

Florez-Bossio v Rodriguez

2011 NY Slip Op 33157(U)

November 28, 2011

Supreme Court, Nassau County

Docket Number: 601317/09

Judge: Roy S. Mahon

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SCAW

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

JOSE FLOREZ-BOSSIO,

TRIAL/IAS PART 6

Plaintiff(s),

INDEX NO. 601317/09

- against -

**MOTION SEQUENCE
NO. 1**

LILIA RODRIGUEZ,

**MOTION SUBMISSION
DATE: September 16, 2011**

Defendant(s).

X X X

The following papers read on this motion:

- Notice of Motion** **X**
- Affirmation in Opposition** **X**
- Reply Affirmation** **X**

Upon the foregoing papers, the motion by defendant for an Order pursuant to CPLR 3212 and Article 52 of the Insurance Law of the State of New York granting summary judgment to defendant, Lilia Rodriguez and dismissing the plaintiff Complaint for non-economic loss allegedly resulting from a motor vehicle accident on September 3, 2008, on the ground that the injuries claimed by plaintiff, Jose Florez-Bossio, do not satisfy the "serious injury" threshold requirement of New York insurance Law §5102(d) and thus his claim for non-economic loss is barred by Insurance Law §5104(a), is determined as hereinafter provided:

This personal injury action arises out of a motor vehicle accident that occurred on September 3, 2008 at approximately 12:30 pm in the parking lot of the premises located at 172 Fulton Avenue, Hempstead, NY.

The plaintiff in the plaintiff's Verified Bill of Particulars sets forth:

"C5-6 and C6-7 focal disc bulges creating impingement on the neural canal; cervical subluxations at C1-2, C2-3 and C6-7; straightening of the cervical lordosis; cervical pain radiating to left upper extremity associated with numbness and tingling in the left arm; cervical tenderness; left demyelinating median nerve neuropathy; left carpal tunnel syndrome; left trapezius muscle pain and tightness sensation; loss of range of motion, cervical spine; hypoesthesia on the left at the C6-T1 dermatome levels' cervico-brachial syndrome; bilateral trapezius muscle myofascial pain syndrome; cervical muscle spasm; cervical vertebral fixation; cervical subluxation complex;

cervical myalgia; cervical disc displacement;

Low back pain and tenderness; lumbar subluxations at L1-2, L3-4, L4-5 and L5-S1; low back syndrome; lumbar muscle spasm; lumbar vertebral fixation; left thigh tingling sensation; hypoesthesia at left L5 dermatome; lumbar subluxation complex; lumbar myalgia; lumbar disc displacement; left shoulder pain and tenderness; left shoulder contusion; left shoulder derangement; left shoulder supraspinatus tendonitis; loss of range of motion, lumbar spine; left lower rib pain; left anterior chest and left ribs contusion; headaches; post concussion syndrome; dizziness; nausea; thoracic tenderness; thoracic subluxation complex; thoracic myalgia; thoracic vertebral fixation; substantial impairment of the plaintiff's ability to engage in his normal daily activities."

The defendant, amongst other things, submits the plaintiff's Winthrop University Hospital Emergency Department records from the day of the accident in issue; two unsworn reports of Old Country Road Imaging & Diagnostic PC by Charles DeMarco MD, a treating physician of the plaintiff's, one dated October 15, 2008 of an MRI of the plaintiff's lumbar spine and one dated October 22, 2008 of an MRI of the plaintiff's left shoulder; an unsworn report dated January 14, 2009 of United Diagnostic Imaging PC by Mark Shapiro, MD, of an MRI of the plaintiff's brain; an affirmed letter report dated June 2, 2010 of East Hills Medical Services, PC by Isaac Cohen, MD, an orthopedist of an orthopedic examination of the plaintiff conducted on June 2, 2010, and four affirmed letter reports of David A. Fisher, MD a radiologist all dated June 5, 2010 of a review of certain MRI's of the plaintiff's cervical spine, left shoulders; lumbar spine and brain.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

It is noted that the question of whether the plaintiff has made a prima facie showing of a serious injury should be decided by the Court in the first instance as a matter of law (see *Licaro v. Elliot*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088; *Palmer v. Amaker*, 141 AD2d 622, 529 NYS2d 536, Second Dept., 1988; *Tipping-Cestari v. Kilhenny*, 174 AD2d 663, 571 NS2d 525, Second Dept., 1991).

