

Flores v Benitez

2011 NY Slip Op 30894(U)

April 6, 2011

Supreme Court, Suffolk County

Docket Number: 05120/2009

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Jose J. Flores,

Plaintiff,

-against-

Josefina Benitez and Elmer A. Benitez,

Defendants.

Clerk of the Court

Motion Sequence No.: 001; MG
CDISPO

Motion Date: 10/1/10
Submitted: 1/19/11

Index No.: 05120/2009

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Upon the following papers numbered 1 to 25 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 11; Answering Affidavits and supporting papers, 12 - 19; Replied Affidavits and supporting papers, 20 - 25.

In this action, the plaintiff seeks to recover damages for personal injuries arising from a rear-end motor vehicle accident which occurred on May 17, 2007 in Central Islip, New York. The accident purportedly occurred when a vehicle owned by defendant Josefina Benitez and operated by defendant Elemer A. Benitez collided with the rear of a vehicle in which the plaintiff was a passenger. The plaintiff alleges that he sustained serious and permanent injuries as a result of the defendants' negligence in causing the accident. Specifically, by way of the bill of particulars he alleges that he sustained serious and permanent injuries including a herniated disc at C5-6; disc bulges at C2-3, C3-4, C4-5 and C6-7; cervical radiculopathy; cervical myofascial derangement; an annular bulge at L3-4; lumbosacral radiculopathy; lumbosacral myofascial

Flores v. Benitez

Index No.: 5120/2009

Page No. 2

derangement; right shoulder derangement; right shoulder supraspinatus impingement; right shoulder subacromial subdeltoid bursitis; right shoulder biceps tendon subluxation/dislocation; right shoulder tendonitis; buttocks tendonitis/contusion; right knee contusion; post-traumatic headaches; and cervico-brachial syndrome. Plaintiff alleges that he was confined to bed and home from the date of the occurrence through May 19, 2007, was totally disabled from May 17, 2007 to May 19, 2007, and is partially disabled to date. Plaintiff alleges that he was incapacitated from employment for two days following the accident.

The defendants now move for summary judgment dismissing the complaint on the grounds that the plaintiff did not sustain a “serious injury” as defined by Insurance Law Section §5102 (d).

A defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of making a *prima facie* showing that the injured plaintiff did not sustain a “serious injury” within the meaning of Insurance Law §5102 (d) (see, Alvarez v. Prospect Hosp., 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]; Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept., 1992]). A defendant may satisfy this burden by submitting the plaintiff’s own deposition testimony and the affirmed medical report of the defendant’s own examining physician (see, Moore v. Edison, 25 AD3d 672 [2nd Dept., 2006]). Once this showing has been made, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to overcome the defendant’s submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (see, Gaddy v. Eyler, 79 NY2d 955 [1992]; Grossman v. Wright, 268 AD2d 79 [2nd Dept., 2000]; Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept., 1992]; see also, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

In support of their motion for summary judgment, the defendants submit, *inter alia*, the plaintiff’s deposition testimony and the affirmed reports of Peter Chiu, M.D., Michael J. Katz, M.D. and Alan B. Greenfield, M.D. Dr. Chiu performed an independent medical examination on the plaintiff on July 17, 2007. He measured the range of motion of the plaintiff’s cervical and lumbosacral spines, compared his findings to normal values, and found the plaintiff’s range of motion to be normal in all respects. He concluded that the plaintiff had sustained strains/sprains of his cervical, thoracic and lumbar spines, and that all of these injuries had resolved. Dr. Chiu concluded that, at the time of his examination, the plaintiff was not disabled, was capable of working and performing activities of daily living without restriction and did not require further treatment including physical therapy.

