

Martinez v Virgil-Green
2014 NY Slip Op 31885(U)
July 16, 2014
Sup Ct, Suffolk County
Docket Number: 11-12463
Judge: Arthur G. Pitts
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 3-24-14
ADJ. DATE 4-3-14
Mot. Seq. # 002 - MD

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CARMEN D. MARTINEZ, STEPHANIE
FUENTES, and RAUL MARTINEZ,

Plaintiffs,

- against -

LETICIA M. VIRGIL-GREEN,

Defendant.

-----X

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Upon the following papers numbered 1 to 28 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 21 - 26; Replying Affidavits and supporting papers 27 - 28; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant for summary judgment dismissing the complaint on the ground that the plaintiffs did not sustain serious injuries as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiffs when their vehicle was rear-ended by a vehicle owned and operated by the defendant on Fifth Avenue in North Bayshore, New York, on October 1, 2008. At the time of the accident, plaintiffs Stephanie Fuentes and Raul Martinez were passengers in a vehicle operated by plaintiff Carmen Martinez.

By their bill of particulars, the plaintiffs allege that, as a result of the subject accident, Carmen Martinez sustained serious injuries including "supraspinatus tendinosis versus partial tear" in left shoulder, rotator cuff tear, shoulder sprain/strain, left shoulder tendonitis, numbing, tingling and burning sensation to the left shoulder, reversal of the normal cervical lordosis, cervical and lumbar herniated discs, cervical

and lumbosacral radiculopathy, cervical and lumbar sprain/strain, cervicalgia, lumbago, and cervical, thoracic and lumbar subluxation, and tenderness in the area of T1-S2 with spasm. The plaintiffs allege that Stephanie Fuentes sustained serious injuries including decreased signal intensity of the marrow on the T-1 weighted sequence of the left shoulder, rotator cuff tear, shoulder sprain/strain, straightening of the normal cervical lordosis, cervical radiculopathy, cervical sprain/strain, numbing, tingling and burning sensation to the left shoulder, cervical and lumbar herniated discs, cervical radiculopathy, cervical and lumbosacral sprain/strain, cervicalgia, lumbago, cervical and thoracic subluxation, and tenderness in the area of C1-C7 and L1-L5 with spasm. The plaintiffs allege that Raul Martinez sustained serious injuries including right foraminal narrowing at C3-C4, C4-C5, C5-C6, L3-L4, and L4-L5, herniated discs at C5-C6 and C6-C7, a bulging disc at L2-L3, tear of the distal supraspinatus tendon of the left shoulder, acromioclavicular joint arthrosis of the shoulders, supraspinatus and infraspinatus tendinosis of the right shoulder, numbing, tingling and burning sensation to the shoulders, rotator cuff tear, shoulder sprain/strain, straightening of the normal cervical lordosis, S1 radiculopathy, right C6 and left C7 radiculitis, bilateral carpal tunnel syndrome, tenderness in the area of C1-C7 and L1-L5 and the left knee with spasm, cervicalgia, cervical radiculopathy, cervical sprain/strain, lumbago, and lumbar subluxation.

The defendant now moves for summary judgment dismissing the complaint on the ground that the plaintiffs have not sustained serious injuries as defined in Insurance Law § 5102 (d).

Insurance Law § 5102 (d) defines “serious injury” as “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 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.”

In order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 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 a “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 (see *Perl v Meher*, 2011 NY Slip Op 8452, 2011 NY Lexis 3320 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) (see *Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos* 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff’s own deposition testimony and the affirmed medical report

of the defendant's own examining physician (*see Moore v Edison*, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; *Faroze v Kamran* 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Boone v New York City Tr. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, the defendant failed to make a prima facie showing that plaintiff Carmen Martinez did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see Reitz v Seagate Trucking, Inc.*, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). On August 5, 2013, approximately four years and ten months after the subject accident, the defendant's examining orthopedist, Dr. Edward Toriello, examined Carmen Martinez using certain orthopedic tests, including impingement sign, cross-arm test, straight leg raising test, McMurray's test, and Lachman's test. Dr. Toriello found that all the test results were normal or negative, and that there was no spasm or tenderness in Carmen Martinez's cervical and lumbosacral spine. Dr. Toriello performed range of motion testing on Carmen Martinez's cervical and lumbosacral spine, shoulders and knees using a goniometer, and found that she had range of motion restrictions: flexion 0 degrees (50 degrees normal) in the cervical spine, flexion 140 degrees (180 degrees normal) in the left shoulder, and flexion 45 degrees (60 degrees normal) in the lumbosacral spine (*see Jean v New York City Tr. Auth.*, 85 AD3d 972, 925 NYS2d 657 [2d Dept 2011]; *Reitz v Seagate Trucking, Inc.*, *supra*). Dr. Toriello opined that "the limitation of motion noted on today's examination is subjective and voluntarily limited by the claimant." Dr. Toriello failed to set forth the objective tests that were performed to support his conclusion that plaintiff Carmen Martinez did not suffer from any limitation of the range of motion in her cervical and lumbosacral spine and left shoulder (*see Chiara v Dernago*, 70 AD3d 746, 894 NYS2d 129 [2d Dept 2010]; *Mannix v Lisi's Towing Serv.*, 67 AD3d 977, 888 NYS2d 773 [2d Dept 2009]; *Vazquez v Basso*, 27 AD3d 728, 815 NYS2d 626 [2d Dept 2006]; *Kennedy v Brown*, 23 AD3d 625, 805 NYS2d 408 [2d Dept 2005]). Dr. Toriello's report is insufficient to sustain the defendant's prima facie burden.

