

Collazo v Collazo

2014 NY Slip Op 34056(U)

June 11, 2014

Supreme Court, Bronx County

Docket Number: Index No. 21268/11E

Judge: Alexander W. Hunter, Jr.

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 23A**

-----X
Tiffani Collazo and Michael Ortiz,

Index No.: 21268/11E

Plaintiffs,

Decision and Order

-against-

Javier Collazo, Jeffrey Roman and Praxair, Inc.,

Defendants.

-----X
HON. ALEXANDER W. HUNTER, JR.

The motion for summary judgment by defendant Javier Collazo, designated as motion sequence 005, and the motion for summary judgment by defendants Jeffrey Roman and Praxair, Inc., designated as motion sequence 006, are consolidated for joint disposition and decided herein.

The motion by defendant Javier Collazo for an order pursuant to CPLR 3212, granting summary judgment in his favor and dismissing the complaint on the ground that plaintiffs have not sustained a serious injury, is granted. The motion by defendants Jeffrey Roman and Praxair, Inc. for an order pursuant to CPLR 3212, granting summary judgment in their favor and dismissing the complaint on the ground that plaintiffs have not sustained a serious injury, is granted.

The cause of action is for personal injuries allegedly sustained by plaintiffs in a motor vehicle accident that occurred at the intersection of Poplar Street and Castle Hill Avenue in Bronx County on January 29, 2011 at approximately 12:53 A.M. At the time of the accident, Plaintiffs were passengers in a vehicle operated by defendant Javier Collazo. The vehicle plaintiffs were occupying was struck in the rear by a vehicle operated by defendant Jeffrey Roman and owned by defendant Praxair, Inc. Neither plaintiff was taken by ambulance to a hospital. Instead, they both left the scene of the accident in the vehicle operated by defendant Javier Collazo. (Tiffani Collazo tr at 26, lines 2-10; Michael Ortiz tr at 31, lines 2-3). Plaintiff Tiffani Collazo first sought medical treatment two to three weeks after the accident. (Tiffani Collazo tr at 27, lines 10-16). Plaintiff Michael Ortiz first sought medical treatment a few days after the accident. (Michael Ortiz tr at 33, lines 8-12). In their verified bill of particulars, plaintiff Tiffani Collazo alleges to have sustained injuries to her cervical spine, thoracic spine, and lumbar spine. Plaintiff Michael Ortiz alleges to have sustained injuries to his thoracic spine, lumbar spine, and right knee.

Defendant Javier Collazo argues that neither plaintiff has sustained a serious injury. In support, he submits the affirmed reports of Arnold T. Berman, M.D., FACS an orthopedic surgeon, who examined plaintiffs Michael Ortiz and Tiffani Collazo on September 12, 2013 and October 10, 2013, respectively. (Defendant Javier Collazo's Exhibits F and H). On the date of

the examination, Mr. Ortiz complained of pain in his right knee and lower back. He indicated to Dr. Berman that he stopped receiving treatment in 2012. All range of motion testing was conducted with the use of a goniometer. Plaintiff Michael Ortiz exhibited full ranges of motion in his cervical spine, lumbar spine, and right knee. Dr. Berman noted that the radiological studies on March 2, 2011 and the EMG studies dated March 8, 2011, both indicated preexisting degenerative changes in the lumbar spine. Dr. Berman diagnosed Mr. Ortiz with lumbar strain, resolved with no residuals and right knee strain and contusion, resolved with no residuals. Dr. Berman opined, "Mr. Ortiz sustained the above mentioned injuries which are now fully resolved with no clinical residuals. There were subjective complaints of pain without objective findings....Mr. Ortiz requires no further treatment or diagnostic testing as a direct result of the incident on 1/29/2011....The claimant can participate in all activities of daily living."

On the date of her examination, plaintiff Tiffani Collazo complained of pain in her lower and upper back. All range of motion testing was conducted with the use of a goniometer. Plaintiff Tiffani Collazo exhibited full ranges of motion in her cervical spine and lumbar spine. Dr. Berman diagnosed Ms. Collazo with cervical strain/sprain resolved with no residuals and lumbar strain/sprain with no residuals. Dr. Berman noted that MRI studies of her lumbar spine demonstrated findings of pre-existing degeneration that predated the accident. Dr. Berman opined, "Ms. Collazo requires no further treatment or diagnostic testing. The claimant can participate in all activities of daily living, including all occupational duties full time with no restrictions."