Flores v. Benitez

Index No.: 5120/2009

Page No. 3

Dr. Katz examined the plaintiff on February 16, 2010. He examined the plaintiff's cervical spine and obtained negative results on Adson's test. He measured the range of motion of the plaintiff's cervical spine, compared his results to normal values and found the plaintiff's range of motion to be normal in all respects. He examined the plaintiff's lumbar spine and obtained negative results on the straight leg raising test, Babinski test and Patrick's test. He measured the range of motion of the plaintiff's lumbar spine, compared it to normal values and found it to be normal in all respects. Dr. Katz examined the plaintiff's right shoulder, found no impingement and obtained negative results on objective testing including the apprehension test. He measured the range of motion of the plaintiff's right shoulder, compared it to normal values, and found it to be normal in all respects. Lastly, Dr. Katz examined the plaintiff's right knee. He obtained negative results on objective tests including Lachman's test, patellar apprehension test, pivot shift, posterior draw sign and posterior sag sign. He measured the range of motion of the plaintiff's right knee, compared it to normal values and found it to be normal in all respects. Dr. Katz concluded that the plaintiff has sustained a cervical strain, a lumbosacral strain, a right shoulder contusion and a right knee contusion, and that all injuries had resolved. He concluded that, at the time of the exam, the plaintiff showed no signs or symptoms of permanence relative to his neck, back, right shoulder or right knee. He found that the plaintiff was not disabled, was capable of gainful employment as a landscaper and was capable of performing activities of daily living. Dr. Katz further noted that the MRI of the plaintiff's cervical spine, which he reviewed, indicated multi-level preexisting degenerative changes.

The affirmed reports of Dr. Greenfield avers that he reviewed an MRI of the plaintiff's cervical spine performed on December 9, 2007, an MRI of the plaintiff's lumbar spine performed on August 23, 2007 and an MRI of the plaintiff's right shoulder performed on August 6, 2007. In each report, Dr. Greenfield affirms that each MRI depicted degenerative, chronic and long-standing conditions that were unrelated to the subject accident and that there were no abnormalities present which could be attributed to the subject accident.

As is relevant to this motion, the plaintiff testified that he did not have any pain at the scene of the accident and that he first felt pain later that night. He missed approximately two to three days of work as a landscaper immediately following the accident. He first sought medical care approximately one to two weeks following the accident. He began receiving chiropractic care and physical therapy from Dr. Vicente's office approximately five days a week. His treatment was later decreased to three times a week. He continues to treat with Dr. Vicente's office approximately two times per month. He testified that, as a result of the accident, he has constant lower back pain and intermittent shoulder pain. He has difficulty lifting and playing with his children. In addition, his work as a landscaper has become more challenging.

Flores v. Benitez

Index No.: 5120/2009

Page No. 4

The evidence submitted by the defendants established their *prima facie* entitlement to summary judgment dismissing the complaint by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (see, Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v. Eyler, 79 NY2d 955 [1992]; Saetia v. VIP Renovations Corp., 68 AD3d 1092 [2nd Dept., 2009]; Dietrich v. Puff Cab Corp., 63 AD3d 778 [2nd Dept., 2009]; DiFilippo v. Jones, 22 AD3d 788 [2nd Dept., 2005]; Casella v. N.Y. City Transit Auth., 14 AD3d 585 [2nd Dept., 2005]). In opposition to the defendants' *prima facie* showing, it was incumbent upon the plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he did sustain a "serious" injury as a result of the instant accident, or that there are questions of fact as to whether he sustained such an injury as a result of the subject accident (see, Toure v. Avis Rent A Car Sys., 98 NY2d 345 at 350 [2002]). The plaintiff failed to meet this burden.

In opposition to the motion, the plaintiff submits, *inter alia*, the affirmed narrative report of Socorro Vicente, M.D. dated October 25, 2010, various treatment reports prepared by Dr. Vicente from June 1, 2007 through August 19, 2009, the affirmed report of Fidel Rodriguez, M.D., unaffirmed MRI reports of the plaintiff's right shoulder, lumbosacral spine and cervical spine and uncertified and unaffirmed computerized range-of-motion studies.

