

Bahos v Cortez

2011 NY Slip Op 33302(U)

August 24, 2011

Supreme Court, Queens County

Docket Number: 25791/09

Judge: Bernice Daun Siegal

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

-----X
John C. Bahos, Marisol Hernandez, and
Ludivia Clavijo,

Plaintiffs,

Index No.: 25791/09
Motion Date: 6/1/11
Motion Cal. No: 3
Motion Seq. No: 6

-against-

Nazly C. Cortez, Edison H. Ramos, and Lynn
V. Galfano,

Defendants.

-----X

The following papers numbered 1 to 17 read on this motion by defendant for an order granting defendant Lynn V. Galfano leave to make this motion and for an order granting the defendant Ludivia Clavijo and any and all cross claims against defendant on the basis that plaintiff Ludivia Clavijo did not sustain a “serious injury” under Insurance Law 5102(d).

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Notice of Cross-Motion- Affidavits.....	5 - 9
Affirmation in Opposition	10 - 13
Reply Affirmation	14 - 15
Reply Affirmation.....	16 - 17

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

Facts

The defendant Lynn V Galfano (“Galfano”) and defendants Nazly C Cortez (“Cortez”) and Edison H. Ramos (“Ramos”) move and cross-move, respectively, for summary judgment pursuant to CPLR §3212 on the grounds that plaintiff Ludivia Clavijo (hereinafter “Clavijo”) did not sustain a serious injury under Insurance Law §5102(d). Plaintiff was involved in a motor vehicle accident

involving defendants on December 4th, 2008. After the accident, Clavijo did not go to the hospital and returned to work five days after the accident. Upon returning to work she resumed the same hours, days, duties and pay though she alleges trouble bending down because of her neck and knee. On December 16th, 2008 Clavijo visited Dr. Viviane Etienne (hereinafter “Dr. Etienne”). Dr. Etienne conducted range of motion tests and found significantly limited motion in the cervical spine, lumbosacral spine, and right knee, and advised Clavijo that she should not perform any heavy work because of the sustained injuries. Also Clavijo enrolled in physical therapy at Dr. Etienne’s suggestion and walked to and from the facility for treatment. Dr. Etienne last examined Clavijo on April 7th, 2010. The results indicated minor limitations in Clavijo’s range of motion and Dr. Etienne suggested the patient have knee surgery. (plaintiff’s exhibit A ¶ 21-23). The defendant, Galfano, had the plaintiff examined by Dr. Salvatore Corso (hereinafter “Dr. Corso”) on December 23, 2010. Dr. Corso stated there was no evidence of disability or limited range of motion.

Analysis

Galfano’s motion and Cortez and Ramos’ cross-motion for summary judgment and pursuant to CPLR §3212 dismissing Clavijo’s cause of action are granted as more fully set forth below.

Initially, Galfano seeks leave of the court to have the within motion for summary judgment considered despite being filed more than 120 days after the Note of Issue was filed. Galfano contends that pursuant to CPLR § 3212 there is good cause for their delay in filing the summary judgment motion because of the plaintiff’s failure to appear for two independent medical examinations. Good cause requires a satisfactory explanation for the untimeliness of the motion. (*Brill v. City of New York*, 2 N.Y.3d 648, 652 [Ct. App. 2004]). Good cause for the delay may be established where plaintiff fails to show for two independent medical examinations thereby frustrating defendants’ discovery and ability to file a timely motion for summary judgment. (*Kunz v. Gleeson*, 9 A.D.3d 480,

481 [2nd Dept. 2004]; *Gonzalez v. 98 Mag Leasing Corp.*, 95 N.Y.2d 124 [Ct App. 2000]; *Jerry v. New York City Hous. Auth.*, 285 A.D.2d 531 [2nd Dept. 2001]; but cf. *Tower Ins. Co. of N.Y. v. Razy Assoc.*, 37 A.D.3d 702, 703 [2nd Dept. 2007]). Unlike *Tower Ins.*, the independent medical exam was essential to the defendant's case because it provided the evidentiary basis for defendant's motion and there was no unexplained delay between taking the deposition and making the motion. (*Tower Ins. Co. of N.Y.*, 37 A.D.3d at 703). Furthermore, plaintiff's papers fail to object to the court addressing the portion of the motion for summary judgment. Therefore the motion for summary judgment is properly before this court

Defendants move for summary judgment in its favor on the ground that Clavijo did not sustain a "serious injury" within the meaning of the Insurance Law. That statutory provision states, in pertinent part that a "serious injury" is defined 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's customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Insurance Law §5102(d)

Galfano contends that Clavijo did not suffer a serious injury based on the medical report of Dr. Corso. The issue of whether Clavijo sustained a serious injury is a matter of law to be determined in the first instance by the court. (*Licari v. Elliott*, 57 N.Y.2d 230 [Ct App. 1982]; *Porcano v. Lehman*, 255 A.D.2d 430, 431 [2nd Dept. 1998]; *Brown v. Stark*, 205 A.D.2d 725 [2nd Dept. 1994]). 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 [Ct App. 2002]; *Sealy v. Riteway-1, Inc.*, 54 A.D.3d 1018 [2nd Dept. 2008]; *Meyers v. Bobower Yeshiva Bnei Zion*, 20 A.D.3d 456 [2nd Dept. 2005]). A defendant can meet his or her prima facie burden 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). (see *Magarin v. Kropf*, 24 A.D.3d 733 [2nd Dept. 2005]; see also *Gaddy v. Eyler*, 79 N.Y.2d 955, 956 [Ct. App. 1992]; *Morris v. Edmond*, 48 A.D.3d 432 [2nd Dept. 2008]).

