

Fuentes v Urrutia

2007 NY Slip Op 30909(U)

April 19, 2007

Supreme Court, Suffolk County

Docket Number: 0028809/2003

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 11-2-06
ADJ. DATE 1-2-06
Mot. Seq. # 002 - MG; CASEDISP
Mot. Seq. # 003 - XMG

-----X	
LUCIO FUENTES and MARY LUZ BLAS,	:
	:
	:
Plaintiffs,	:
	:
- against -	:
	:
EPIFANIO URRUTIA, ERASMO URRUTIA,	:
ROSA VELIZ and JUAN VELIZ,	:
	:
Defendants.	:
-----X	

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Upon the following papers numbered 1 to 41 read on this motion and cross motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 24; Notice of Cross Motion and supporting papers 25 - 27; Answering Affidavits and supporting papers 28 - 37; Replying Affidavits and supporting papers 38 - 41; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Rosa Veliz and Juan Veliz for summary judgment dismissing the claims against them on the ground that the action by plaintiffs Lucio Fuentes and Mary Luz Blas is barred by Insurance Law § 5104, as neither plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d), is granted; and it is

ORDERED that the cross motion by defendants Epifanio Urrutia and Erasmo Urrutia for summary judgment dismissing the claims against them based on plaintiffs' failure to meet the serious injury threshold set forth in Insurance Law § 5104 is granted.

Plaintiffs Lucio Fuentes and Mary Luz Blas commenced this action to recover damages for personal injuries allegedly sustained in a multi-vehicle accident that occurred at the intersection of North Thompson Drive and Pine Aire Drive in the Town of Islip on April 1, 2002. Plaintiffs' bill of particulars alleges that plaintiff Fuentes sustained numerous injuries as a result of the subject accident, including herniated and bulging discs in his lumbosacral region; bulging discs in his cervical region; and cervical and lumbosacral radiculopathy. It alleges that plaintiff Blas also sustained serious injuries in the accident, such as sprains and radiculopathy in the cervical and lumbar regions of her spine. The bill of particulars further alleges that plaintiffs sought treatment at the Emergency Department of Southside Hospital on the day of the accident, and that they were confined to home for 15 weeks due to their injuries.

Defendants now move for summary judgment dismissing the claims and cross claims against them on the ground that both plaintiffs are precluded by Insurance Law § 5104 from recovering for non-economic loss, as neither one sustained a "serious injury" within the meaning of Insurance Law § 5102 (d). Defendants' submissions in support of the motions include copies of the pleadings; transcripts of plaintiffs' deposition testimony; medical records related to plaintiff Fuentes and plaintiff Blas's treatment for spinal injuries following a motor vehicle accident in April 2001; and sworn medical reports prepared by Dr. Mark Zuckerman, Dr. Arthur Bernhang, and Dr. A. Robert Tantleff. At defendants' request, Dr. Zuckerman, a neurologist, and Dr. Bernhang, an orthopedist, conducted examinations of plaintiffs in December 2005. Dr. Tantleff, a radiologist, conducted an independent review of magnetic resonance imaging (MRI) studies of plaintiff Fuentes' cervical and lumbar regions that were performed in May 2002.

Plaintiffs oppose the motions for summary judgment, arguing that defendants failed to meet their burden on the motion as to plaintiff Blas, as Dr. Zuckerman's report contains findings that she exhibited "some left trapezius spasm" and mild carpal tunnel syndrome on the right side. Alternatively, plaintiffs argue that affidavits by plaintiffs' treating chiropractor, Dr. Cletus Simonetti, raise triable issues as to whether plaintiff Fuentes sustained a "significant limitation of use" of the lumbosacral region of the spine, and whether plaintiff Blas sustained a "significant limitation of use" of the cervical and lumbosacral regions.

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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (see, *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking

summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses. "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see, Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Pagano v Kingsbury, supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact or demonstrate an acceptable excuse for failing to meet the requirement of tender in admissible form (*Gaddy v Eyler, supra; Pagano v Kingsbury, supra; see, Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *see generally, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

