

Santos v Grunner

2012 NY Slip Op 32786(U)

November 7, 2012

Supreme Court, Suffolk County

Docket Number: 09-36592

Judge: Denise F. Molia

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INDEX No. 09-36592
CAL. No. 12-00513MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 6-12-12
ADJ. DATE 9-28-12
Mot. Seq. # 002 - MD

-----X
JOSE SANTOS, MARTA BENITEZ and :
CARMEN SARAVIA, :
 :
 :
 Plaintiffs, :
 :
 - against - :
 :
 LOMA C. GRUNNER, :
 :
 :
 Defendant. :
-----X

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Upon the following papers numbered 1 to 39 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 27; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 28-29 (untabbed); Replying Affidavits and supporting papers 30-31; 32-39; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by the defendant, Loma C. Grunner, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiffs, Jose Santos, Marta Benitez, and Carmen Saravia, failed to sustain serious injuries as defined by Insurance Law § 5102 (d), is denied.

Plaintiffs seek to recover damages for personal injuries allegedly sustained in a motor vehicle accident which occurred on Route 110, at or near the intersection with Pinelawn Road, in Huntington, New York, when the vehicle being operated by plaintiff, Jose Santos, was struck in the rear by a vehicle operated by defendant Loma C. Grunner. Marta Benitez and Carmen Saravia, were passengers in the Santos vehicle at the time of the accident. Summary judgment was previously granted to plaintiff on the counterclaim, Jose Santos, against defendant Grunner on the issue of liability, by order dated November 16, 2011 (Molia, J.), and the counterclaim and all cross claims asserted against Santos were dismissed.

The defendant now seeks summary judgment on the basis that Jose Santos, Marta Benitez, and Carmen Saravia did not sustain serious injuries as defined by Insurance Law §5102 (d). The plaintiffs oppose the defendant's application.

Pursuant to Insurance Law § 5102(d), " '[s]erious 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 medical determined injury or impairment of a non-permanent

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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 term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (*Licari v Elliot*, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (*DeAngelo v Fidel Corp. Services, Inc.*, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott, supra*).

Based upon a review of the foregoing evidentiary submissions, it is determined that the defendant failed to establish prima facie entitlement to summary judgment on the issue of whether each plaintiff sustained a serious injury as defined by Insurance Law § 5102 (d).

The defendant's experts have not provided copies of their respective curriculum vitae and have not set forth the bases in their respective reports to each qualify as an expert to give testimony in this matter. The defendant has failed to provide with the moving papers, the copies of the medical records which her experts reviewed and upon which they base their opinions, in part, including the MRI reports of each of the plaintiffs' MRI studies, x-ray reports, and hospital records, as required pursuant to CPLR 3212. Expert testimony is limited to facts in evidence (*see, Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *Marzuillo v Isom*, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; *O'Shea v Sarro*, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; *Hornbrook v Peak Resorts, Inc.* 194 Misc2d 273, 754 NYS2d 132 [Sup Ct. Tomkins County 2002]), which evidence has not been provided in this case. While the defendant attempted to correct these deficiencies in the moving papers by providing some of plaintiffs' MRI reports in the reply papers, factual issues concerning those reports still preclude summary judgment from being granted to the defendant.

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JOSE SANTOS

By way of his verified bill of particulars, Jose Santos alleges that as a result of this accident he has sustained injury consisting of loss of enjoyment of life and the prior activities which he enjoyed; 2.5 x 1.6 x 1.8 collection located to the left of the L2 spinous process consistent with hemorrhage from muscle tear of the paraspinal muscles; right shoulder curved acromion process causing a moderate degree of subacromial impingement upon the musculotendinous junction of the supraspinatus; subcortical cystic changes in the greater tuberosity by the insertion of the infraspinatus tendon; signal abnormality in the distal supraspinatus tendon consistent with a partial tear and tendinitis without retraction; arthroscopic surgery, shaving and debridement of torn glenoid labrum and subacromial decompression; post concussion syndrome; headaches; jaw pain; radiculitis of the entire spine; and aggravation of prior injuries.

Michael J. Katz, M.D. has set forth that he examined Jose Santos, a 47 year old male, in an independent orthopedic examination relating to injuries Santos alleges occurred to his neck, back and right shoulder in this accident. Dr. Katz has set forth his range of motion findings, measured with a goniometer upon examination of Santos' cervical and lumbar spine, right shoulder, and upper and lower extremities, and set forth no deficits on comparing those findings with the normal range of motion values. Dr. Katz stated that Santos was status post successful arthroscopy of the right shoulder. He stated that he reviewed the intra-operative photographs which, he stated, revealed degenerative changes in the labrum of the right shoulder, which changes ordinarily do not require surgery. He continued that the changes noted in the MRI report of June 3, 2007 are pre-existing developmental anatomic changes, as well as degenerative, but are not acute traumatic changes. However, Dr. Katz does not set forth the basis for this conclusory opinion which is unsupported by evidentiary proof. Additionally, Dr. Katz does not address the findings set forth in the operative report with regard to the impingement syndrome and the subacromial decompression, leaving the court to speculate as to the cause of such conditions and their relation to the subject accident. He does not state that such conditions do not require surgical intervention, raising further factual issue. Such factual issues preclude summary judgment. Dr. Katz's additional affirmation adds nothing further to his initial report.