In making such a determination, summary judgment is an appropriate vehicle for determining whether a plaintiff can establish prima facie a serious injury within the meaning of Insurance Law Section

5102(d) (see, **Zoldas v. Louise Cab Corp.**, 108 AD2d 378, 381, 489 NYS2d 468, First Dept., 1985; **Wright v. Melendez**, 140 AD2d 337, 528 NYS2d 84, Second Dept., 1988).

Serious injury is defined, in Section 5102(d) of the Insurance Law, wherein it is stated as follows:

"(d) 'Serious 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 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."

The respective unsworn reports of the plaintiff's treating physicians are properly considered herein (see, **Pagano v Kingsbury**, 182 AD2d 268, 587 NYS2d 692 (Second Dept., 1992). The x-ray report contained within the plaintiff's Winthrop University Hospital's records provides:

"Exam: CHEST PA AND LATERAL

Chest PA and lateral views:

HISTORY: Left lower rib pain.

This study demonstrates the cardiac silhouette and mediastinal contours to be within normal limits. The lung fields are clear. The bony thorax is unremarkable.

IMPRESSION: Normal study."

Dr. DeMarco's respective reports set forth:

"MRI OF THE LEFT SHOULDER

Protocol: T1, T2 GE sequences obtained in multiple projections.

Findings: The visualized osseous elements are intact with no evidence of fracture or dislocation. The marrow signals are within normal limits. The visualized hyaline cartilage show no evidence of osteochondral defect. The glenohumeral joint is normally maintained. The glenoid labrum are intact.

The acromioclavicular joint demonstrates no evidence of hypertrophic change, and there is no evidence of encroachment on the supraspinatus muscle or tendon. The biceps tendon appears unremarkable. There is no evidence of joint effusion. There is no evidence of signal abnormality or irregularity of the supraspinatus tendon.

The visualized portions of the infraspinatus, teres minor and subscapularis muscles and tendons are all within normal limits.

IMPRESSION:

MRI OF THE SHOULDER WITHIN NORMAL LIMITS."

"MRI OF THE LUMBAR SPINE

Protocol: T1, T2 sagittal and axial images.

Findings: The lumbar vertebral bodies are normal in height and appearance. There is no fracture or acute compression deformity. There is no abnormal bone marrow infiltration. There is no spondylolisthesis or pars fracture.

The discs are normal in height and signal.

There is no spinal stenosis. The conus medullaris and the cauda equina are normal in position and appearance. There is no intradural mass lesion. The facet joints are normal. The lateral neural foramina are patent. The paraspinal soft tissues are unremarkable.

IMPRESSION:

NORMAL MRI OF THE LUMBAR SPINE."

Dr. Shapiro states in said physician's report of the January 14, 2009 MRI of the plaintiff's brain:

"MRI OF THE BRAIN

T1 sagittal and axial images, as well as proton density and T2 weighted axial images do not demonstrate any mass, hemorrhage or midline shift.

The ventricles, cisterns and sulci are normal in size. No focal abnormality is demonstrated in the pons, fourth ventricle or cerebellum. The seventh and eighth nerve complexes demonstrate normal contour. No abnormality is seen in the deep gray or white matter. There is no territorial infarct. There is no sellar or suprasellar mass. The midline structures are intact.

Signal from the calvarium and surrounding soft tissues are unremarkable. No abnormality is seen in the visualized paranasal sinuses, mastoid air cells or orbits.

IMPRESSION: NO EVIDENCE OF HEMORRHAGE OR SPACE OCCUPYING LESION."

Dr. Cohen's report of the orthopedic examination of the plaintiff set forth:

"PHYSICAL EXAMINATION:

Mr. Jose Florez Bossio is an alert and cooperative 25-year-old man who stands 5'8", weighs 150 pounds, and has brown hair and brown eyes. He is right-hand dominant, and is in no distress. He moves about the exam room

freely without difficulty.

On examination, very well developed upper extremities were documented with strong shoulders, both right and left.

Cervical Spine: Maintenance of the normal cervical curvature is noted on inspection. Paravertebral muscles are supple, non-tender on palpation with no evidence of muscle spasms noted. In active fashion, range of motion is with flexion and extension of 50 degrees (normal 45-65 degrees), left and right lateral bending in the 45-degree range (normal up to 46 + - 6.5) and rotation motion to the right and left in the 80-degree range (normal up to 78 + - 15). Compression test and Spurling test are negative. Percussion test is negative. Upper extremity motor strength is good at 5/5 on a clinical basis and sensation is intact. No atrophy is noted particularly of the interosseous or thenar eminence. Range of motion of both wrists is normal and Tinel's sign is negative. Reflexes are present, equal and symmetrical in both upper extremities, biceps, triceps and brachioradialis.

Thoracolumbosacral Spine: Inspection reveals claimant to have maintenance of the normal lordotic curvature. Palpation of the paravertebral muscle is supple and non-tender with no trigger points or spasms present. Range of motion in active fashion is with flexion to 70 degrees (normal up to 66 + - 15), extension to 30 degrees (normal up to 33 + - 5.5), and right and left lateral bending to 25 degrees (normal up to 29 + - 6.6). Left and right rotational motion is possible to 30 degrees (normal up to 30).

Lower Extremities: Reflexes are present, equal and symmetrical in both lower extremities, knee jerks and heel cords. Straight leg sign, performed bilaterally in the sitting position, is negative to 90 degrees (normal to 90 degrees). Muscle strength is satisfactory at 5/5 on a clinical basis with no noted atrophy. No sensory deficit is documented. Claimant is able to stand on toes and heels without difficulty and walks with a normal heel toe gait.

Left Shoulder: Examination of the left shoulder is unremarkable with no gross deformity noted, and no erythema or effusion present. Active range of motion is performed with forward elevation possible to 170 degrees (normal up to 167 + - 4.7), abduction to 180 degrees (normal up to 184 + - 7), adduction is possible to 30 degrees (normal up to 30), external rotation to 95 degrees (normal up to 104 + - 8.5), and internal rotation to 65 degrees (normal up to 69 + - 4.6). There is no tenderness on palpation of the AC joint, and no weakness of the external rotation present. Impingement signs are negative. Hawkins', Neer's and Spurling's tests are negative bilaterally.

Right Shoulder: The shoulder on the right is also unremarkable with no erythema or effusion noted. IN active fashion, forward elevation is to 170 degrees (normal up to 167 + - 4.7), abduction to 180 degrees (normal up to 184 + - 7), adduction is to 30 degrees (normal up to 30), external rotation to 95 degrees (normal up to 104 + - 8.5), and internal rotation is to 65 degrees (normal up to 69 + - 4.6). No tenderness is present on palpation of the AC joint. There is no weakness of the external rotation. Impingement signs are

negative. Hawkins' and Neer's tests are negative.

Ranges of motion were determined guided by the clinical measurements of joint motion issued by the American Academy of Orthopedic Surgeons, edited by Drs. Greene and Heckman. All measurements were taken with the goniometer.

DIAGNOSIS:

1. Status post motor vehicle accident
2. Cervical and thoracolumbosacral strain, resolved
3. Shoulder contusions, resolved
4. Normal left wrist

DISCUSSION:

At the time of this evaluation, Mr. Jose Florez Bossio has a completely normal functional capacity of both the cervical and thoracolumbosacral spine areas, as well as of the both upper and lower extremities with normal examinations. There is no clinical evidence for left carpal tunnel syndrome. The objective work up performed was also unremarkable as documented in the medical records evaluated.

After the accident, the claimant states he lost maybe a couple of days from work, and has been able to continue to perform his normal activities in an unrestricted fashion. Based on today's physical examination, Mr. Florez Bossio has no evidence of disability, sequelae or permanency related to this accident.

In summary, it is my opinion the claimant sustained mild soft tissue injuries from which he recovered satisfactorily without any sequelae or permanency. At the time of this evaluation, he has a completely normal functional capacity of the musculoskeletal system."

The respective reports of Dr. Fisher set forth:

"MRI of the Lumbar Spine (Mineola Open MRI 10/15/2008):

Technique:

T1 and T2 sagittal and axial oblique sequences were performed.

Findings:

The lumbar vertebral bodies are normal in height and alignment. Disc spaces are well preserved. There is no disc herniation or annular bulge. The conus medullaris is normal in position. There is no evidence of spinal stenosis or fracture.

Impression:

Normal study.

SUMMARY

At your request, I have reviewed an MRI of the lumbar spine which was

performed six weeks following the date of the accident. This is a normal examination. There are no disc herniations or bulges present. There is no radiographic evidence of traumatic or causally related injury to the lumbar spine."

