

Martinez v Marsh

2007 NY Slip Op 34268(U)

December 28, 2007

Supreme Court, Suffolk County

Docket Number: 0027524/2004

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

P R E S E N T :

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 1-3-07

CAL. DATE 10-31-07

MNEMONIC: # 004 - MD

MNEMONIC: # 005 - XMD

MNEMONIC: # 006 - XMD

MNEMONIC: # 007 - XMD

-----X

ANA MARTINEZ,

Plaintiff,

- against -

SHAVON L. MARSH, AMALIA C. BLAKE,
BENJAMIN LUGO, JR., RICHARD P.
CALLARA and THOMAS W. HUDSON,

Defendants.

-----X

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Upon the following papers numbered 1 to 48 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers) 12-16; 17 - 20; 21 - 24; Answering Affidavits and supporting papers 25 - 28; 29 - 30; Replying Affidavits and supporting papers 31 - 32; Other _____; and after hearing counsel in support and opposed to the motion it is,

ORDERED that this motion (004) by defendant, Richard P. Callara, pursuant to CPLR 3211 and 3212 for an order granting summary judgment dismissing the complaint on the basis that the plaintiff, Ana Martinez, has not sustained serious injury within the meaning of Insurance Law §5102(d), is denied; and it is further

ORDERED that cross-motion (005) by the defendants, Shavon L. Marsh and Amalia C. Blake, pursuant to CPLR 3211 and 3212 for an order granting summary judgment dismissing the complaint on the basis that the plaintiff, Ana Martinez, has not sustained serious injury within the meaning of Insurance Law §5102(d), is denied; and it is further

ORDERED that cross-motion (006) by defendant, Thomas W. Hudson, pursuant to CPLR 3211 and 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Ana Martinez, has not sustained serious injury within the meaning of Insurance Law §5102(d), is denied; and it is further

ORDERED that cross-motion (007) by defendant, Benjamin Lugo, Jr., pursuant to CPLR 3211 and 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Ana Martinez, has not sustained serious injury within the meaning of Insurance Law §5102(d), is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff, Ana Martinez, on November 25, 2001, in a four vehicle collision while she was traveling as a passenger in a vehicle eastbound on Jackie Robinson Parkway at the intersection with Queens Boulevard Overpass, County of Queens, State of New York, when the vehicle operated by her driver, the defendant Benjamin Lugo, Jr., and the vehicles owned/operated by the defendants, Shavon Marsh, Amalia C. Blake, Richard P. Callara and Thomas W. Hudson came into contact. The complaint alleges the defendants were negligent in causing the accident.

In the verified bill of particulars, the plaintiff has claimed injuries consisting of, *inter alia*, pain in her neck, lower back, mid-back, and pelvic region, post traumatic occipital headaches; migraine headaches, cervical sprain and spasm, thoracic sprain and spasm, lumbar sprain and spasm, hip sprain and spasm, myofascitis, cervicgia, and low back syndrome. The plaintiff claims she has suffered a permanent loss of use of a body system function, organ or member; significant disfigurement or dismemberment; significant limitation of use of a body system, function, organ or member; permanent consequential limitation of use of a body system, function organ or member; and an injury or impairment which prevented the plaintiff from performing substantially all of the material acts which constituted the plaintiff's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident.

In motions (004) by Richard P. Callara, motion (005) by Shavon L. Marsh and Amalia C. Blake, motion (006) by Thomas W. Hudson, and motion (007) by Benjamin Lugo, Jr., the defendants seek summary judgment dismissing the complaint on the basis that the plaintiff

has not sustained a serious injury within the meaning of Insurance Law §5102(d).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (**Sillman v Twentieth Century-Fox Film Corporation**, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (**Winegrad v N.Y.U. Medical Center**, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (**Winegrad v N.Y.U. Medical Center, supra**). Once such proof has been offered, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; **Zuckerman v City of New York**, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (**Joseph P. Day Realty Corp. v Aeroxon Prods.**, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (**Castro v Liberty Bus Co.**, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (**Friends of Animals v Associated Fur Mfrs.**, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of motion (004), defendant Richard P Callara has submitted, *inter alia*, an attorney's affirmation by Glen P. Rodriguez, Esq.; a copy of the summons and complaint; his verified answer with a cross-claim asserted against the co-defendants; a copy of the plaintiff's verified bill of particulars; copies of the transcripts of the examinations before trial (EBT) of Ana Martinez; a copy of an affirmed chiropractic report of Janice C. Salayka, D.C.; the affirmed report of Francisco Santiago, M.D. dated February 4, 2002, for the independent physical medicine and rehabilitation examination of the plaintiff; and the affirmed report of Arthur Bernhang, M.D., dated June 30, 2006, for his independent medical examination of the plaintiff on that date.

