

Gomez v Orozco

2013 NY Slip Op 30928(U)

April 25, 2013

Supreme Court, New York County

Docket Number: 111850/2009

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ARLENE P. BLUTH

PRESENT: _____
Justice

PART 22

Index Number : 111850/2009
GOMEZ, ELVIRA
vs.
OROZCO, NELSON
SEQUENCE NUMBER : 003
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for 12f's MSJ / serious inj

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 1

Answering Affidavits — Exhibits _____ | No(s) 1 ~~004~~

Replying Affidavits _____ | No(s) 3

Upon the foregoing papers, it is ordered that this motion is

*consolidated for joint disposition
with mot seq 004 and is*

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

~~DECIDED IN ACCORDANCE WITH~~
FILED

MAY 01 2013

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4/25/13

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22**

Index No.: 111850/09
Seq 003 and 004

Elvira Gomez, Andres Gomez and Daniel Gomez,
Plaintiffs,

-against-

**Nelson Orozco, Rolando Correa and
Benito Tapia,**

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

FILED

MAY 01 2013

NEW YORK

COUNTY CLERKS OFFICE

Motion sequence numbers 003 and 004 are consolidated for filing.

Defendant Orozco's motion for summary judgment dismissing Daniel Gomez's claims on the grounds that he did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) (seq 003) is granted. Defendants Correa and Tapia's motion dismissing Andres Gomez's claims on the same grounds (seq 004) is denied.

In this action, plaintiffs allege that on November 22, 2008 they sustained personal injuries when they were passengers in a vehicle owned by Tapia and operated by Correa which was involved in an accident with Orozco's vehicle.

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Rodriguez v Goldstein*, 182 AD2d 396 [1992]). Such evidence includes "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003], quoting *Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert

affidavits indicating that plaintiff's injury was caused by a pre-existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818 [1st Dept 2010], citing *Pommells v Perez*, 4 NY3d 566 [2005]). In order to establish prima facie entitlement to summary judgment under the 90/180 category of the statute, a defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident (*Elias v Mahlah*, 2009 NY Slip Op 43 [1st Dept]). However, a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*id.*).

Once the defendant meets his or her initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury (*see Shimm*, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Further, where the defendant has established a pre-existing condition, the plaintiff's expert must address causation (*see Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]).

Daniel Gomez (seq 003)

In paragraph 16 of the bill of particulars, Daniel Gomez alleges, inter alia, that he suffered

a tear of the meniscus of his right knee and trauma to his left knee, and disc herniation at T11-12 (thoracic spine) and disc bulge at L4-5 (lumbar spine). In support of the motion that Daniel Gomez did not sustain a serious injury, defendant Orozco refers to the June 9, 2011 affirmed report (exh E to moving papers) of Dr. Westerband, an orthopedist, who reviewed Daniel Gomez's records and performed a physical examination. In his report, Dr. Westerband found full ranges of motion in his lumbar spine, and both knees (measured by a goniometer), and determined that all orthopedic tests were negative; he concluded that plaintiff's lumbar spine injury and right knee strain/sprain were resolved, he had left knee internal derangement, and there was no evidence of a disability.

Additionally, movant indicates that Daniel was not incapacitated from his customary daily activities for at least 90 days during the 180 days following the accident because he did not claim that he lost any time from work or school either in his bill of particulars (exh C) or at his deposition (exh D).

Based on the foregoing, defendant has satisfied his burden of establishing prima facie that plaintiff Daniel Gomez did not suffer a serious injury, and the burden shifts to plaintiff to raise a triable factual question as to whether he sustained a serious injury.

In opposition, Daniel submits the affirmation of Dr. Roskin, a radiologist who reviewed a December 24, 2008 MRI of Daniel's right knee and found a tear in his right medial meniscus, and a December 31, 2008 MRI of Daniel's lumbar spine and found a disc herniation at T11-12 (exh K). Nothing in this report raises a triable question of fact to defeat summary judgment because Dr. Roskin did not state that these conditions were causally related to the subject motor vehicle accident.