On January 20, 2014, the defendant's examining radiologist, Dr. David Fisher, reviewed an X-ray examination of Carmen Martinez's cervical spine, performed on October 7, 2008, and two MRI examinations of her left shoulder and lumbar spine, performed on October 7, 2008 and December 20, 2008 respectively. Dr. Fisher found that the cervical vertebral bodies were normal in height and alignment, and that disc spaces were well preserved. With regard to the left shoulder, Dr. Fisher found that there was no fracture or marrow edema, the rotator cuff appeared intact, and there was no evidence of tendonitis or cuff tear. He also found that the lumbar vertebral bodies were normal in height and alignment, and that there was no disc herniation or annular bulge. However, Dr. Fisher's X-ray and MRI reports were not paired with a sufficient medical report of an orthopedist or neurologist who examined Carmen Martinez (*cf. Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]).

The defendant also failed to make a prima facie showing that plaintiff Stephanie Fuentes did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see Reitz v Seagate Trucking, Inc.*, *supra*). On April 9, 2013, approximately four years and six months after the subject accident, the defendant's examining orthopedist, Dr. Michael Katz, examined Stephanie Fuentes using certain orthopedic and neurological tests, including Adson's test, straight leg raising test, Babinski sign, Patrick sign, apprehension test, O'Brien's test, Hawkins Kennedy test, Lift-Off sign, and Hornblower's sign. Dr. Katz

found that all the test results were negative or normal. Dr. Katz performed range of motion testing on Stephanie Fuentes's cervical and lumbosacral spine and left shoulder using a goniometer, and found that her range of motion results when compared to normal findings were all normal. However, as Dr. Katz failed provide any specific range of motion testing results for right and left rotation of Stephanie Fuentes's lumbar spine, his report is insufficient to sustain the defendant's prima facie burden (*see Barrera v MTA Long Island Bus*, 52 AD3d 446, 859 NYS2d 483 [2d Dept 2008]).

The defendant likewise failed to make a prima facie showing that plaintiff Raul Martinez did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see Reitz v Seagate Trucking, Inc.*, *supra*). On April 9, 2013, the defendant's examining orthopedist, Dr. Michael Katz, examined Raul Martinez using certain orthopedic and neurological tests, including Adson's test, straight leg raising test, Babinski sign, Patrick sign, apprehension test, O'Brien's test, Hawkins Kennedy test, Lift-Off sing, and Hornblower's sign, Tinel's test, Phalen's test, Finkelstein's test, Durkan's compression test, and Lachman's test. Dr. Katz found that all the test results were negative or normal. Dr. Katz performed range of motion testing on Raul Martinez's cervical and thoracolumbosacral spine, shoulders, hands, wrists, and left knee and left shoulder using a goniometer, and found that his range of motion results when compared to normal findings were all normal. However, Dr. Katz failed provide any specific range of motion testing results for right and left rotation of Raul Martinez's lumbar spine (*see Barrera v MTA Long Island Bus*, *supra*). Moreover, although Dr. Katz found that Raul Martinez had normal range of motion in his shoulders, he failed to compare Raul Martinez's shoulders range of motion to what is considered normal range of motion (*see Quintana v Arena Transp., Inc.*, 89 AD3d 1002, 933 NYS2d 379 [2d Dept 2011]; *LaCagnina v Bernard*, 34 AD3d 534, 824 NYS2d 161 [2d Dept 2006]). By failing to compare the results that were reported to the normal range, Dr. Katz's report leaves it to the court to speculate as to whether the reported range of motion would have been abnormal (*see Djetoumani v Transit, Inc.*, 50 AD3d 944, 857 NYS2d 601 [2d Dept 2008]). Dr. Katz's report is insufficient to sustain the defendant's prima facie burden.

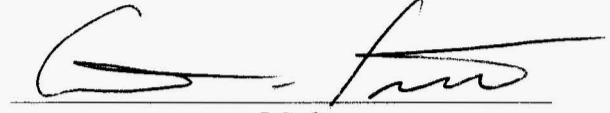
In addition, on January 20, 2014, the defendant's examining radiologist, Dr. David Fisher, reviewed two MRI examinations of Raul Martinez's lumbar spine, performed on December 13, 2007 and October 27, 2008, two MRI examinations of his cervical spine, performed on December 7, 2007 and October 27, 2008, and an X-ray examination of his cervical spine, performed on October 27, 2008. Dr. Fisher found that the lumbar vertebral bodies were normal in height and alignment, and that there were degenerative changes throughout the lumbar spine, most pronounced at the L3-L4 and L4-L5 levels. Dr. Fisher also found that the cervical vertebral bodies were normal in height and alignment, and that there were degenerative changes throughout the cervical spine, most pronounced from the C3-C4 through the C6-C7 levels. Dr. Fisher concluded that Raul Martinez's cervical and lumbar condition predated the subject accident and reflected a chronic pre-existing condition. As to an alleged preexisting condition, there is only Dr. Fisher's conclusory notation, itself insufficient to establish that Raul Martinez's pain might be chronic and unrelated to the accident (*see Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Linton v Nawaz*, 62 AD3d 434, 879 NYS2d 82 [1st Dept 2009]). Moreover, Dr. Fisher's X-ray and MRI reports were not paired with a sufficient medical report of an orthopedist or neurologist who examined Raul Martinez (*cf. Toure v Avis Rent A Car Sys.*, *supra*).

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Inasmuch as the defendant failed to meet her prima facie burden, it is unnecessary to consider whether the papers submitted by the plaintiffs in opposition to the motion were sufficient to raise a triable issue of fact (*see McMillian v Naparano*, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; *Yong Deok Lee v Singh*, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]).

Accordingly, the defendant's motion is denied.

Dated: July 16, 2014



J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION