

Collado v Argueta

2012 NY Slip Op 31532(U)

June 5, 2012

Supreme Court, Nassau County

Docket Number: 15437/10

Judge: Jeffrey S. Brown

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

-----X TRIAL/IAS PART 17
AURELIA COLLADO and ORLANDO COLLADO,

Plaintiffs,

-against-

Index No. 15437/10
Mot. Seq. # 1,2
Motion Date 5.11.12
Submit Date 5-11-12
XXX

JUAN A. ARGUETA, ERNESTO MELARA, KEITH
LYNCH and TABATHA A. ENCALADA,

Defendants.

-----X
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The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Notice of Cross-Motion, Affidavits (Affirmations) Exhibits Annexed.....	4
Answering Affidavit	2,5
Reply Affidavit.....	3

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Upon the foregoing papers, the defendants' motions seeking an order granting summary judgment pursuant to CPLR § 3212 and dismissal of plaintiff's complaint, on the grounds that the plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d) is determined as hereinafter provided.

The plaintiff commenced this lawsuit by filing a summons and complaint wherein the plaintiff claimed personal injuries resulting from a motor vehicle accident, which occurred on September 22, 2007. Issue was then joined by service of the defendant's answer.

In a personal injury action, a summary judgment motion seeking to dismiss the complaint requires that a defendant establish a *prima facie* case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). (*Gaddy v. Eyer*, 79 N.Y.2d 955 [1992]). Upon such a showing, it becomes incumbent on the plaintiff to come forward with sufficient

evidence, in admissible form, to demonstrate the existence of a question of fact on the issue. Id. The court must then decide whether the plaintiff has established a prima facie case of sustaining a serious injury (*Licari v. Elliot*, 57 N.Y.2d 230 [1983]).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physicians or the unsworn reports of the plaintiff's examining physicians (*see, Pagano v. Kingsbury*, 182 A.D.2d 268 [2nd Dept. 1992]). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 N.Y.2d 813 [1991]).

Essentially, in order to satisfy the statutory serious injury threshold requirement, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345 (2002), stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both the plaintiff and the defendant rely on those reports (*see, Gonzalez v. Vasquez*, 301 A.D.2d 438 [1st Dept. 2003]).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez*, 4 N.Y.3d 566 [2005]).

Insurance Law §5102 (d) defines serious injury to mean a personal injury which results in: (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) 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.

To meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eycler, supra; Licari v. Elliot*, 67 N.Y.2d 230 [1982]). A minor, mild or slight limitation will be deemed insignificant within the meaning of the statute (*Licari v. Elliot, supra*). A claim raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, can be made by an expert's designation of a numeric percentage of a plaintiff's loss of motion, in order to

prove the extent or degree of the physical limitation (*see, Toure v. Avis, supra*). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff's limitation to the normal function, purpose and use of the affected body organ, member, function or system (Id).

Finally, to prevail under the "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" category, a plaintiff must demonstrate through competent, objective proof, a "medically determined injury or impairment of a non-permanent nature which would have caused the alleged limitations on the plaintiff's daily activities" (*Monk v. Dupuis*, 287 A.D.2d 187 [3rd Dept. 2001]). A curtailment of the plaintiff's usual activities must be "to a great extent rather than some slight curtailment" (*Licari v. Elliott, supra* at 236). Under this category specifically, a gap or cessation in treatment is irrelevant in determining whether the plaintiff qualifies (*Gomez v. Ford Motor Credit Co.*, 10 Misc.3d 900 [Sup. Ct., NY Cty., 2005]).

With these guidelines in mind, the court will turn to the merits of the defendant's motion. In support of their motion, the defendants submit the following: the summons and verified complaint; verified answer with cross-claim and demands; verified bill of particulars; deposition testimony of plaintiff; and independent medical examination report of Dr. Richard Weiss.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see, Zuckerman v City of New York*, 49 NY2d 557, 562; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Matter of Redemption Church of Christ v Williams*, 84 AD2d 648, 649; *Greenberg v Manlon Realty*, 43 AD2d 968, 969)." *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (N.Y. 1985)

As a result of the accident plaintiff alleges to have sustained, *inter alia*, the following injuries as per her verified bill of particulars: disc bulge of the C3-C4 level effacing the thecal sac; disc bulge of the C4-C5 level; disc bulge of the C5-C6 level effacing the thecal sac; straightening of the mid-cervical spine; and cervical myofascial syndrome with radiculopathy.

