

Arias v Paredes

2010 NY Slip Op 32308(U)

June 8, 2010

Supreme Court, Queens County

Docket Number: 8940/08

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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CAMILO ARIAS,

Plaintiff,

-against-

Index No.: 8940/08
Motion Date: 3/3/10
Motion Cal. No: 4
Motion Seq. No: 1

MARK N. PAREDES and CORONA COMMUNITY
AMBULANCE CORP., INC.,

Defendants.

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The following papers numbered 1 to 10 read on this motion by defendants Mark N. Paredes and Corona Community Ambulance Corp., Inc., pursuant to CPLR §3212, granting summary judgment in favor of defendants and dismissing the complaint on the ground that the injuries claimed do not satisfy the “serious injury” threshold requirement of sections 5102(d) and 5104 of the Insurance Law.

	PAPERS NUMBERED
Notice of Motion-Affidavits--Exhibits-Memorandum of Law.....	1 - 4
Affirmation in Opposition-Exhibits.....	5 - 10

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

This is an action for personal injury in which plaintiff Camilo Arias (“plaintiff”) alleges that he sustained a serious personal injury on October 22, 2005, as a result of a motor vehicle accident that occurred at the intersection of 108th Street and 41st Avenue, Queens County, New York, when plaintiff’s vehicle came into contact with the vehicle owned by defendant Corona Community Ambulance Corp. and operated by defendant Mark N. Paredes. Plaintiff claims that, as a result of the accident, he sustained injuries, including, inter alia, left foraminal herniations at L3-4 and L5-S1; sprain/strain lumbar spine; left hip and thigh sprains/strains. Defendants move for summary judgment on the ground that plaintiff failed to meet the “serious injury” threshold requirement of section 5102(d) of the Insurance Law, which, in pertinent part, defines a “serious injury” as:

- a personal injury which results in ...significant disfigurement;
- ...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 party from performing substantially all of the material acts which constitute such person customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

The issue of whether plaintiff sustained a serious injury is a matter of law to be determined in the first instance by the court. See Licari v. Elliott, 57 N.Y.2d 230 (1982). The burden is on the defendant to make a prima facie showing that plaintiff's injuries are not serious. Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345 (2002). By submitting the affidavits or affirmations of medical experts, who, through objective medical testing, conclude that plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d), a defendant can meet his or her prima facie burden. See Margarin v. Krop, 24 A.D.3d 733 (2nd Dept. 2005); Karabchievsky v. Crowder, 24 AD3d 614 (2nd Dept. 2005). The threshold question in determining a summary judgment motion on the issue of serious injury is the sufficiency of the moving papers, with consideration only given to opposing papers once defendants, as the movants, make a prima facie showing that plaintiff did not sustain a serious injury. Toure v Avis Rent A Car System, 98 N.Y.2d 345 (2002).

In support of their motion, defendants submitted plaintiff's deposition testimony; uncertified records of Healthy Chiropractic, P.C., a chiropractic facility; and the affirmed medical report of Dr. Eduardo Alvarez, an orthopedic surgeon who conducted an Independent Orthopedic Examination of plaintiff on April 15, 2009, and reviewed various medical records of plaintiff's health providers. Based upon his physical examination of plaintiff, Dr. Alvarez found that plaintiff had a normal range of motion in his cervical spine, lumbar spine and hips, and set forth as his impression, a clinically resolved sprain of plaintiff's lumbosacral spine and contusion of the left hip and thigh. Defendants also pointed to plaintiff's deposition testimony in which he testified that following the accident, he did not go to the hospital and first sought medical care eight days after the accident, that consisted of chiropractic care, orthopedic care and acupuncture treatments from J. P Medical.

