Bruno v Diaz
2007 NY Slip Op 31469(U)
May 21, 2007
Supreme Court, Kings County
Docket Number: 0027417/2004
Judge: Bruce M. Balter
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of May, 2007.

PRESENT:

HON. BRUCE BALTER,
Justice.

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LUIS BRUNO, et ano.,
Plaintiffs,

Index No. 27417/04

- against -

ALEXANDRA DIAZ, et ano.,

Defendants.

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The following papers numbered 1 to 4 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant Alexandra Diaz moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiffs Luis Bruno (Mr. Bruno) and Santa Ortiz (Ms. Ortiz) on the ground that they failed to sustain a serious injury as that term is defined under § 5102 (d) of the Insurance Law.[1] Co-defendant

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[1] 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

[* 2]

Mark Lustre cross-moves for an order, pursuant to CPLR 3212, granting summary judgment on the issue of threshold and dismissing the complaint as asserted against him.[2]

This action arose from a motor vehicle accident involving an automobile owned and operated by Mr. Lustre and a motor vehicle owned by Mr. Bruno and operated by Ms. Diaz. The accident occurred at the intersection of Myrtle Avenue and Stockholm Street in Brooklyn on September 2, 2003. At the time of the accident, Mr. Bruno was a back-seat passenger and Ms. Ortiz was a front-seat passenger of the vehicle operated by Ms. Diaz.

In the complaint, Mr. Bruno alleges that he sustained serious injuries as a result of the accident. More specifically, Mr. Bruno alleges, in his bill of particulars, that he suffered, *inter alia*, sprains of the left shoulder and lumbar sacral spine. Additionally, Mr. Bruno claims that such injuries constitute an impairment within the 90/180 days category of the Insurance Law and are of "a serious, significant and lasting and permanent nature."

Ms. Ortiz also alleges in the complaint that she sustained serious injuries as a result of the accident. In the bill of particulars, Ms. Ortiz claims that she suffered, *inter alia*, sprains of the cervical spine, lumbar sacral spine and right shoulder. Ms. Ortiz further claims

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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 and eighty days immediately following the occurrence of the injury or impairment."

[2] Co-defendant Mark Lustre adopts the arguments of defendant Ms. Diaz in support of his cross motion for summary judgment.

that she satisfies the 90/180 days category of the Insurance Law and that her injuries are of "a serious and significant and lasting and permanent nature."

In support of the motion and cross motion, defendants submit the affirmed medical report of Dr. Ravi Tikoo, a neurologist, based upon an independent medical examination of Mr. Bruno on August 26, 2006, at the movants' request. Mr. Bruno's straight leg raising was found to be unlimited to 90 degrees. In his report, Dr. Tikoo notes that "[t]here was mild tenderness of the cervical and lumbar spine." As a result of his examination of Mr. Bruno, Dr. Tikoo diagnosed Mr. Bruno with a history of lumbosacral and cervical strains and also concluded that:

> "it is my opinion, with a reasonable degree of medical certainty that my neurological exam of Luis Bruno was essentially normal. Despite his subjective complaints, there were no objective findings to substantiate these complaints. Luis does not need any further treatment or diagnostic testing ... It is my opinion that he does not have significant clinical evidence of neuropathy, radiculopathy, or disc herniation. ...Luis is not disabled from a neurological basis. It is my opinion that a permanent injury has not been sustained."

Defendants also submit the affirmed medical report of Dr. Barry M. Katzman, an orthopedist, who examined Mr. Bruno on August 24, 2006, at the movants' request. During his examination of Mr. Bruno, Dr. Katzman conducted, *inter alia*, range of motion tests of his cervical and thoracolumbar spine, straight leg raising test and Spurling's maneuver. Based upon his examination of Mr. Bruno, Dr. Katz diagnosed Mr. Bruno with resolved

[* 4]

cervical and lumbar strains and determined that "[t]here is no need for causally related orthopedic treatment." Dr. Katz further stated in his report that "[t]he injuries sustained in the accident are causally related assuming the history as given by the claimant is correct and there is medical documentation to support it."

In addition, defendants submit the affirmed report of Dr. Richard A. Heiden, a radiologist, based upon a review of the MRI of Mr. Bruno's cervical spine. The MRI examination was performed on October 17, 2003. Dr. Heiden notes the existence of disc herniations in Mr. Bruno's cervical spine but opines that they are as a result of "degenerative disease" and are "not attributable" to the subject accident. Defendants assert that strain and sprain injuries as alleged by plaintiffs are insufficient to satisfy requirements of the definition of a serious injury under the Insurance Law.

