

**Santos v Manga**

2016 NY Slip Op 31115(U)

May 6, 2016

Supreme Court, Bronx County

Docket Number: 301917/2013

Judge: Julia I. Rodriguez

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 STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM- PART 27

INDEX # 301917/2013

WILLIE F. SANTOS, EDUARDO R. BOVER, ORLANDO  
TORRES, LUISA DE MOTA DE RAMIREZ and CANDIDA  
GARCIA MOTA,

Plaintiffs,

-against-

BENJAMIN A. MANGA and IHINTZIA CORP.,

Defendants.

**DECISION and ORDER**

Present: Hon. Julia I. Rodriguez  
Supreme Court Justice

Recitation, as required by CPLR 2219 (a), of the papers considered in review of Defendants' motion for summary judgment on serious injury/threshold:

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits & Memorandum of Law	1
Affirmation in Opposition Plaintiff & Exhibits	2
Reply Affirmation	3

This action arises out of a two-vehicle accident on November 13, 2012. Plaintiff Willi F. Santos alleged he sustained injury to his neck. Plaintiff Orlando Torres alleged injuries to his right knee and left shoulder. Plaintiff Candida Garcia alleged injuries to her low back and right knee. After discovery Defendants move for an order granting summary judgment and dismissing Plaintiff's complaint for failure to satisfy the serious injury threshold under Insurance Law §5104(a) and §5102(d). In support of summary judgment Defendants submitted the medical affirmations of **Audrey Eisenstadt**, a Board Certified Radiologist; and **Alan M. Crystal**, a Board Certified Orthopedist.

1. WILLI F. SANTOS:

Dr. Eisenstadt reviewed the MRI of the cervical spine taken on 11/27/12; Eisenstadt's impression was "desiccation C2-3, C3-4 and C5-6 intervertebral disc levels with minimal disc bulging seen at the C5-6 intervertebral disc level." Eisenstadt opined that this MRI "performed two weeks post accident revealed no evidence of any osseous, ligamentous or intervertebral disc changes post-traumatic in etiology or causally related to the 11/13/12 accident. . . no disc herniation or osseous contusion is identified, [which would be] additional findings seen with recent cervical trauma."

Dr. Crystal conducted an orthopedic examination on May 1, 2014. Crystal reported that

Santos complained of back and neck pain and told Crystal that his right knee no longer bothered him. Crystal conducted range of motion testing of the cervical and lumbar spines and both hips and knees; he found “full and normal” ranges in each of these body parts. Crystal also reported normal motor and muscle strength in the lower extremities. Crystal concluded that Plaintiff was “fully functional to perform all normal and usual daily activities, including work, without any restrictions.” Crystal opined that “because of the lack of any objective neurological findings, the lack of the cervical MRI reporting any root impingement, and the high prevalence of bulging discs in asymptomatic individuals. . . there is no basis to causally relate the alleged injuries of record of the spine to the accident of 11/13/2012.”

2. ORLANDO TORRES:

Dr. Eisenstadt reviewed the cervical CT scan dated 11/19/2012, and the MRIs of the lumbar taken on 1/28/13 and the right knee taken on 5/9/2013. Eisenstadt’s impression was “bony degenerative hypertrophic changes C1-2 articulation...minimal bulging C5-6 intervertebral disc level...no disc herniation seen.” Eisenstadt opined that this CT scan “performed six days following the accident reveals degenerative changes at the C1-2 articulation . . . which are months to years in origin and have no traumatic etiology...no causal relationship or association with the 11/13/12 incident.” With respect to the lumbar MRI, Eisenstadt reported that the MRI “performed two-and-a-half months following the accident revealed no evidence of any post-traumatic osseous, ligamentous and intervertebral disc changes ...causally related to the 11/13/12 incident.” Her impression was disc degeneration L3-4 and L4-5 at the intervertebral disc levels and minimal bulging at L4-5 which was longstanding and predating the accident.

Dr. Crystal conducted an orthopedic examination on April 3, 2014. Crystal listed all the records he reviewed, including the operative reports of left shoulder surgery performed on 3/4/2013 and right knee surgery performed on 5/20/2013. Crystal conducted range of motion testing of the lumbar and cervical spines, both knees, feet, ankles; he did not report any deficiencies in any of these body parts, and reported normal muscle and motor strength in the lower extremities. Crystal reported that claimant would not allow passive motion of the

shoulders, and noted no tenderness of the acromioclavicular, rotator cuff and clavicle joints. Crystal disagree with Plaintiff's doctors' interpretation of the cervical MRI, the CT scan and right knee MRI. Crystal opined that "because of the lack of any objective neurological findings, the lack of lumbar MRI or cervical CT reporting any nerve root impingement . . there is no basis to causally relate the alleged injuries of ...the spine to the accident of 11/13/2012." Crystal also opined that the operative findings of the left shoulder and right knee lacked "a traumatic etiology and were clearly degenerative."