Defendant Javier Collazo refers to the deposition testimonies of both plaintiffs and their verified bill of particulars to demonstrate that the plaintiffs did not sustain a medically determined injury that prevented them from performing substantially all of their usual and customary daily activities for at least 90 days out of the first 180 days post-accident. In their verified bill of particulars, plaintiff Tiffani Collazo alleges to have been confined to bed for one week and to home for two months while plaintiff Michael Ortiz alleges to have been confined to bed for two weeks and to home for two weeks. Neither plaintiff was employed at the time of the accident. At her deposition, plaintiff Tiffani Collazo testified that she missed one to two weeks of school as a result of the accident. (Tiffani Collazo tr at 14, lines 5-9).

Defendants Jeffrey Roman and Praxair, Inc. move for the same relief as defendant Javier Collazo. In support, they submit the affirmed reports of Bradley D. Weiner, an orthopedist, who examined plaintiffs Tiffani Collazo and Michael Ortiz on December 9, 2013 and October 4, 2013, respectively. (Defendants Jeffrey Roman and Praxair, Inc.'s Exhibits J and K). At the time of her examination, Ms. Collazo complained of occasional lumbar pain. Active range of motion was measured with an inclinometer. Dr. Weiner measured full ranges of motion in her cervical spine and lumbar spine. After reviewing her medical records and upon physical examination, Dr. Weiner diagnosed Ms. Collazo with cervical strain (by report) and lumbosacral strain now resolved. In his opinion, Dr. Weiner determined that Ms. Collazo "has returned to status quo ante." There was no evidence of a permanent limitation in function or use of the cervical spine or lumbar spine as a result of the accident.

With respect to plaintiff Michael Ortiz, active range of motion was also measured with an inclinometer. Despite complaints of ongoing right knee pain, Mr. Ortiz had yet to be evaluated by an orthopedist. Although he found limited ranges of motion in both the lumbosacral spine and the right knee, Dr. Weiner opined that they were self-limited. Dr. Weiner diagnosed Michael Ortiz with lumbosacral strain, right knee contusion, and symptom magnification.

In opposition to both motions, plaintiffs argue that defendants have failed to make a prima facie showing that plaintiffs did not sustain a serious injury. Moreover, plaintiffs assert that genuine issues of fact exist which preclude summary judgment dismissal. Plaintiffs argue that the range of motion testing results submitted by defendants are directly contradicted by the range of motion testing conducted by their expert. Plaintiffs also question the credibility of the conclusions set forth by Drs. Berman and Weiner in light of the positive MRI findings of a disc herniation in the cervical spine of Tiffani Collazo and the positive MRI findings of a disc bulge in the lumbar spine of Michael Ortiz.

Plaintiffs submit the affidavits of Louis Castaldi, D.C., a chiropractor, who treated both plaintiffs. (Plaintiffs' Exhibits B and E). Plaintiffs also submit their respective medical records from Advanced Chiropractic Care, P.C. (Plaintiffs' Exhibits A and D). Tiffani Collazo first presented to the office of Dr. Castaldi on February 9, 2011. Upon initial examination with the use of a goniometer, Dr. Castaldi found diminished ranges of motion in the lumbar spine. At a follow-up examination on April 18, 2011, Dr. Castaldi noted diminished ranges of motion in the lumbar spine. Ms. Collazo was evaluated for a final time on February 10, 2014. Again, Dr. Castaldi measured decreased ranges of motion in the lumbar spine. He noted that Ms. Collazo completed chiropractic treatment on or about April 24, 2012 because any further treatment would be palliative in nature. Based upon his multiple examinations of Ms. Collazo, numerous objective tests, including electromyography/nerve conduction study and an MRI of the lumbar spine, Dr. Castaldi opined that the accident on January 29, 2011 was the direct cause of a permanent consequential limitation and a significant limitation of use of her lumbar spine.

Plaintiff Michael Ortiz first presented to the office of Dr. Castaldi on February 23, 2011. During his initial examination, Dr. Castaldi measured, with the use of a goniometer, diminished ranges of motion in the lumbar spine. At a follow-up examination on April 11, 2011, Dr. Castaldi noted diminished ranges of motion in the lumbar spine. Mr. Ortiz was examined for a final time on February 6, 2014. Dr. Castaldi found diminished ranges of motion in the lumbar spine. Mr. Ortiz last received medical treatment on or about February 22, 2012 as any further treatment would be palliative in nature. Based upon his multiple examinations of Mr. Ortiz, numerous objective tests, including electromyography/nerve conduction study and an MRI of the lumbar spine, Dr. Castaldi opined that the accident on January 29, 2011 was the direct cause of a permanent consequential limitation and a significant limitation of use of his lumbar spine.

In reply, all three defendants assert that they have made a prima facie showing that neither plaintiff has sustained a serious injury. They also aver that plaintiffs have failed to raise a triable issue of fact. Defendant Javier Collazo avers that 1) plaintiff Tiffani Collazo has not submitted any evidence of recent quantified range of motion findings with respect to her cervical spine or thoracic spine and 2) plaintiff Michael Collazo has failed to submit any recent objective

evidence with respect to his right knee. As for their alleged injuries to their lumbar spines, defendant Javier Collazo argues that the reports of Dr. Castaldi are insufficient to raise a triable issue of fact since he impermissibly relied upon unsworn reports of other physicians, namely, the results of the lumbar MRI studies performed by Dr. Steven Losik on March 2, 2011, the CMG-NCV tests performed by Dr. Bhim Nangia on March 8, 2011, and the reports of Dr. Mikhail Solomonov dated April 29, 2011. Defendant Javier Collazo notes that none of the reports of Drs. Losik, Nangia, or Solomonov are in admissible form. Moreover, none of the reports of Drs. Losik or Nangia were annexed to the opposition papers of plaintiffs. Defendants Jeffrey Roman and Praxair, Inc. also point to unexplained gaps in treatment for both plaintiffs.

Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of fact. **Rotuba Extruders v. Ceppos**, 46 N.Y.2d 233 (1978); **Andre v. Pomeroy**, 35 N.Y.2d 361 (1974); CPLR 3212(b). The function of the court on a motion for summary judgment is issue finding rather than issue determination. **Sillman v. Twentieth Century Fox Film Corp.**, 3 N.Y.2d 395 (1957). For summary judgment to be granted, the moving party must establish his or her cause of action or defense by presenting evidentiary proof in admissible form that would be sufficient to warrant the court in directing judgment in favor of the moving party. **Friends of Animals, Inc. v. Associated Furniture Manuf., Inc.**, 46 N.Y.2d 1065 (1979). Where the moving party fails to make such a showing, the motion must be denied regardless of the sufficiency of the opposition papers. **Winegrad v. New York University Medical Center**, 64 N.Y.2d 851 (1985). Once the movant has made this showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that would require a trial of the action. **Alvarez v. Prospect Hosp.**, 68 N.Y.2d 320 (1986); **Zuckerman v. City of New York**, 49 N.Y.2d 557 (1980). In considering a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion. **People v. Grasso**, 50 A.D.3d 535 (1st Dept. 2008). However, mere conclusory allegations or defenses are insufficient to preclude summary judgment. **Zuckerman**, 49 N.Y.2d 557.

When moving for summary judgment dismissal, the defendant has the initial burden of showing that the plaintiff has not sustained a "serious injury." **Spencer v. Golden Eagle, Inc.**, 82 A.D.3d 589 (1st Dept. 2011). A defendant can satisfy his or her initial burden by submitting sworn or affirmed statements of their examining physician, the sworn testimony of plaintiff, or the unsworn medical records of plaintiff. **Brown v. Achy**, 9 A.D.3d 30 (1st Dept. 2004); **Arjona v. Calcagno**, 7 A.D.3d 279 (1st Dept. 2004); **Nelson v. Distant**, 308 A.D.2d 338 (1st Dept. 2003). In opposition, plaintiff must submit objective medical evidence sufficient to raise a triable issue of fact as to whether he or she sustained a serious injury. **Toure v. Avis Rent A Car Systems, Inc.**, 98 N.Y.2d 345 (2002); **Gaddy v. Eyler**, 79 N.Y.2d 955 (1992). The objective medical findings must include "either a specific percentage of the loss of range of motion or a sufficient description of the qualitative nature of plaintiff's limitations based on the normal function, purpose and use of the body part." **Bent v. Jackson**, 15 A.D.3d 46, 49 (1st Dept. 2005) (internal quotations omitted). The subjective testimony of a plaintiff as to his or her own pain or inability to perform specific tasks is insufficient to sustain a claim of serious injury. **Glover v. Capres Contracting Corp.**, 61 A.D.3d 549 (1st Dept. 2009).