Although Jose Santos alleges to have sustained radiculitis relating to his spine, and Dr. Katz diagnosed that Santos has resolved cervical strain with radiculitis, and resolved lumbar strain with radiculitis, no report from an examining neurologist has been submitted by the defendant, thus further precluding summary judgment (*Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; *Rodriguez v Schickler*, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996]). Notably, Dr. Katz does not set forth the basis for his opinion that such radiculitis is resolved.

Jeffrey Warhit, M.D., defendant's radiology expert, has set forth that he reviewed the MRI's of the Jose Santos' lumbosacral spine dated May 30, 2007, and right shoulder dated June 3, 2007, and set forth his findings. However, he did not set forth the findings in the MRI report issued by plaintiff's examining physician, leaving it to this court to speculate as to the findings therein. In his report concerning his radiologic review of Jose Santos' MRI of the lumbosacral spine of May 30, 2007, Dr. Warhit did find that the plaintiff had a small central disc herniation at the L5-S1 level, with mild mass effect on the anterior aspect of the dural sac, as well as moderate narrowing of the neural foramina. His impression, however, is that the study is negative for evidence for a traumatic injury to the lumbosacral spine and is also negative for evidence of fracture, disc herniation or disc bulging, thus contradicting his finding of a small central disc herniation at the L5-S1 level. He also noted a 2cm cystic-appearing mass in the paraspinal muscles posteriorly at the level of L2, which he stated does not appear traumatic in etiology and stated that possibilities for its presence include a ganglion cyst. Dr. Warhit does not rule out that this cyst was due to muscle tear as alleged by the plaintiff, and does not rule out that it was not caused by

the subject accident.

Based upon the foregoing, it is determined that the defendant has failed to establish prima facie entitlement to summary judgment on the basis that Jose Santos did not sustain a serious injury as defined in Insurance Law § 5102 (d) as to the first category of injury.

MARTA BENITEZ

By way of her verified bill of particulars, Marta Benitez alleges that as a result of this accident she has sustained injuries consisting of loss of enjoyment of life; cervical spine posterior disc bulges at C2-3, C5-6, and C6-7 encroaching on the ventral aspect of the thecal sac and lateral recesses bilaterally; lumbar posterior disc bulges at L2-3 through L4-5 which are each encroaching upon the ventral aspect of the thecal sac and lateral recesses bilaterally; lumbar posterior disc herniation at the L5-S1 level favoring the right side and encroaching upon the ventral aspect of the thecal sac and lateral recesses bilaterally with the right side greater than the left, impinging upon the ventral margin of the right S1 nerve root; right shoulder straight acromium process with mild hypertrophic changes of the acromioclavicular joint causing a mild to moderate degree of subacromial impingement upon the musculotendinous junction of the supraspinatus; signal abnormality in the distal supraspinatus tendon crossing a substantial portion of the thickness and possibly crossing its full thickness, consistent with a tear and/or tendinitis and may represent a small full thickness tear or significant thickness partial tear of the supraspinatus; small amount of fluid in the subacromial subdeltoid bursa which could be related to the possible tear or represent some bursitis; arthroscopic surgery, shaving and debridement of the glenoid labrum tear and subacromial decompression; right knee moderate size joint effusion; post concussion syndrome; headaches; jaw pain; radiculitis throughout the entire spine; aggravation of prior injuries.

Michael J. Katz, M.D. set forth in his affirmation that he performed an independent orthopedic examination on Marta Benitez and that he reviewed various records pertaining to her claim of injuries, as well as color copies of the intra-operative pictures taken during the arthroscopic surgery performed on her on July 1, 2007. Dr. Katz stated that upon his review of those intra-operative pictures, he noted no acute tears and that the definitive changes shown therein were more likely due to the plaintiff's job as an office cleaner rather than anything related to the subject accident of April 17, 2007. However, Dr. Katz does not set forth the basis for his conclusory opinion which is unsupported by evidentiary proof.