3. CANDIDA GARCIA MOTA:

Dr. Eisenstadt reviewed the MRIs of the lumbar spine and right shoulder, both dated 1/24/2013; she also reviewed the MRIs of the cervical spine and right knee, both dated 11/19/2012. Regarding the lumbar MRI taken two-and-half-months post-incident, she reported that it revealed "extensive degenerative disc disease centered at the L4-5 level" and that no annular tear or bone contusions were seen at any ... disc level to indicate a traumatic disc rupture or bone contusion casually related to the 11/13/12 incident."

Regarding the right shoulder MRI Eisenstadt reported "a low lying acromion, which is a developmental variant present since childhood... it has no traumatic etiology or causal relationship to the incident."

With respect to the cervical MRI taken six days post-incident, Eisenstadt concluded there was "no evidence of any recent or acute post-traumatic changes involving the osseous, ligamentous or intervertebral disc structures." She found bony changes from the C3-4 through C5-6 which "were well over six months in development." She noted disc bulging of the C3-4, C4-5 and C6-7 levels manifesting "degenerative disc disease." Eisenstadt concluded that at no disc level was "there any osseous contusion, disc herniations, annular or traumatic disc ruptures or soft tissue changes post-traumatic in origin or causally related to the incident of 11/13/12."

With respect to the right knee MRI taken six days post-incident, Eisenstadt reported "degenerative joint disease involving the osseous and meniscal structures typical in distribution and appearance for arthritis." She noted a "small joint effusion...involving the medial meniscus...another manifestation of degenerative joint disease, months to years in development

and predating the incident,” rather than a large joint effusion which would be suggestive of a traumatic meniscal injury occurring six days before the MRI.

Dr. Crystal conducted an orthopedic examination on April 10, 2014. Crystal conducted range of motion testing of the lumbar and cervical spines, hips, knees, feet and ankles, and both shoulders; he reported no abnormalities in any of the ranges of these body parts. Crystal diagnosed normal motor strength and reflexes of the upper and lower extremities. Crystal’s impression was that the “claimant has absolutely no objective findings of a symptomatic herniated disc at a lumbar or cervical level causing root impingement.” Crystal concluded that, in light of the “absence of any objective neurological findings, the “high prevalence of bulging/herniated discs” were caused by disc dessication and degeneration rather than the accident of 11/13/2012. Crystal also disagreed with Plaintiff’s doctors’ diagnosis of the right shoulder and right knee. He opined that neither the right shoulder or right knee were injured as a result of the accident, and that the MRIs of both of these body parts indicated degeneration and arthritis.

\* \* \* \* \*

The issue of whether a claimed injury falls within the statutory definition of a “serious injury” is a question of law for the courts which may be decided on a motion for summary judgment. *See Licari v. Elliott*, 57 N.Y.2d 230, 237, 441 N.E.2d 1088, 1091, 455 N.Y.S.2d 570, 573 (1982). This court finds that Defendants met their initial burden of proof that neither of the three Plaintiffs sustained a “serious injury.” Once a defendant sets forth a *prima facie* case that the claimed injury is not serious, the burden shifts to the plaintiff to demonstrate, by the submission of objective proof, that there are substantial triable issues of fact as to whether the purported injury was serious. *See Toure v. Avis Rent-A-Car Sys., Inc.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865, 774 N.E.2d 119 (2002); *Rubenscastro v. Alfaro*, 29 A.D.3d 436, 437, 815 N.Y.S.2d 514, 515 (1st Dep’t 2006).

In opposition to summary judgment, Plaintiff Willi F. Santos submitted the medical affirmation of Dr. Titiana Pavlova who examined him on Nov. 14, 2012, one day post-accident. Santos also submitted an uncertified report of the cervical MRI dated Nov. 27, 2012 reporting a

disc bulge at C5-C6.

In opposition to summary judgment, Plaintiff Orlando Torres submitted uncertified copies of the operative reports of the right knee dated 5/20/2013, and of the left shoulder dated 4/4/2013. Torres also submitted medical affirmations by Dr. Titiana Pavola, who examined him on 11/14/2012, one day post-accident, and by Dr. Randall Ehrlich, who examined him on 2/12/2013; Dr. Ehrlich was the surgeon who performed the knee and shoulder surgeries.