Additionally, defendants point to Mr. Bruno's deposition testimony that his while his employer instructed him not to return to work because of his alleged injuries, his treating doctor failed to instruct him to do the same. As such, defendants argue that Mr. Bruno fails to satisfy the 90/180 days category of the Insurance Law.

In further support of their motion and cross motion, defendants also submit affirmed neurological and orthopedic medical reports, based upon examinations of Ms. Ortiz performed by Drs. Tikoo and Katzman, at the movants' request. Ms. Ortiz was examined by Dr. Tikoo on August 22, 2006. During his examination of Ms. Ortiz, Dr. Tikoo conducted, among other things, a straight leg raising test, cognitive exam, cranial nerve examination,

motor examination, sensory examination, coordination exam. Straight leg raising was possible at 90 degrees. Based upon his examination of Ms. Ortiz, Dr. Tikoo diagnosed her with: "(1) [s]ubjective [c]omplaints of [h]eadaches, (2) [h]istory of [c]ervical [s]train, and (3) [h]istory of [l]umbosacral [s]train." Dr. Tikoo also notes Ms. Ortiz's complaints of pain in her neck and back which worsened with bending.

Specifically, Dr. Tikoo states in his report that:

> Based on today's clinical evaluation and the claimant's reported history, it is my opinion, with a reasonable degree of medical certainty that my neurological exam of Santa Ortiz was essentially normal. Despite her subjective complaints, there were no objective findings to substantiate these complaints. Santa does not need any further treatment or diagnostic testing. Maximal medical improvement has been reached. She is able to function in her normal capacity. It is my opinion that she does not have significant clinical evidence of neuropathy, radiculopathy, or disc herniation. Furthermore, Santa is not disabled from a neurological basis. It is my opinion that a permanent injury has not been sustained.

Ms. Ortiz was examined by Dr. Katzman on August 24, 2006. During his examination of Ms. Ortiz, Dr. Katzman conducted range of motion tests of Ms. Ortiz's cervical spine and lumbar spine and compared the results with the normal. Dr. Katzman also conducted the Spurling's maneuver and straight leg raising test which yielded negative results. Based upon his examination of Ms. Ortiz, Dr. Katzman diagnosed her with resolved cervical and lumbar strains. Dr. Katzman is of the opinion that her injuries are causally related to the subject

accident "assuming the history as given by the claimant is correct and there is medical documentation to support it." Further, in his report, Dr. Katzman opines that Ms. Ortiz needs no "causally related orthopedic treatment."

In opposition to the motion, plaintiffs submit the affirmed medical reports of Dr. Eleanor Lipovsky. Mr. Bruno was first examined by Dr. Lipovsky on September 9, 2003. At that time, Dr. Lipovsky conducted, *inter alia*, the Spurling test and range of motion testing of Mr. Bruno's cervical spine and left shoulder. The results were not compared with the normal. Based upon her examination of Mr. Bruno, Dr. Lipovsky diagnosed him with, *inter alia*, cervical spine sprain/strain; possible cervical disc displacement; possible cervical radiculitis/radiculopathy; left shoulder sprain/strain. Mr. Bruno was again examined by Dr. Lipovsky on October 10, 2003, November 18, 2003, December 11, 2006 and on December 21, 2006, respectively.[3] During the December 21, 2006 examination, Dr. Lipovsky conducted range of motion tests of Mr. Bruno's cervical spine and lumbar spine and compared the results to the normal, finding a decreased range of motion. Dr. Lipovsky causally related Mr. Bruno's injuries to the subject accident. In her report, Dr. Lipovsky refers to the examination of Mr. Bruno by Dr. Renato Battisti, a chiropractor, on September 5, 2003 and his examination by Dr. Milton M. Smith, an orthopedist, on October 16, 2003 noting objective tests and decreased range of motion of Mr. Bruno's cervical and lumbar spine. However, these reports were unsworn and any reference to them will not be

[3] The court notes that while Dr. Lipovsky's last examination of plaintiffs was on December 21, 2006, the affirmation is dated December 12, 2006.

[* 7]

considered by the court. Dr. Lipovsky first examined Ms. Ortiz on September 9, 2003. Upon her examination of Ms. Ortiz, Dr. Lipovsky conducted Spurling sign, straight leg raising test, and range of motion tests of her cervical spine and lumbar spine. However, the results of these tests were not compared to the normal in Dr. Lipovsky's report. Straight leg raising test and Spurling sign were positive. Based upon her examination of Ms. Ortiz, Dr. Lipovsky diagnosed her with, *inter alia*, cervical spine sprain/strain; possible cervical disc displacement; possible cervical radiculitis/radiculopathy; lumbosacral spine sprain/strain/ possible lumbosacral disc displacement; possible lumbosacral radiculitis/radiculopathy; left elbow sprain/strain; and left lower leg sprain/strain. Dr. Lipovsky opines that Ms. Ortiz was instructed not to perform any heavy work at that time. Dr. Lipovsky again examined Ms. Ortiz on October 10, 2003, November 18, 2003 and December 11, 2006 and December 21, 2006, respectively. The court notes, however, that the affirmation was signed on December 12, 2006. During the December 11, 2006 examination of plaintiff, Dr. Lipovsky conducted the foramina compression test and straight leg raising test and obtained positive results. Dr. Lipovsky determined that "[t]here was spasm and tenderness upon palpation of the cervical and lumbar paraspinal muscles." On December 21, 2006, Dr. Lipovsky conducted range of motion tests of Ms. Ortiz's cervical and lumbar spines. With regard to the ranges of motion for the cervical and lumbar regions of Ms. Ortiz's spine, Dr. Lipovsky compared the results to the normal and determined that there was a decreased range of motion. In addition, in her report, Dr. Lipovsky refers to the September 5, 2003 and October 16, 2003 examinations of

Ms. Ortiz by Dr. Renato Battisti, a chiropractor, and Dr. Milton Smith, an orthopedist, respectively. Objective tests were performed with positive results and decreased range of motions compared to the normal were listed. However, said reports are unsworn and will not be considered by the court.

In addition, plaintiffs submit their own affidavits in which they each aver that they ceased treatment when their no-fault benefits were discontinued. Mr. Bruno avers that he was instructed to rest at home after the accident and that he was unable to return to work for four months after the accident as a result of his injuries. Ms. Ortiz avers that she was unable to "attend to [her] usual and customary activities which included running errands for [her] family and household and tending to [her] household chores" for approximately four months after the accident and that she still experiences pain and is unable to stand for extended periods of time.

In reply, defendants contend that plaintiffs failed to submit sufficient evidence in admissible form to raise a triable issue of fact as to whether they suffered a serious injury. Defendants assert that plaintiff's counsel's affirmation and their own affidavits are not probative evidence on medical issues. Defendants maintain that plaintiffs failed to submit evidence of range of motion limitations contemporaneous with the subject accident and that that plaintiff's expert failed to explain the gap in their treatment. Defendants further contend that Dr. Lipovsky's reference to testing performed by other doctors is inadmissible as it is

unsworn. Finally, defendants reiterate their argument that plaintiffs fail to satisfy the 90/180 days category.

To succeed on a motion for summary judgment, defendants must meet an initial burden of demonstrating that Mr. Bruno and Ms. Ortiz did not sustain a "serious injury" as that term is defined by Insurance Law § 5102 (*see Gaddy v Eyler*, 79 NY2d 955 [1992]; *Omar v Goodman*, 295 AD2d 413 [2002]; *Fenstamacher v Reyell*, 152 AD2d 890 [1989]). "A defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities causally related to the motor vehicle accident, has established a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) ..." (*Kearse v New York City Transit Authority*, 16 AD3d 45, 49-50 [2005] [internal citations omitted]).Once the defendant has established a prima facie case that the plaintiff did not sustain a "serious injury," the burden shifts to the plaintiff to "come forward with admissible proof to raise a triable issue of fact" (*Napoli v Cunningham*, 273 AD2d 366 [2000]). If the plaintiff is unable to meet this burden, summary judgment will be granted to defendant (*see e.g. Ginty v McNamara*, 300 AD2d 624 [2002]; *Attanasio v Lashley*, 223 AD2d 614, 614-15 [1996]; *Sotirhos v Pinello*, 209 AD2d 687, 687-88 [1994]).

Plaintiffs are required to plead the specific category under which they allegedly suffered a serious injury within the meaning of § 5102 (d) of the Insurance Law. In their verified bills of particulars, plaintiffs claim that they satisfy the 90/180 days category of the

Insurance Law and that their injuries are of "a serious, significant and lasting and permanent nature." Insofar as plaintiffs' claims are to be construed that their injuries are permanent, the court notes that the medical evidence submitted by plaintiffs in opposition to defendants' motion and cross motion is bereft of any findings of permanency. Accordingly, for the purposes of the instant motion and cross motion, the court shall construe plaintiffs' serious injury claims as limited to the "significant limitation of use of a body function or system" and the 90/180 days categories.

