

Rosa v Delacruz

2016 NY Slip Op 32939(U)

October 4, 2016

Supreme Court, Bronx County

Docket Number: 308543/12

Judge: Joseph E. Capella

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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 20

Case Disposed
Settle Order
Schedule Appearance

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
AGRIPINO POLANCO ROSA and KATHY
ACEVEDO,

Index #: 308543/12

Plaintiffs,

DECISION/ORDER

- against -

Present:
Hon. Joseph E. Capella
J.S.C.

RAFAEL DELACRUZ and DEVONE HARP,

Defendants.

-----X
The following papers numbered 1 to 4 read on this motion, noticed on March 8, 2016, and duly submitted as no. _____ on the Motion Calendar of _____.

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1
ANSWERING AFFIDAVIT AND EXHIBITS	3
REPLY AFFIDAVIT AND EXHIBITS	4
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	2
MEMOS OF LAW	--

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THESE MOTIONS ARE GRANTED AS FOLLOWS:

By notice of motion,¹ the defendant, Rafael Delacruz, seek summary judgment (CPLR 3212) dismissal of the first cause of action by plaintiff, Agripino Polanco Rosa ("Rosa"), based on an alleged failure to meet the serious injury threshold of Insurance Law § 5102(d). In a separately noticed motion, the defendant, Devon Harp, joins in the aforementioned Delacruz-motion. In support of the relief sought, the defendants' experts, Dr. Emmanuel (orthopedic surgeon) and Dr. Desrouleaux (neurologist), who examined Rosa on August 6, 2012, some four months after the April 5, 2012-accident, found, *inter*

¹ The instant motions were transferred to Judge Capella the week of September 19, 2016.

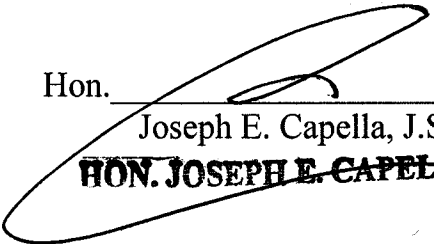
alia, that plaintiff had full range of motion of the cervical spine, lumbar spine and left shoulder, and negative cervical compression and straight leg raising tests. The thoracic curvature was normal with no sensory loss. Their diagnosis was that all alleged injuries to the cervical, lumbar and thoracic spine, and left shoulder have all resolved, and that plaintiff may continue to work without limitation. On October 14, 2014, Dr. Begman, an orthopedic surgeon, also examined Rosa on defendants' behalf, and made similar findings. Based on the aforementioned, the burden now shifts to Rosa to establish material issues of fact (*Zuckerman v City of NY*, 49 NY2d 557 [1980]).

In opposition, Rosa provides a June 6, 2016-narrative report by orthopedic surgeon, Dr. McCulloch, in which he states that on June 13, 2012, he diagnosed Rosa with a rotator cuff tear, but fails to set forth how he reached this diagnosis. Moreover, this directly contradicts the May 22, 2012-MRI report by Rosa's radiologist, which did not address causation and found no evidence of a tear. (*Santos v Perez*, 107 AD3d 572 [1st Dept 213].) This narrative report also reveals that in his most recent exam of Rosa on May 25, 2016, Dr. McCulloch did not examine the cervical, thoracic and lumbar spine. In addition, the "Healthworx" records annexed to the opposition papers, which purport to show Rosa's post-accident medical treatment, were not in admissible form. Given the aforementioned, Rosa has not met her burden on the issues of permanent consequential and significant limitation. As for her 90/180 claim, Rosa indicated on her no-fault application that she did not miss work after the accident. On the other hand, she stated in her deposition that she did, but could not recall the number of days missed. Rosa also testified that she left her employment because she "could not do the job"; however, this occurred some nine months after the accident. And except for Dr. McCulloch's impression on the last page of his June 6, 2016-narrative report in which he restricted Rosa to working in sedentary capacity, there is no medical proof to show that plaintiff was disabled or unable to work after the accident (*Kauderer v Penta*, 261 AD2d 365 [2nd Dept 1999]). Based on the aforementioned, the defendants' motions are granted, and the

plaintiff-Rosa's first cause of action is dismissed.

This constitutes the decision and order of this court.

10/4/16
Dated

Hon. 
Joseph E. Capella, J.S.C.
HON. JOSEPH E. CAPELLA