"MRI of the Cervical Spine (Doshi Diagnostics 9/30/2008):

Technique:

T1 and T2 sagittal and T2 axial oblique sequences were performed. Image quality is suboptimal.

Findings:

The cervical vertebral bodies are normal in height and alignment. Disc spaces are well preserved. There is no evidence disc herniation or annular disc bulge. The craniocervical junction and cervical cord are normal in appearance and there is no evidence of spinal stenosis or fracture.

Impression:

Unremarkable study.

SUMMARY

At your request, I have reviewed an MRI of the cervical spine which was performed four weeks following the date of the accident. This is a normal study. There are no disc herniations or bulges present. There is no radiographic evidence of traumatic or causally related injury to the cervical spine."

"MRI of the Left Shoulder (Mineola Open MRI 10/22/2008):

Technique:

T1 and T2 coronal and sagittal oblique and gradient echo axial oblique sequences were performed.

Findings:

The Acromioclavicular and glenohumeral joints are normally aligned. There is no evidence of fracture or marrow edema. The rotator cuff appears intact. There is no evidence of tendonitis or cuff tear. There is no significant joint effusion or bursal fluid accumulation. The biceps tendon appears intact and no labral tear is identified.

Impression:

Unremarkable study.

SUMMARY

At your request, I have reviewed an MRI of the left shoulder which was performed seven weeks following the date of loss. This is a unremarkable study. There are no disc herniations or bulges present. There are no rotator cuff or labral tear evident. There is no radiographic evidence of traumatic or causally related injury to the left shoulder."

"MRI of the Brain (United Diagnostic 1/14/2008):

Technique:

T1, T2 and STIR axial and T1 sagittal oblique were performed.

Findings:

There is no evidence of parenchymal hemorrhage, space occupying lesion or territorial infarct. The ventricles and sulci are within normal limits for the patient's age. There are no extra-axial fluid collections and there is no shift of the midline structures. The paranasal sinuses, pituitary fossa, brainstem and IAC's are unremarkable. The calvarium is intact.

Impression:

Unremarkable study.

SUMMARY

At your request, I have reviewed an MRI of the brain that was performed four months following the accident. This is a normal examination. There are no disc herniations or bulges present. There is no evidence of traumatic or causally related injury."

The Court finds that the defendants have submitted evidence in admissible form to make a "prima facie showing of entitlement to judgment as a matter of law" (**Winegrad v. New York University Medical Center, 64 NY2d 851, 853; Pagano v. Kingsbury, supra at 694**) and is sufficient to establish that the plaintiff did not sustain a serious injury. Accordingly, the burden has shifted to the plaintiff to establish such an injury and a triable issue of fact (see **Gaddy v. Eyer, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176; Jean-Meku v. Berbec, 215 AD2d 440, 626 NYS2d 274, Second Dept., 1995; Horan v. Mirando, 221 AD2d 506, 633 NYS2d 402, Second Dept., 1995**).

In opposition to the requested relief, the plaintiff offers the reports and the records of Total Wellness & Medical Health, PC by Dabid Khanan for September 5, 2008; September 12, 2008; November 12, 2008; December 17, 2008 and April 26, 2011; a September 30, 2008 unsworn report of Dr. Shapiro of an MRI of the plaintiff's cervical spine and an affidavit of the plaintiff.

While the plaintiff submits that the approximate 2½ year gap in treatment with Dr. Khanan was occasion by an exhaustion of No-fault benefits, such a situation is inadequate to explain the gap in treatment (see, **Villalta v Schechter, 273 AD2d 299, 710 NYS2d 87 (Second Dept., 2000)**).

Based upon the foregoing, the defendant's application for an Order pursuant to CPLR 3212 and Article 52 of the Insurance Law of the State of New York granting summary judgment to defendant, Lilia Rodriguez and dismissing the plaintiff' Complaint for non-economic loss allegedly resulting from a motor vehicle accident on September 3, 2008, on the ground that the injuries claimed by plaintiff, Jose Florez-Bossio, do not satisfy the "serious injury" threshold requirement of New York insurance Law §5102(d) and thus his claim for non-economic loss is barred by Insurance Law §5104(a), is granted.

SO ORDERED.

DATED: 11/29/2011

Ray S. M...
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ENTERED

DEC 02 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE