

**Sanchez v Danella Constr. of N.Y. Inc.**

2007 NY Slip Op 31829(U)

June 12, 2007

Supreme Court, New York County

Docket Number: 0109380/2005

Judge: Deborah A. Kaplan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN  
*Justice*

PART 22

OSWALDO SANCHEZ

INDEX NO. 109380/05

MOTION DATE 4-3-07

MOTION SEQ. NO. 002

- v -

DANELLA CONSTRUCTION OF NEW YORK  
INC. and ANTONIO LOPES

MOTION CAL. NO. 98

The following papers, numbered 1 to 3, were read on this motion by the defendants for summary judgment dismissing the complaint on the ground that the plaintiff did not meet the serious injury threshold requirement of Insurance Law § 5102(d).

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits — Memo

Answering Affidavits — Exhibits

Replying Affidavit

Cross-Motion:  Yes  No

**FILED**  
JUN 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

PAPERS NUMBERED

- 1
- 2
- 3

At approximately 3:30 a.m. on March 17, 2004, plaintiff Oswaldo Sanchez was stopped at a red traffic light on 1<sup>st</sup> Avenue between 79<sup>th</sup> and 80<sup>th</sup> Streets in Manhattan. A vehicle owned by defendant Danella Construction of New York Inc. and driven by defendant Antonio Lopes collided with the rear of plaintiff's vehicle. The impact caused plaintiff's head and back to hit the back of the seat. The plaintiff stepped out of the car on his own, spoke to the police officers at the scene, refused medical assistance and drove home.

In July 2005, the plaintiff commenced the instant action to recover damages for injuries he allegedly sustained in the accident. Specifically, he claims to have suffered a herniated disc, sprains and strains of the lumbosacral and cervical spine, severe contusions to both hips and various psychological damages. The defendants now move for summary judgment dismissing the complaint on the ground that the plaintiff did not meet the threshold "serious injury" requirement of Insurance Law § 5102(d), necessary to sustain this action. The defendants' motion is granted.

To prevail on a motion for summary judgment, the moving party must produce evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. See Kosson v Algaze, 84 NY2d 1019 (1995); Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Winegrad v New York Univ. Med Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980). Where, as here, a defendant seeks summary judgment on the threshold "serious injury" issue under "No-Fault threshold" issue (Insurance Law § 5102[d]), he or she bears the initial burden of establishing the absence of a "serious injury" as a matter of law. This is because, in enacting Insurance Law §5102(d), the Legislature intended to weed out frivolous claims and limit recovery to significant injuries arising from motor vehicle accidents. See Pommells v Perez, 4 NY3d 566 (2005); Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Ljicari v Elliot, 57 NY2d 230 (1982).

If the moving party makes the requisite showing, the burden then shifts to the opposing party to come forward with proof in admissible form to raise a triable issue of fact requiring a trial. See Kosson v Algaze, *supra*; Alvarez v Prospect Hospital, *supra*; Winegrad v New York Univ. Med Ctr., *supra*; Zuckerman v City of New York, *supra*. The party opposing a motion for summary judgment on the threshold "serious injury" issue must come forward with objective proof of his or her injury to raise a triable issue. See Toure v Avis Rent A Car Systems, *supra*; Dufel v Green, 84 NY2d 795 (1995). Subjective complaints alone are not sufficient. See Toure v Avis Rent A Car Systems, *supra*; Gaddy v Eyler, 79 NY2d 955 (1992).

In support of their motion, the defendants have produced the pleadings, the deposition testimony of the plaintiff, the police report of the accident, and the affirmed reports of Dr. Erik Entin and Dr. Andrew Weiss, who examined the plaintiff for his No-Fault carrier in July 2004, and Dr. Robert Goldstein, a board-certified orthopaedist, who examined the plaintiff in July 2006.

At his deposition, the plaintiff testified that the day after the accident, he went back to work as a parking lot attendant. After work, he presented at Inwood Hospital complaining of lower back pain and other symptoms. He was thereafter treated by Dr. Noel Howell and underwent a course of physical therapy, chiropractic treatment, electro-stimulation, ultrasound and massage therapy for four months,

until Dr. Howell determined that the plaintiff would derive no benefit from further treatment. The plaintiff thereafter embarked on a home exercise program. He did not see any psychologist or psychiatrist as a result of the accident, and was not prescribed medication.

