

Adamo v Murphy

2024 NY Slip Op 35187(U)

February 8, 2024

Supreme Court, Richmond County

Docket Number: Index No. 152315/2022

Judge: Ronald Castorina, Jr.

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NYSCEF DOC. NO. 58
Adamo et al v. Murphy
Index No.: 152315/2022
Memorandum Decision and Order on Motion Sequence #001

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND PART IAS-7M

**PRESENT: HON. RONALD CASTORINA, JR.,
JUSTICE OF THE SUPREME COURT**

_____ X

PAUL ADAMO and ALEXA ADAMO,
Plaintiff,

Index No.: 152315/2022

MEMORANDUM DECISION
AND ORDER

-against-

Motion Seq: #001

ALYSSA MURPHY and JANICE J. MURPHY,
Defendant.

_____ X

[CASTORINA, J.]

The following e-filed documents listed on NYSCEF (Motion #001) numbered 25-56 were read on this motion.

Upon the foregoing documents, and after oral argument conducted on February 1, 2024, on Motion Sequence #001, Motion Sequence #001 is resolved and therefore, it is hereby,

ORDERED, that Plaintiff’s request for summary judgment on the threshold issue for serious injury under *Insurance Law § 5102 [d]* is **DENIED**; and it is further,

ORDERED, that the Clerk of the Court shall enter judgment accordingly.

Memorandum Decision

I. Procedural History

On December 21, 2022, Plaintiff commenced this negligence action to recover for personal injuries allegedly sustained by the Plaintiff because of a vehicle accident on October 21, 2022. Plaintiff filed Motion Sequence #001 by Notice of Motion on January 2, 2024, and filed a supplemental affirmation and supplemental material facts and exhibits on January 10, 2024,

seeking (a) summary judgment pursuant to *CPLR* § 3212 [a] on the issue of liability and threshold under *Insurance Law* § 5102 [d] for serious injury on behalf of Plaintiff; and (b) for such other and further relief as this Court deems just and proper.

Defendants filed opposition on January 27, 2024. On February 1, 2024, Plaintiff waived reply on the record in Court and oral argument was completed. Summary judgment on the issue of liability was granted on the record on February 1, 2024. The only issue remaining is the Plaintiff's request for summary judgment pursuant to *CPLR* § 3212 [a] on the threshold issue for serious injury under *Insurance Law* § 5102 [d].

II. Facts

Parties were involved in a motor vehicle accident occurring on October 12, 2022, at or near the intersection of Richmond Avenue and Forest Hill Road. (NY St Cts Filing [NYSCEF] Doc No. 32; 33). Plaintiff, Paul Adamo, testified that at the time of the accident, he was completely stopped for at least one minute at a red light when it was hit in the rear by the Defendant Alyssa Murphy. (NY St Cts Filing [NYSCEF] Doc No. 32). Defendant Alyssa Murphy testified that she operated a vehicle owned by Defendant Janice J. Murphy that collided with the rear end of a vehicle that Plaintiff was operating at approximately fifteen (15) to twenty (20) miles per hour. (NY St Cts Filing [NYSCEF] Doc No. 33).

As a result of this accident, Plaintiff alleges that he sustained a serious injury that caused him to lose employment at his Federal Reserve job from the date of the accident to the present and receive no-fault lost wages benefits from May 4, 2023, to October 19, 2023.

On June 22, 2023, Plaintiff testified that presumably after the accident,

- A. I went home.
- Q. Did you go to an emergency room?
- A. No.
- Q. Did you go to work that night?
- A. No.
- Q. How long were you out of work?
- A. Since October 12th. Since the accident.

- Q. You haven't returned to work at all?
- A. No.
- Q. Have you applied for disability?
- A. Yes.
- Q. Was that through your business or through an insurance company?
- A. That's through my job.
- Q. Were you approved?
- A. Yes.
- Q. How much are you receiving?
- A. [\$]4,100[.00] a month.
- Q. What was your salary?
- A. It was [\$]2,500[.00] twice a month. (NY St Cts Filing [NYSCEF] Doc No. 32; 54).

Plaintiff alleges that because of the collision, he has sustained serious and permanent injuries to his cervical and lumbar spine which has caused him to lose approximately fourteen (14) months of work commencing the date of the accident to the present and continuing. (NY St Cts Filing [NYSCEF] Doc No. 43). Plaintiff further alleges that he has been disabled and unable to work since the date of the accident due to the injuries and constant pain which restricts his range of motion in his neck and back. (*see id*).

III. Serious Injury Pursuant to *Insurance Law § 5102 [d]*

Courts “have required objective proof of a plaintiff’s injury in order to satisfy the statutory serious injury threshold” (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345 [2002] *citing Dufel v Green*, 84 NY2d 795 [1995]; *Lopez v Senatore*, 65 NY2d 1017 [1985]); “subjective complaints alone are not sufficient” (*see id citing Gaddy v Eyler*, 79 NY2d 955 [1992]; *Scheer v Koubek*, 70 NY2d 678 [1987]).

“A plaintiff moving for summary judgment on the issue of serious injury must establish, *prima facie*, that he or she sustained a serious injury within the meaning of *Insurance Law § 5102 [d]* and ‘that the [serious] injury was causally related to the accident’” (*see Degachi v Faridi*, 215

AD3d 733 [2d Dept 2023] quoting *Kapeleris v Riordan*, 89 AD3d 903 [2d Dept 2011] citing *Elshaarawy v U-Haul Co. of Miss.*, 72 AD3d 878 [2d Dept 2010]).

