

**Montas v Rivera**

2015 NY Slip Op 30801(U)

April 1, 2015

Sup Ct, Bronx County

Docket Number: 310400/10

Judge: Howard H. Sherman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX

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MARIA DEL ROSARIO MONTAS and SOFIO MOLINA  
SANTANA,

Index No.: 310400/10

*Plaintiffs,*

-against-

**DECISION/ORDER**

JEFF RIVERA and JESSIE L. MITCHELL, JR.,

*Defendants*

Howard H. Sherman  
J.S.C.

**Facts and Procedural Background**

Plaintiff seeks damages for injuries allegedly sustained in a motor vehicle accident that occurred on December 11, 2011 on the Major Deegan Expressway, Bronx, New York.

The Note of Issue was filed on December 12, 2013 .

Plaintiff Maria Del Rosario **Montas** ("Montas") alleges that as a result of the motor vehicle accident she sustained the following serious injuries: cervical spine herniation at C4-5 an dC7-T1 with limitations of range of motion; lumbar spine bulges at L3-4 and L4-5 with limitations of range of motion and ganglion cyst of the posterior mid left knee [Verified Bill of Particulars ¶9(a)].

It is further alleged that Montas was confined to bed/home for approximately three weeks following the accident, and for four weeks after a 6/7/10 surgery <sup>1</sup>[Id. 11].

Plaintiff Sofio Molina **Santana** ("Santana") alleges that as a result of the motor vehicle accident he sustained the following injuries: bulging disc at C4-5 with stenosis and

<sup>1</sup> Chiropractic manipulation under anesthesia.

bulging disc at C5-6 and bulging discs at L3-4 and L4-5 and herniation at L5-S1 with restrictions of range of motion of both spinal areas [Verified Bill of Particulars ¶9(b)].

It is further alleged that Santana was confined to home for approximately two weeks following the accident [Id. 11].

No specific categories of serious injury are alleged.

**Motions**

1) Defendant Jessie L. Mitchell, Jr. ("Mitchell") moves for summary judgment dismissing the complaint based on the failure of plaintiffs to establish an accident-related serious injury within the meaning of Insurance Law §5102(d).

In support defendant comes forward with affirmed reports of independent medical evaluations conducted by Edward M. Weiland, M.D., a board-certified orthopedist; Daniel J. Feuer, M.D., a board-certified neurologist; Robert Israel, M.D., a board-certified orthopedist, and the reports of board-certified radiologists Sheldon P. Feit, M.D. and Jessica F. Berkowitz, M.D.

2) Defendant Jeff Rivera ("Rivera") cross-moves for the same relief submitting in support thereof the affirmed reports of board certified neurologist Mariana Golden, M.D. and board-certified radiologist Bert R. Heyligers, M.D.

**Independent Medical Evaluations**

**Montas**

1) Dr. Robert Israel rendered an orthopedic evaluation of plaintiff after a physical

examination conducted on September 5, 2012.

For purposes of the evaluation, Dr. Israel reviewed inter alia, the contemporaneous MRI reports, and emergency treatment medical reports for the period 12/11/09 through 6/10/10.

Plaintiff presented using a cane , and with complaints of pain in her neck, lower back, and left knee that was the "same" as the time of the accident.

After conducting a series of objective tests, including range of motion testing;<sup>2</sup> muscle and motor strength; observation for spasm upon palpation; SLR; ligament stability testing of the left knee, including varus and valgus, and anterior and posterior cruciate, and McMurray's, Dr. Israel concluded that plaintiff was capable of work activities and the activities of daily living without restriction.

2) Dr. Edward Weiland performed a neurological evaluation of plaintiff after an October 7, 2013 examination.

For purposes of his evaluation, Dr. Weiland reviewed the hospital, diagnostic and treatment records for the period 12/11/09 - 04/12/11.

Upon examination he found full ranges of motion of every plane of the cervical, thoracic, and lumbar spine, as quantified and compared to normal headings.<sup>3</sup> There were

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<sup>2</sup> Measured with a goniometer and in accordance with AMA guidelines.

<sup>3</sup> A goniometer was used for measurements and findings determined in accordance with AMA Guide, Fifth Edition.

negative findings on Fabere-Patrick sign and Adson's maneuver and no paraspinal muscle spasm was noted. Straight leg raising was unlimited at 90°.

Dr. Weiland concluded that the examination was normal with no evidence of any lateralizing neurologic deficits.

3) Marianna Golden, M.D. examined plaintiff on September 18, 2012 and reviewed reports diagnostic studies and chiropractic treatment and operative reports [1/26/10 - 3/24/10; 06/7/09 - 6/8/09].

Upon motor examination, Dr. Golden found it to reveal 5/5 power in the upper and lower extremities and normal tone and bulk. Reflexes were 2+ equal and symmetric in the upper and lower extremities and the sensory examination was normal.

Dr. Golden found no evidence of a causally related disability and no objective evidence of radiculopathy.<sup>4</sup>

**Radiologists' Contemporaneous Diagnostic Reviews of Studies**

a) The 1/28/10 MRI study of the cervical spine was found by Dr. Feit to reveal a normal study with no discernible abnormalities. Upon his review of the films, Dr. Heyligers opined that it was a normal study with no intradural abnormalities or disc bulges or herniations identified.

b) The lumbosacral MRI of the same date was concluded to be a normal study by Dr.

