

Collado v Clark

2009 NY Slip Op 30416(U)

February 19, 2009

Supreme Court, Nassau County

Docket Number: 13617-06

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
JOSE COLLADO AND JOSELINE COLLADO,

TRIAL TERM PART: 47

Plaintiff,

-against-

INDEX NO.: 13617/06

MOTION DATE: 11-5-08

SUBMIT DATE: 2-11-09

**SEQ. NUMBER - 001 &
002**

RONALD CLARK AND BOLLIE CLARK,

Defendants.

-----x

The following papers have been read on this motion:

- Notice of Motion, dated [sic] 3-7-03.....1**
- Notice of Cross Motion, dated 9-23-08.....2**
- Affirmation in Opposition, dated 12-11-08.....3**
- Affirmation in Reply and in Further Support of Motion
For Summary Judgment, dated 2-5-09.....4**

The motion of defendants for summary judgment pursuant to CPLR§ 3212, is granted as to both plaintiffs and the complaints are dismissed. The motion (incorrectly denominated as a cross motion [see CPLR §2215]) by Jose Collado (Jose) as defendant on the counterclaim pursuant to CPLR§ 3212 for summary judgment dismissing the complaint of plaintiff Joseline Collado (Joseline) on the ground that Joseline failed to sustain a serious injury within the parameters of Insurance Law § 5102(d) is granted.

The court notes that the complaint does not plead a separate cause of action for personal injuries sustained by plaintiff Jose and the second pleaded cause of action on his behalf is a derivative claim based on Joseline's action. However, the Bill of Particulars specifies injuries separately sustained by him, the submissions on this motion consider him to be an alleged injured party and no party has raised an objection to Jose's failure to plead his own individual claim. Hence, the Court has treated this motion on the premise that both Jose and Joseline are claiming injuries and will overlook (albeit not approving) the omission of a cause of action on Jose's behalf.

The movants seek summary judgment dismissing the complaints in this action predicated on the contention that plaintiffs did not sustain serious injury as a result of the underlying accident, which occurred on June 2, 2006, in Nassau County. Joseline was a passenger in Jose's vehicle which was involved in an accident in Nassau County, New York, with a vehicle owned by defendant Bollic Clark and driven by defendant Ronald Clark.

Insurance Law § 5102(d) defines "serious injury" as a personal injury which results in, among other things,

"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."

In his Bill of Particulars plaintiff Jose alleges injuries which include disc herniation at L5-S1, cervical sprain/strain and related sequelae.

Plaintiff Joseline alleges lumbosacral sprain/strain, lumbosacral derangement, myofascitis with radiculopathy and nerve root compression, cervical sprain/strain, cervical derangement, myofascitis with radiculopathy and nerve root compression.

It is well settled that in order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as a serious injury within the meaning of Insurance Law § 5102(d). *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345,350 (2002); *Scheer v Koubek*, 70 NY2d 678, 679 (1987); *Tuna v Babendererde*, 32 AD3d 574, 575 (3rd Dept. 2006). On a motion for summary judgment where the issue is whether a plaintiff has sustained a serious injury under the no-fault law, the movant bears the initial burden of presenting competent evidence that there is no cause of action. *Browdame v Candura*, 25 AD3d 747, 748 (2nd Dept. 2006).

By submitting deposition transcripts, and the Bills of Particulars, movants have satisfied their initial burden of establishing that plaintiffs have not sustained a serious injury under the 90/180 category of the Insurance Law. Neither plaintiff has submitted any competent medical evidence that he or she was unable to perform substantially all of his or her daily activities for not less than 90 days of the first 180 days subsequent to the subject accident. *Albano v Onolfo*, 36 AD3d 778 (2d Dept. 2007); *Duran v Sequino*, 17 AD3d 626 (2nd Dept. 2005); *Sainte-Aime v Ho*, 274 AD2d 569 (2nd Dept. 2000).

With respect to the other categories claimed, the movants have submitted affirmed medical reports of physicians who conducted independent medical examinations of the plaintiffs.

As to plaintiff Jose, Dr. Cohen an orthopedist reviewed plaintiff's records, conducted specific, tests with quantified results and found no active or objective disability or permanency related to the accident.

Dr. Feit, a radiologist, reviewed plaintiff's lumbar MRI taken shortly after the accident and found disc bulges at L3-4, L4-5, L5-S1, degenerative spondylosis and no evidence of focal herniation. He further opines that none of the results are caused by the accident or causally related to any injury from the accident.

Based on the foregoing, the Court finds that the movants have made out a *prima facie* showing that the plaintiff Jose has not sustained a "serious injury" that would satisfy any of the other categories alleged in his Bill of Particulars or deposition, thus shifting the burden to the plaintiff to come forward with admissible evidence demonstrating the existence of triable issues of fact. *Toure v. Avis Rent a Car Systems Inc., Supra; Junco v. Ranzi*, 288 AD2d 440 (2d Dept. 2001) .

In opposition to this motion, plaintiff Jose submits an affirmation of his attorney, his own affidavit, the affidavit and reports of chiropractor Dr. Levine and the affirmation, with report, of Dr. Carillo a radiologist.

Dr. Carillo finds a disc herniations at L5-S1 and early degenerative disc disease at L3-L4. He makes no findings as to causation and finds no other abnormalities.

Dr. Levine treated plaintiff for four months and does not indicate having seen him between October 2006 and October 2008. Dr. Levine's first report is dated March 20, 2007, and sets forth limitations of cervical and lumbar ranges of motion but no date is given for the examination and Dr. Levine does not address Jose's prior accident in 1998 which is described in Jose's deposition.