Additionally, Daniel submits an unsigned, unaffirmed 12/23/08 report from an orthopedist, Dr. Leibowitz (exh L), and an initial report and physical therapy initial evaluation from Bronx Park Medical, PC (exh M), which are unaffirmed which were not in admissible form and were not considered. However, even if these unaffirmed reports were considered, they did not address causation.

Because plaintiff Daniel Gomez has not refuted defendant Orozco's prima facie evidence that his injuries lumbar spine and right knee sprain/strain were resolved, and there has been no showing of permanent consequential limitation of a body organ, function or system, no showing of a significant limitation of use of a body function or system, and no showing of a medically determined injury which prevented him from performing substantially all of his customary and usual activities for at least 90 of 180 days following the accident, defendant Orozco's motion for summary judgment dismissing Daniel Gomez's claims (seq 003) is granted.

Andres Gomez (seq 004)

In his bill of particulars (para. 16), Andres alleges, inter alia, that he suffered a head injury, loss of hearing and tinnitus, and disc herniations to the cervical spine at C2-3, C3-4 and C5-6, and to the lumbar spine at L2-3 and L3-4. In support of their motion that Andres Gomez did not sustain an serious injury, defendants Correa and Tapia refer to the July 6, 2011 affirmed report (exh E to moving papers) of Dr. Tikoo, an neurologist who examined Andres Gomez at the request of defendants' no-fault carrier. Dr. Tikoo stated that he reviewed Andres Gomez's records and performed a physical examination, and found no evidence of a primary neurologic disability or deficit. Specifically, Dr. Tikoo's diagnosis was (1) history of cervical sprain, (2)

history of lumbosacral sprain, and (3) subjective complaints of hearing loss.

Significantly, in the report of plaintiff's July 6, 2011 physical examination, Dr. Tikoo noted "(h)earing was decreased bilaterally" but he does not state what tests he performed or how he made this determination. In his diagnosis, Dr. Tikoo contradicts this finding by stating that plaintiff's hearing loss was subjective; again, he does not state the basis for that conclusion. Defendants did not submit a report from an otolaryngologist, audiologist or any other health care provider in connection with plaintiff's claimed hearing loss. As such, defendants' motion papers failed to demonstrate, prima facie, that plaintiff's alleged hearing loss was not causally related to the subject accident, and it is unnecessary to determine whether the papers submitted by plaintiff in opposition were sufficient to raise a triable issue of fact. *See Catana v Hussain*, 78 AD3d 639, 909 NYS2d 920 (2d Dept 2010), citing *Lubrano v Brown*, 251 AD2d 383, 672 NYS2d 817 (2d Dept 1998) (Supreme Court properly denied defendant's motion for summary judgment as defendant's papers failed to show that plaintiff's alleged hearing loss, a serious injury, was not causally related to accident).

Because defendants' evidence failed to demonstrate that plaintiff's hearing loss was not causally related to the accident, it is unnecessary to address whether his proof with respect to other alleged injuries (cervical and lumbar spine) would have been sufficient to withstand defendants' motion for summary judgment. *See Sylla v Brickyard Inc.*, 104 AD3d 605, __ NYS2d __ (1st Dept 2013). Accordingly, defendants' motion (seq 05) is denied.

Accordingly, it is

ORDERED that defendant Orozco's motion for summary judgment dismissing plaintiff Daniel Gomez's claims on the grounds that he did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) (seq 003) is granted, and those claims are hereby dismissed as against all defendants and it is further

ORDERED that defendants Correa and Tapia's motion dismissing plaintiff Andres Gomez's claims on the same grounds (seq 004) is denied; and it is further

ORDERED that defendants are directed to serve a copy of this order with notice of entry on plaintiffs within 45 days.

This is the Decision and Order of the Court.

Dated: April 25, 2013
New York, New York



HON. ARLENE P. BLUTH, JSC

FILED
MAY 01 2013
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