The medical evidence presented by defendants establishes prima facie that plaintiffs did not suffer any serious injuries in the accident (*see, Hasner v Budnik*, 35 AD3d 366, 826 NYS2d 387 [2d Dept 2006]; *St. Pierre v Fevrier*, 28 AD3d 641, 813 NYS2d 516 [2d Dept 2006]; *Meely v 4 G's Truck Renting Co.*, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). Dr. Zuckerman's sworn report regarding plaintiff Fuentes, for example, states that plaintiff exhibited full range of motion in his cervical and lumbar regions, and that an examination of the spinal musculature revealed no spasm or tenderness. It states, among other things, that plaintiff Fuentes exhibited normal muscle strength and movement in his upper and lower extremities; that he could walk on his heels and toes without difficulty; that his deep tendon reflexes were normal; and that his sensation was intact. Similarly, Dr. Zuckerman's report regarding plaintiff Blas states, in relevant part, that plaintiff had full range of motion in her cervical spine; that there was no evidence of cervical radiculopathy; and that there was a mild trapezius spasm on the left side. It states that plaintiff Blas could forward flex 85 degrees out of 90 degrees; that she had full lateral flexion in her lumbar region; that there was no evidence of lumbar radiculopathy; and that there was a slight lumbar spasm. The report further states that plaintiff Blas had normal muscle strength and movement in her upper and lower extremities, except for a slight weakness on right thumb abduction; that her gait and balance are normal; that her deep tendon reflexes are normal; and that her sensory responses are normal.

Moreover, defendants' submissions show that both plaintiff Fuentes and plaintiff Blas received approximately nine months of treatment for injuries to their cervical and lumbar spines following a motor vehicle accident that occurred in April 2001. Further, the sworn reports by Dr. Tantleff state, in part, that a review of the MRI studies of plaintiff Fuentes' lumbar region shows that he suffers from a chronic degenerative disc condition, as well as Scheurermann's disease or congenital juvenile degenerative discogenic disc disease. As to plaintiff Fuentes' cervical region, Dr. Tantleff's report states that the MRI studies reveal chronic degenerative discogenic disc disease and spondylosis. Dr. Tantleff concludes that the disc changes in plaintiff Fuentes' spine are chronic, degenerative and preexisted the April 2002 accident.

The burden of proof, therefore, shifted to plaintiffs to raise a triable issue of fact (*see, Gaddy v Eyler, supra*). When a defendant in an action to recover damages for serious injury presents evidence that a plaintiff's alleged pain and injuries are related to a preexisting condition, the plaintiff must come forward with medical evidence addressing the defense of lack of causation (*see, Pommells v Perez,*

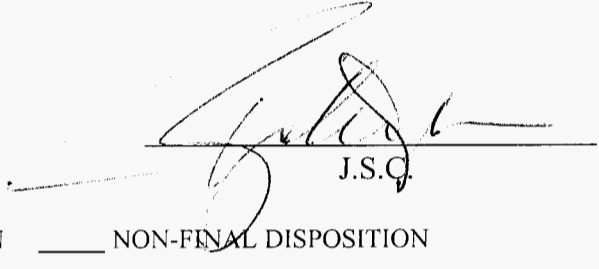
supra; **Franchini v Palmieri**, 1 NY3d 536, 775 NYS2d 232 [2003]; **Baksh v Shabi**, 32 AD3d 525, 820 NYS2d 327 [2d Dept 2006]; **Giraldo v Mandanici**, *supra*). Furthermore, a plaintiff claiming injury within the “limitation of use” category must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitations of movement and their duration (*see*, **Laruffa v Yui Ming Lau**, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; **Cerisier v Thibiu**, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; **Meyers v Bobower Yeshiva Bnei Zion**, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). He or she must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see*, **Bell v Rameau**, 29 AD3d 839, 814 NYS2d 534 [2d Dept 2006]; **Suk Ching Yeung v Rojas**, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]; **Ifrach v Neiman**, 306 AD2d 380, 760 NYS2d 866 [2d Dept 2003]), as well as objective medical findings of limitations that are based on a recent examination of plaintiff (*see*, **Laruffa v Yui Ming Lau**, *supra*; **Murray v Hartford**, 23 AD3d 629, 804 NYS2d 416 [2d Dept 2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; **Batista v Olivo**, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]; **Kauderer v Penta**, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]). In addition, a plaintiff claiming serious injury who terminates treatment after the accident must offer a reasonable explanation for having done so (**Pommells v Perez**, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see*, **Joseph v Layne**, 24 AD3d 516, 808 NYS2d 253 [2d Dept 2005]; **Ali v Vasquez**, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]; **Batista v Olivo**, *supra*).