It is well settled that "[t]o establish . . . a significant limitation, the medical evidence must provide either quantitative or qualitative assessment to differentiate serious injuries from mild and moderate ones" (*Clements v Lasher*, 15 AD3d 712, 713 [2005]). Accordingly, it is also well established that "[a] defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities causally related to the motor vehicle accident, has established a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d)" (*Kearse v New York City Transit Authority*, 16 AD3d 45, 49 [2005]; *see also Kerzhner v N.Y. Ubu Taxi Corp.*, 17 AD3d 410, 410 [2005]).

Based upon a review of the record, the court finds that defendants have arguably established their prima facie case that plaintiffs did not sustain any serious injuries which resulted in "a significant limitation of use of a body function or system." With the exception of the straight leg raising test, Dr. Tikoo fails to sufficiently identify the objective tests he

performed in reaching his determination that plaintiffs did not suffer a serious injury. However, defendants' submission of Dr. Katzman's reports indicates that plaintiffs demonstrated a normal range of motion in the cervical spine and lumbar spine based upon objective tests results. Dr. Katzman further determined that plaintiffs' sprains and strains have since resolved.

In opposition, plaintiffs fail to proffer any medical evidence in admissible form that was contemporaneous with the subject accident showing any initial range of motion limitations of the cervical and lumbar spines so as to substantiate their claims of a serious injury (*Manning v Tejeda*, 38 AD3d 622 [2007]; *Zinger v Zylberberg*, 35 AD3d 851 [2006]; *Elder v Stokes*, 35 AD3d 799 [2006]). Furthermore, plaintiffs' physician relied on the unsworn reports of others in reaching her conclusions (*Felix v New York City Transit Authority*, 32 AD3d 527 [2006]; *Friedman v U-Haul Truck Rental*, 216 AD2d 266 [1955]). As such, plaintiffs' proof was insufficient to raise a triable issue of fact as to whether they suffered a serious injury that was significant.

With respect to Mr. Bruno's "90/180-day" serious injury claims, defendants have also established their prima facie case entitling them to judgment as a matter of law. Defendants submit a transcript of Mr. Bruno's deposition testimony in support of the motion and cross motion. At his deposition, Mr. Bruno testified that he missed work for two to three months after the accident and that his employer then told him not to return to work due to his alleged injuries. However, in opposition, Mr. Bruno failed to submit any evidence in admissible

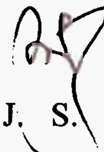
form demonstrating that he suffered a medically determined injury which prevented him from performing substantially all of his customary activities during the relevant statutory time (*Webb v Johnson*, 13 AD3d 54, 55 [2004]).

With respect to Ms. Ortiz's "90/180-day" claims, defendants have failed to satisfy their initial burden of proof. Although, based upon his examination of Ms. Ortiz, Dr. Katzman opined that her injuries have resolved, neither of defendants' experts addressed her claim that she sustained a medical injury or impairment of a non-permanent nature which prevented her from performing substantially all of her material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (*Joycelyn v Singh Airport Service*, 35 AD3d 668 [2006]; *Lopez v Geraldino*, 35 AD3d 398 [2006]). As such, in the instant case where the medical affirmations submitted by defendants are based upon examinations of Ms. Ortiz which were conducted by Dr. Tikoo and Dr. Katzman three years after the subject accident occurred and, therefore, cannot be considered probative on the issue of whether Ms. Ortiz suffered a medically determined injury which prevented her from performing substantially all of her customary activities during the relevant statutory time period (*see Webb*, 13 AD3d at 55). Since defendants have failed to establish their prima facie entitlement to judgment as a matter of law with respect to the 90/180 category of serious injury, it is unnecessary to reach the question of whether plaintiffs' opposition papers, with respect to Ms. Ortiz, were sufficient to raise a triable issue of fact (*see generally Aronov v Leybovich*, 3 AD3d 511 [2004]).

Accordingly, the court denies that branch defendants' motion and cross motion for summary judgment on the issue of threshold with respect to Ms. Ortiz's claim of a serious injury which satisfies the 90/180 days category of the Insurance Law. Defendants' motion and cross motion for summary judgment on the issue of threshold with respect to Mr. Bruno is granted in its entirety.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

Bruce M. Balter