The plaintiff also testified that he suffered a gunshot wound to his back in 1995, underwent surgery and that the bullet was still lodged in his back. However, he claimed that he did not suffer any back pain as a result of the gunshot wound or surgery. According to the plaintiff, it was not until after this accident that he became unable to jog or lift weights or stand for great lengths of time. He now must take occasional rests while sweeping and moping at his current janitorial job.

Dr. Entin, a board-certified psychiatrist and neurologist, noted that the plaintiff was attending physical therapy and chiropractic treatment three times per week and complained of low back pain, but that he missed no time from work after the accident and was working full-time without restrictions at the time of this examination. Dr. Entin performed a number of tests, which are listed in his report, and reviewed plaintiff's medical records, including reports of CT scans and electrodiagnostic studies of the plaintiff's spine. He found no muscle spasm or atrophy and "no objective evidence of neurologically based disability or deficit in relation to the accident." Dr. Entin's diagnosis was "cervical sprain and lumbar sprain, resolved." He stated that the plaintiff was "capable of performing his usual work duties full time as well as his normal activities of daily living."

Dr. Weiss, a board-certified orthopaedist, stated in his report that he also reviewed plaintiff's medical records and performed an array of tests. Dr. Weiss noted that "there were subjective complaints of tenderness at L1 through L5" but no muscle spasm noted in that area. He found plaintiff to have a full active range of motion of the cervical and lumbar spine and no deficits or restrictions. Dr. Weiss' examination revealed "no objective evidence of disability in relation to the motor vehicle accident of 3-17-04 despite subjective complaints" and that the plaintiff "sustained no permanent impairment" and "was able to return to his pre-loss activity levels, including occupational duties, without restrictions." He opined that the plaintiff suffered a "sprain of the cervical and thoracolumbosacral spine" which was causally related to the accident, but that the sprain had resolved.

In his affirmed report, Dr. Robert Goldstein, who performed the orthopaedic IME in July 2006, states that he reviewed the plaintiff's Bill of Particulars and deposition testimony, as well as numerous medical records, including the medical reports and final narrative report of Dr. Howell, and performed an array of tests on the plaintiff, which are listed in his report. Like Drs. Entin and Weiss, Dr. Goldstein found all normal functioning. He concluded, among other things, that the plaintiff had "completely recovered from the alleged injuries" to his spine and hips, "there is no need for further diagnostic testing or orthopedic treatment" and "there is no orthopedic disability or permanency as a result of the accident of March 17, 2004."

In their Memorandum of Law in support of their motion, the defendants argue that the plaintiff has failed to establish, or even allege, that his claimed injuries fall under any particular category of "serious injury" as defined by Insurance § 5102(d).

In opposition to the motion, the plaintiff has submitted the radiology report of Dr. Miklos Weinberger, whose examination of the CT scan of the lumbosacral spine on April 21, 2004, showed a "central posterior disc herniation at the L5-S1 with impingement upon the thecal sac." The plaintiff also submits his deposition testimony and his affidavit of merit, in which he alleges that the physical examination of Drs. Goldstein, Entin and Weiss, relied upon by the defendants, each "lasted approximately five minutes" and that these doctors did not perform any tests while he was in their offices. The plaintiff alleges in his affidavit that he continues to have pain in his neck and back every day and his daily activities are restricted and none of these complaints or restrictions existed before the accident.

The plaintiff also submitted a narrative report, dated September 21, 2004, and an affidavit, dated November 29, 2006, from his treating physician, Dr. Howell. In the narrative report, Dr. Howell diagnoses plaintiff with "acute lumbosacral musculo-ligamentous sprain/strain, lumbar disc herniation and S/P contusion to both sternocleidal muscles." Dr. Howell noted that the plaintiff experiences lower back pain, demonstrates "signs and symptoms of residual inflammatory pathology of the muscular and supportive structures of the cervical and lumbosacral spine" and has a "significant decrease in lumbar spine range of

motion." His report also states that plaintiff has full range of motion in his cervical and thoracic spine. Dr. Howell opined that the plaintiff suffered severe trauma to his spine in the accident, and predicted some long-range and permanent symptoms.