Plaintiffs’ submissions are insufficient to defeat summary judgment. Significantly, the affidavits by plaintiffs’ treating chiropractor, Dr. Simonetti, fail to discuss the fact that plaintiffs were treated for spinal injuries following the 2001 motor vehicle accident, or to explain how such prior injuries may have affected his diagnoses (*see*, **Franchini v Palmieri**, *supra*; **Vidor v Davila**, __ AD3d __, 2007 WL 610058 [2d Dept, Feb. 27, 2007]; **Cervino v Gladysz-Steliga**, 36 AD3d 744, 829 NYS2d 169 [2d Dept 2007]; **D’Alba v Yong-Ae Choi**, 33 AD3d 650, 823 NYS2d 423 [2d Dept 2006]; **Moore v Sarwar** 29 AD3d 752, 816 NYS2d 503 [2d Dept 2006]). Dr. Simonetti’s affidavit concerning plaintiff Fuentes also fails to address defendants’ expert’s conclusion that MRI studies of the cervical and lumbar region performed in 2002 show plaintiff Fuentes suffers from preexisting degenerative disc conditions in his cervical and lumbar regions (*see*, **Franchini v Palmieri**, *supra*; **Zinger v Zylberberg**, 35 AD3d 851, 828 NYS2d 128 [2d Dept 2006]; **Khan v Finchler**, *supra*; **D’Alba v Yong-Ae Choi**, *supra*; **Legendre v Siqing Bao**, 29 AD3d 645, 816 NYS2d 495 [2d Dept 2006]; **Giraldo v Mandanici**, *supra*). Further, while Dr. Simonetti states in his affidavits that he conducted range of motion testing during plaintiffs’ initial examinations in April 2002, he does not provide the results of such testing, nor does he indicate that he performed range of motion or other clinical tests at any other time during the five-month period plaintiffs were under his care (*see*, **Murray v Hartford**, 23 AD3d 629, 804 NYS2d 416 [2d Dept 2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; **Ersop v Variano**, 307 AD2d 951, 763 NYS2d 482 [2d Dept 2003]; **Kassim v City of New York**, 298 AD2d 431, 748 NYS2d 265 [2d Dept 2002]; **Delgado v Hakim**, 287 AD2d 592, 732 NYS2d 233 [2d Dept 2001]; **Sainte-Aime v Ho**, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]). It also appears that Dr. Simonetti impermissibly based his diagnoses that plaintiff Fuentes suffered dis injuries in his cervical and lumbar regions on unsworn MRI reports prepared by another physician (*see*, **Marziotto v Striano**, __ AD3d __, 2007 WL 766078 [2d Dept, March 13, 2007]; **Elder v Stokes**, 35 AD3d 799, 828 NYS2d 138 [2d Dept 2006]; **Felix v New York City Tr. Auth.**, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]; **Magarin v Kropf**, 24 AD3d 733, 807 NYS2d 398 [2d Dept 2005]). Accordingly, Dr. Simonetti’s conclusions that both plaintiff Fuentes and

plaintiff Blas suffered significant limitations in spinal function as a result of the subject accident are rejected as speculative and tailored to meet the statutory threshold (*see, Cervino v Gladysz-Steliga, supra; Knijnikov v Mushtaq*, 35 AD3d 545, 827 NYS2d 198 [2d Dept 2002]; *D'Alba v Yong-Ae Choi, supra; Bennett v Genas*, 27 AD3d 601, 813 NYS2d 446 [2d Dept 2006]).

Thus, as no other admissible medical evidence was proffered by plaintiffs showing the limitations in plaintiffs' spinal function shortly after the subject accident and the duration of such injuries, plaintiffs failed to raise a triable issue as to whether they sustained injuries within the "significant limitation of use" category (*see, Iusmen v Konopka*, __ AD3d __, 2007 WL 766192 [2d Dept, March 13, 2007]; *Zinger v Zylberberg, supra; Felix v New York City Tr. Auth., supra*). The Court notes that the existence of herniated or bulging discs, in and of itself, is not evidence of a serious injury (*see, Manning v Tejada*, __ AD3d __, 2007 WL 766103 [2d Dept, March 13, 2007]; *Iusmen v Konopka, supra; Yakubov v CG Trans Corp.*, 30 AD3d 509, 817 NYS2d 353 [2d Dept 2006]; *Kearse v New York City Tr. Auth., supra*). In addition, plaintiffs failed offer an explanation for the cessation of all medical treatment for the alleged injuries just five months after the accident (*see, Pommells v Perez, supra; Manning v Tejada, supra*). Accordingly, defendants' motions for summary judgment dismissing the claims against them are granted.

Dated: APR 19 2007



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION

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