2005]; *Sylvain v Maurer*, 165 AD3d 1203, 85 NYS3d 203 [2d Dept 2018]). 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). To prove the extent or degree

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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]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see *Licari v Elliott*, supra). 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]).

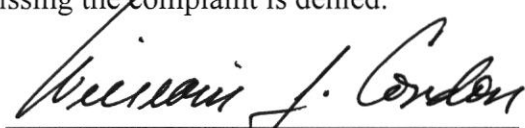
In opposition, plaintiffs have raised an issue of fact as to whether their injuries were significant, permanent and causally related to the subject accident (see *Garafano v Alvarado*, 977 NYS2d 316 [2d Dept 2013]; *Bakare v Kakaouras*, 110 AD3d 838, 972 NYS2d 710 [2d Dept 2013]; *David v Caceres*, 96 AD3d 990, 947 NYS2d 990 [2d Dept 2012]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law § 5102 (d), but also that the injury was causally related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (see *Valentin v Pomilla*, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). Although plaintiffs have submitted records by several doctors that are unaffirmed and unsworn, which are inadmissible and without probative value (see CPLR 2106; *Grasso v Angerami*, 79 NY2d 813, 588 NYS2d 76 [1991]; *Quintana v Arena Transp., Inc.*, 89 AD3d 1002, 933 NYS2d 379 [2d Dept 2011]; *Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]), plaintiffs also have proffered medical evidence sufficient to establish a serious injury to defeat defendants’ prima facie showing (see *Hiotidis v Ramuni*, 161 AD3d 955, 77 NYS3d 442 [2d Dept 2018]). Plaintiffs have submitted the affirmed medical records of Dr. Jasmin and Dr. Lerner, which demonstrate that plaintiffs sustained significant range of motion limitations in their cervical and lumbar spines as a result of the subject accident (see *Awadh v Moronta*, 86 AD3d 524, 926 NYS2d 172 [2d Dept 2011]; *Tai Ho Kang v YoungSun Cho*, 74 AD3d 1328, 904 NYS2d 743 [2d Dept 2010]; *Jules v Barbecho*, 55 AD3d 548, 866 NYS2d 214 [2d Dept 2008]). Dr. Jasmin examined each plaintiff immediately after the subject accident’s occurrence and found that plaintiff Landron sustained range of motion limitations to his spine, and that plaintiff Mendoza sustained range of motion limitations to his lumbar region due to the subject accident. Plaintiffs also submitted the affirmed medical report of Dr. Lerner who found continuing significant limitations in the ranges of motion in plaintiff Landron’s spine and plaintiff Mendoza’s lumbar spine, that each plaintiff’s injuries were causally related to the subject accident, and that considering the duration of the symptoms and associated impairments such limitations were permanent in nature and would require each plaintiff to receive future treatment. Consequently, plaintiffs’ doctors’ reports are sufficient to raise a triable issue of fact as to whether plaintiff Landron and plaintiff Mendoza sustained serious injuries within the limitations of use categories of the Insurance Law 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]).

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Moreover, since defendants failed to establish, prima facie, a lack of causation (*see Sanclemente v MTA Bus Co.*, 116 AD3d 688, 938 NYS2d 280 [2d Dept 2014]; *Rodgers v Duffy*, 95 AD3d 864, 944 NYS2d 175 [2d Dept 2012], the burden did not shift to plaintiffs to raise a triable issue of fact as to causation or to explain any gap in treatment (*see Pommells v Perez, supra; Torres v Rettaliata*, 171 AD3d 829, 95 NYS3d 829 [2d Dept 2019]; *Lambropoulos v Gomez*, 166 AD3d 952, 86 NYS3d 787 [2d Dept 2018]).

Plaintiffs’ medical evidence, therefore, conflicts with that of defendants’ experts, who found that the injuries sustained by plaintiffs 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, defendants’ motion for summary judgment dismissing the complaint is denied.

Dated: 10/8/21



J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION