

Marcelino v Siguenca

2007 NY Slip Op 30647(U)

February 13, 2007

Supreme Court, Queens County

Docket Number: 0003432/2005

Judge: James P. Dollard

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, JAMES P. DOLLARD IAS PART 13
Justice

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SANTO F. MARCELINO AND
FRANCISCO MARCELINO,

Index No. 3432/05

Plaintiffs,

Motion Date: Dec. 13, 2006

Cal. No. 14

-against-

Motion Sequence No. 2

EDGAR M. SIGUENCIA AND
"JOHN DOE",

Defendants.

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The following papers numbered 1 to 10 read on this motion by plaintiff on the counterclaim, Santo F. Marcelino, for an order dismissing plaintiff Francisco Marcelino's complaint for failure to establish the threshold "serious injury" requirement pursuant to Insurance Law §5102.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavit-Exhibit.....	1 - 4
Affirmation in Opposition.....	5 - 7
Reply Affirmation.....	8 - 10
(Additional reply papers <u>not</u> considered by the court due to late submission)	

Upon the foregoing papers it is ordered that this motion is granted.

In support of summary judgment dismissing plaintiff Francisco Marcelino's complaint, plaintiff on the counterclaim, Santo F. Marcelino made a prima facie showing that plaintiff did not sustain a serious injury through the affirmation of a board-certified neurologist, Dr. Wendy Cohen who examined plaintiff Francisco Marcelino four years after the accident and found no evidence of disability or impairment (Houston v. Gajdos, 11 AD3d 514 citing Toure v. Avis Rent A Car Sys, 98 NY2d 345; Gaddy v. Eyler, 79 NY2d 955 (1992)). Dr. Cohen performed objective medical tests such as Patrick's and Kernig's and found them to be

normal. Dr. Cohen also compared Francisco Marcelino's range of motion in the cervical and lumbar spines, respectively to the normal ranges of motions and found them to be normal. Dr. Cohen's assessment was "normal neurological evaluation".

Movant also submits two affirmed independent radiology reports from Dr. Audrey Eisenstadt dated March 24, 2006 of the lumbar and cervical spines. The first report addresses the lumbar spine MRI examination performed on plaintiff Francisco Marcelino on July 18, 2002, five weeks after the accident. Dr. Eisenstadt concludes that this MRI "reveals evidence of degenerative disc disease at the L3-4 intervertebral disc level. There is osteophyte formation or bony overgrowth and endplate signal change seen. These bony changes could not have developed in less than six months time and clearly predate the June 7, 2002 accident. Disc degeneration is also seen at this level". The second report addresses the cervical spine and Dr. Eisenstadt concludes that "the cervical spine MRI examination performed four weeks following the accident reveals evidence of degenerative disc disease throughout the cervical region. The changes are most severely seen at the C5-6 intervertebral disc level, the most common level in the population for degenerative disc disease to occur". The burden now shifts to Santo Marcelino plaintiff on the counterclaim to raise a triable issue of fact (Friends of Animals, Inc. v. Associated Fur Manufacturing, Inc., 46 NY2d 1065, 1067 citing CPLR §3212, sub(b)).

In opposition to summary judgment relief, plaintiff Francisco Marcelino submits an affirmation from Dr. Tonusa Basu who states that Francisco Marcelino presented to his office on June 12, 2002 five days after the accident. He noted range of motion discrepancies in the cervical and lumbar spines and subsequently placed plaintiff Francisco Marcelino on a course of physical therapy three times per week. Plaintiff treated at Dr. Basu's facility from June 12, 2002 through November 13, 2002 when plaintiff had reached maximum improvements and he was given home exercises. Dr. Basu opines that the injuries sustained by plaintiff Francisco Marcelino were causally related to the accident. Plaintiff Francisco Marcelino also submits an affirmation from Dr. Richard Rizzuti who affirms that on July 3, 2002 plaintiff presented to his office for an MRI of the cervical spine and his impression was: "Subligamentous posterior disc herniation at C6-7 impinging on the anterior aspect of the spinal canal". The July 18, 2002 MRI of the lumbar spine found "Mild to moderate spinal stenosis from L2- through L5". Dr. Basu fails to address the degenerative findings in Dr. Eisenstadt's reports or Dr. Rizzuti's finding of spinal stenosis in plaintiff Francisco Marcelino's lumbar spine. As such, Dr. Basu's opinion that there is a causal relationship between the accident and his alleged injuries is speculative (Gomez v. Epstein, 29 AD3d 950 (2d Dept.

2006); Bycinthe v. Kombos, 29 AD3d 845 (2d Dept. 2006); Kaplan v. Vanderhans, 26 AD3d 468 (2d Dept. 2006)).

Accordingly, the complaint is dismissed.

Dated: February 13, 2007

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J.S.C.