

Cruz v Nolasco

2011 NY Slip Op 31127(U)

April 15, 2011

Supreme Court, Queens County

Docket Number: 17048/2009

Judge: Robert J. McDonald

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Expressway he stopped his vehicle due to stop and go traffic. After being stopped for a couple of seconds his vehicle was struck in the rear by the vehicle owned and operated by the defendant, Arilda A. Nolasco. Cruz contends that as a result of the impact he sustained herniated discs and muscle sprains in the cervical and lumbar spines. DeJesus alleges she sustained radiculopathy, thoracic spine sprain, cervical and lumbar spine sprains and muscle spasms.

The plaintiffs commenced an action against the defendant by filing a Summons and Verified Complaint on June 26, 2009. Issue was joined by service of defendant's Verified Answer dated July 22, 2009. The defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiffs' complaint on the ground that neither plaintiff suffered a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Brian L. Smith, Esq.; a copy of the pleadings; plaintiffs' verified bill of particulars; a copy of the transcript of each plaintiff's examination before trial; and the affirmed medical reports of Dr. Alan J. Zimmerman with respect to both Cruz and DeJesus.

In their verified Bill of Particulars, plaintiff Cruz states that as a result of the accident he sustained, inter alia, a herniated disc at L4-L5; postconcussion syndrome with occipital hematoma, and spasms of the lumbar paraspinal muscles. Plaintiff DeJesus states that she sustained, inter alia, active L5 radiculopathy and thoracic spine sprain; postconcussion syndrome; and spasms of the lumbar paraspinal muscles. Cruz states that he was confined to bed for one week following the accident and confined to his home for five weeks following the accident. DeJesus was confined to bed for one week following the accident and confined to her home for four weeks following the accident. Cruz missed 25 days of work and DeJesus missed 20 days of work due to the accident.

Plaintiffs contend that they each sustained a serious injury as defined in Insurance Law § 5102(d) in that they sustained permanent loss of a body organ, member, function or system; permanent consequential limitation or use of a body organ or member; significant limitation of use of a body function or system; a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

Plaintiff, Francisco Cruz, age 29, was examined by Dr. Alan J. Zimmerman, a board certified orthopedic surgeon, who was retained by the defendant. In his examination of July 15, 2010, Dr. Zimmerman performed quantified and comparative range of motion tests using a hand held goniometer. He found that Cruz had no limitations of range of motion of the cervical spine and displayed a normal range of motion in the lumbar spine. Dr. Zimmerman's diagnoses was "cervical and lumbar sprain, resolved." He stated that Cruz has no disability, no permanency, and no further treatment was necessary. He also found that there was no clinical support for the diagnosis of a lumbar disc herniation.

In his examination before trial taken on June 10, 2010, Cruz stated that he was out of work for five weeks due to his injuries. He was treated by Dr. Miller with physical therapy for three months. He stated that he stopped going for treatment because his no-fault benefits ran out. He also had private health insurance with United Healthcare. He also saw a neurologist, Dr. Alluri, no more than 10 times. He stopped treating with him when no-fault ran out. He also treated with a physical therapist, Dr. Berman. He stopped treating with him because he felt he wasn't making sufficient progress. Cruz stated his last treatment from the 2006 accident was in 2007. He testified that he still has pain in his lower back on a weekly basis.

Plaintiff, Rosanna DeJesus, age 25, was examined by Dr. Zimmerman on July 15, 2010. Dr. Zimmerman performed quantified and comparative range of motion tests using a hand held goniometer. He found that DeJesus displayed normal range of motion of her cervical and lumbar spines. Dr. Zimmerman concluded that as a result of the accident, DeJesus sustained a lumbar sprain that had resolved. There was no cervical injury. He stated that she has no disability and that her claim of active right L5 radiculopathy is not supported by the clinical findings or the claimant's complaints.

In her examination before trial taken on June 10, 2010, Rosanna DeJesus testified that she missed four weeks from work as a result of the accident. She was on home rest for one week after the accident. After the accident she began going for physical therapy with Dr. Miller. Her treatments lasted three months. She had an MRI which revealed a sprain of the lower back. She also began treating with Dr. Alluri, a neurologist about one month after the accident. She saw him for about three months. She stopped her treatments because no-fault stopped paying. However she had private health insurance through United Healthcare. She

testified that she also treated with Dr. Berman for about ten months until the treatments were no longer beneficial. She stated that she still experiences pain in her lower back on a daily basis.

Defendant's counsel contends that the deposition testimony of the parties as well as the medical reports of Dr. Zimmerman are sufficient to establish, *prima facie*, that neither plaintiff has sustained a permanent loss of a body organ, member, function or system; that they have not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that the plaintiffs have not sustained a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiffs, for not less than 90 days during the immediate one hundred days following the occurrence, from performing substantially all of their usual daily activities.

In opposition, plaintiffs' attorney Paul C. Cavaliere, Esq., submits his own affirmation as well as the affidavits of the plaintiffs Cruz and DeJesus; the affirmed medical reports of Dr. J. R. Alluri dated December 23, 2010; the narrative reports of Steven Berman, R.P.T. dated September 27, 2010, the unaffirmed reports of physical therapist Steven Berman and a copy of the police accident report (MV-104).