Through the submission of the affirmed medical report of their expert, who conducted an orthopedic examination of plaintiff and found no abnormalities or permanency causally related to the accident, defendants' presented sufficient evidence to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). See, Pommells v. Perez, 4 N.Y.3d 566 (2005); Rodriguez v. Huerfano, 46 A.D.3d 794 (2nd Dept. 2007); Baez v. Rahamatali, 6 N.Y.3d 868 (2006); Zhang v. Wang, 24 A.D.3d 611 (2005); Burgos v Vargas, 33 A.D.3d 579 (2nd Dept. 2006); Batista v Olivo, 17 A.D.3d 494 (2nd Dept. 2005); Sainte-Aime v Ho, 274 A.D.2d 569 (2nd Dept. 2000). They established, prima facie, that plaintiff suffered no limitation of motion as a result of the accident, and no medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his customary daily activities for not less than ninety days during the one hundred eighty days immediately following his alleged injury or impairment. Defendants thus established their entitlement to summary judgment dismissing the complaint insofar as asserted by plaintiff on the threshold issue. See, Baez v. Rahamatali, 6 N.Y.3d 868 (2006); Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002); Gaddy v. Eyler, 79 N.Y.2d 955 (1992); Licari v. Elliott, 57 N.Y.2d 230 (1982); Djetoumani v. Transit, Inc., 50 A.D.3d 944 (2nd Dept. 2008). The burden then shifted to plaintiff to demonstrate the existence of a triable issue of fact as to whether he sustained a serious injury. See Gaddy v. Eyler, 79 N.Y.2d 955 (1992).

In opposition, plaintiff submitted the affirmation of his attorney; the February 5, 2010 affirmation of Dr. Jadwiga Pawlowski, of J.P. Medical, P.C., who examined and conducted range of motion studies on October 25, 2005, and further examined plaintiff on November 29, 2005, January 3, February 7 and March 7, 2006; the October 22, 2009 affirmation of Dr. Mark Shapiro, the radiologist who interpreted the December 1, 2005 MRI of plaintiff's lumbar spine; the January 21, 2010 affirmation of Dr. Pervaiz Quereshi, who examined plaintiff on October 5, 2009; and his own affidavit. From the outset, it is noted that plaintiff's attorney's affirmation is insufficient to show that plaintiff sustained a serious injury, as it is well recognized that an attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance. See, Codrington v. Ahmad, 40 A.D.3d 799 (2nd Dept. 2007); Warrington v. Ryder Truck Rental, Inc., 35 A.D.3d 455 (2nd Dept. 2006); Zuckerman v. City of New York, 49 N.Y.2d 557, 563 (1980). Similarly, although plaintiff describes his persistent pain and limitations, the self-serving affidavit of plaintiff also is insufficient to raise a triable issue of fact as to whether he sustained a serious injury. Carrillo v. DiPaola, 56 A.D.3d 712 (2nd Dept. 2008); Gastaldi v. Chen, 56 A.D.3d 420 (2nd Dept. 2008); Silla v. Mohammad, 52 A.D.3d 681 (2nd Dept. 2008); Hargrove v. New York City Transit Authority, 49 A.D.3d 692 (2nd Dept. 2008); Verette v. Zia, 44 A.D.3d 747 (2nd Dept. 2007); Iusmen v. Konopka, 38 A.D.3d 608 (2nd Dept. 2007); Mejia v. DeRose, 35 A.D.3d 407 (2nd Dept. 2006).

With regard to plaintiff's medical evidence, Dr. Mark Shapiro, in his October 22, 2009 affirmation, affirmed that he was the Radiologist who interpreted the December 1, 2005 MRI of plaintiff's lumbar spine, and found left foraminal herniations at L3-4 and L5-S1. Notwithstanding, this submission is not competent medical evidence sufficient to raise a triable issue of fact with regard to the threshold issue. The affirmation and annexed MRI report merely reveals the existence

of herniations. The mere existence of a herniated disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration. Pommells v. Perez, 4 N.Y.3d 566, 574 (2005); Sutton v. Yener, 65 A.D.3d 625, 626 (2nd Dept. 2009); Chanda v. Varughese, 67 A.D.3d 947 (2nd Dept. 2009); Cerisier v. Thibiu, 29 A.D.3d 507 (2nd Dept. 2006). This evidence, standing alone, is not competent medical evidence showing the existence of significant limitations in plaintiff's spine that was contemporaneous with the subject accident. See, McMullin v. Walker, 68 A.D.3d 943 (2nd Dept. 2009); Sutton v Yener, *supra*; Sorto v. Morales, 55 A.D.3d 718 (2nd Dept. 2008); Casas v. Montero, 48 A.D.3d 728, 729 (2nd Dept. 2008); Morris v. Edmond, 48 A.D.3d 432, 433 (2nd Dept. 2008). The affirmations of Drs. Pawlowski and Qureshi, however, stand on a different footing.

In his affirmation, Dr. Pawlowski affirmed that plaintiff began treatment on October 25, 2005, at J.P. Medical, P.C., complaining of "lower back pain and stiffness with radiation to the left thigh;" the initial diagnosis was "anxiety, tension and stress reaction to pain, lumbosacral sprains/strains, lumbar myofasciitis/lumbalgia and r/o lumbar disc displacement/herniation." He further affirmed that objective testing revealed limitations in plaintiff's lumbar and thoracic spine, to the following extent:

Computerized range of motion testing of the thoracic spine revealed flexion 40° (normal 50°) and extension 20° (normal 30°).
Computerized range of motion testing of the lumbar spine revealed flexion 50° (normal 90°), extension 10° (normal 30°), right lateral flexion at 15° (normal 20°), left lateral flexion 15° (normal 20°), right rotation at 15° (normal 30°) and left rotation at 15° (normal 30°) with pain tenderness noted upon minimal movement.

Plaintiff was prescribed a course of physical therapy, acupuncture, and chiropractic treatment, and Dr. Pawlowski indicated that plaintiff underwent MRI testing on December 1, 2005 which revealed "left foraminal herniations at L3-4 and L5-S1." He further indicated that plaintiff treated with J.P. Medical for approximately four months and during this period, plaintiff continued to experience decreased range of motion in his lumbar spine. Dr. Pawlowski concluded:

Based upon the objective tests taken (including a lumbar MRI and range of motion studies) and my own clinical examinations, the mechanism of injury is entirely consistent with the clinical presentation that the accident of October 22, 2005 was a direct producing cause of Camilo Arias's injuries and pathologies causing injuries to his peripheral nervous and musculoskeletal systems concerning his lumbar spine and kept him partially disabled from work and his daily activities. It is clear that this patient had sustained a significant trauma to the lumbar spine and it is felt that this patient had restricted range of motion to the lumbar spine area and thus a limitation of use of a body organ, function or system that prevented him from performing all of his activities at work and home for the

four (4) months he was treating at J.P. Medical.

It was determined after his last treatment at J.P. medical that further medical therapy would only be palliative in nature and as a result the patient was continued on home rehabilitation exercises with a view towards relieving his symptoms and helping him perform his daily activities. It is my opinion with a reasonable degree of medical certainty that Camilo Arias suffered the above injuries from this subject car accident and there was a direct causal relationship between these injuries and the motor vehicle accident.

Furthermore, the patient was partially disabled from work and his daily activities due to the physical nature of his job [as a carpenter] and the limitations that his injuries to his lumbar spine preventing him from performing his duties without pain and discomfort.

Moreover, Dr. Qureshi, who examined plaintiff on October 5, 2009, affirmed that the physical examination of plaintiff's lumbar spine revealed spasm and restrictions in motion in all directions. He further affirmed that the computerized range of motion testing he conducted revealed the following:

flexion 48° (normal 60°), extension 24° (normal 25°), right bending 23° (normal 25°), and left bending 22° (normal 25°), right rotation at 15° (normal 30°) and left rotation at 15° (normal 30°).

Dr. Qureshi stated, based upon the records and his clinical evaluations, that his final diagnosis of plaintiff was "lumbar radiculopathy and disc herniation at L3-L4 and L5-S1." He opined that plaintiff suffers from a partial disability to his lumbar spine which is permanent in nature, causally related to the automobile accident of October 22, 2005, which Dr. Qureshi found to be a competent producing cause of plaintiff's injuries and disabilities.

Thus, based upon the aforementioned evidence, plaintiff has raised a triable issue of fact with regard to the threshold issue. Accordingly, based upon the foregoing, defendants' motion for summary judgment on the ground that plaintiff failed to sustain a "serious injury" is denied.

Dated: June 8, 2010

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J.S.C.