

Rios v Dhakal
2022 NY Slip Op 35229(U)
December 21, 2022
Supreme Court, Nassau County
Docket Number: Index No. 604967/21
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAUPresent: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 3

X
GIORDI ALVARADO RIOS and IVANI RIOS,

Plaintiffs,

-against-

Index No.: 604967/21
Motion Sequence...01, 02
Motion Date...9/16/22

KUL PRASAD DHAKAL,

Defendant.

X

Papers Submitted:

Notice of Motion (Seq. 01).....X
 Affirmation in Opposition.....X
 Reply Affirmation.....X
 Notice of Cross-Motion (Seq. 02).....X
 Affirmation in Opposition.....X
 Reply Affirmation.....X

Upon the foregoing papers, the motion (Mot. Seq. 01) by the Defendant, KUL PRASAD DHAKAL (“DHAKAL”), seeking an Order pursuant to CPLR § 3212, granting him summary judgment, dismissing the Plaintiff’s Complaint on the basis that the Plaintiff, IVANI RIOS, did not sustain a “serious injury” as defined by New York Insurance Law § 5102 (d); and the cross-motion (Mot. Seq. 02), by the Plaintiff on the counterclaim, GIORDI ALVARADO RIOS, seeking an Order pursuant to CPLR § 3212, granting him summary judgment, dismissing the Complaint on the basis that the Plaintiff, IVANI RIOS, did not sustain a “serious injury” as defined by New York Insurance Law §

5102 (d), are determined as provided herein.

The instant action involves a motor vehicle accident that occurred on March 15, 2020, at approximately 1:45 pm on Merrick Avenue, at or near the intersection with Taylor Avenue, County of Nassau, New York.

As a result of the subject accident, the now twenty-one year old Plaintiff, IVANI RIOS, claims, *inter alia*, trigger point injections to the lumbar, cervical and thoracic spine; C3-C4, C4-C5 disc bulge; C5-C6 disc bulge with herniation; C6-C7 disc bulge; cervical radiculopathy; sprain/strain of the cervical spine; loss of range of motion to the cervical spine; L1-L2, L2-L3, L3-L4, L4-L5, L5-S1 disc bulge; lumbar radiculopathy; sprain/strain of the lumbar spine; and loss of range of motion to the lumbar spine (*See* NYSECF Doc. No. 30).

In support of the motion, the Defendant submits the affirmed medical report of Eric Freeman, M.D., a board-certified orthopedic surgeon who examined the Plaintiff on December 7, 2021 (*See* NYSECF Doc. No. 32). Physical examination of the Plaintiff's cervical spine and lumbar spine revealed normal range of motion (*Id.* at p. 2). Dr. Freeman opined that the Plaintiff does not require any further orthopedic care and that the Plaintiff has had an excellent recovery from the subject accident (*Id.* at P. 3).

The Defendant also submits the affirmed medical report of Itzhak Haimovic, M.D., a board-certified neurologist who examined the Plaintiff on December 1, 2021 (*See* NYSECF Doc. No. 33). Physical examination of the Plaintiff's back and neck revealed normal range of motion (*Id.* at p. 3). Dr. Haimovic concluded that there is no evidence of residual neurological deficit and that the Plaintiff does not require any additional treatment

(*Id.* at p. 4).

The Defendant also proffers the affirmed radiology review of A. Robert Tantleff, M.D. (*See* NYSECF Doc. No. 34). Dr. Tantleff reviewed the MRI of the Plaintiff's cervical spine dated April 22, 2020, which revealed a bulging disc at C3-4 with thecal sac impingement at C4-5 through C6-7 (*Id.* at p. 1). The report indicates that there is regional discogenic changes with disc desiccation (*Id.*). Dr. Tantleff opines that the discogenic changes are not inconsistent with the Plaintiff's age (*Id.* at p. 2). Dr. Tantleff further opines that the findings are consistent with the Plaintiff's age and are not causally related to the subject accident (*Id.* at p. 3). Dr. Tantleff also reviewed the MRI of the Plaintiff's lumbar spine dated April 22, 2020 (*Id.* at p. 5). The study revealed a bulging disc at L2-3 through L4-5 without stenosis, and a bulging disc at L5-S1 with near impingement upon the exiting L5 roots (*Id.*). Dr. Tantleff opines that the findings are consistent with the Plaintiff's age and represent chronic discogenic change unrelated to the subject accident (*Id.* at p. 7). Many of the assertions by Dr. Tantleff are mere conjecture without foundational support.

In opposition to the motion, the Plaintiff, IVANI RIOS, submits the MRI of the Plaintiff's cervical spine and the MRI of the Plaintiff's lumbar spine dated April 22, 2020 (*See* NYSECF Doc. No. 60 and No. 61). The MRI of the Plaintiff's cervical spine revealed a bulging disc at C3-4 with thecal sac impingement (*Id.* at p. 1). The study also revealed a bulging disc without stenosis at C4-5, C5-6 and C6-7 (*Id.*). The MRI of the Plaintiff's lumbar spine revealed bulging discs at levels L2-3 through L4-5 without stenosis (*Id.*). The study also demonstrated a bulging disc at L5-S1 with near impingement upon

the exiting L5 roots (*Id.*).

The Plaintiff also submits the Affirmation of Sima Anand, M.D., the Plaintiff's treating physician (*See* NYSECF Doc. No. 71). Dr. Anand attests that during the period from March 23, 2020 through June 18, 2020, the Plaintiff returned to her office on eighteen (18) separate occasions for trigger point injections to the lumbar and cervical spine (*Id.* at p. 4). Notably, Dr. Anand further attests that physical examination of the Plaintiff's cervical and lumbar spine revealed decreased range of motion (*Id.* at p. 5). Significantly, Dr. Anand concluded that there is a causal relationship between the Plaintiff's injuries and the subject accident (*Id.* at p. 10).

The Plaintiff also proffers the Affirmation of Richard Obedian, M.D., who is also the Plaintiff's treating physician (*See* NYSECF Doc. No. 72). Notably, Dr. Obedian attests that physical examination of the Plaintiff's cervical and lumbar spine revealed decreased range of motion (*Id.* at p. 3). Dr. Obedian opined that the Plaintiff's injuries are causally related to the subject accident (*Id.* at p. 5). Significantly, Dr. Obedian concluded that the Plaintiff has sustained significant and permanent injuries to the cervical and lumbar spine with ongoing disability (*Id.* at p. 6).

In moving for summary judgment, the defendants must make a *prima facie* showing that the plaintiff did not sustain a "serious injury" within the meaning of the statute. Once this is established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*See Pommels v. Perez*, 4 N.Y.3d 566 [2005]; *see also Grossman v. Wright*, 268 A.D.2d 79 [2d Dept. 2000]).

Within the scope of the defendant's burden, a defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part (*See Qu v. Doshna*, 12 A.D.3d 578 [2d Dept. 2004]; *Browdame v. Candura*, 25 A.D.3d 747 [2d Dept. 2006]; *Mondi v. Keahan*, 32 A.D.3d 506 [2d Dept. 2006]).

The defendant is not required to disprove any category of serious injury which has not been properly pled by the plaintiff (*See Melino v. Lauster*, 82 N.Y.2d 828 [1993]). Moreover, even pled categories of serious injury may be disproved by means other than the submission of medical evidence by a defendant, including the plaintiff's own testimony and submitted exhibits (*See Michaelides v. Martone*, 186 A.D.2d 544 [2d Dept. 1992]; *Covington v. Cinnirella*, 146 A.D.2d 565 [2d Dept. 1989]).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician (*See Pagano v. Kingsbury*, 182 A.D.2d 268 [2d Dept. 1992]). Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent A Car Systems*, 98 N.Y.2d 345 (2002), stated that the plaintiff's proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests (*Toure v. Avis Rent A Car Sys.*, *supra* at 353). However, the MRI and CT scan tests and reports must be paired with the doctor's observations during his physical examination of the plaintiff (*Toure v. Avis Rent A Car Systems*, *supra*). In addition,

unsworn MRI reports are not competent evidence unless both sides rely on those reports (*See Gonzalez v. Vasquez*, 301 A.D.2d 438 [1st Dept. 2003]).

Even where there is ample objective proof of the plaintiff's injury, the Court of Appeals held in *Pommels v. Perez*, 4 N.Y.3d 566 (2005), that certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of the plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a pre-existing condition, would interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez, supra*).

Medical evidence offered by a plaintiff on a threshold motion must be objective in nature with respect to the extent or degree of the alleged physical limitations resulting from the injury and its duration (*See Bacon v. Bostany*, 104 A.D.3d 625 [2d Dept. 2013]). Furthermore, in addition to providing medical proof contemporaneous with the subject accident, the plaintiff must provide competent medical evidence containing verified objective findings based upon a recent examination where the expert must provide an opinion as to the significance of the injury (*See Kauderer v. Penta*, 261 A.D.2d 365 [2d Dept. 1999]; *Constantinou v. Surinder*, 8 A.D.3d 323 [2d Dept. 2004]; *Brown v. Tairi Hacking Corp.*, 23 A.D.3d 325 [2d Dept. 2005]).