In support of motion (005), the defendants Shavon Marsh and Amalia Blake (hereinafter March and Blake) have submitted an attorney's affirmation; a copy of the summons and complaint; and a copy of their verified answer with a cross-claim asserted against the co-defendants for contribution and/or indemnification. It is set forth in the attorney's affirmation that the defendants Marsh and Blake adopt and incorporate the facts, legal arguments and exhibits and procedural history submitted in the affirmation of Glen P. Rodriguez, Esq. (in motion (004).

In support of motion (006), defendant Thomas W. Hudson has submitted an attorney's affirmation; a copy of the summons and complaint; a copy of his verified answer and a cross-claim asserted against the co-defendants for contribution and/or indemnification. In the attorney's affirmation, counsel states he adopts the arguments put forth in the affirmation of

Glen P. Rodriguez, Esq. in motion (004). He further avers that the evidentiary proof in support of this cross-motion is the affirmed medical reports of Janice C. Salayka, D.C., Francisco Santiago, M.D. and Arthur Bernhang, M.D. which have been provided with motion (004).

In support of motion (007), defendant Benjamin Lugo, Jr. has submitted an attorney's affirmation and a copy of his verified answer with a cross-claim against the co-defendants. And, in the attorney's affirmation, his counsel asserts that the defendant is adopting the arguments and evidence submitted by Glen P. Rodriguez, Esq., the counsel for the co-defendant Richard P. Callara.

The plaintiff opposes the motion and cross-motions and has submitted an attorney's affirmation; the affirmation of Stephanie Miriam Bayner, M.D. with annexed medical records; and the affirmed report and the affirmation of Gary Dicanio, D.O., with annexed medical records.

CPLR 3212(b) does not provide for a party moving for summary judgment to adopt and incorporate by reference the arguments and evidence submitted by another party as the defendants have done in motions (005), (006) and (007). Further, CPLR 3212(b) provides in pertinent part that a motion for summary judgment must be submitted with a copy of the pleadings. The defendant Benjamin Lugo has failed to submit a copy of the summons and complaint with his motion. However, this Court will search the records, as provided by CPLR 3212(b), for the arguments, evidence and pleadings.

Pursuant to Insurance Law § 5102(d), "[s]erious injury" means 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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (*Licari v Elliot*, 57 NY2d 230, 455 NYS2d 570).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that the plaintiff has no cause of action" (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*DeAngelo v Fidel Corp. Services, Inc.*, 171 AD2d

588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2nd Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, the plaintiff. (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808, 810 [3rd Dept 1990]).

It is noted that the report submitted by Janice C. Salayka, D.C., a chiropractor, is affirmed, is not in affidavit form and is not notarized. It is therefore not competent evidence in admissible form and will not be considered on this motion and the cross-motions for summary judgment (*Holmes v Hanson*, 286 AD2d 750, 730 NYS2d 528 [2nd Dept 2001]; *Coyoc v New York City Housing Authority et al*, 2002 NY Slip Op 50231U, 2002 NY Misc 759 [Queens County 2002]).

Francisco Santiago, M.D. conducted an independent physical medical and rehabilitation examination of the plaintiff for Crossland Medical Services on February 4, 2002, for the alleged injuries to her neck and lower back relating to this accident of November 25, 2001. He stated the plaintiff did not have any x-rays or MRI's due to her pregnancy with an EDC of May 15, 2002. Instead, she presented for physical therapy four times a week ongoing to the date of his examination. Upon examination, he found her gait to be normal. He stated the range of motion of her cervical spine was full with no gross tenderness or spasm to the neck and upper trapezius region upon palpation. Back examination did not reveal any gross kyphosis or scoliosis, and there was no gross tenderness to the thoracic area palpation. Lumbosacral range of motion is stated to be within normal limits with no gross tenderness or spasm to lumbosacral area palpation. He stated that both upper and lower extremity strength is good plus/normal muscle grade, and range of motion is within normal limits for the joints tested in both upper and lower extremities. His impression was that of cervical sprain/strain resolved and lumbosacral sprain/strain, resolved. He found a causal relationship between the injuries and the accident, but opined there was no medical necessity for treatment within the field of physical medicine, including physical therapy, and that no disability was found.

