

Sepulveda v Nunez

2015 NY Slip Op 32149(U)

October 8, 2015

Supreme Court, Bronx County

Docket Number: 307328/2013

Judge: Jr., Kenneth L. Thompson

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
COUNTY OF BRONX IA 20 _____ X
VINCENT SEPULVEDA,

Plaintiff,

-against-

MIGUEL E. NUNEZ,

Defendant. X

MIGUEL E. NUNEZ,

Plaintiff,

-against-

JOSE R. ORTIZ and JONATHAN L. ORTIZ and INTEX
AUOT LEASING and SHAHROKH T. ARAE,

Defendant. _____ X

The following papers numbered 1 to 8 read on this motion to amend pleadings

	PAPERS NUMBER
No On Calendar of June 3, 2015	
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	1, 5
Answering Affidavit and Exhibits	2, 6
Replying Affidavit and Exhibits	3, 4, 8
Affidavit	
Pleadings -- Exhibit	
Memorandum of Law	7
Stipulation -- Referee's Report -- Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order of this motion is as follows:

This action arose as a result of personal injuries sustained by plaintiff, Vincent Sepulveda, (hereinafter, "Sepulveda") as a result of a motor vehicle accident which occurred on April 9, 2013. Defendant, Miguel E. Nunez, ("Nunez") moves for summary judgment dismissing this action, contending that Sepulveda cannot establish that he sustained serious injury as that term is defined in Insurance Law §5102(d). Sepulveda, moves pursuant to CPLR 3025 and 305, to amend the complaint to add third-party defendant, Shahrokh T. Arae, (Arae), as a direct defendant in Sepulveda's complaint. Arae cross-moves to strike the note of issue and for

Index No: 307328/2013

DECISION AND ORDER

Present:
HON. KENNETH L. THOMPSON, JR.

Third -Party Index: 83703/2014

discovery. The motions of Nunez, Sepulveda and the cross-motion of Arae are consolidated for purposes of decision and disposition.

The initial burden on a threshold motion is upon the defendant to present evidence establishing that plaintiff has not sustained a serious injury and therefore has no cause of action. It is only when defendant's initial burden is met that plaintiff would be required to establish *prima facie* that a serious injury had been sustained within the meaning of Insurance Law § 5102(d). (*Pommells v Perez*, 4 N.Y.3d 566, 574 [1st Dept 2005]).

Defendants offer, in part, as proof of the absence of serious injury to plaintiff the affirmation of Audrey Eisenstadt, a radiologist and Naunibal Sachdev Singh M.D., a neurologist. The evaluations performed by the aforementioned physicians were performed at the request of defendants.

As a result of Dr. Eisenstadt's review of cervical and lumbar spine MRI scans, Dr. Eisenstadt diagnosed plaintiff with cervical spine straightening and a bulging and herniated disc at L5-S1 along with degeneration. Dr. Eisenstadt opined that there was no posttraumatic disc changes.

As a result of Singh's physical examination of plaintiff on September 4, 2014, Dr. Singh found that plaintiff had normal range of motion of the cervical, thoracic and lumbar spine. Dr. Singh opined that there was no medical necessity for further treatment, medical testing of follow-up with respect to neurology. Dr. Singh further opined that plaintiff has no neurological disability and is not disabled from working or from activities of daily living.

Plaintiff testified that he missed a couple of days from work as a result of the subject collision. "The evidence that plaintiff missed less than 90 days of work in the 180 days

immediately following the accident and indeed otherwise worked "light duty" is fatal to the 90/180-day claim (*see Tsamos v. Diaz*, 81 AD3d 546 [2011])." (*Williams v. Perez*, 92 A.D.3d 528, 529 [1st Dept 2012]).

With respect to plaintiff's claim of a compression fracture, plaintiff submitted the affirmation of Narayan Paruchuri, M.D., a radiologist. In her affirmation, Dr. Paruchuri stated she "read the MRI film and the results are stated on the annexed MRI Report. Specifically, I noted, among other things, the existence of an Anterior Wedge Compression Fracture of the T12 and L1 which I noted to be related to patient's previous trauma which took place on April 9, 2013." However, the MRI report Dr. Paruchuri annexed to her affirmation, states that the compression fracture "could be related to patient's previous trauma." (Emphasis added). "[T]he reviewing radiologist could only state that plaintiff's herniations and disc bulge "may be" related to the subject accident. Absent any description of the objective nature of his findings, plaintiff's doctor's affidavit must be viewed as conclusory and insufficient to establish a serious injury (*see Munoz v Hollingsworth*, 18 AD3d 278, 279 [2005])." *Fernandez v. Mercedes*, 45 A.D.3d 385, 386 [2007]).

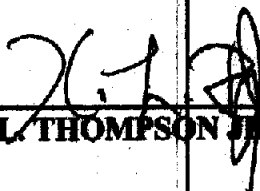
Clearly, Dr. Paruchuri's report that the compression fracture, "could" be related to the subject vehicular collision is insufficient to defeat a summary judgment motion. Dr. Paruchuri nor plaintiff explains why Dr. Paruchuri changed her equivocal opinion that the compression fracture could be related to the subject vehicular collision to a medical opinion that the compression fracture was related to the collision. "[Plaintiff's] failure to explain the inconsistencies between her treating physician's finding of near full range of motion in the lumbar spine within three months after the accident, and his present findings of deficits, entitles defendant to summary judgment (*see Dorrian v Cantalicio*, 101 AD3d 578 [1st Dept 2012]; *Jno-Baptiste v Buckley*, 82 AD3d 578 [1st Dept 2011])." *Santos v. Perez*, 107 A.D.3d 572, 574 [1st

Dept 2013]).

Accordingly, the motion for summary judgment of Miguel E. Nunez is granted, and the complaint of Vincent Sepulveda is dismissed. The motion to amend the complaint and the cross-motion of third-party defendant Shahrokh T. Arae to strike the note of issue and for discovery are denied as moot in light of the dismissal of Sepulveda's complaint.

The foregoing shall constitute the decision and order of the Court.

Dated: OCT 08 2015



KENNETH L. THOMPSON JR. J.S.C.