In opposition to summary judgment, Plaintiff Candida Garcia also submitted a medical affirmation by Dr. Titiana Pavlova, who examined her on 11/14/2012, one day post-accident, and by Dr. Randall Ehrlich, who examined her on 3/5/2013. Garcia also submitted an uncertified MRI report of right knee dated Nov. 19, 2012, stating the impression as “horizontal tear posterior horn medial meniscus communicating with inferior meniscal surface.” Defendant’s submission included Dr. Ehrlich’s operative report of right knee surgery performed on 4/1/2013.

After consideration of Plaintiff’s submission, the Court finds that Plaintiff Willi F. Santos failed in his burden of rebuttal that he sustained a serious injury pursuant to the Insurance Law; his only medical evidence is Dr. Pavlova’s findings on one visit one day after the accident; at his deposition he testified he was never confined to bed after the accident and that he could not remember how long he was confined to bed [Transcript, pg. 50]. However, with respect to the claims by Plaintiffs Torres and Garcia Mota, the Court finds that the differing and/or contradictory medical opinions expressed by the parties’ respective doctors raise issues of fact and credibility which should be determined by the trier of fact. Consequently, the Court holds that although defendants met their initial burden, the submissions by Plaintiffs Torres and Garcia Mota raised material issues of fact *and credibility* as to whether these two plaintiffs sustained a “significant limitation of use of a body function or system,” and/ or “permanent consequential limitation of use of a body organ or member.” At this juncture the court declines to dismiss these claims as matter of law. *Pommells v. Perez*, 4 N.Y.3d 566, 577, 797 N.Y.S.2d 380, 386-387, 830 N.E.2d 278, 284-285 (2005); Cf. *Castillo v. Abreu*, 132 A.D.3d 520, 18 N.Y.S.3d 378 (1<sup>st</sup> Dept. 2015); *Boateng v. Ye Yiyen*, 119 A.D.3d 424, 990 N.Y.S.2d 17 (1<sup>st</sup> Dept. 2014); *Pantojas*

*v. Lajara Auto Corp.*, 117 A.D.3d 577, 986 N.Y.S.2d 87 (1<sup>st</sup> Dept. 2014); *Clementson v. Price*, 107 A.D.3d 533, 967 N.Y.S.2d 357 (1<sup>st</sup> Dept. 2013); *Angeles v. American United Transportation, Inc.*, 110 A.D.3d 639, 973 N.Y.S.2d 644 (1<sup>st</sup> Dept. 2013); *Brown v. Covington*, 82 A.D.3d 406, 918 N.Y.S.2d 36 (1<sup>st</sup> Dept. 2011); *Rubin v. SMS Taxi Corp.*, 71 A.D.3d 548, 898 N.Y.S.2d 110 (1<sup>st</sup> Dept. 2010); and see *Victor Pantojas v. Lajara Auto Corp.*, 117 A.D.3D 577, 986 N.Y.S.2D 87, 2014 N.Y. (1<sup>st</sup> Dept. 2014) (plaintiff's physical therapy records, submitted by defendants, showing that he began physical therapy five days after the accident provides contemporaneous evidence of injures). Any claim that Plaintiff failed to explain a gap in treatment is similarly deferred to the trier of fact. Cf. *Deloris Brown v. Joseph Covington*, 82 A.D.3d 406, 918 N.Y.S.2d 36 (1<sup>st</sup> Dept. 2011) (Plaintiff offered sufficient explanation for gap in treatment in that her no fault benefits were denied).

However, the Court finds that both Plaintiffs failed to meet their burden of rebuttal regarding the 90/180 claim, i.e., that he suffered "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." Here, Plaintiff Torres did not rebut Defendants' claim that at his deposition he testified that he was never confined to bed, and that including the days after the first surgery, he was at most confined for the first 69 of the 180 days. Plaintiff Garcia Mota did not rebut Defendants' claim that at her deposition she testified that, while never confined to bed, after the accident she was confined to her home for one month.

For the foregoing reasons, Defendants' motion for summary judgment dismissing the complaint for Plaintiff's failure to meet the "serious injury" threshold of Insurance Law §5102(d) is **granted** solely to the extent Santos' claims are dismissed and the 90/180 claims by Plaintiffs Torres and Garcia Mota are **dismissed**, as those claims were not medically substantiated; therefore it is

ORDERED that the complaint is dismissed solely as to Willi F. Santos. Defendants' motion is otherwise **denied** as to Defendants Torres and Garcia, as herein above described.

Dated: May 6, 2016