

Rijos v Farley

2023 NY Slip Op 35064(U)

December 19, 2023

Supreme Court, Queens County

Docket Number: Index No. 704395/2021

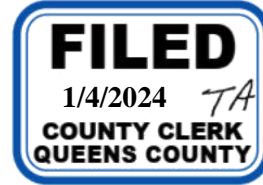
Judge: Denis J. Butler

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: HONORABLE DENIS J. BUTLER IAS Part 12
Justice

BRYANNA MARIE RIJOS, Plaintiff(s),
-against- LINDLEY FARLEY and NIGHTINGALE TAXI LLC, Defendant(s).
Index Number 704395/2021
Motion Date: October 24, 2023
Motion Seq. No. 1

The following papers were read on this motion by defendants, Lindley Farley and Nightingale Taxi LLC, for an order pursuant to CPLR § 3212 granting defendants summary judgment and dismissal of the action, on the grounds plaintiff Bryanna Marie Rijos' injuries fail to meet the "serious injury" threshold requirement of New York State Insurance Law § 5102(d):

Table with 2 columns: Document Name, Papers Numbered. Includes Notice of Motion, Affirmation, Reply Affirmation, etc.

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendants, Lindley Farley and Nightingale Taxi LLC, move for summary judgment and dismissal of plaintiff, Bryanna Marie Rijos' (hereinafter "Rijos") complaint, contending that plaintiff Rijos failed to sustain a serious injury within the meaning of Insurance Law § 5102(d). Plaintiff opposes.

This action arises out of an automobile accident which occurred on February 14, 2021, at the intersection of East 30th Street and Third Avenue in New York, New York.

Under New York's "No-Fault" insurance law, in order to maintain an action for personal injury a plaintiff must establish that a "serious injury" has been sustained. (*Licari v. Elliot*, 57 NY2d 230 [1982]). 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.

The question of whether plaintiff Rijos sustained a "serious injury" as defined by Insurance Law § 5102(d) is one of law that can be disposed of by summary judgment (see *Licari v Elliot*, 57 NY2d 230, 237 [1982]), and in seeking same, defendants Lindley Farley and Nightingale Taxi LLC have the burden of establishing that plaintiff's injuries do not rise to the level of those enumerated in the statute (see *Gaddy v Eyler*, 79 NY2d 9555, 956-57 [199]). This may be accomplished through submission of plaintiff's deposition testimony and/or the affidavits, affirmations, or sworn reports of medical experts who examine the plaintiff and conclude that no objective medical findings support the plaintiffs claim. (See *Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]).

Defendants, Lindley Farley and Nightingale Taxi LLC, seek summary judgment with respect to that section of New York Insurance Law §5102, contending plaintiff has not sustained "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" (Hereinafter "90/180"). Although Dr. Semble's December 2022 and Dr. Spinger's March 2023 medical reports submitted by defendants Lindley Farley and Nightingale Taxi LLC opine that plaintiff Rijos' injuries were "resolved" and there was no evidence of "permanency," the reports fail to address the "90/180" categories of injury alleged by plaintiff Rijos. Defendants submission of plaintiff Rijos' deposition testimony in

support of defendants motion is also inadequate to satisfy defendants burden. Moreover, plaintiff Riojos' testimony reflects, among other things, plaintiff Rijos was unable to work for at least two months following the accident and she was advised to keep all activities to a minimum by her doctor. Such testimony fails to establish as a matter of law that plaintiff Rijos was not prevented from performing substantially all of plaintiff's daily activities for at least 90 days of the 180 days after the accident. Additionally, plaintiff Rijos presented the affidavit of plaintiff Rijos treating chiropractor, Dr. Jamie P. Skurka and Dr. Skurka's medical records, which indicates that plaintiff Rijos first treated at Dr. Skurka's office on March 3, 2021, and that Dr. Skurka found plaintiff Rijos suffered from cervical/thoracic sprain/strain and cervical disc bulges and as a result, Dr. Skurka opined plaintiff Rijos was "temporarily totally disabled from employment" and issued plaintiff Rijos a "Disability Certificate" dated March 6, 2021. As such, plaintiff Rijos has raised a triable issue of fact regarding plaintiff Rijos' claim that Ms. Rijos was unable to perform substantially all of plaintiff's daily activities for not less than 90 out of the first 180 days after the accident.

As to the branches of defendants, Lindley Farley and Nightingale Taxi LLC motion seeking summary judgment against plaintiff Rijos contending plaintiff has not suffered a serious injury under "permanent loss of use" of a body member, organ, system or function, or "permanent consequential limitation" of a body system or function, or "significant consequential limitation" of a body system of function, as defined in Insurance Law § 5102, defendants Lindley Farley and Nightingale Taxi LLC have presented a prima facie case of entitlement to summary judgment on those claims. Defendants, Lindley Farley and Nightingale Taxi LLC presented plaintiff Rijos' bill of particulars, plaintiff Rijos' sworn deposition testimony, and the affirmed reports of defendant's doctors, Dr. Richard Semble and Dr. Scott A. Springer, in support of defendants motion. Plaintiff Rijos' bill of particulars states that plaintiff has multiple disc bulges of the cervical and thoracic spine. Defendant's orthopedic expert Dr. Richard Semble examined plaintiff Rijos and found Ms. Rijos had full range of motion by using objective tests and comparing the percentage of a normal range of motion with plaintiff Rijos' range of motion. Dr. Semble found no permanent injury correlated to the accident and determined plaintiff Rijos had resolved cervical spine, lumbar spine and thoracic spine sprain/strain. Dr. Springer reviewed plaintiff Rijos' cervical and thoracic MRI's and found that there were no "posttraumatic changes causally related to the 2/14/2021 incident."

The burden falls upon plaintiff to rebut the defendants Lindley Farley and Nightingale Taxi LLC's claim, and demonstrate that there is an issue of fact as to whether plaintiff sustained a serious injury. Here, plaintiff fails to raise a triable issue of fact that plaintiff Rijos sustained a permanent loss of use, a permanent limitation, or a significant consequential limitation within the meaning of § 5102(d). Plaintiff Rijos failed to present sworn evidence of a serious injury based on a recent medical examination. (See *Gomez v. Epstein*, 29 AD3d 950 [2nd Dept. 2006].)

Accordingly, it is

ORDERED, that the branch of defendants Lindley Farley and Nightingale Taxi, LLC's motion for summary judgment pursuant to CPLR § 3212 dismissing plaintiff Rijos complaint on the grounds that plaintiff Rijos has not suffered "serious injury" pursuant to the "90/180" category of "serious injury" as defined in Insurance Law § 5102 is DENIED, and it is further

ORDERED, that the branches of defendants Lindley Farley and Nightingale Taxi LLC's motion for summary judgment pursuant to CPLR §3212 dismissing plaintiff Rijos complaint on the grounds that plaintiff Rijos has not suffered a "permanent loss of use" of a body member, organ, system or function; "permanent consequential limitation" of a body system or function; or "significant consequential limitation" of a body system of function, categories of "serious injury" as defined in Insurance Law § 5102, is GRANTED.

This constitutes the Decision and Order of the Court.

Dated: December 19, 2023



Denis J. Butler, J.S.C.

