

Fuentes v Sanchez
2011 NY Slip Op 34065(U)
April 11, 2011
Supreme Court, Bronx County
Docket Number: 302995/09
Judge: Ben R. Barbato
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

APR 13 2011

PM

**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX**

Present: Honorable Ben R. Barbato

IRMA FUENTES and GILBERT FUENTES as
ADMINISTRATORS OF THE ESTATE OF
RICARDO FUENTES,

Plaintiff,

-against-

SEGUNDO SANCHEZ and DYA INC.,

Defendants.

**AMENDED
DECISION/ORDER**

Index No.: 302995/09

The following papers numbered 1 to 8 read on this motion and cross-motion for summary judgment noticed on June 30, 2010 and transferred on February 18, 2011.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1, 2, 3
Memorandum of Law	4
Cross-motion, Affirmation & Exhibits	5, 6, 7
Reply Affirmation	8

Upon the foregoing papers, and after reassignment of this matter from Justice Edgar Walker on February 18, 2011, and upon the court's own motion *sua sponte*, Defendants, Segundo Sanchez and DYA Inc., seek an Order granting summary judgment and dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d); by Cross-motion Plaintiffs, Irma Fuentes and Gilbert Fuentes as Administrators of the Estate of Ricardo Fuentes, seek an Order granting summary judgment on the issue of liability. Defendants' motion for summary judgment is **denied** and Plaintiffs' motion for summary judgment is **denied** to the extent indicated below.

This is an action arising from a motor vehicle accident which occurred on December 16, 2008, while Plaintiff, Irma Fuentes, was operating her motor vehicle on that roadway known as

Randall Avenue at its intersection with White Plains Road in the County of Bronx, City and State of New York. Plaintiff was caused to be struck by a vehicle operated by Segundo Sanchez and owned by DYA Inc., who Plaintiff alleges failed to stop at a red light controlling the aforementioned intersection.

On February 19, 2010, the Plaintiff appeared for an orthopedic examination conducted by Defendant's appointed physician Doctor Jacquelin Emmanuel. Upon examination Dr. Emmanuel, noted that Plaintiff was reported to have been examined at the hospital emergency room but was discharged without admission. She also states that Plaintiff had undergone rehabilitation treatment which has since been discontinued. She further states that Plaintiff informed her of Plaintiff's involvement in an accident eight years prior where she injured her right elbow, neck and back. Dr. Emmanuel offers that Plaintiff currently complains of pain to her neck, lower back, left knee and left leg. Dr. Emmanuel also notes that the Plaintiff at the time of the examination was 82 years of age. Dr. Emmanuel's examination of Plaintiff's cervical and lumbar spine reveal normal ranges of motion there being no evidence of spasm or tenderness upon palpation of the lumbar spine and that Soto-Hall, cervical compression, Spurling, distraction and shoulder depression tests were all determined to be negative. Examination of the left leg was found by Dr. Emanuel to be normal with no deformity, swelling, redness, increased temperature or atrophy present. Examination of Plaintiff's left knee revealed slight limitation of range of motion to 120 degrees with no signs of redness, swelling, increased temperature, tenderness or joint effusion. Dr. Emanuel reports all testing was normal and said examination failed to reveal any abnormal finding or disabilities.

On February 19, 2010, the Plaintiff appeared for a neurological examination conducted by Defendant's appointed physician Doctor Maria Audrie De Jesus. Dr. De Jesus notes that

Plaintiff has current complaints of pain in her neck, lower back and left knee. Again range of motion tests were determined to be normal as well as Plaintiff's mental status, cranial nerve, motor system, reflexes, sensory system, cerebellar, and gait and coordination. Accordingly, Dr. De Jesus determined no finding of objective neurological disabilities and recommended Plaintiff could engage in her everyday daily activities.

Defendant also offers the Affirmation of Dr. Jeffery Lang, a radiologist, who reviewed the M.R.I.'s of Plaintiff's cervical and lumbar spine. Dr. Lang, testifies that there is evidence of "spondylosis with disc space narrowing and endplate hypertrophic changes and disc osteophyte complex at C4-5, C5-6 and C6-7". Dr. Lang's impression of the cervical spine is that Plaintiff did not suffer any trauma to the cervical spine associated with the December 16, 2008 accident. Dr. Lang's examination of the MRI of Plaintiff's lumbar spine reveals no herniations but finds degenerative changes present at L5-S1 with hypertrophic changes and disc dessication, athropathy and stenosis most pronounced at the L4-5 level. Dr. Lang finds no correlation between the Plaintiff's injury and the subject matter accident.