Arthur Bernhang, M.D. set forth in his report, dated June 30, 2006, that he examined the plaintiff on that date. He did not state his specialty; his letterhead did not contain his specialty; and his affirmation set forth he was a medical doctor licensed to practice medicine in the State of New York. He itemized the records and reports he reviewed. He stated that upon examination of Ana Martinez, that her neck was "fine/good;" she gets pain in her thoracic spine/interscapular area if she is sitting with her neck flexed while reading; and her lower back hurts and the pain radiates down her left leg if she is standing for a long period of time. He stated she is currently unable to sit for a long period of time and is unable to lift her son. He stated he observed active range of motion measured by goniometer. Upon examination of the plaintiff's cervical spine, he quantified his observations, but compared those findings to the average range of motion rather than to the normal range of motion. Although the Spurling's test for cervical radiculopathy causes no radicular symptoms, he stated she had some pain in the area of the spinous process at C7. Dorsolumbar expansion with the knees extended was 7"

compared to the "average of 4", lying spine straight leg raising was 65/60 but he did not state if this was normal or average range of motion. Dorsal wrist flexion range of motion was compared to the average range of motion with no evidence of carpal tunnel syndrome. He stated he found no objective orthopedic evidence of any residua of injury said to have occurred to the cervical, thoracic or lumbar spine or the right wrist. He found there was no residual disability and that Ana Martinez was working full time.

At her EBT of May 2, 2006, the plaintiff testified that at the time of the accident she was working for Water Sports Manufacturing as a customer service representative. She sought medical care and treatment after the accident with J&R Medical and Pain Management of Bay Shore, L.I., New York for complaints of pain in her neck, chest, and back for which she was prescribed physical therapy, heat, cold and massage which she received until her insurance coverage was withdrawn. She was about four months pregnant at the time of the accident and delivered a child in May, 2002. Since the accident, she has had difficulty with grocery shopping as she is not able to lift as much weight as she used to lift before the accident. Her neck and back hurt if she remains seated too long at work.

Based upon the foregoing, the Court finds that no party has demonstrated prima facie entitlement to summary judgment that Ana Martinez did not suffer a serious injury within the meaning of Insurance Law §5102(d).

Here, the parties failed to satisfy the burden of establishing, prima facie, that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (see, **Agathe v Tun Chen Wang**, 33 AD3d 737, 822 NYS2d 766 [2 Dept 2006]; see also, **Walters v Papanastassiou**, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). The moving parties' examining physicians either failed to provide specific range of motion measurements for the plaintiff, as set forth above, or failed to compare those findings with normal ranges of motion (see, **Hypolite v International Logistics Management, Inc.**, 43 AD3d 461, 842 NYS2d 453 [2nd Dept 2007]; **Somers v Macpherson**, 40 AD3d 742, 836 NYS2d 620 [2nd Dept 2007]; **Browdame v Candura**, 25 AD3d 747, 807 NYS2d 658 [2nd Dept 2006]). Francisco Santiago, M.D. did not quantify his range of motion findings or compare those findings to the normal. Arthur Bernhang, M.D. quantified the range of motion findings, but compared those findings to the average rather than to the normal range of motion. By failing to compare the results that were reported to the normal range, or by failing to quantify their range of motion findings in degrees, the reports of the examining physicians leave it to this Court to speculate as to whether the ranges of motion reported are normal or abnormal (see, **Rodriguez v Schickler**, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). Additionally, Arthur Bernhang, M.D., by comparing his findings to the average range of motion, creates factual issues in that he has not set forth the age group, sex, or other variable factors in determining an average range of motion, thus leaving it to this court to speculate on what is meant by "average". As the reports of the independent examining physicians do not exclude the possibility that the plaintiff suffered a serious injury in the accident, the moving parties are not entitled to summary judgment (see, **Peschanker v Loporto**, 252 AD2d 485, 675 NYS2d 363 [2d Dept 1998]).

Since the defendants failed to establish their entitlement to judgment as a matter of law, it is not necessary to consider whether the plaintiff's papers in opposition to the defendants' motions were sufficient to raise a triable issue of fact (see, **Agathe v Tun Chen Wang**, *supra*; **Walters v Papanastassiou**, *supra*).

Dated: DEC 28 2007



J.S.C.