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<sup>4</sup> A page of another physician's report is attached to Dr. Golden's report and not considered as incomplete, failing to even name the examinee.

Feit, who found no discernable abnormalities.

c) Upon review of the 5/28/10 MRI study of the left knee, Dr. Feit found a "very small" Baker's cyst and an area of meniscal degeneration within the posterior horn of the medial meniscus with no evidence fo a meniscal tear or ligamentous injury identified. He concluded that the films revealed no abnormalities causally related to the accident.

**Santana**

1) Plaintiff presented for neurological examination on September 6, 2012 with complaints of recurrent neck and low back pain.

For purposes of his evaluation, Dr. Feuer reviewed the emergency treatment records and reports of diagnostic studies, and a 4/24/10 consultation, as well as chiropractic progress notes.

Upon range of motion testing with a goniometer, Dr. Feuer found full ranges of motion in all planes of the cervical and lumbosacral spine as quantified and compared to normal AMA Guidelines readings.

There was no spasm or tenderness observed and SLR was negative, bilaterally in the sitting position. Upon these findings, and those upon motor, sensory, coordination testing, Dr. Feuer concluded that there was objective neurological disability or permanency.

2) Dr. Robert Israel conducted an orthopedic evaluation of plaintiff on September 5, 2012, reviewing for such purpose reports of the contemporaneous diagnostic studies and

the hospital records.

Upon an examination revealing negative findings on a series of objective tests and full ranges of motion on every plane of the cervical and lumbar spine as quantified and compared to normal readings,<sup>5</sup> Dr. Israel concluded that plaintiff was capable of working and carrying out his daily activities without restriction.

3) Upon neurological examination on September 18, 2012, Dr. Golden concluded to be "normal", the neurologist opined to a reasonable degree of medical certainty that plaintiff had no accident-related neurologic disability, and specifically no objective evidence of radiculopathy.

*Radiologists' Contemporaneous Diagnostic Reviews of Studies*

a) Upon review of the 1/28/10 MRI of the lumbar spine, Dr. Berkowitz concluded that the films revealed a broad-based herniation at L5-S1 without evidence of acute traumatic injury, and Dr. Heyligers opined that the films revealed degenerative disc disease at L4-5 with an associated posterior bulging at that level, and no evidence of herniation.

b) The cervical spine MRI of 2/3/10 was reviewed by Dr. Berkowitz who found the films to reveal nonspecific straightening of the upper lordosis and minimal bulging at C5-6 without any causal relationship to the motor vehicle accident, and no evidence of an acute injury. Dr. Heyligers opined to a reasonable degree of medical certainty that the films

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<sup>5</sup> Dr. Israel used a goniometer for measurements and referenced the AMA Guidelines, 5<sup>th</sup> Ed.

revealed no evidence of bulging or herniation or intradural abnormalities or paravertebral soft tissue masses.

**DISCUSSION AND CONCLUSIONS**

Upon review of the injuries asserted and the periods of confinement alleged to have resulted from these impairments in the bill of particulars, it is clear that the categories of serious injury applicable here, are confined to two : "significant" and permanent consequential limitations of use.

Upon review of the findings by objective testing upon recent examinations including findings of the absence of spasm in the affected areas, and negative SLR, and as well as symmetric motor testing in all major muscle groups of the upper and lower extremities, and the reviews of the contemporaneous diagnostic studies reflecting the lack of indicia of traumatic injury it is the finding of this court that defendants have met their initial burden to prove as a matter of law that neither plaintiff sustained an accident related permanent consequential limitation of use of the cervical and/or lumbar spine or a significant limitation of use of either spinal area. In addition, defendants have shouldered their burden with respect to plaintiff Montas' knee injury alleged.

Upon this showing, it is incumbent upon plaintiff to come forward with "with an objective medical basis supporting the conclusion they sustained a serious injury (see, Toure v Avis Rent A Car Sys., 98 NY 2d 345, 350-351, 774 NE2d 1197, 746 NYS 2d 865

[2002]).”; Baez v Rahamatalli, 6 NY 3d 868, 869; 850 NE 2d 19 [2006].

The only medical submission in admissible form tendered in opposition to the motion are the affirmations of Irving Etkind, MD. who conducted recent examinations of the plaintiffs. In addition, though tendered as unaffirmed, the copies of the reports of the contemporaneous MRI studies are considered as having been relied upon by defendants’ radiological experts in making their evaluations.

As afforded all favorable inferences, it is the finding of this court that Dr. Etkind’s affirmations incorporating findings of restrictions of range of motion in every level tested of each plaintiff’s cervical and lumbar spine as clinically correlated with a review of the diagnostic films themselves, and as causally related to the underlying accident, with consideration of the issues of etiology raised by defendants’ radiological experts, are sufficient to raise issues of fact that plaintiffs sustained accident-related spinal injuries in the “significant” and permanent consequential limitations of use categories.

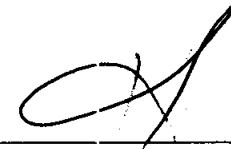
Accordingly, it is

ORDERED that the motion and cross-motion be and hereby are granted to the extent of awarding summary judgment in favor of defendants dismissing the plaintiffs’ claims of

serious injury in all categories with the exception of "significant" and "permanent consequential" limitations of use.

This constitutes the decision and order of this court.

Dated: <sup>April</sup> ~~March~~ 1, 2015  
Bronx, New York



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Howard H. Sherman