In his affidavit dated December 20, 2010, Cruz states that after the accident he was confined to his home for five weeks. He stated that the medical reports indicate that he sustained a herniated disc as a result fo the accident which still causes him severe pain and discomfort. He states that he was treated with physical rehabilitation for 8 - 9 months following the accident.

DeJesus states in her affidavit dated December 20, 2010 that the injuries she received in the accident were serious, significant and permanent and as such, preclude summary judgment. She states that as a result of te accident she sustained right spinal radiculopathy at the L5 lumbar disc, a thoracic spinal sprain and continuous debilitating headaches as a result of the 2006 accident. She states that she still lives in severe pain and discomfort.

Plaintiffs' counsel contends that the defendant has failed to make a *prima facie* showing of entitlement to judgment as a matter of law because the two reports of Dr. Zimmerman do not mention the 90/180 category of serious injury and his findings were based only on a perfunctory

examination.

Plaintiffs also submit affirmed reports from neurologist Dr. Alluri dated December 27, 2010. Dr. Alluri states that he examined Cruz immediately following the accident and again in November 2010. He states that the MRI studies of the lumbar and cervical spines showed a disc herniation at L4-5 and bulging discs at C2-C3 and C5-C6. Dr. Alluri states that the injuries are permanent and constitute a permanent consequential limitation of use of the cervical spine and lumbar spine and are causally related to the accident of July 2006. He also states that the injuries suffered by Cruz prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the occurrence of his injuries.

As to Rosanna Cruz, Dr. Alluri states in an affirmed report dated December 23, 2010 that he examined her immediately following the accident and found that the MRI study revealed a posterior disc herniation at L4-L5. An MRI of the cervical spine revealed bulging discs at C2-C3 through C5-C6 (Note: this appears to have inadvertently been taken from Cruz's report, as these specific injuries are not alleged in DeJesus' Bill of Particulars). Dr. Alluri also states she sustained active lumbar radiculopathy at L5 on the right side and postconcussion syndrome with posttraumatic headaches. Dr. Alluri states that as a result of the July 2006 accident Ms. DeJesus sustained permanent consequential limitation of use of her lumbar spine and thoracic spine and also that her injuries prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the occurrence of her injuries.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff

has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Initially it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendant, including the affirmed medical reports of Dr. Zimmerman was sufficient to meet its prima facie burden by demonstrating that each 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]).

In opposition, each plaintiff failed to raise a triable issue of fact as to whether they each sustained a serious injury under the permanent loss of use, the permanent consequential limitation of use, and/or the significant limitation of use categories of Insurance Law § 5102 (d). In his reports regarding each plaintiff Dr. Alluri, a neurologist, failed to provide any results of quantified range of motion testing on the cervical and lumbar spines and failed to provide any objective test results which show that either plaintiff had significant limitations of range of motion of the spine. Since he failed to set forth any objective medical findings from either a contemporaneous or recent examination, as to each plaintiff, he failed to raise any issue of fact to rebut the findings of Dr. Zimmerman. "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 disc injury and its duration" (Catalano v Kopmann, 73 AD3d 963 [2d Dept. 2010]; also see Stevens v

Sampson, 72 AD3d 793 [2d Dept. 2010]; Keith v Duval, 71 AD3d 1093 [2d Dept. 2010]; Rivera v Bushwick Ridgewood Props., Inc., 63 AD3d 712 [2d Dept. 2009]).

In addition, with respect to Ms. DeJesus, Dr. Alluri diagnosed her injuries a thoracic back sprain with radiculopathy. However, the Appellate Division, Second Judicial Department has held that sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d) (see Rabolt v Park, 50 AD3d 995 [2d Dept. 2008]; Washington v Cross, 48 ADd 457 [2d Dept. 2008]; Hasner v Budnik, 35 AD3d 366 [2d Dept. 2006]).

Finally, the plaintiffs failed to raise a triable issue of fact as to whether they sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d), since Cruz states that he was out of work for five weeks after the subject accident, and DeJesus states she was out of work for four weeks and thereafter they each returned to their respective employment (see Kreimerman v Stunis, 74 AD3d 753 [2d Dept. 2010]; Nesci v. Romanelli, 74 AD3d 765 [2d Dept. 2010]; Hamilton v Rouse, 46 AD3d 514 [2d Dept. 2007]; Mercado v Garbacz, 16 AD3d 631 [2d Dept. 2005]).

In addition, each plaintiff failed to adequately explain the cessation of the their medical treatment eight months after the accident. Although they stated that they stopped treatment when their no-fault benefits expired, they each testified that they had private health insurance (see Pommells v Perez, 4 NY3d 566 [2005]; West v Martinez, 78 AD3d 934 [2d Dept. 2010]; Vasquez v John Doe # 1, 73 AD3d 1033 [2d Dept. 2010]; Haber v Ullah, 69 AD3d 796 [2d Dept. 2010]).

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the defendant's motion for summary judgment is granted and the complaint filed by plaintiffs Francisco Cruz and Rosanna DeJesus is dismissed; and, it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: April 15, 2011
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.