

Acosta v Gutierrez

2013 NY Slip Op 33947(U)

August 5, 2013

Supreme Court, Bronx County

Docket Number: 307300/2009

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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NELSON ACOSTA,

Plaintiff,

DECISION AND ORDER

Index No. 307300/2009

- against -

JUDIT GUTTIERREZ, ELVIN DIAZ, CLARIVEL
DELCASTILLO and DAVID DELCASTILLO,

Defendants.

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PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated January 16, 2013 of defendants Clarivel Delcastillo and David Delcastillo and the affirmation, affirmed report, exhibits and memorandum of law submitted in support thereof; plaintiff's affirmation in opposition dated July 8, 2013 and the affidavit and affirmations annexed thereto; the reply affirmation dated July 25, 2013 of defendants Clarivel Delcastillo and David Delcastillo; and due deliberation; the court finds:

Plaintiff commenced this action to recover damages for personal injuries sustained in a motor vehicle accident that occurred on November 25, 2008. Defendants Clarivel Delcastillo and David Delcastillo (collectively "Delcastillo") now move pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint on the ground that plaintiff did not sustain a "serious injury," as the phrase is defined in Insurance Law § 5102. Plaintiff alleges in his verified bill of particulars to have sustained a tear to the lateral rotator cuff in his right shoulder and radiculitis, subluxation and disc displacement of his spine. He was confined to his "bed home for approximately 27 weeks." Plaintiff claims he suffered a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and 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 ("90/180"). Plaintiff does not identify an injury in the nature of a significant disfigurement in his bill of particulars.

In support of the motion, Delcastillo submits copies of the pleadings, plaintiff's deposition transcript, and an affirmed report from Thomas Nipper, M.D., who conducted an orthopedic examination of plaintiff on December 20, 2011. Except for a limitation on a single plane of movement of the cervical spine, Dr. Nipper observed full ranges of motion of the cervical and lumbar spine and right shoulder and additional tests administered were negative. He concluded that plaintiff's spine and shoulder strains/sprains had resolved without any objective evidence of any disability.

Plaintiff was a high school sophomore at the time of the accident although he ceased attending school in January 2009. He visited the emergency room three days after the accident and complained of neck, rib, and shoulder pain. He was given a neck brace and pain medicine before being released. He sought additional treatment in December and attended physical therapy for one year and two months. A specialist recommended shoulder surgery but plaintiff's no fault and Medicaid coverage would not pay for the surgery. He also worked as a cashier for three or four months in 2009. At the time of his deposition in 2011, plaintiff testified could no longer play baseball, carry his cousin's daughter, or lift objects greater than ten pounds.

Delcastillo has demonstrated that plaintiff did not a "permanent consequential" or a "significant limitation of use" of his spine or right shoulder. *See Osborne v. Diaz*, 104 A.D.3d 486, 961 N.Y.S.2d 117 (1st Dep't 2013); *Brand v. Evangelista*, 103 A.D.3d 539, 962 N.Y.S.2d 52 (1st Dep't 2013). The limitation in a single plane of movement of the cervical spine is insufficient to negate the *prima facie* showing. *Paduani v. Rodriguez*, 101 A.D.3d 470, 470, 955 N.Y.S.2d 48, 49 (1st Dep't 2012). Delcastillo, though, is not entitled to dismissal of plaintiff's 90/180 claim. Plaintiff alleged he was

confined to his home for twenty-seven weeks, although he began work as a cashier in March or May 2009. Delcastillo's medical expert examined plaintiff well beyond the statutory period, *see Robinson v. Joseph*, 99 A.D.3d 568, 952 N.Y.S.2d 187 (1st Dep't 2012), and Delcastillo submitted no medical evidence contradicting plaintiff's claimed disability from the date of the accident until he began his job as a cashier. *See Jeffers v. Style Tr. Inc.*, 99 A.D.3d 576, 952 N.Y.S.2d 541 (1st Dep't 2012).

Plaintiff in opposition raises issues of fact whether he suffered a "permanent consequential" or "significant limitation of use" of the right shoulder. *See Clementson v. Price*, 107 A.D.3d 533, 967 N.Y.S.2d 357 (1st Dep't 2013). His treating physician, Riaz Ahmad, M.D. observed range of motion limitations of the right shoulder and cervical spine in an examination performed one month after the accident and opined the injury was causally related to the accident. He released plaintiff from his care on December 7, 2009 after finding that plaintiff had reached maximum medical improvement. Dr. Ahmad last examined plaintiff on March 11, 2013 and found limitations of the right shoulder accompanied by pain and spasm. Range of motion of the cervical spine was within normal limits. Joseph Leadon, M.D. interpreted the MRI taken February 19, 2009 of plaintiff's right shoulder and observed a "small amount of signal in lateral rotator cuff due to partial tear or to inflammatory change." He also reported disc dessication at C2-C3 and C3-C4 on the MRI taken March 5, 2009 of plaintiff's cervical spine.

As to plaintiff's claimed lumbar spine injury, plaintiff presented no proof of quantified or qualified range of motion limitations contemporaneous with the accident, *see Rosa v. Mejia*, 95 A.D.3d 402, 943 N.Y.S.2d 470 (1st Dep't 2012), as Dr. Ahmad reported that range of motion of the lumbar spine was within normal limits during his initial December examination. Dr. Ahmad also performed no tests on that area during the March 2013 examination.

Since plaintiff is unable to establish his claim of serious injury in the category of significant disfigurement and his claim of serious injury to the lumbar spine, dismissal in favor of defendants Judit

Gutierrez and Elvin Diaz is also warranted. *See* CPLR 3212(b); *Lopez v. Simpson*, 39 A.D.3d 420, 835 N.Y.S.2d 98 (1st Dep't 2007).

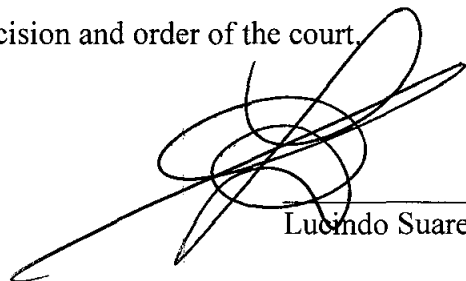
Accordingly, it is

ORDERED, that the motion of defendants Clarivel Delcastillo and David Delcastillo for summary judgment dismissing plaintiff's complaint is granted to the extent of dismissing plaintiff's claim of serious injury in the category of "significant disfigurement" and plaintiff's claim of serious injury to the lumbar spine; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants Judit Gutierrez, Elvin Diaz, Clarivel Delcastillo and David Delcastillo dismissing plaintiff's claim of serious injury in the category of "significant disfigurement" and plaintiff's claim of serious injury to the lumbar spine.

This constitutes the decision and order of the court.

Dated: August 5, 2013



Lucindo Suarez, J.S.C.