

Castro v Vargas

2013 NY Slip Op 33791(U)

July 2, 2013

Supreme Court, Bronx County

Docket Number: 306812/09

Judge: Wilma Guzman

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

Index No. 306812/09
Motion Calendar No. 5
Motion Date: 4/22/13

ALICE CASTRO, JESUS LOPEZ AND HERMINO
CRESPO

Plaintiff,

-against-

OLGA C. VARGAS and RITA FROEHLICH
Defendants.

DECISION/ ORDER
Present:
Hon. Wilma Guzman
Justice Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support, and Exhibits Thereto.....	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers and after due deliberation, and following oral argument, the Decision/Order on this motion is as follows:

Defendant Froehlich moves for an Order granting summary judgment dismissing plaintiff Lopez' complaint on the grounds that this plaintiff fails to meet the burden of a sustainable serious injury under Ins. Law sections 5102(d) and 5104(a). Defendant Vargas cross-moves for an Order granting summary judgment dismissing plaintiff' Lopez' complaint and adopts and incorporates the exhibits and arguments of defendant Froelich. Plaintiff Lopez submitted written opposition.

Plaintiffs commenced this cause of action seeking damages for injuries allegedly sustained while operating his motor vehicle on February 10, 2008.

In support of the motion for summary judgment, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician. *Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2nd Dept. 1992) Also, an affirmed physician's report, being in admissible form and showing that a plaintiff was not suffering from any disability or consequential injury from the accident would be sufficient to satisfy

a defendant's burden of proof and shift to the plaintiff the burden of establishing the existence of a triable issue of fact. See Gaddy v. Eyley, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992), where defendant established a prima facie case that plaintiff's injuries were not serious through the affidavit of a physician who examined plaintiff and concluded that plaintiff had a normal examination. When the movant has made such a showing, the burden shifts and it then becomes incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). To raise a triable issue of fact as to whether a herniated disc constitutes a serious injury, a plaintiff is required to 'provide objective evidence of the extent or degree of the alleged physical limitations resulting from the [injury] and their duration' (Noble v. Ackerman, 252 A.d.2d 392, 394). In lieu thereof, "[a]n expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (see Dufel, 85 N.Y.2d at 798.'" (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 350).

Dr. Michael J. Katz examined plaintiff Jesus Lopez on July 7, 2011. Using a goniometer, Dr. Katz noted normal ranges of motion in the plaintiff's cervical spine and limited range of motion as compared to the norm in the lumbosacral spine, post laminectomy, , thoracolumbar spine. Dr. Katz reviewed the MRI report of the cervical spine MRI taken on February 22, 2008 and the April 2, 2009 radiology review of this cervical spine done by Dr. Mendelsoh. The impression indicated mild age related degenerative change with no evidence of focal disc herniation or any abnormality causally related to the trauma of February 10, 2008. Dr. Katz further reviewed MRI report of the lumbar spine MRI taken on April 7, 2008. Dr. Katz opined that the plaintiff's laminectomy which he underwent two years after the subject accident was not causally related to the accident since the April 7, 2008 lumbar spine MRI did not show any disc bulges or herniations. Dr. Katz further opined that the cervical spine radiculopathy had resolved. Plaintiff is not disabled, capable of activities of daily living and capable of gainful employment with limited bending or lifting.

Dr. James Hughes examined the plaintiff Jesus Lopez on August 22, 2012. Dr. Huges reviewed the MRI report of the cervical spine MRI taken on February 22, 2008 and the lumbar spine MRI taken on April 7, 2008 as well as the reports of the lumbar spine MRI's done on October

13, 2009 and November 29, 2010. Dr. Hughes noted normal ranges of motion in the cervical spine and limited range of motion in the lumbar spine. Dr. Hughes opined that plaintiff had a herniated disc at L4-L5, chronic degenerative disease at L4-L5 and L5-S1 and was post L4-L5 and L5-S1 foraminotomies, laminectomies interbody discectomies, interbody space with bone graft occurring on December 2, 2010. Dr. Hughes opined that the April 7, 2008 MRI was normal, in particular there was no disc bulges, herniations or foraminal narrowing. The February 22, 2008 cervical MRI revealed posterior protruded disc at C5-C6. Dr. Hughes opined that plaintiff should continue with a home exercise program to strengthen his abdominal muscles which would enable him to return to work as a landscape worker.

Defendant has met the prima facie burden for summary judgment. It is now incumbent on the plaintiff to submit competent proof of a triable issue of fact.

In opposition, plaintiff submits, inter alia, the affirmation of Dr. Richard Radna who indicates that he treated plaintiff between September 2009 and January 2012. He reviewed plaintiff Lopez' medical reports and MRI's. He recommended that plaintiff undergo lumbar spine surgery and on December 2, 2010, plaintiff Lopez underwent a decompressive Laminectomy/Facetctomy at L4/5, L5-S1, Laminectomy L5. On December 3, 2010, plaintiff Lopez underwent an L4-5 and L5-S1 discectomy and Inter-body Stabilization. Dr. Radna opined that he disagreed with Dr. Hughes opinion that the plaintiff's lumbar spine injuries were degenerative and causally relates them to the subject accident and not degeneration. Furthermore, in March 2013, plaintiff continued to show range of motion limitations in the cervical spine and lumbar spine.

Dr. Chantal Hilaire conducted range of motion testing on plaintiff Lopez on February 14, 2008 and found range of motion limitations as compared to the norms in the plaintiff's cervical spine and lumbar spine.

Plaintiff Jesus Lopez has submitted sufficient proof to raise a triable issue of fact as to whether he sustained a serious injury of a significant limitation of use of a body organ, member, function or system or a permanent consequential limitation of use of a body function or system.

See generally, Sylla v. Brickyard Inc., 2013 WL 1235463(1st Dept. 2013), under the Insurance Law § 51. Dr. Hilarie examined plaintiff and found range of motion limitations as compared to the norms

contemporaneous to the accident in both the cervical spine and lumbar spine. In her records, she causally related plaintiff's symptomology to the subject accident. She further indicates, therein that plaintiff Lopez is partially disabled. Dr. Hilarie's sworn reports, which were also reviewed by defendants doctors, coupled with Dr. Radna's opinion, which he rendered after reviewing the plaintiffs medical records and MRI's, and findings plaintiff Lopez injuries were causally related to the accident and not degenerative, are enough to raise triable issues of fact as to whether the plaintiff's injuries were causally related to the accident or degenerative. *Contra Kamara v. Ajlan*, 2013 N.Y. Slip Op. 3064643(N.Y.A.D. 1st Dept); *Vasquez v. Almanzar*, 2013 N.Y. Slip Op. 04561 (N.Y.A.D. 1st Dept.). However, plaintiff fails to submit sufficient medical proof that they were unable to perform their usual and customary activities for 90 out of the first 180 days following the accident. *Uddin v. Cooper*, 32 A.D.3d 270 (1st Dept.2006). All other portions of defendants motion are unavailing.

Accordingly, it is

ORDERED that defendant Froelich's motion for summary judgment dismissing the complaint of plaintiff Jesus Lopez for failure to sustain a serious injury is hereby granted to the extent that plaintiff Jesus Lopez has failed to raise a triable issue of fact as to whether he was incapable of performing all of his usual and customary activities for 90 out of 180 days following the accident. All other portions of defendant's motion for summary judgment are hereby denied.

It is further

ORDERED that defendant Castro's motion for summary judgment dismissing the complaint of plaintiff Jesus Lopez for failure to sustain a serious injury is hereby granted to the extent that plaintiff Jesus Lopez has failed to raise a triable issue of fact as to whether he was incapable of performing all of his usual and customary activities for 90 out of 180 days following the accident. All other portions of defendant's motion for summary judgment are hereby denied. It is further

ORDERED that defendant Froelich serve a copy of this order upon all parties with notice of entry, within thirty(30) days of this order.

This constitutes the decision of the Court.

DATE

~~JUL - 2 2013~~

HON. WILMA GUZMAN, JSC.