Galfano met her initial burden of establishing that Clavijo did not sustain a serious injury through the submission of the affirmation of Dr. Corso's report, wherein he compared the results elicited from the goniometer testing to the normal range of motion testing and found that plaintiff's range of motion tests were within normal limits and Clavijo was not disabled. Therefore Galfano made a prima facie showing that Clavijo did not sustain a serious injury within the meaning of insurance law § 5102(D). The burden now shifts to Clavijo to demonstrate the existence of a triable issue of fact as to whether she sustained a serious injury. (*Matthews v. Cupie Transp. Corp.*, 302 A.D.2d 566, 567 [2nd Dept. 2003]; see also *Gaddy*, 79 N.Y.2d at 957; *Greene v. Miranda*, 272 A.D.2d 441 [2nd Dept. 2000]). If a bodily limitation is substantial in degree but only fleeting in duration, it does not qualify as a serious injury under the statute. (*Partlow v. Meehan*, 155 A.D.2d 647, 648 [2nd Dept. 1989]; see also *McCleary v. Hefter*, 194 A.D.2d 594 [2nd Dept. 1993]; *Ciaccio v. J & R Home Improvements*, 149 A.D.2d 558 [2nd Dept. 1989]).

In Clavijo's case while the affirmation of Dr. Viviane Etienne represented range of motion tests for two visits one on December 16th, 2008 and April 7th, 2011, only the December 16th test represents a significant limitation to range of motion. During the April 7th, 2011 range of motion test the plaintiffs' lumbar range of motion was limited by 8% on flexion, 8% on extension, and by 9%

on the right knee. Since the Clavijo's range of motion is not limited more than 9% for any body part Clavijo has failed to prove serious injury. (see *McLoud v. Reyes*, 82 A.D.3d 848, 849 [2nd Dept. 2011]; see also *Waldman v. Dong Kook Chang*, 175 A.D.2d 204 [2nd Dept. 1991]; *Konco v. E.T.C. Leasing Corp.*, 160 A.D.2d 680 [2nd Dept. 1990]. In *McLoud*, the court rejected plaintiffs claim when the injury caused a 12% limitation. (*McLoud*, 82 A.D.3d at 849). Therefore Clavijo has failed to demonstrate a serious injury through limited range of motion.

Clavijo contends that Galfano failed to show entitlement to summary judgment under the 90 to 180 category of serious injury because defendant's expert failed to discuss plaintiffs condition within 90 to 180 days after the accident. However, Clavijo's deposition testimony conclusively shows that she did not sustain an injury preventing her from performing substantially all of the material acts constituting her customary activities during at least 90 out of the first 180 days following the accident. (*Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.*, 48 A.D.3d 664, 665 [2nd Dept. 2008]; see also *Letellier v. Walker*, 222 A.D.2d 658, 659 [2nd Dept. 1995]; *Covington v. Cinnirella*, 146 A.D.2d 565, 566, [2nd Dept. 1989]; but cf. *Pinder v. Salvatore*, 69 A.D.3d 823, 824 [2nd Dept. 2010] (plaintiff testified during deposition that missed ten months of work immediately following the accident)). Like *Sanchez*, where the plaintiff testified during deposition that he only missed five weeks of work, Clavijo testified at her deposition that she returned to work five days after the accident and walked to and from physical therapy. (*Sanchez*, 48 A.D.3d at 665). In opposition, Clavijo failed to provide evidence proving she missed work for at least 90 days following the accident. Furthermore, while Clavijo's doctor's affirmation purports to address the 90/180-day claim, it merely "offers an unavailing conclusory recitation of the statutory language." (*Browne v. Covington*, 82 A.D.3d 406, 407 [1st Dept March 1, 2011]; see also *Rodriguez v. Tsui*, 233 A.D.2d 382 [2nd Dept 1996].) Therefore the plaintiff has failed to prove there was a serious injury under the

90 to 180 day category.

Further plaintiff has failed to demonstrate a permanent loss of use of a body organ. In order to qualify as a permanent loss there must be a total loss of use of the body organ. (*Oberly v. Bangs Ambulance*, 96 N.Y.2d 295, 298 [Ct App. 2001]; *see also Albury v. O'Reilly*, 70 A.D.3d 612 [2nd Dept. 2010]; *Candia v. Omonia Cab Corp.*, 6 A.D.3d 641, 642 [2nd Dept. 2004]). None of plaintiffs' medical reports or sworn depositions indicate the total loss of use of a body organ. Therefore because plaintiff has failed to prove a total loss of use there is no permanent loss of a body organ.

Conclusion

For the reasons set forth above, Galfano's motion and Cortez and Ramos' cross-motion for summary judgment pursuant to CPLR §3212 dismissing Clavijo's cause of action are granted, and the complaint of plaintiff Ludicia Clavijo and any and all cross claims against defendants are dismissed.

Dated: August 24 , 2011

Bernice D. Siegal, J. S. C.