

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

Torres v. Rettaliata

2019 NY Slip Op 02578 (N.Y. Ct. App. 2019) · No. 2017-05014 · Decided April 3, 2019

SUMMARY

The Appellate Division, Second Department, affirmed an order denying the defendants' motion for summary judgment in a personal-injury action arising from a motor vehicle accident. The court held that although the defendants established prima facie that the plaintiff did not sustain a serious injury under Insurance Law § 5102(d), the plaintiff raised triable issues of fact concerning injuries to her right shoulder and cervical and lumbar spine, and the defendants failed to establish lack of causation.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Alan D. Scheinkman, P.J.; John M. Leventhal, J.; Francesca E. Connolly, J.; Valerie Brathwaite Nelson, J.
JURISDICTION	New York
DECIDED	April 3, 2019
DOCKET	2017-05014
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants appealed from an order denying their motion for summary judgment dismissing a personal-injury complaint under New York's serious-injury threshold statute.
STANDARD OF REVIEW	The court reviewed whether defendants were entitled to summary judgment as a matter of law and whether plaintiff raised a triable issue of fact concerning serious injury and causation.
PRECEDENTIAL VALUE	published appellate decision
PARTIES	Peter D. Rettaliata, et al. v. Carmen Torres

TOPICS

- personal injury
- summary judgment
- insurance
- standard of review
- appellate procedure

PRACTICE AREAS

personal injury

insurance

civil procedure

appellate procedure

QUESTIONS PRESENTED

1. Whether defendants established prima facie that Torres did not sustain a serious injury within the meaning of Insurance Law § 5102(d).
2. Whether Torres raised a triable issue of fact regarding serious injury to her right shoulder and cervical and lumbar spine under the permanent consequential limitation of use and significant limitation of use categories.
3. Whether defendants established prima facie a lack of causation so as to shift the burden to Torres to explain any gap in treatment.

HOLDINGS

1. Although defendants met their prima facie burden regarding the serious-injury categories, Torres raised a triable issue of fact concerning whether she sustained serious injuries to her right shoulder and cervical and lumbar spine; therefore, summary judgment dismissing the complaint was properly denied.
2. Because defendants failed to establish prima facie a lack of causation, the burden did not shift to Torres to raise a triable issue regarding causation or explain any gap in treatment.

FACTUAL BACKGROUND

Torres allegedly sustained injuries to her right shoulder and the cervical and lumbar regions of her spine in a motor vehicle accident. Defendants submitted medical evidence asserting that the injuries did not constitute serious injuries under the permanent consequential limitation of use and significant limitation of use categories of Insurance Law § 5102(d). Torres submitted evidence raising a triable issue concerning those injuries, while defendants failed to establish prima facie that the injuries were not caused by the accident.

PROCEDURAL HISTORY

Carmen Torres commenced an action for personal injuries allegedly sustained in a motor vehicle accident. Defendants moved for summary judgment, arguing that Torres had not sustained a serious injury within the meaning of Insurance Law § 5102(d). The Supreme Court, Suffolk County, denied the motion, and the Appellate Division affirmed insofar as appealed from.

DISPOSITION

affirmed

CASES CITED

- *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 (2002)
- *Gaddy v. Eyler*, 79 N.Y.2d 955, 956-957 (1992)
- *Staff v. Yshua*, 59 A.D.3d 614 (2d Dep't 2009)

- Perl v. Meher, 18 N.Y.3d 208, 218-219 (2011)
- Sanclemente v. MTA Bus Co., 116 A.D.3d 688, 689 (2d Dep't 2014)
- Rodgers v. Duffy, 95 A.D.3d 864, 866 (2d Dep't 2012)
- Pommells v. Perez, 4 N.Y.3d 566, 572 (2005)
- Lambropoulos v. Gomez, 166 A.D.3d 952 (2d Dep't 2018)

OPINION

PER CURIAM.

Torres v Rettaliata (2019 NY Slip Op 02578) Torres v Rettaliata 2019 NY Slip Op 02578 Decided on April 3, 2019 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on April 3, 2019 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department ALAN D. SCHEINKMAN, P.J. JOHN M. LEVENTHAL FRANCESCA E. CONNOLLY VALERIE BRATHWAITE NELSON, JJ. 2017-05014 (Index No. 35579/12) [*1]Carmen Torres, respondent, vPeter D. Rettaliata, et al., appellants.

The Law Office of David S. Klausner PLLC, White Plains, NY (Stephen Slater of counsel), for appellants. DECISION & ORDER In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Suffolk County (Peter H. Mayer, J.), dated March 10, 2017.

The order, insofar as appealed from, denied the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. ORDERED that the order is affirmed insofar as appealed from, without costs or disbursements.

The plaintiff commenced this action to recover damages for personal injuries that she allegedly sustained in a motor vehicle accident. The defendants moved for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident.

The Supreme Court, inter alia, denied the defendants' motion. The defendants appeal from so much of the order as denied their motion for summary judgment dismissing the complaint. The defendants met their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyler*, 79 NY2d 955, 956-957).

They submitted competent medical evidence establishing, prima facie, that the alleged injuries to the plaintiff's right shoulder and the cervical and lumbar regions of the plaintiff's spine did not

constitute serious injuries under the permanent consequential limitation of use and significant limitation of use categories of Insurance Law § 5102(d) (see *Staff v Yshua*, 59 AD3d 614).

In opposition, however, the plaintiff raised a triable issue of fact as to whether she sustained a serious injury to her right shoulder and the cervical and lumbar regions of her spine under the permanent consequential limitation of use and significant limitation of use categories of Insurance Law § 5102(d) (see *Perl v Meher*, 18 NY3d 208, 218-219).

As the defendants failed to establish, *prima facie*, a lack of causation (see *Sanclemente v MTA Bus Co.*, 116 AD3d 688, 689; *Rodgers v Duffy*, 95 AD3d 864, 866), the burden did not shift to the plaintiff to raise a triable issue of fact regarding causation or to explain any gap in treatment (see *Pommells v Perez*, 4 NY3d 566, 572; *Lambropoulos v Gomez*, 166 AD3d 952).

Accordingly, we agree with the Supreme Court's determination denying the defendants' motion for summary judgment dismissing the complaint. SCHEINKMAN, P.J., LEVENTHAL, CONNOLLY and BRATHWAITE NELSON, JJ., concur. ENTER: Aprilanne Agostino Clerk of the Court