Furthermore, as per the bill of particulars, plaintiff was not confined to a hospital, bed, or home for any period of time; nor did she miss any time from work because of the accident.

Plaintiff claims that she sustained a serious injury as defined in the Insurance Law Section 5102(d) in that she was disabled for a period in excess of 90 out of the first 180 days following the occurrence; that she sustained a 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 organ or member; significant limitation of use of a body function or system; significant disfigurement; a fracture.

The movant relies on the orthopedic medical evaluation of Dr. Richard Weiss dated December 22, 2011 in support of the application for summary judgment. With respect to the cervical spine, Dr. Weiss found the following: no spasm in the trapezil or paracervical muscles. Range of motion tests performed by a goniometer were all found to be in the normal range and the testing elicited no complaint of pain. No tenderness was elicited on palpation of the paracervical muscles; Spurling's maneuver failed to elicit any sign of radiculopathy to the shoulders bilaterally; motor strength was 5/5 in the upper extremities; sensation was normal; and reflexes were 2+.

With respect to the lumbar spine, Dr. Weiss found that there was no spasm in the paralumbar muscles; no tenderness on palpation of the paralumbar muscles. Range of motion tests performed by a goniometer were all found to be in normal range. Straight leg raise testing was negative bilaterally; heel/toe walking as well as tandem walk was performed without difficulty; minor's sign was absent; motor strength was 5/5 in the lower extremities; sensation was normal and reflexes were 2+.

With respect to the shoulders, Dr. Weiss found that there was no creptius noted in either shoulder; impingement sign was negative. Range of motion tests performed by a goniometer were all found to be in normal range.

Dr. Weiss' impression after performing the physical examination upon plaintiff and the history as reported, if correct, by plaintiff was a resolved cervical sprain/strain; resolved lumbosacral sprain/strain; and resolved right shoulder sprain/strain. Furthermore, he concluded that there was no objective evidence of any disability.

Based on the admissible evidence, the court finds that the defendant has established a *prima facie* case that the plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102 (d), specifically, a fracture, a disfigurement, a 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 organ or member; significant limitation of use of a body function or system; or 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 burden now shifts to the plaintiff to raise an issue of fact with respect to whether she meets the serious injury threshold requirement.

In opposition to the application, the plaintiff submitted only the following documentary evidence: an unsigned MRI report dated October 26, 2007 by Five Towns Total Medical Care, P.C. The court notes that the MRI report of plaintiff's cervical spine was not signed or sworn, therefore, any reference to it by a physician for plaintiff is disregarded (*see, Mahoney v Zerillo*, 6

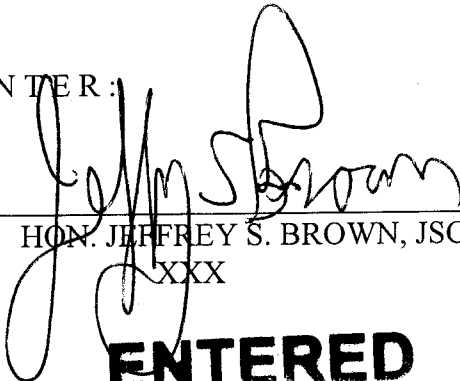
AD3d 403; *Friedman v U-Haul Truck Rental*, 216 AD2d 266; *Bycinthe v. Kombos*, 29 A.D.3d 845, 815 N.Y.S.2d 693; *Vista Surgical Supplies, Inc. v Travelers Ins. Co.*, 50 AD3d 778; *Dowling v. Mosey*, 32 A.D.3d 1190, 1191).

In the instant matter, the defendants did succeed in making a *prima facie* showing that the plaintiff did not sustain a "serious injury" pursuant to the Insurance Law. Further, the plaintiff did not successfully counter this showing with sufficient medical evidence, in admissible form, to demonstrate the existence of material issues of fact that she has in fact sustained a "serious injury" pursuant to the aforementioned insurance law.

Accordingly, based on the foregoing, the motion and cross-motion by the defendants for summary judgment dismissing the claims against them must be **GRANTED**, with prejudice.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
May 30, 2012

ENTER :

HON. JEFFREY S. BROWN, JSC
XXX

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ENTERED
JUN 05 2012
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