

Richardson v Panora

2021 NY Slip Op 34244(U)

February 8, 2021

Supreme Court, Kings County

Docket Number: Index No. 511548/2018

Judge: Richard Velasquez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8th day of FEBRUARY, 2021

P R E S E N T:

HON. RICHARD VELASQUEZ, Justice.

-----X
GREGORY RICHARDSON and TAMMY M. WASHINGTON,

Plaintiff,

-against-

Index No.: 511548/2018
Decision and Order

JORGE PANORA and ELLIOTT L. EPSTEIN,

Defendants,

-----X

The following papers NYSCEF Doc #'s 16 to 64 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed_____	16-28; 30-35
Opposing Affidavits (Affirmations)_____	55-62; 63-64

After having heard Oral Argument on FEBRUARY 8, 2020 and upon review of the foregoing submissions herein the court finds as follows:

Defendant, JORGE PANORA, move pursuant to CPLR § 3212 for an order granting defendants summary judgment and dismissing the Complaint of plaintiff, in as much as plaintiffs GREGORY RICHARDSON and TAMMY M. WASHINGTON both fail to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (d). (MS#1) Plaintiff opposes the same. Defendant, ELLIOT EPSTEIN also moves pursuant to CPLR 3212 dismissing the complaint on the basis that the plaintiffs, GREGORY RICHARDSON and TAMMY M. WASHINGTON, did not sustain a “serious

injury” under Section 5102(d) of the Insurance Law. (MS#2) Plaintiff opposes the same.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party’s papers.

A motion for summary judgment will be granted “if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party”. *CPLR* §3212 (b). The “motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” *Id.* The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. The moving party must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Zuckerman v. City of New York*, 49 NY2d 557 [1990].) Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v. Algaze*, 84 NY2d 1019 [1995]).

It is well settled, in a soft tissue injury case, a plaintiff alleging a “serious injury”, must provide objective medical evidence of a “serious injury” within the meaning of the Insurance Law § 5102(d). A defendant seeking summary judgment on the grounds that plaintiff’s injury does not meet the threshold, the defendant must show that there is no question of fact that there is no loss of range of motion.

In the present case, all the evaluating doctors, find differing ranges of motion from the other evaluating doctors, for each plaintiff, which raise issues of fact. Additionally, plaintiffs evaluating doctor, Dr. Kotkes finds limited ranges of motion, where defendants doctors did not. The court also notes, annexed to plaintiff’s opposition are the defendant doctors Dr. Zimmerman and Dr. Richardson reports, which were not annexed to the moving papers of wither defendant, both of which also found limited ranges of motion for both plaintiff’s. This is similar to the situation in *Knokhinov v. Murray*, 27 Misc.3d 1211(A), 2010 WL 1542529 (N.Y.Sup.), where the evaluating doctors found differing normative values. In *Knokhinov*, the court denied summary judgment because when the findings reported by one doctor are assessed by application of the standard of “normal” stated by the other doctors, the reports present “contradictory proof”. *Id. See also Dettori v. Molzon*, 306 AD2d 308, 309 [2d Dept 2003]. As Judge Battaglia noted in *Knokhinov supra.*, in the Second Department, measuring a plaintiff’s range of motion and comparing it to a normal range of motion has become the linchpin of determining if a soft tissue injury is a “serious injury.” Therefore, in a case such as this where the ranges of motion observed by one of the doctors is less than the range of motion sworn to by another of the doctors, there are issues of fact. As such,

both defendants motion for summary judgment on serious injury threshold must be denied.

Accordingly, Defendant, JORGE PANORA motion for summary judgment on serious injury threshold is hereby denied, for the reasons stated above. (MS#1). Defendant, ELLIOT EPSTEIN, motion for summary judgment on serious injury threshold is hereby denied, for the reasons stated above. (MS#2).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
February 8, 2021

ENTER FORTHWITH:



HON. RICHARD VELASQUEZ