Defendant Javier Collazo has established his prima facie entitlement to summary judgment as a matter of law with respect to the claims by plaintiff Tiffani Collazo of a “permanent consequential limitation” and a “significant limitation of use” of her cervical spine, thoracic spine, and lumbar spine by the submission of the affirmed report of his orthopedic surgeon. Defendant Javier Collazo has also established his prima facie entitlement to summary judgment as a matter of law with respect to the claims by plaintiff Michael Ortiz of a “permanent consequential limitation” and a “significant limitation of use” of his lumbar spine and right knee by the submission of the affirmed report of his orthopedic surgeon. This court further finds that defendants Jeffrey Roman and Praxair, Inc. have made a prima facie showing of entitlement to summary judgment with respect to both plaintiffs by the submission of the affirmed reports of their orthopedist. Drs. Berman and Weiner “detailed the specific objective tests used in [their] personal examinations, as well as the underlying data from those tests, to show full range of motion.” DeJesus v. Paulino, 61 A.D.3d 605, 607 (1st Dept. 2009); see also, Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345; Mitrotti v. Elia, 91 A.D.3d 449 (1st Dept. 2012); Porter v. Bajana, 82 A.D.3d 488 (1st Dept. 2011).

The burden then shifted to plaintiffs to set forth sufficient evidence to raise a triable issue of fact to preclude summary judgment. See, Gaddy v. Eyler, 79 N.Y.2d 955 (1992). This court notes that plaintiff Tiffani Collazo failed to submit any objective evidence of injury with respect to her cervical spine or thoracic spine. Similarly, plaintiff Michael Ortiz failed to submit any objective evidence of injury with respect to his right knee. In opposition, plaintiffs have failed to raise a triable issue of fact as to whether plaintiffs sustained a serious injury. The only evidence submitted in admissible form is the affidavits of Dr. Castaldi. However, his affidavits are of no probative value since it is evident that Dr. Castaldi relied upon the unsworn reports of Drs. Nangia and Losik in reaching his conclusions about plaintiffs. See, Malupa v. Oppong, 106 A.D.3d 538 (1st Dept. 2013); Dembele v. Cambisaca, 59 A.D.3d 352 (1st Dept. 2009); Phillips v. Zilinsky, 39 A.D.3d 728 (2nd Dept. 2007).

Defendants have also established prima facie that plaintiffs did not sustain a serious injury under the 90/180-day category by the submission of the deposition transcripts of plaintiffs and their verified bill of particulars. Vaughn v. Leon, 94 A.D.3d 646 (1st Dept. 2012); Merrick v. Lopez- Garcia, 100 A.D.3d 456 (1st Dept. 2012); Arenas v. Gauman, 98 A.D.3d 461 (1st Dept. 2012); McCree v. Sam Trans Corp., 82 A.D.3d 601 (1st Dept. 2011); Hernandez v. Adelango Trucking, 289 A.D.3d 407 (1st Dept. 2011). None of the evidence submitted by plaintiffs supports their claims that they were unable to perform substantially all of the material acts that constituted their usual and customary daily activities due to a medically determined injury during the relevant time period. De La Cruz v. Hernandez, 84 A.D.3d 652 (1st Dept. 2011); Valentin v. Pomilla, 59 A.D.3d 184 (1st Dept. 2009).

Accordingly, the motion by defendant Javier Collazo for summary judgment is granted. The motion by defendants Jeffrey Roman and Praxair, Inc. for summary judgment is granted. The complaint is hereby dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs.

Defendant Javier Collazo is directed to serve a copy of this order with notice of entry on all parties and file proof thereof with the Clerk's office.

This constitutes the decision and order of this court.

Dated: June 11, 2014

ENTER:



J.S.C.

ALEXANDER W. HUNTER JR.