During his independent orthopedic examination of Marta Benitez, Dr. Katz noted that she sustained injuries to her neck, back, right shoulder, and right knee, and that she underwent arthroscopic surgery to the right shoulder on July 1, 2007, followed by physical therapy three to four times per week for eight to nine months. At the exam, she complained of pain in her right shoulder with lifting. Dr. Katz set forth the range of motion findings determined with a goniometer in examining Marta Benitez's cervical and thoracolumbar spine, her right shoulder and her right knee. He compared his findings to the normal ranges of motion and set forth no deficits. His diagnosis was that of cervical strain-resolved; lumbosacral strain-resolved, right knee contusion-resolved, and status successful, post arthroscopy of the right shoulder. There are factual issues raised by Dr. Katz who has set forth that the intra-operative photos of the right shoulder arthroscopy of July 10, 2007 indicated definitive changes with no acute tears, although he does not state what those definitive changes are. He added that the MRI report of her right shoulder of June 9, 2007, indicted tendinitis or partial tear of the supraspinatus, which conflicts with the operative report which indicated a glenoid labrum tear and subacromial decompression, as well as partial tear of the rotator cuff. He then stated that "[t]here are no acute visualized on the intra-operative photos." He added that it is far more likely that the pathology that was addressed in the right shoulder was the result of Benitez working as an office cleaner than anything that occurred as a restrained front passenger. However, Dr. Katz does not provide

a basis for his conclusory opinion, which is unsupported by evidentiary proof.

Although Marta Benitez alleges to have sustained radiculitis relating to her spine, no report from an examining neurologist has been submitted by the defendant, thus further precluding summary judgment (*Browdame v Candura, supra; Rodriguez v Schickler, supra*).

Jeffrey Warhit, M.D. has set forth in his affirmation concerning his independent radiology review of the MRI's of Marta Benitez's lumbosacral spine dated May 30, 2007, cervical spine dated June 2, 2007, and right shoulder dated June 9, 2007. Dr. Warhit indicated that he saw a small disc herniation at L5-S1 which was a degenerative change, however, he did not set forth the basis for his opinion that it was a degenerative change, or when such degeneration occurred. It is noted in his report dated November 1, 2010, that his impression was that the disc herniation at the L5-S1 level "may well be on a degenerative basis." He continued that there is no evidence of a traumatic injury to the lumbosacral spine, but does not set forth the basis for this conclusory opinion. As to the cervical spine, he noted mild bulging discs at C5-6 and C6-7, with degenerative changes from C4-C7. Again, he did not set forth the basis for his opinion that it was a degenerative change, or when such degeneration occurred. In his report of November 1, 2010, he also noted intervertebral disc space narrowing and anterior and posterior osteophyte formation. In that report he noted that the bulging discs noted at C5/C6 and C6/C7 levels "may well be on a degenerative basis," however, he did not rule out that they were proximately caused by the accident. His review of the plaintiff's right shoulder MRI concluded that she had impingement syndrome secondary to degenerative changes in the acromioclavicular joint. He stated that there was no evidence of a traumatic injury to the right shoulder, but did not state any basis for his opinions. Such factual issues preclude summary judgment.

Based upon the foregoing, it is determined that the defendant failed to establish prima facie entitlement to summary judgment on the basis that Maria Benitez did not sustain a serious injury as defined in Insurance Law § 5102 (d) as to the first category of injury.

CARMEN SARAVIA

By way of her verified bill of particulars, Carmen Saravia alleges that as a result of this accident she sustained injuries consisting of cervical spine posterior disc herniation at C5-6 favoring the right side, encroaching upon the ventral aspect of the thecal sac, impinging upon the right ventral aspect of the cord, mildly deforming the ventral aspect of the cord; lumbar posterocentral disc herniation at L5-S1 encroaching upon the ventral aspect of the thecal sac; left shoulder mildly curved acromion process with mild hypertrophic changes of the acromioclavicular joint causing a mild to moderate degree of subacromial impingement upon the musculotendinous junction of the supraspinatus; tiny subcortical cystic changes in the greater tuberosity at the insertion of the infraspinatus tendon; left shoulder-signal abnormality within the distal supraspinatus tendon which does not cross the full thickness of the tendon and particularly involve the bursal surface, consistent with a partial tear and/or tendinitis without retraction, which required arthroscopic surgery, shaving, and debridement of the rotator cuff and the glenoid labrum, and subacromial decompression.

Dr. Katz has set forth in his affirmation that he reviewed various records, including color copies of the intra-operative pictures taken during Carmen Saravia's arthroscopic surgery performed on July 10, 2007. He stated that his review of those pictures revealed that there were pre-existing degenerative changes, including a degenerative labrum rotator cuff, which are not related to the subject accident. However, he has not set forth the basis for this opinion or what findings indicated that there were degenerative changes, or when they occurred. During his independent orthopedic examination of the plaintiff, he noted that she alleged injuries to her neck, back

and both shoulders, and that she had a right shoulder arthroscopy. Dr. Katz set forth his range of motion findings determined with a goniometer during his examination of the plaintiff's cervical, lumbar, right and left shoulder. The last page of his report has not been provided to this court. However, he incorporated the report into his later affirmation wherein he set forth his conclusory opinion that her injuries were degenerative, and unrelated to the accident, thus precluding summary judgment relative to Carmen Saravia's right shoulder injury.

