

Diaz v Acevedo

2014 NY Slip Op 33314(U)

July 10, 2014

Supreme Court, Bronx County

Docket Number: 308579/2011

Judge: Norma Ruiz

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NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 308579/2011

YASMIN DIAZ,

Plaintiffs,

Decision and Order

-against-

Present:
HON. NORMA RUIZ

CESAR ACEVEDO and "JOHN DOE"

Defendants.

The following papers numbered 1 to 5 Read on this motion SUMMARY JUDGMENT
Noticed on 12/16/13 and duly submitted as No. 9 on the Motion Calendar of 4/21/14

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion

to:	Papers	Numbered
Notice of Motions, Affidavits Annexed and		
Memorandum of Law		1-3
Notice of Cross Motions and Answering Affidavits.....		4
Replying Affidavits		5
Other:		

Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:

Defendant moves for summary judgment on the grounds that the plaintiff did not sustain a serious injury. Upon a review of the moving papers and opposition submitted thereto, the motion is granted.

This action involves a motor vehicle accident on February 28, 2009. According to the bill of particulars plaintiff, who was 28 on the date of the accident, sustained the following injuries: bulging disc at C4-5, C5-6, C6-7, L4-5, L5-S1. Plaintiff further alleged that "to the extent defendants claim that any injuries sustained by the plaintiff were caused by pre-existing conditions, the plaintiff alleges that, as a result of the subject accident, plaintiff suffered an

activation and/or exacerbation of previously latent, inactive, dormant , quiescent, non symptomatic (sic) condition(s)”

The Court finds that the defendant met his prima facie burden of establishing that the plaintiff did not sustain a serious injury by submitting the affirmed report of its medical expert Dr Michael J. Katz who, based upon his examination of the plaintiff, found full range of motion in the plaintiff’s cervical and lumbar spine and concluded that all strains had resolved (*Cruz v Rivera*, [1st Dept 2012]). In addition, Dr. Katz noted the plaintiff was involved in two prior motor vehicle accidents.

It is undisputed that the plaintiff was involved in a motor vehicle accident in the year 2003 wherein she injured her neck and back, thereafter in 2007, she injured her right ankle. Apparently, there was also a subsequent accident in 2012 and it is unclear what injuries, if any, she sustained in that accident.

Defendant had an expert radiologist review MRI films of the plaintiff’s cervical and lumbar spine taken before the subject accident. The doctor opined that the cervical MRI performed on June 25, 2007 revealed “straightening of the normal cervical lordosis”, “mild disc desiccation at C2-3 through C5-6” and a “slight disc bulging at the C5-6 level. The doctor further opined that the MRI of the lumbar spine taken on August 9, 2007 revealed disc desiccation at the L4-5 level with disc space narrowing and circumferential disc bulging. It was noted that increased signal intensity along the posterior aspect of the disc is compatible with annular fissuring. In addition, the doctor opined that there were mild bilateral facet and ligamentous hypertrophic degenerative changes present which contributed to mild central canal stenosis. Also noted was a mild disc bulge at the L5-S1 level. The doctor opined that all of these injuries were degenerative disc disease and predated the accident.

In opposition, the plaintiff failed to raise an issue of fact. The plaintiff submitted in admissible form copies of the reports for the MRIs that were performed after the subject accident. The MRI of the cervical spine dated April 8, 2009 found a centrally bulging disc at C4-5, C5-6 and a broad bulging disc at C6-7 which caused slight spinal stenosis. The MRI of the lumbar dated April 22, 2009, found a broad bulging disc at L4-L5 and a centrally bulging disc at L5- S1. Plaintiff failed to submit the MRI reports for the tests performed on her cervical and lumbar spine in 2007. Thus the court is unable to compare and determine if the back injuries are essentially the same or if the injuries worsened after the subject accident of 2009. The court

notes, however, that based on the defendant's radiologist interpretation of the 2007 films, the injuries appear to be substantially the same.

The plaintiff's treating neurologist, Dr. Nicky Bhatia, submitted an affirmation in an attempt to address defendant's claim that the plaintiff's injuries are pre-existing. Dr. Bhatia states "I am aware of Ms. Diaz prior accident in 2003, where she injured her neck and back as well as her prior accident in 2007, where she injured her right ankle and right knee. I reviewed those prior records. She treated and made an adequate recovery. The accident of 2/28/09 exacerbated her prior condition" (see Dr. Bhatia's affirmation dated February 14, 2014). The court notes that the prior accident records were not annexed to the doctors affirmation. Nor was the basis for this opinion set forth in the affirmation. As such, this opinion is nothing more than a bald assertion. Regarding the subsequent accident, Dr. Bhatia simply noted that there was a subsequent accident and that when the plaintiff had the subsequent accident she was still experiencing pain to her neck and back from the 2009 accident.

Dr. Bhati's last examination of the plaintiff was on January 25, 2014. In his narrative report of said exam, he noted that "after traumatic injury in 2003 there has been ongoing neck and lumbar pain that was subsequently made worse with above accident in 2009" (see Dr. Bhatia's report dated January 25, 2014). This statement was in direct contrast to the doctor's later affirmation in which he claimed the plaintiff made an adequate recovery after the 2003 accident. Moreover, there was no basis for the doctor's opinion that the limitations found in his last exam were as a result of the accident in 2003 or 2009 or 2012. It is not enough for Dr. Bhati to just claim he reviewed the record of the prior accident and based on such review he believes the current injuries are attributable to the subject accident. The doctor has to provide a basis for such an opinion.

The plaintiff also annexed an affirmation from her treating physician, Dr. Ahmad Riaz, who also stated in a conclusory fashion that he reviewed the prior records and believes that plaintiff "made a full recovery" and, as such, her current limitations were causally related to the subject accident.

Based on the foregoing, the court finds that the plaintiff failed to show objective evidence by which the claimed aggravation of injuries sustained in the previous accident could be measured. There was no objective evidence of any injuries different from the pre-existing injuries sustained in the 2003 accident (*see generally Farmer v. Ventkate, Inc.* 117 AD3d 562

[1st Dept 2009]; *Nelson v. Tamara Taxi, Inc.*, 112 AD3d 547 [1st Dept 2013][plaintiff failed to show that the prior injury was less severe and fully resolved before the accident]). As such, the plaintiff failed to raise an issue of fact.

Accordingly, the motion is granted. This action is dismissed.

Dated: 7/10/14
Bronx, New York



HON. NORMA RUIZ, J.S.C.