Although the MRI reports of the plaintiff's right shoulder, lumbosacral spine, and cervical spine were unaffirmed, the plaintiff properly relied on them in opposition to the defendants' motion because the reports of the defendants' experts contain references to these MRI reports (see, Amamedi v. Archibala, 70 AD3d 449 [1st Dept., 2010]; Gastaldi v. Chen, 56 AD3d 420 [2nd Dept., 2008]; Williams v. Clark, 54 AD3d 942 [2nd Dept., 2008]). Nevertheless these reports were insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury to his right shoulder, lumbosacral spine or cervical spine. It is well settled that the mere existence of a herniated or bulging 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 injury and its duration (see, Catalano v. Kopmann, 73 AD3d 963 [2nd Dept., 2010]; Simanovskiy v. Barbaro, 72 AD3d 930 [2nd Dept., 2010]; Caraballo v. Kim, 63 AD3d 976 [2nd Dept., 2009]; Sealy v. Riteway-1, Inc., 54 AD3d 1018 [2nd Dept., 2008]; Kilakos v. Mascera, 53 AD3d 527 [2nd Dept., 2008]; Waring v. Guirguis, 39 AD3d 741 [2nd Dept., 2007]). The plaintiff fails to provide the requisite objective evidence.

Contrary to the plaintiff's contention, the affirmed reports prepared by Dr. Vicente and Dr. Rodriguez were insufficient for this purpose. These reports failed to provide any competent objective medical evidence revealing the existence of a limitation in the plaintiff's cervical spine, lumbosacral spine or right shoulder that was contemporaneous with the subject accident (see, Torchon v. Oyezole, 78 AD3d 929 [2nd Dept., 2010]; Posa v. Guerrero, 77 AD3d 898 [2nd Dept.,

Flores v. Benitez

Index No.: 5120/2009

Page No. 5

2010]; Mancini v. Lali NY, Inc., 77 AD3d 797 [2nd Dept., 2010]; Vickers v. Francis, 63 AD3d 1150 [2nd Dept., 2009]). Although reports prepared by Dr. Vicente note that the plaintiff had a “painful decreased range of motion” in these areas on June 1, 2007, Dr. Vicente failed to quantify the results of any range-of-motion testing at such time (see, Simanovskiy v. Barbaro, 72 AD3d 930 [2nd Dept., 2010]). The reports prepared by Dr. Vicente and Dr. Rodriguez were also insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury to his cervical spine, lumbosacral spine or right shoulder as a result of the subject accident because they failed to address the findings of the defendants’ expert radiologist who opined that there were no abnormalities causally related to the subject accident depicted in the plaintiff’s MRIs and that the MRIs depicted degenerative, chronic and long-standing conditions that were unrelated to the subject accident (see, Singh v. City of New York, 71 AD3d 1121 [2nd Dept., 2010]; Larson v. Delgado, 71 AD3d 739 [2nd Dept., 2010]; Rodriguez v. Grant, 71 AD3d 659 [2nd Dept., 2010]; Lopez v. Abdul-Wahab, 67 AD3d 598 [1st Dept., 2009]).

The computerized range-of-motion tests annexed to the motion papers were without any probative value because they were neither certified nor affirmed (see, Simanovskiy v. Barbaro, 72 AD3d 930 [2nd Dept., 2010]; Luna v. Mann, 58 AD3d 699 [2nd Dept., 2009]; Hernandez v. Taub, 19 AD3d 368 [2nd Dept., 2005]).

Lastly, the plaintiff failed to submit any competent medical evidence to support a claim that he was unable to perform substantially all of his daily activities for not less than 90 of the 180 days immediately following the subject accident (see, Collado v. Abouzeid, 68 AD3d 912 [2nd Dept., 2009]; Vickers v. Francis, 63 AD3d 1150 [2nd Dept., 2009]; Amato v. Fast Repair Inc., 42 AD3d 477 [2nd Dept., 2007]).

Accordingly, it is

ORDERED that the motion by the defendants for summary judgment dismissing the complaint is granted.

Dated: April 6, 2011


HON. WILLIAM B. REBOLINI, J.S.C.

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