In his affirmation of November 29, 2006, Dr. Howell states that he examined and treated the plaintiff in 2004, and next examined him on November 9, 2006. Dr. Howell agreed with Dr. Goldstein's finding of a herniated disc at L5-S1 that impinges on the thecal sac. However, contrary to Dr. Goldstein, Dr. Howell was of the view that "despite considerable treatment, Mr. Sanchez continues to suffer from the injuries he sustained on March 17, 2004, which have resulted in significant loss of use of the body parts injured" and that the injuries "limit his functions and daily activities with respect of his back, which are serious in nature, and there is a direct causal relationship" between the accident and plaintiff's current complaints. In his affirmation, Dr. Howell states that he performed a computerized range of motion exam on the plaintiff in his office on November 15, 2006, which showed a "whole body impairment of 46%." However, the report of the exam, upon which he relies for the 46% figure, lists only minor range of motion deficits in the lumbar spine, *i.e.* 3% impairment of the left lateral and 5% in the right lateral, 11% in flexion and 7% in extension, no significant deficits in the cervical spine and none at all in the thoracic spine.

In their reply papers, the defendants point out that the plaintiff claims, for the first time, that his injuries constitute a "significant limitation of use of his neck and back" within the definition of the Insurance Law. They argue that the plaintiff's opposition papers fail to support this belated claim.

It is well settled that a herniated or bulging disc may constitute a serious injury within the meaning of Insurance Law §5102(d). See Pommels v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., 22 AD3d 326 (1<sup>st</sup> Dept. 2005); Ariona v Calcano, 7 AD3d 279 (1<sup>st</sup> Dept. 2004) and that a CT scan or MRI may constitute objective evidence to support subjective complaints. See Ariona v Calcano, *supra*; Lesser v Smart Cab Corp., 283 AD2d 273 (1st Dept. 2001). However, "a plaintiff must still offer some objective evidence of the extent or degree of the alleged physical limitations, and their duration, resulting from the disc injury" (Ariona v Calcano, *supra*; see Pommels v Perez, 4 NY3d 566 [2005];

Nagbe v Mimigrøen Hacking Group, Inc., supra; Simms v APA Truck Leasing Corp., 14 AD3d 322 [1<sup>st</sup> Dept. 2005]).

The defendants met their burden on this motion. While the CT scan of the plaintiff's spine taken on April 21, 2004, one month after the accident, shows the presence of a herniated disc approximately, the defendants have presented proof in admissible form that the condition resolved thereafter. Upon examination of the plaintiff in July 2004, Dr. Entin and Weiss both found all normal functioning and no permanent injury from the accident. Upon examining the plaintiff in two years later, in July 2006, Dr. Goldstein again found that the plaintiff had completely recovered from the injuries he suffered in the accident. Thus, the defendants established the absence of a "serious injury" as a matter of law. See Pommells v Perez, supra; Toure v Avis Rent A Car Systems, supra; Licari v Elliot, supra.

The plaintiff, in turn, failed to come forward with objective proof to raise a triable issue. See Toure v Avis Rent A Car Systems, supra; Dufel v Green, supra. The reports and affirmation of his treating physician, Dr. Howell, are insufficient to defeat the motion. The court notes that the plaintiff's proof does not establish that the disc herniation revealed in the April 21, 2004, had not resolved. Furthermore, Dr. Howell's estimation of a "whole body impairment of 46%" does not adequately address the findings of Drs. Entin, Weiss and Goldstein. Indeed, notwithstanding his stated opinion that the plaintiff still suffers a "significant decrease in lumbar spine range of motion," the report upon which he relies for the aggregate 46% figure lists only minor range of motion deficits in the lumbar spine. Dr. Howell's conclusions are premised largely upon the plaintiff's own subjective complaints which, as stated above, are insufficient to meet his burden on this motion. See Toure v Avis Rent A Car Systems, supra; Gaddy v Eyer, supra. Finally, as correctly argued by the defendants, the plaintiff fails to even articulate which particular category of "serious injury" he is claiming in this action. See Insurance Law § 5102(d).

Accordingly, the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiffs did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is granted.

For these reasons and upon the foregoing papers, it is,

ORDERED that the defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to the defendants as taxed by the Clerk of the Court, and it is further,

ORDERED that Clerk is directed to enter judgment accordingly.

Dated: June 12, 2007

*Deborah Kaplan*  
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 Deborah A. Kaplan      J.S.C.  
**DEBORAH A. KAPLAN**  
 J.S.C.

Check one:     FINAL DISPOSITION     NON-FINAL DISPOSITION  
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