

Hilario v Matos

2015 NY Slip Op 30800(U)

April 9, 2015

Sup Ct, Bronx County

Docket Number: 310360/2008

Judge: Lucindo Suarez

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This opinion is uncorrected and not selected for official publication.

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

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CANDIDA HILARIO, LUPE DILONE nad MICHELLE
JIMENEZ,

DECISION AND ORDER

Plaintiffs,

Index No. 310360/2008

- against -

EDUARDO MATOS, EUGENIO SALAS, JIMMY
HOLGUIN, and NYLL MANAGEMENT,

Defendants.

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PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated November 24, 2014 of defendants Eugenio Salas and Jimmy Holguin and the affirmation, exhibits and reports submitted in support thereof; the affirmation in opposition dated April 1, 2015 of plaintiffs Candida Hilario and Lupe Dilino; and due deliberation; the court finds:

In this action arising out of a May 8, 2008 motor vehicle accident, defendants Eugenio Salas and Jimmy Holguin move pursuant to CPLR 3212 for summary judgment dismissing the complaint of plaintiffs Candida Hilario ("Hilario") and Lupe Dilone ("Dilone") on the ground that neither plaintiff suffered a "serious injury," as the phrase is defined in Insurance Law § 5102. Hilario and Dilone discontinued their claims against defendants Eduardo Matos and NYLL Management by stipulation filed April 3, 2013. The court dismissed the complaint of plaintiff Michelle Jimenez in an order dated December 3, 2014.

According to the verified bill of particulars, Hilario suffered a partial rotator cuff tear to her right shoulder; numerous cervical and lumbar spine disc herniations; and injuries to her shoulders, knees and right ankle. She was confined to her bed and home for one week and incapacitated from her household

duties for three months. Dilone suffered from supraspinatus tendinosis in the right shoulder; bilateral shoulder pain; disc herniations at C3-C4 and C4-C5; disc bulges at C5-C6 and C6-C7; lumbar discogenic derangement; and radiculopathy. She was confined to her bed and home for one and one-half weeks and she was incapacitated from her household duties for three months. Both plaintiffs claim their injuries constitute a permanent loss of use of a body organ, member, function or system; 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").

Defendants offer reports from neurologist Ravi Tikoo, M.D., orthopedic surgeon Robert J. Orlandi, M.D., and radiologist Richard A. Heiden, M.D. and plaintiffs' deposition transcripts in support of the motion. Defendants have demonstrated that neither plaintiff suffered a serious injury within the meaning of the Insurance Law. *See Figueroa v. Ortiz*, 125 A.D.3d 491, — N.Y.S.2d — (1st Dep't 2015). Dr. Tikoo reported that his March 17, 2010 neurological examinations of plaintiffs were normal. Dr. Orlandi examined plaintiffs on March 15, 2010 and found normal ranges of motion for all areas tested and normal or negative results for all clinical tests administered. The single deficit on forward flexion (65/80 degrees) of Hilario's lumbar spine was not supported by other objective evidence. He opined that the need for Hilario's right shoulder surgery was unrelated to the accident. Dr. Heiden found degenerative changes but no evidence of post-traumatic injuries in plaintiffs' MRI studies. Hilario testified that she was confined to her bed for one week and to her home for one month after the accident. Dilone testified that she was confined to her bed and home for one week.

Plaintiffs in opposition submit reports from Craig Antell, D.O. and treating physician Noel Howell, M.D. and affidavits and MRI reports from Ronald Roskin, M.D. Their submissions are

sufficient to raise triable issues of fact that both plaintiffs suffered a permanent consequential or a significant limitation of use injury to their cervical spines. *See Diaz v. Dela Cruz*, 125 A.D.3d 552, — N.Y.S.2d — (1st Dep't 2015). Dr. Roskin reported positive findings for disc bulges or herniations in the cervical spine MRIs but saw no evidence of degenerative changes on either study. Dr. Howell recorded motion deficits when he examined plaintiffs the day after the accident. Given the absence of prior injury, he concluded in his final narrative reports that plaintiffs' injuries were causally related to the motor vehicle accident. Dr. Antell examined plaintiffs in response to the motion and found decreased motion on all planes of movement. His findings correlated with the positive MRI findings of cervical disc herniations or bulges. *See James v. Perez*, 95 A.D.3d 788, 945 N.Y.S.2d 283 (1st Dep't 2012). He concluded that the injuries were causally related to the accident. Since plaintiffs raised an issue of fact regarding their cervical spine injuries, the court need not determine whether their other claimed injuries meet threshold since they are entitled to recover damages for all injuries causally related to the accident. *See Macdelinne F. v. Jimenez*, 2015 N.Y. App. Div. LEXIS 2178 (1st Dep't Mar. 19, 2015). Plaintiffs, though, failed to raise triable issues of fact on their permanent loss of use and 90/180 claims. *See Oberly v. Bangs Ambulance Inc.*, 96 N.Y.2d 295, 751 N.E.2d 457, 727 N.Y.S.2d 378 (2001); *Chaston v. Doucoure*, 125 A.D.3d 500, 3 N.Y.S.3d 33 (1st Dep't 2015).

Accordingly, it is

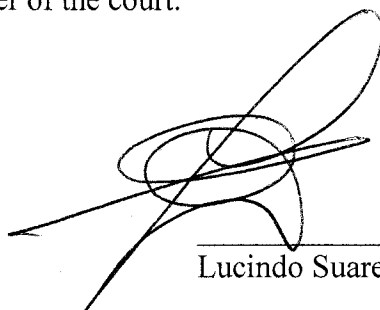
ORDERED, that the motion of defendants Eugenio Salas and Jimmy Holguin for summary judgment dismissing the complaint of plaintiffs Candida Hilario and Lupe Dilone is granted to the extent of dismissing plaintiffs' claims of serious injury in the categories of permanent loss of use of a body organ, member, 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; and it is further

ORDERED, that the clerk of the court is directed to enter judgment in favor of defendants Eugenio Salas and Jimmy Holguini dismissing the serious injury claims of plaintiffs Candida Hilario and Lupe Dilone in the categories of permanent loss of use of a body organ, member, 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.

This constitutes the decision and order of the court.

Dated: April 9, 2015

A handwritten signature in black ink, appearing to read 'Lucindo Suarez', is written over a horizontal line. The signature is stylized with several loops and a long horizontal stroke extending to the left.

Lucindo Suarez, J.S.C.