“Serious injury” means 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. (*see CLS Ins § 5102 [d]*)

By submitting a physician's affidavit in admissible form, Plaintiff establishes a prima facie case of ‘serious injury’ pursuant to *Insurance Law § 5102 [d]*. (*see McGovern v Walls*, 201 AD2d 628 [2d Dept 1994] citing *Hochlerin v Tolins*, 186 AD2d 538 [2d Dept 1992]; *Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992]; *Spezia v De Marco*, 173 AD2d 462 [2d Dept 1991]; *Bates v Peoples*, 171 AD2d 635 [2d Dept 1991]; *Morsellino v Frankel*, 556 NYS.2d 103 [2d Dept 1990]; *Lynch v Adirondack Transit Lines, Inc.*, 169 AD2d 904 [3d Dept 1991]).

A plaintiff satisfies the burden of establishing their prima facie case, that they sustained a serious injury within the meaning of *Insurance Law § 5102 [d]* and that the serious injury was causally related to the accident by submitting their own affidavit and the affirmation of their treating physician. (*see Kapeleris v Riordan*, 89 AD3d 903 [2d Dept 2011]).

Plaintiff contends that because of the collision between the Plaintiff's and Defendant's vehicles, Plaintiff lost at least fourteen (14) months of his employment commencing the date of the accident to the present and continuing and has received no-fault lost wages since May 4, 2023. Plaintiff has submitted a certification by the Plaintiff's treating physician, Mario Funicelli, D.C., that certifies the Plaintiff has sustained a permanent serious injury within a reasonable degree of chiropractic certainty due to the October 12, 2022, accident causing him to be disabled from employment from October 22, 2022, until the present. (NY St Cts Filing [NYSCEF] Doc No. 49).

The certification by Mario Funicelli, DC provides, “[t]he patient, Paul Adamo, came under my care on October 19, 2022, as a result of injuries he sustained in an accident occurring on October 12, 2022, until November 30, 2023.” (*see id.*). The injuries described in the certification were diagnosed, as a result of the accident. (*see id.*). The chiropractic report does not provide what, if any activities the plaintiff is unable to perform due to the alleged injuries and relies upon tests that are not before the court. The finding that the Plaintiff is disabled from employment is a vague, conclusory, and bare allegation.

Plaintiff provides unaffirmed documentation, dated October 18, 2023, from the office of Shan Nagendra, MD advising that the Plaintiff “treats in our Office” and he is totally disabled and unable to work. (NY St Cts Filing [NYSCEF] Doc No. 49). Plaintiff further submits an unaffirmed report by Ravi Salickram, a physician’s assistant, dated June 29, 2023. (NY St Cts Filing [NYSCEF] Doc No. 35).

“To obtain summary judgment it is necessary that the movant establish his cause of action or defense ‘sufficiently to warrant the court as a matter of law in directing judgment’ in his favor . . . , and he must do so by tender of evidentiary proof in admissible form. (*see Zuckerman v New York*, 49 NY2d 557 [1980] *citing CPLR § 3212 [b]*).

The evidence provided by the Plaintiff from his medical providers is not in the proper form of an affidavit or an affirmation and cannot be considered by the Court as it is improper hearsay. The evidence submitted by the Plaintiff has failed to establish, *prima facie*, that he has sustained a serious injury within the meaning of *Insurance Law § 5102 [d]* and ‘that the [serious] injury was causally related to the accident’” (*see Degachi v Faridi*, 215 AD3d 733 [2d Dept 2023] *quoting Kapeleris v Riordan*, 89 AD3d 903 [2d Dept 2011] *citing Elshaarawy v U-Haul Co. of Miss.*, 72 AD3d 878 [2d Dept 2010]).

Accordingly, Plaintiff’s request for summary judgment on the threshold issue for serious injury under *Insurance Law § 5102 [d]* is **DENIED**.

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V. Decretal Paragraphs

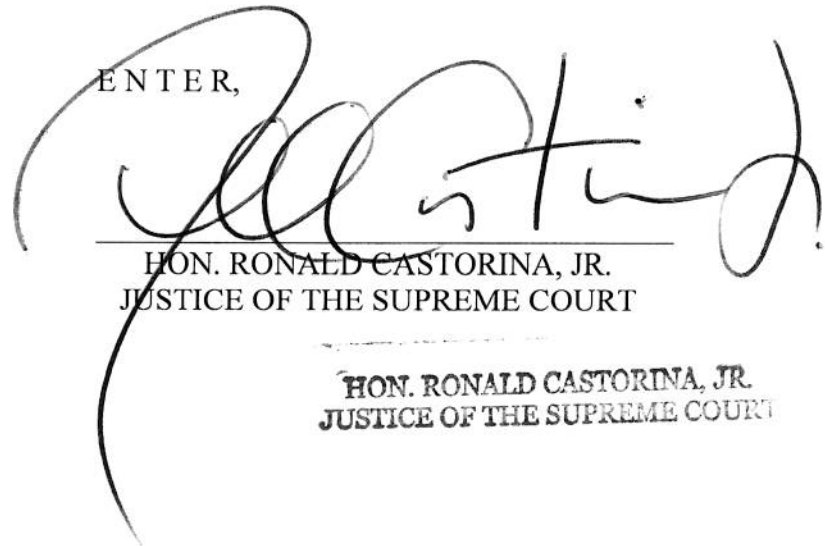
It is hereby **ORDERED** that Plaintiff's request for summary judgment on the threshold issue for serious injury under *Insurance Law § 5102 [d]* is **DENIED**; and it is further,

ORDERED, that the Clerk of the Court shall enter judgment accordingly.

The foregoing shall constitute the Decision and Order of the Court.

Dated: February 8, 2024
Staten Island, New York

ENTER,



HON. RONALD CASTORINA, JR.
JUSTICE OF THE SUPREME COURT

HON. RONALD CASTORINA, JR.
JUSTICE OF THE SUPREME COURT