At the outset, the Court finds that the evidence submitted does not support a finding that the Plaintiff suffered a serious injury with respect to the category of a "fracture." The Plaintiff's MRI reports do not reveal a fracture. Additionally, the evidence does not support a finding that the Plaintiff suffered a serious injury with respect to

“permanent loss of use of a body organ, member, function or system” and “permanent consequential limitation of use of a body organ or member.” As such, the Court will limit its analysis to the remaining two categories of serious injury claimed by the Plaintiff, to wit, “significant limitation of use of a body function or system” and “a medically determined injury or impairment of a non-permanent nature which prevented the Plaintiff from performing substantially all of the material acts which constitute the Plaintiff’s usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the subject motor vehicle accident” (“90/180”).

Here, in opposition, the Court finds that the Plaintiff submitted sufficient evidence to raise an issue of fact with respect to the two remaining categories of serious injury via the affirmed medical opinions of Sima Anand, M.D. and Richard Obedian, M.D., that were based on their physical examination of the Plaintiff, as well as the MRI reports. While the Defendant’s expert noted that the Plaintiff had normal ranges of motion, the Plaintiff’s expert found decreased range of motion of the Plaintiff’s cervical and lumbar spine. Additionally, the Plaintiff’s experts find that the Plaintiff’s injuries are causally related to the subject accident. Further, the Plaintiff’s experts and the Defendant’s experts both report different findings with respect to the Plaintiff’s MRI’s, presenting another clear question of fact warranting denial of the motions.

Accordingly, it is hereby

ORDERED, that the branch of the Defendant’s motion (Mot. Seq. 01), seeking an Order, pursuant to CPLR § 3212, granting him summary judgment dismissing the Plaintiff’s Complaint on the basis that the Plaintiff, IVANI RIOS, did not sustain a

“serious injury” as defined by Insurance Law § 5102 (d), with respect to the “fracture”, “permanent loss of use of a body organ, member, function or system” and “permanent consequential limitation of use of a body organ or member” categories, is **GRANTED**; and it is further

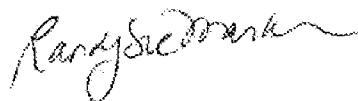
ORDERED, that the branch of Defendant’s motion (Mot. Seq. 01), seeking an Order pursuant to CPLR § 3212, granting him summary judgment dismissing the Plaintiff’s Complaint on the basis that the Plaintiff, IVANI RIOS, did not sustain a “serious injury” as defined by Insurance Law § 5102 (d), with respect to the “significant limitation of use of a body function or system” and “a medically determined injury or impairment of a non-permanent nature which prevented the Plaintiff from performing substantially all of the material acts which constitute the Plaintiff’s usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the subject motor vehicle accident” (“90/180”) categories, is **DENIED**; and it is further

ORDERED, that the branch of the Plaintiff on the counterclaim’s cross-motion (Mot. Seq. 02), seeking an Order, pursuant to CPLR § 3212, granting him summary judgment dismissing the Complaint on the basis that the Plaintiff, IVANI RIOS, did not sustain a “serious injury” as defined by Insurance Law § 5102 (d), with respect to the “fracture”, “permanent loss of use of a body organ, member, function or system” and “permanent consequential limitation of use of a body organ or member” categories, is **GRANTED**; and it is further

ORDERED, that the branch of Plaintiff on the counterclaim's cross-motion (Mot. Seq. 02), seeking an Order pursuant to CPLR § 3212, granting him summary judgment dismissing the Complaint on the basis that the Plaintiff, IVANI RIOS, did not sustain a "serious injury" as defined by Insurance Law § 5102 (d), with respect to the "significant limitation of use of a body function or system" and "a medically determined injury or impairment of a non-permanent nature which prevented the Plaintiff from performing substantially all of the material acts which constitute the Plaintiff's usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the subject motor vehicle accident" ("90/180") categories, is **DENIED**.

This constitutes the decision and Order of this Court.

DATED: Mineola, New York
December 21, 2022



Hon. Randy Sue Marber, J.S.C.

ENTERED

Dec 21 2022

NASSAU COUNTY
COUNTY CLERK'S OFFICE