Under the "no fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained. *Licari v. Elliot*, 57 N.Y.2d 230(1982) The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). In the present action, the burden rests on Defendant to establish, by submission of evidentiary proof in admissible form, that Plaintiff has not suffered a "serious injury." *Lowe v. Bennett*, 122 A.D.2d 728 (1st Dept. 1986) *aff'd* 69 N.Y.2d 701 (1986). Where a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been

sustained, the burden then shifts and it is incumbent upon the plaintiff to produce *prima facie* evidence in admissible form to support the claim of serious injury. *Licari, supra; Lopez v. Senatore*, 65 N.Y.2d 1017 (1985). Further it is the presentation of objective proof of the nature and degree of a Plaintiff's injury which is required to satisfy the statutory threshold for "serious injury". Therefore, disc bulges and herniated disc alone do not automatically fulfil the requirements of Insurance Law §5102 (d). See.: *Cortez v. Manhattan Bible Church*, 14 A.D.3d 466 (1st Dept. 2004) Plaintiff must still establish evidence of the extent of his purported physical limitations and its duration. *Arjona v. Calcano*, 7 A.D.3d 279 (1st Dept. 2004).

Plaintiff offers the testimony of Dr. David R. Payne, a radiologist, who on January 13, 2009, supervised the taking of the MRI of Plaintiff's left knee. Based upon the testimony of Dr. Payne the MRI reveals a tear of the posterior horn of the medial meniscus with joint effusion. On January 20, 2009 Dr. Payne supervised the taking of the MRI of Plaintiff's cervical spine. Dr. Payne states that the MRI reveals bulging disc at C4-5 and C5-6 without stenosis and bulging disc at C6-7 with mild biforaminal stenosis. Also on January 20, 2009 Dr. Payne supervised the taking of the MRI of Plaintiff's lumbar spine. The MRI reveals disc bulging at L1-2, L2-3 with moderate biforaminal stenosis, a left foraminal herniation at L3-4, impinging upon the exiting L3 root, bulging disc at L4-5 with left foraminal herniation, impinging the exiting L4 root, bulging disc at the transitional L5-S1 level with right formaminal herniation impinging upon the exiting L5 root.

Plaintiff also offers the testimony of Dr. Albert Graziosa, an orthopedic surgeon who examined Ms. Fuentes on January 7, 2009. Dr. Graziosa examination of Plaintiff's cervical and lumbar spines reveals a quantitative limited range of motion in both spines and tenderness over the anterolateral aspect of the tibial plateau and proximal aspects of the fibular. Dr. Graziosa

again examined Plaintiff on February 17, 2009 at which time Plaintiff complained of discomfort in the mid central and lower back. She also complained about her left knee and was counseled that surgical management may be necessary should conservative treatment fail. Plaintiff once again appeared at the office on April 1, 2009 for a follow-up visit which based upon Dr. Graziosa's Affirmation revealed worsening pain. In fact Plaintiff had follow up visits with Dr. Graziosa on May 6, 2009, May 27, 2009, June 24, 2009, July 22, 2009, August 19, 2009 and September 25, 2009 at each subsequent visit Dr. Graziosa testifies that Plaintiff condition worsened. On June 25, 2010 Dr. Graziosa testified that Plaintiff complained of worsening left knee pain and a range of motion which remained unchanged. Dr. Graziosa opines with a reasonable degree of medical certainty that Plaintiff's injuries are causally related to the accident of December 16, 2008 and not any prior accident.

On December 24, 2008 Plaintiff was examined by Dr. Peter C. Kwan a neurologist who determined that plaintiff suffered significant limitation in range of motion in the cervical and lumbar spine consistent with cervical and lumbar nerve damage. He further diagnosed Plaintiff with post concussion syndrome, traumatic injury to the lumbar and cervical spines and left knee, left leg and cervical and lumbar radiculopathy. On January 30, 2009 Dr. Kwan conducted cervical and lumbar EMG/NCVs which revealed radiculopathy. On March 27, 2009, April 21, 2009 and July 14 2010 physical examination of the Plaintiff by Dr. Kwan revealed consistent incapacity due to traumatic injury resulting from the motor vehicle accident of December 16, 2008.

In the instant case Plaintiff has demonstrated by admissible evidence objective and quantitative evaluation that she has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue

of fact for determination by a jury. Further, she has demonstrated by admissible evidence the extent and duration of her physical limitations sufficient to allow this action to be presented to a trier of facts. The role of the court is to determine whether bona fide issues of fact exist, and not to resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811 (4th Dept. 2000). The moving party must tender evidence sufficient to establish as a matter of law that there exist no triable issues of fact to present to a jury. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986) Based upon the exhibits and testimony submitted, the Court finds that the Defendant has failed to meet that burden.

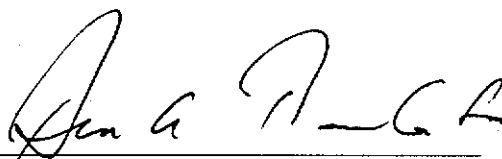
With respect to plaintiff's cross-motion defendant has offered no opposition.

Therefore it is

ORDERED, that Defendant, Segundo Sanchez and DYA Inc's, motion an Order granting summary judgment and dismissing Plaintiffs' Complaint for failure to satisfy the serious injury threshold under Insurance Law §§5102(d) is **denied** and it is further

ORDERED, that Plaintiff, Irma Fuentes and Gilbert Fuentes as Administrators of the Estate of Ricardo Fuentes, cross-motion for an Order granting summary judgment on the issue of liability is **denied**.

Dated: April 11, 2011



Hon. Ben R. Barbato, A.J.S.C.