Significantly, Dr. Levine fails to state what treatment was rendered, what tests were performed, why there was a two year gap in treatment or why plaintiff discontinued his initial treatment. The failure of a treating medical provider to take into account a plaintiff's prior injuries seriously affects the reliability of his/her conclusions, *Besso v. DeMaggio*, 56 AD3d 596 (2d Dept. 2008); *Seck v. Minigreen Hacking Corp.*, 53 AD3d 608 (2d Dept. 2008), and the failure to describe the tests performed in arriving at the reported limitations has been held to undermine the effect of the conclusions reached. *Gordon v. Tibulcio*, 50 AD3d 460 (1st Dept. 2008).

Moreover, plaintiff has failed to address the opinions of defendants' experts that plaintiff's injuries were degenerative and pre-existed the accident. *Shaw v. Looking Glass Associates, LP*, 8 AD3d 100 (1st Dept. 2004).

Medical proof which indicates limitations in the lumbar or cervical spine is sometimes sufficient to raise a triable issue of fact. *See, e.g., Rosario v Universal Truck & Trailer Service, Inc.*, 7 AD3d 306 (1st Dept. 2004). However, certain factors may override a plaintiff's objective medical proof of limitations and allow dismissal of the complaint. *Pommells v Perez*, 4 NY3d 566 (2005). Specifically, the Court held in *Pommells* that

additional contributing factors, such as a gap in treatment, which would interrupt the chain of causation between the claimed accident and the claimed injury would render plaintiff's case subject to dismissal. *Id* at 566, citing *Franchini v Palmieri*, 1 NY3d 536 (2003); *see also Mohamed v Siffra*, 19 AD3d 56 (2nd Dept. 2005).

Further, "the existence of a herniated or bulging disc is not evidence of serious injury in the absence of objective medical evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration." *Albano v Onolfo, supra; Yakubov v CG Trans Corp.*, 30 AD3d 509 (2nd Dept. 2006); *Kearse v New York City Tr. Auth.*, 16 AD3d 45 (2nd Dept. 2005). Despite the existence of an MRI indicating a herniated disc or bulges, plaintiff has failed to rebut defendant's *prima facie* showing that he did not sustain a serious injury as defined by Insurance Law § 5102(d) because there is no objective demonstration of a significant impairment related thereto. *Kearse v NYCTA, supra.*

Plaintiff has not presented sufficient medical proof of significant range of motion restrictions at the time he ceased treatment. *Bell v Rameau*, 29 AD3d 839 (2nd Dept. 2006); *Li v Yun*, 27 AD3d 173 (2nd Dept. 2006); *Suk Ching Yeung v Rojas*, 18 AD3d 863 (2nd Dept. 2005); *Rodriguez v Cesar*, 40 AD3d 731 (2nd Dept. 2007).

As to plaintiff Joseline, defendants have submitted the report of an independent medical examination performed by Dr. Cohen, an orthopedist.

Dr. Cohen conducted tests and compared the results with what is normal and concluded with a diagnosis of resolved contusions and no evidence of any injuries related to the accident. Dr. Cohen also conducted objective tests, reported quantified results that were

compared to normal and concluded that plaintiff Joseline had completely recovered from soft tissue contusions.

In opposition, plaintiff Joseline has submitted an affidavit of her father, Jose, an affidavit from Dr. Levine who treated her with heat for three or four months and who reexamined her again in October 2008, after this motion was made. There were no MRIs, x-rays, tests or any other medical treatment.

A report by Dr. Levine dated March 20, 2007, catalogues examination results without giving the day such results were obtained and a later report, two years after treatment ceased, also contains quantified results. As with co-plaintiff Jose, Dr. Levine does not describe any medical treatment other than heat pads and does not explain the two year gap in treatment. Moreover, his diagnosis and impressions are admittedly based on subjective complaints of pain.

The range of motion quantifications expressed in the 2007 reports for both plaintiffs do not give the dates they were recorded, and thus may not be considered as being contemporaneous with the accident. *Kuchero v. Tabachnikov*, 54 AD3d 729 (2d Dept. 2008). Moreover, these reports do not adequately describe the tests employed in order to obtain such results. *Sapienza v. Ruggiero*, 57 AD3d 643 (2d Dept. 2008); *Hernandez v. Bahlke*, 6 AD3d 578 (2d Dept. 2004).

Finally, neither plaintiff has submitted competent evidence of any medical treatment. There is not only a gap in treatment but except for a four month course of physical therapy with heat pads, there is no evidence of any treatment to either plaintiff. *Thompson v. Abbasi*,

15 AD3d 95, 99 (1st Dept. 2005); *DeCayette v. Kreger Truck Renting, Inc.*, 260 AD2d 342 (2d Dept. 1999); *Rum v. Pam Transport, Inc.*, 250 AD2d 751 (2d Dept. 1998), (failure of physician to provide any information concerning the nature of plaintiff's medical treatment).

Based on the foregoing both motions are granted and the complaints of both plaintiffs are dismissed. CPLR §3212.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: February 19, 2009


HON. DANIEL PALMIERI
Acting Supreme Court Justice

**TO: Steven L. Raskind, Esq.
Attorneys for Plaintiffs
95 front Street
Hempstead, NY 11550**

**Law Office of Robert P. Tusa, Esq.
By: Joseph T. Schnurr, Esq.
Attorney for Defendants
1225 Franklin Avenue, Ste. 500
Garden City, NY 11530**

**Ronald I. Lemberger, Esq.
Attorneys for the Defendant on the counter claim of Jose Collado
20 Main Street
Hempstead, NY 11550**

**ENTERED
FEB 20 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE**