

Canizalez v Gomez

2014 NY Slip Op 33507(U)

March 10, 2014

Supreme Court, New York County

Docket Number: 115973-2009

Judge: George J. Silver

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

5A
3/10/11
E

PRESENT: Hon. George J. Silver
Justice

PART 10

CANIZALEZ, ANA D.
- v -
GOMEZ, ROBERTO

RECEIVED
MAR 10 2011
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

INDEX NO. 115973-2009
MOTION DATE _____
MOTION SEQ. NO. 001

The following papers, numbered 1 to 2, were read on this motion for _____

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits----- No(s). 1, 2
Answering Affirmation(s) — Affidavit(s) — Exhibits----- No(s). 3
Replying Affirmation(s) — Affidavit(s) — Exhibits----- No(s). 4

FILED
MAR 10 2011
COUNTY CLERK'S OFFICE
NEW YORK

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

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident on December 20, 2008, Defendants Roberto Lopez and DR Limo Services, Inc. ("Defendants") move pursuant to §3212 and Insurance Law § 5101 (d) for an Order granting Defendants summary judgment dismissing Plaintiffs Ana D. Canizalez's ("D. Canizalez"), Lucia Jiminez's ("Jiminez"), Rosa Robles' ("Robles"), and Adriana Canizalez's ("A.Canizalez") Complaint. Plaintiffs oppose this motion.

In support of their motion, Defendants argue that each of the four Plaintiff's failed to plead a serious injury under New York Insurance Law §5102(d). D. Canizalez plead in her Bill of Particulars L3-L4 hypertrophy of the ligamentum flavum, bulging discs in L4-L5, L5-S1, C5-C6, C6-C7, and radiculopathy on the right of C5-C6. Jiminez plead anterior hypertrophic change at L5-S1, L2-L3 hypertrophy, L3-L4 hypertrophy and bulging disc, L4-L5 bulging disc plus hypertrophy, L5-S1 herniated disc, and C4-C5, C5-C6 bulges with radiculopathy. Robles has bulging discs at L2-L3, L3-L4, L4-L5, and L5-S1, hypertrophy of the capsule of the acromioclavicular joint of her right shoulder, Type III Acromion, and partial tear in her right ankle. A. Canizalez plead a right palmar subluxation of the distal phalanx of the first digit and right thumb hyperextension deformity with a probable injury to the volar plate. Upon expert examinations from Dr. Mann, an orthopedist, Dr. Bagley, a neurologist, and Dr. Tantleff, a radiologist, Defendants argue that the Plaintiffs did not suffer a serious injury under New York State Insurance Law §5102(d).

Plaintiff D. Canizalez visited Dr. Mann on June 23, 2010 where he reviewed D. Canizalez's complete medical record. Dr. Mann performed range of motion testing using a goniometer and found no limitations, diagnosing her with resolved cervical/ lumbar sprains with no permanent injuries. Dr. Bagley reviewed all of D. Canizalez's records and performed a neurological exam and a complete physical exam on June 25, 2010 and found normal range of motion without limitations and no indication of any permanent neurological disabilities. Lastly, Dr. Tantleff reviewed D. Canizalez's xrays of her cervical

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

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check as appropriate: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

spine, thoracic spine, and lumbar spine, all of which he found to be normal.

Further, Jiminez visited Dr. Mann on June 23, 2010 where he reviewed all of her medical records. Dr. Mann performed range of motion testing using a goniometer and found no limitations, diagnosing her with resolved cervical/lumbar sprains and status post right knee arthroscopy surgery with no permanent injuries. Dr. Bagley performed a neurological exam and a complete physical exam on Jiminez on June 25, 2010 and found normal results with no indication of any permanent neurological disabilities. Last, Jiminez had x-rays of her cervical spine, thoracic spine, lumbar spine, and skull reviewed by Dr. Tantleff. Dr. Tantleff found all x-rays to be normal. Further, Dr. Tantleff found degeneration of the thoracic and lumbar spine, with no evidence of disc herniations, exacerbation, or evidence of a recent trauma to the soft tissue structures. Dr. Tantleff also reviewed MRI's of Jiminez's lumbar spine, cervical spine, and right knee and found any injury is the result of degeneration and wear-and-tear.

Robles visited Dr. Mann on June 23, 2010 where he reviewed all of Robles's medical records. Dr. Mann performed range of motion testing using a goniometer and found no limitations, diagnosing her with resolved cervical/lumbar sprains, and resolved right ankle/foot strain. Dr. Bagley performed a neurological exam and a complete physical exam on Robles' cervical spine, lumbar spine, mental status, cranial nerves, motor responses, gait/coordination, and sensory responses on June 25, 2010 and found normal results with no indication of any permanent neurological disabilities. Last, Robles had her x-rays of the thoracic spine, lumbar spine, right ankle, and left ankle reviewed by Dr. Tantleff. Dr. Tantleff found all x-rays to be normal.

Lastly, infant A. Canizalez visited Dr. Mann on February 24, 2011 where he reviewed all of her medical records and performed range of motion testing on her cervical and lumbar spine, finding no limitations and diagnosing her with normal cervical and lumbar spine and status post right thumb fracture. Dr. Bagley performed a neurological exam and a complete physical exam on A. Canizalez on February 15, 2011 and found normal results with no indication of any permanent neurological disabilities. Last, A. Canizalez had x-rays of her right thumb reviewed by Dr. Tantleff, which he found to be normal.

Based on each of the Plaintiffs' pleadings, deposition testimony, and examinations by medical providers, Defendants argue Plaintiffs failed to state a cause of action under any of the nine categories which constitute serious injury under of New York Insurance Law §5102(d). Subjective complaints of pain, alone, are not enough to sustain a claim for serious injury. The mere existence of a herniation or bulging disc, along with subjective complaints of pain, is not evidence of a serious injury and as such, Plaintiffs' complaint should be dismissed.

In opposition, Plaintiffs argue that they each properly brought a cause of action under New York Insurance Law 5102(d) and each Plaintiff sustained a serious injury. At the very least, Plaintiffs argue that their doctors' reports create genuine issues of material fact requiring this case to be decided by a trier of fact. Plaintiff D. Canizalez testified at her deposition that she entered into a physical therapy treatment plan at Gordon C. Davis Medical P.C. immediately after the accident for four to five months four to five times per week. She testified that she was out of work for a few days and remains curtailed from her normal basic daily duties including exercising, cleaning, wearing heels, and heavy lifting, which proves that she had a serious injury and was unable to perform her customary activities for 90 out of 180 days after the accident. Dr. Gordon Davis referred the MRI films to be reviewed by Dr. Joseph Leadon ("Dr. Leadon"), who reviewed D. Canizalez's MRI of the cervical and lumbar spine and found bulging discs. Dr. Gordon examined D. Canizalez on August 6, 2009, where he stated his prognosis for full and complete long-term recovery for D. Canizalez is guarded and where he found range of motion limitation, bulging discs, and radiculopathy. She was reexamined by Dr. Davis on July 28, 2011 where he found range of motion limitations between 10 and 30 degrees throughout the lumbar and cervical spine and found the injuries to be causally related to the accident of 12/20/2008.

Plaintiff Jiminez testified at her deposition that she immediately sought treatment after the accident with Gordon C. Davis Medical, P.C. and she entered into physical therapy treatment, where she

treated every day for five months. Jiminez underwent right knee surgery at SynergyFirst Medical, PLLC on February 20, 2009 after two months of unsuccessful physical therapy. Prior to the accident, Jiminez testified that she used to babysit her granddaughter and was unable to do so for six months post-accident. Further, she has difficulty walking down stairs, wearing heels, dancing, exercising, running, and caring for her granddaughter. She still experiences pain and uses a cane to assist on ambulation. Dr. Davis referred the MRI films to be reviewed by Dr. Leadon, who reviewed Jiminez's MRI of the knee, finding tears, as well as bulging discs throughout her cervical and lumbar spine. Jiminez visited Dr. Davis on August 9, 2009 and he reported slight improvement but not a full recovery. Further, Dr. Davis found strains and sprains in the cervical spine, lumbar spine, and right knee and found the injuries to be causally related to the accident of 12/20/2008. Upon a reevaluation on July 28, 2011, Dr. Davis found range of motion limitations to her cervical and lumbar spine and found her totally disabled from work.

Plaintiff Robles testified at her deposition that she sought treatment after the accident at Gordon C. Davis Medical, P.C. and entered into a course of physical therapy treatment for four months, four times per week. Robles testified that she walked with a limp for seven months and was out of work for 10 days. Robles further testified that she remains unable to resume her basic daily routines at work (she cannot lift patients at her job as a medical assistant) and at home, such as exercising, cleaning, jogging, running, and lifting and she had to hire an assistant for household chores. Dr. Davis referred the MRI films to be reviewed by Dr. Leadon, who reviewed Jiminez's MRI of the right ankle finding abnormal signal in the peroneous tendon and upon review of the MRI of the lumbar spine, Dr. Leadon found disc bulges. She visited Dr. Davis on August 5, 2009 and he opined that she had not fully recovered and his prognosis for full and complete long-term recovery is guarded. Dr. Davis further found that she has range of motion limitations and found strains and sprains of the cervical spine, right shoulder, lumbar spine, and right ankle. Further, Dr. Davis opined that the injury is causally related to the accident of 12/20/2008. Upon reevaluation on September 22, 2011, Robles still had range of motion limitations of her cervical and lumbar spine.

Plaintiff D. Canizalez, on behalf of her daughter A. Canizalez, testified that A. Canizalez had x-rays taken of her thumb after the accident and had a splint placed for three weeks. A. Canizalez followed-up with Dr. Michael Elia, who referred her to hand specialist Dr. Louis Catalano. Dr. Elia, in his report, opined that A. Canizalez dislocated her thumb and she has a hyperextension deformity and Dr. Catalano opined that there is no displaced fracture noted but a Salter I fracture is not excluded. A. Canizalez complained of pain and her inability to hold books or pencils as a result of the accident.

As such, all four Plaintiffs have suffered a serious injury as defined under New York Insurance Law §5102(d). Plaintiffs doctors' reports demonstrate that their range of motion limitations were objectively measured and quantified and as such, their injuries qualify as a significant or consequential limitation of use. Additionally, Plaintiffs argue that the contradictions on the range of motion limitations are enough to defeat Defendant's motion for summary judgment and their physicians provide ample evidence that their injuries are serious rather than minor and slight. Further, Plaintiffs argue that Defendants' doctors cannot speak to Plaintiff's disabilities and injuries immediately following the accident and their proof doesn't establish that Plaintiffs haven't sustained a serious injury. Plaintiffs argue that Dr. Mann and Dr. Bagley failure to perform diagnostic tests coupled with their conclusory allegations are without any probative value. Further, Plaintiffs argue that there is an issue as to credibility of the doctors and such an issue may not be decided summarily.

Analysis

"A party moving for summary judgement must make a *prima facie* showing of entitlement to a judgement as a matter of law, providing sufficient evidence to demonstrate the absence of any material issue of fact." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81, 760 NYS2d 397, 790 NE2d 772 [2003]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Id.*) In order to prevail on its motion for summary judgment, the Defendants have the

initial burden to present competent evidence showing that the Plaintiffs have 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]). Here, Defendants have made their prima facie case that Plaintiffs have not suffered a serious injury as defined under New York Insurance Law §5102(d) with the affirmations and reports from Dr. Mann, Dr. Bagley, and Dr. Tantleff, all of whom state that Plaintiffs have no current limitations or injuries and that any injury they may have been resolved. Further, Dr. Mann opines that any cause of an injury to Jiminez and Robles are a result of degeneration and wear and tear, resulting from their age, obesity, and overuse of the limbs. “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]). Further, as to Plaintiffs’ claims under the 90/180 category of New York Insurance Law 5102(d), “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” (*Elias v Mahlah*, 2009 NY Slip Op 43 [1st Dept]). Here, Defendants made their prima facie case that Plaintiffs were not injured under the 90/180 category where each Plaintiff testified that they were only out of work, if at all, for a few days and are curtailed from their daily activities very minimally. Each Plaintiff went back to work and resumed their daily activities to a great extent, and are not curtailed enough to meet the threshold under the 90/180 category.

Once the Defendants meet their initial burden, Plaintiffs must then demonstrate a triable issue of fact as to whether they have sustained a serious injury. (*Shinn, supra at 197*) Plaintiffs’ experts may provide a qualitative assessment that has an objective basis and compares Plaintiffs’ 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]). Dr. Mann, upon his examination of D. Canizalez, Jiminez, and Robles, finds range of motion limitations between 10-30 degrees in July 2011. 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]). Dr. Mann addresses causation and states that the injuries of D. Canizalez, Jiminez, and Robles were caused by the accident which occurred on 12/20/2008. As such, Plaintiffs D. Canizalez, Jiminez, and Robles raise issues of fact through their deposition testimony and their doctors’ affirmations and reports that they have serious injuries which qualify as “a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; or a significant limitation of use of a body function or system.” (N.Y. Ins. Law § 5102 (McKinney)) However, they have not raised issues of fact as to their injuries under the 90/180 category, where they each testified at their depositions that they missed only a few days of work, if any, and that their daily activities were curtailed very minimally, not substantially.

However, Plaintiff A. Canizalez does not raise genuine issues of material fact as to her serious injury, where her injuries do not fall within any of the nine categories under New York Insurance Law §5102(d). While Dr. Elia does report that she dislocated her as a result of the accident, the injury was resolved and she has not been curtailed from her daily activities in order to recover under the 90/180 category. Dr. Elia, along with Dr. Castalano and Defendants’ Dr. Tantleff find no fractures and the sole existence of a hyperextension deformity does not qualify as a serious injury under the statute.

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment is denied with respect to Plaintiffs Ana D. Canizalez's, Lucia Jiminez's, and Rosa Robles' permanent consequential and significant limitation claims; and it is further

ORDERED that Defendants' motion for summary judgment is granted as to Plaintiffs Ana D. Canizalez's, Lucia Jiminez's, and Rosa Robles' 90/180 day claims; and it is further

ORDERED that Defendants' motion for summary judgment is granted with respect to Plaintiff Adriana Canizalez's complaint and her complaint is dismissed; and it is further

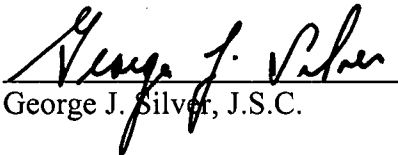
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that all remaining parties are to appear for a pre-trial conference in Part 22, Room 136 of the courthouse located at 80 Centre Street, New York, New York 10007 on April 16, 2014 at 9:30 a.m.; and it is further

ORDERED that movants are to serve a copy of this order, with notice of entry, upon all parties within twenty (20) days of entry.

Dated:

MAR 10 2014
New York County


George J. Silver, J.S.C.

GEORGE J. SILVER

FILED

MAR 10 2014

COUNTY CLERK'S OFFICE
NEW YORK