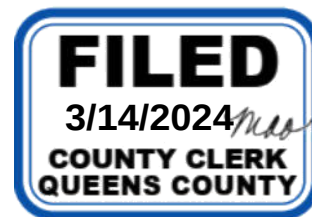


Satos v Russo
2024 NY Slip Op 35336(U)
March 13, 2024
Supreme Court, Queens County
Docket Number: Index No. 720892/2020
Judge: Anna Culley
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: HONORABLE ANNA CULLEY IA Part 27
Justice

-----X
RICHARD TEJADA SANTOS and KATTY
ROSARIO DURAN,

Index
Number 720892 /2020

Plaintiffs,

Motion

Date October 31, 2023

-against-

Mot Seq. No. 2

DANIEL J. RUSSO and MATTHEW RUSSO,

Defendants.

-----X

The following numbered papers read on this motion by defendants Daniel J. Russo and Matthew Russo for summary judgment pursuant to CPLR 3211 (a) (2), (a) (7) and 3212 dismissing the complaint on the ground that plaintiffs did not sustain a "serious injury" as defined by Insurance Law §5102 (d).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF 20-31
Answering Affidavits - Exhibits	EF 36-51
Reply Affidavits	EF 52

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

This is an action to recover damages for personal injuries that plaintiffs allegedly sustained in a motor vehicle accident that occurred August 15, 2019, on College Point Blvd., at or near the intersection with 14th Avenue, Queens County, New York. At the time of the accident, plaintiff Katty Rosario Duran ("Duran") was a passenger in the vehicle operated by plaintiff Richard Tejada Santos ("Santos"). Such vehicle came in contact with the vehicle in which defendant Daniel J. Russo was operating, which is owned by Matthew Russo. In their bill of particulars, plaintiffs allege, among other things, injuries to their cervical and lumbar spine, right knee, and left knee. They claimed their injuries are permanent and progressive in nature.

Plaintiffs brought the instant action claiming they suffered a serious injury pursuant to Insurance Law §5102(d) as they suffered a permanent loss of use of 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 and/or a medically determined injury or impairment of a non-permanent nature which has prevented the plaintiff from performing substantially all of the material acts which constitute her usual and customary daily activities for no less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment (“90/180 day category”).

Plaintiffs moved for summary judgment on the issue of liability. By decision and order dated May 19, 2022, the court granted partial summary judgment in favor of plaintiffs on the issue of liability.

Defendants now move for summary judgment, claiming that both plaintiffs failed to meet the “serious injury” threshold of Insurance Law §5104 (a), as defined in §5102 (d). “[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (see *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Wonderly v City of Poughkeepsie*, 185 AD3d 632 [2d Dept 2020]; *Ayers v City of Mt. Vernon*, 176 AD3d 766 [2d Dept 2019]). The burden is on defendants to establish that plaintiffs have not sustained a serious injury (see *Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345 [2002]; *Stead v Serrano*, 156 AD3d 836 [2d Dept 2017]; *Ellis v Vazquez*, 155 AD3d 694 [2d Dept 2017]).

In support of their motion, defendants submitted, inter alia, the pleadings, plaintiff’s bill of particulars, deposition testimony from both plaintiffs, affirmed IME reports of Dr. Arnold T. Berman (“Dr. Berman”) and MRI review reports by Dr. Marc J. Katzman (“Dr. Katzman”). Dr. Berman examined Santos on September 28, 2022. Dr. Berman reported Santos complained of lower back pain and headaches. He performed objective testing including range of motion testing measured with a goniometer. Upon physical examination, he found Santos exhibited full range of motion in his cervical spine and thoraco-lumbar spine. Upon examining Santos’ right and left shoulders Dr. Berman found normal range of motion. When examining Santos’ right and left knees Dr. Berman found normal range of motion and no pain on a full squat. All other objective tests were negative. Dr. Berman also found Santos demonstrated strength of 5/5 in all areas tested. After examining Santos and reviewing pertinent medical records, Dr. Berman concluded that “Mr. Tejada Santos sustained cervical, thoracic and lumbar spine strains/sprains. There is a causal relationship between the cervical, thoracic and lumbar spine strains/sprains and the MVA, however these injuries have now resolved”. Finally, Dr. Berman found there to be no correlation between the MRI dated August 28, 2019, and the physical examination, as he determined it showed pre-existing cervical spine degenerative disease, bulging discs, spinal canal stenosis and preexisting degenerative disease. Dr. Berman reported that Santos was able to participate in all activities of daily living including work without restrictions and noted that Santos was currently working.

Plaintiff Duran was examined by Dr. Berman on September 28, 2022. Dr. Berman performed objective testing including range of motion testing measured with a goniometer and found that Duran exhibited full range of motion in her cervical spine and thoraco-lumbar spine. Upon examination of the right and left shoulders, Dr. Berman found normal range of motion but on the left shoulder, he found a healed arthroscopic incision. Upon examination of the right and left knees, Dr. Berman found normal range of motion and no pain on full squat. All other objective tests were negative. Dr. Berman also found that Duran demonstrated strength of 5/5 in all areas tested. After examining Duran and reviewing pertinent medical records, Dr. Berman concluded that “Ms. Rosario Duran sustained the above-mentioned strain/sprain injuries due to the accident on 8/15/2019 which are now resolved”. Dr. Berman further reported that the MRI results were chronic with no acute injury and could not have been caused by this “low-speed” motor vehicle accident. He added that the August 28, 2019, MRI of the left knee showed degenerative changes consistent with a prior 2015 left knee arthroscopy/meniscectomy, and that plaintiff Duran could participate in all activities of daily living and work full-time without restrictions. Finally, Dr. Berman found that Duran did not require any further medical treatment and that Duran did not sustain any permanent injury and had no disability as a result of the alleged accident.

Defendants also submit the MRI review reports of Dr. Katzman. Dr. Katzman, a radiologist, performed an independent radiology evaluation of both plaintiffs on September 28, 2022, and reviewed the MRI reports of August 28, 2019. As to plaintiff Santos, Dr. Katzman found the MRI of the cervical spine revealed disc bulges with minimal chronic multilevel degenerative disc disease without evidence of recent post-traumatic injury. He reported these findings to be, by definition, degenerative and non-traumatic and added the aforementioned degenerative changes of the cervical and lumbar spine were clearly chronic, pre-existing, and unrelated to the accident on August 15, 2019. As for plaintiff Duran, Dr. Katzman found the lumbar spine MRI revealed no evidence of recent traumatic injury and there was no recent-appearing traumatic disc herniation, extrusion, or annular tear. The MRI of the cervical spine revealed minimal chronic multilevel degenerative disc disease without evidence of recent post-traumatic injury and the disc bulges were, by definition, degenerative and non-traumatic. He added the aforementioned degenerative changes of the cervical spine were clearly chronic, pre-existing, and unrelated to the accident on August 15, 2019. Finally, the MRI of the left knee revealed no recent traumatic injury.

By submitting the affidavits and affirmations of medical experts, who through objective medical testing concluded that the plaintiff’s injuries are not serious within the meaning of Insurance Law §5102(d), a defendant can meet his or her prima facie burden (*see Fils-Aime v Hossan*, 208 AD3d 559 [2d Dept 2022]; *McCloud v Reyes*, 82 AD3d 848 [2d Dept 2011]; *Margarin v Krop*, 24 AD3d 733 [2005]). Here, defendants have met their prima facie burden.

Where defendant’s evidence is sufficient to meet their initial burden, the burden shifts to plaintiff to produce prima facie evidence, in admissible form, to support the claim of serious injury (*see Licari v Elliott*, 57 NY2d 230, 235 [1982]; *Lopez v Senatore*, 65 NY2d 1017 [1985]; *Barnes v New York City Transit Auth.*, 154 AD3d 800 [2d Dept 2017]).

Plaintiffs oppose the motion and submit the following in their opposition; their deposition transcripts, affirmed medical reports and records from Dr. Herschel Kotkes (“Dr. Kotkes”) and MRI review reports by Dr. Mark Lodespoto (“Dr. Lodespoto”). Dr. Kotkes examined Santos on September 12, 2019, 28 days after the accident, and also on September 5, 2023, four years after the accident. Based upon the examination of September 12, 2019, Dr. Kotkes reported Santos complained of constant neck and lower back pain. For the cervical and lumbar spine, Dr. Kotkes found reduced range of motion and that a Spurling’s test revealed positive and palpable trigger points noted in the muscles of the head and neck. Dr. Kotkes re-examined Santos on September 5, 2023. In that examination Dr. Kotkes again reported Santos complained of neck pain and lower back pain. His examination revealed reduced range of motion of the cervical spine and lumbar spine.

The reports of Dr. Kotkes, however, fail to identify what objective tests were used to measure the claimed range of motion (*see Bayk v Martini*, 142 AD3d 484 [2d Dept 2016]; *Schilling v Labrador*, 136 AD3d 884 [2d Dept 2016]; *Durand v Urick*, 131 AD3d 920 [2d Dept 2015]). While a Spurling’s test may have revealed positive and palpable trigger points, Dr. Kotkes makes no reference to Santos’ admitted prior motor vehicle accidents in 2014 and 2018. The failure to acknowledge a prior accident renders any opinion as to causation speculative (*see Rabolt v Park*, 50 AD3d 995, 996 [2d Dept 2008]; citing *Moore v Sarwar*, 29 AD3d 752, 753 [2d Dept 2006]). Whereas here, defendants have come forward with persuasive evidence that plaintiffs’ injuries were related to a pre-existing condition, plaintiff has the burden to proffer evidence rebutting defendant’s claimed lack of causation. (*Pommells v Perez*, 4 NY3d 566, 580 [2005]). As such, Santos’ reliance on the report of Dr. Kotkes is unavailing.

Dr. Kotkes examined Duran on one day only, September 5, 2019. Although plaintiffs’ counsel’s affirmation references a September 12, 2019, and September 5, 2023 examination of Duran by Dr. Kotkes, no report of the September 5, 2023 examination was submitted in opposition to this motion. As such the court can only consider Dr. Kotkes’ 2019 affirmation regarding Duran. According to his affirmation, Dr. Kotkes examined Duran on September 12, 2019, and reported Duran complained of frequent neck and lower back pain. However, there is no current examination by any doctor that would support Duran’s claim that she suffered a serious injury. “Projections of permanent limitations have no probative value in the absence of a recent examination” (*see Sukalic v Ozone*, 136 AD3d 1018, 1019 [2d Dept 2016], *Schilling v Labrador*, 136 AD3d 884, 885 [2d Dept 2016]; *Bacon v Bostany*, 104 AD3d 625, 628 [2d Dept 2014]). Both the exams of Dr. Kotkes and Dr. Lodespoto are from 2019. Similarly, notwithstanding the finding that a Spurling’s test revealed positive and palpable trigger points in the muscles of the head and neck, Dr. Kotkes made no mention of plaintiff Duran’s admitted prior motor vehicle accident in 2017 (*see Rabolt v Park*, 50 AD3d 995; *Moore v Sarwar*, 29 AD3d 752).

Finally, both plaintiffs submit the affirmed reports of Dr. Lodespoto. Dr. Lodespoto reviewed the MRI taken of Santos on August 28, 2019, and found cervical and lumbar spine bulges. He also reported herniations and bulges in Duran’s cervical and lumbar spine. However, Dr. Lodespoto failed to make any reference to the issue of causation, and also failed to acknowledge that both plaintiffs admitted to being involved in prior accidents (*See Rabolt v Park*, 50 AD3d 995;

Moore v Sarwar, 29 AD3d 752). Dr. Lodespoto's report also failed to rebut Dr. Katzman's findings that plaintiffs' reported injuries were chronic and degenerative in nature (*see Shmerkovich v Sitar Corp.*, 61 AD3d 843 [2d Dept 2009]; *Johnson v Berger*, 56 AD3d 725 [2d Dept 2008]; *Tudisco v James*, 28 AD3d 536, 537 [2d Dept 2006]).

Based upon the foregoing, the court finds that both plaintiffs have failed to raise a triable issue of fact as to whether they suffered a serious injury under the "permanent consequential limitation" or "significant limitation" categories of serious injury. Moreover, court notes plaintiffs did not address their permanent loss of use category in their opposition papers and as such finds these claims to be abandoned. The alleged injuries are not "total" and thus do not constitute a serious injury under the permanent loss of use category as set forth in Insurance Law §5102 (d) (*see Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 298 [2001]).

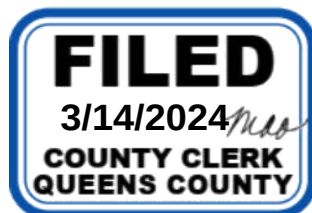
As to the 90/180 day category, plaintiffs have failed to raise an issue of fact. The testimony from plaintiffs establishes that they were not out of work or school for a significant period of time. The vagueness in a bill of particulars to being confined to home and bed by both plaintiffs intermittently is also insufficient to raise a triable issue of fact (*see Ranford v Tim's Tree & Lawn Serv., Inc.*, 71 AD3d 973, 974 [2d Dept 2010]; *Richards v Tyson*, 64 AD3d 760, 761 [2d Dept 2009]; *Letellier v Walker*, 222 AD2d 658 [2d Dept 1995]). The plaintiffs did not submit competent medical evidence that they were unable to perform substantially all of their daily activities for not less than 90 of the first 180 days after the accident. Difficulties in performing certain activities did not equate to being prevented from doing them (*see N.B. v Jameson*, 217 AD3d 819, 820 [2d Dept 2023]; *Bacon v Bostany*, 104 AD3d 625, 628 [2d Dept 2013]; *Lanzarone v Goldman*, 80 AD3d 667, 669 [2d Dept 2011]). Therefore, plaintiffs have failed to establish serious injury under the 90/180 day category.

Accordingly, the motion by defendants for summary judgment in their favor, on the grounds that plaintiffs did not suffer a "serious injury", is granted and plaintiffs' complaint is dismissed.

Movant is not relieved from the applicable provisions of CPLR 2220 and 202.5-b (h) (2) of the Uniform Rules of Supreme and County Courts insofar as it relates to service and notice of entry of the filed document upon all other parties to the action/proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

The foregoing constitutes the decision and order of this court.

Dated: March 13, 2024




ANNA CULLEY, J.S.C.