Likewise, the affirmation of Jeffrey Warhit, M.D. relative to his review of Carmen Saravia's MRI of her right shoulder dated May 19, 2007, indicated that he found impingement syndrome secondary to degenerative changes in the acromioclavicular joint. However, although he stated he found no evidence of traumatic injury, his opinions are conclusory and unsupported.

Based upon the foregoing, it is determined that the defendant failed to establish prima facie entitlement to summary judgment on the basis that Carmen Saravia did not sustain a serious injury as defined in Insurance Law § 5102 (d) as to the first category of injury.

Turning to the second category of injuries defined in Insurance Law § 5102 (d), it is determined that the defendant's examining physician did not examine the plaintiffs during the statutory period of 180 days following the accident, thus rendering defendant's physicians' affirmation insufficient to demonstrate entitlement to summary judgment on the issue of whether any of the plaintiffs were unable to substantially perform all of the material acts which constituted their usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (*Blanchard v Wilcox*, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; see, *Uddin v Cooper*, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; *Toussaint v Claudio*, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the examining physician does not comment on the same. Additionally, there are factual issues concerning this category of injury relative to each plaintiff.

Jose Santos testified at his examination before trial to the extent that he had no injury to his right shoulder or neck prior to this accident, and worked in carpentry five days a week. After the accident, he experienced pain in his right shoulder and had surgery performed after chiropractic treatment did not help relieve his pain. After the surgery, some of the pain in his shoulder was relieved, but he still experiences pain in that shoulder. He is now unable to pick up his ladder from the truck and stretch his arm, and has had to change the way he moves the ladder. He can only lift sheet rock if he cuts it in half. He cannot lift heavy items any longer.

Marta Benitez testified to the extent that after the accident, she felt pain in her chest and right shoulder and went to Huntington Hospital to be treated. Thereafter, she followed up with Dr. Anand for pain in her back, chest and arm, and underwent chiropractic treatment. Subsequently, surgery was performed to her right shoulder, followed by physical therapy, however, she still experiences pain in her right shoulder on a daily basis. About once a week, she experiences pain in her lower back and with numbness in her right leg. Prior to this accident, she experienced no problems or physical complaints with her right shoulder or back. She was involved in a subsequent accident and sustained injury to her left shoulder. As a result of the injuries alleged to have been sustained in the subject accident, she cannot lift heavy items, and when she lifts lighter items, she has to first put the item on her foot before she can lift the item. She can not move her arm backward and forward. Prior to the accident, she was employed by Dr. Davis cleaning his office five days a week, three to four hours each day, and continues to work for him. She also worked doing house cleaning, but is not currently doing so. Prior to the accident, she also worked at buffets, but since the accident, she can no longer lift the chafing dishes, and can no longer do that work.

Carmen Saravia testified to the extent that on the date of the accident she was working at the Sweet Hollow Diner as a parking attendant, and sometimes cooked in the kitchen. After the accident, she did not return to that job, or to any other job she previously worked, as she still experiences back pain from the back injury allegedly sustained in the subject accident. She stated that she is sixty-seven years of age and is now receiving social security for her retirement. She has difficulty remembering things but did not know the diagnosis for her condition. She testified that on April 17, 2007, when the accident occurred, she was a passenger in the rear seat, seated in the middle, in the vehicle operated by her son, Jose Santos. As a result of the impact, her back came into contact with the floor of the car. She was seen in the emergency room at Huntington Hospital and received physical therapy for three months for her back and complaints of pain in her right knee thereafter. She could not remember if she had complaints of pain or injury to any other parts of her body arising out of the accident, and she could not remember Dr. Mannes who performed her shoulder surgery, and could not remember that she had the right shoulder surgery as a result of the subject accident. Since the accident, she cannot lift heavy things and has to take her laundry to the laundromat instead. She had a subsequent accident while a passenger in the vehicle operated by another son, William Calixto, causing her back injury to become worse.

These factual issues raised in defendants' moving papers preclude summary judgment, as the defendants failed to satisfy the burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see, Agathe v Tun Chen Wang*, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also, Walters v Papanastassiou*, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving party in motion (001) failed to establish her prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see, Yong Deok Lee v Singh*, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); *Krayn v Torella*, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; *Walker v Village of Ossining*, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, motion (001) by the defendant for summary judgment dismissing the complaint is denied in its entirety.

Dated: November 7, 2012


Hon. Denise F. Mott
J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION