

Saravia v Horton

2017 NY Slip Op 32412(U)

October 5, 2017

Supreme Court, Bronx County

Docket Number: 24703/13

Judge: Joseph E. Capella

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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 23

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

Case Disposed
Settle Order
Schedule Appearance

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LUIS PERALTA SARAVIA and MARIA PERALTA,

Index #: 24703/13

Plaintiffs,

DECISION/ORDER

- against -

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

HERBERT HORTON and MOHAMMED HOSSAIN,

Defendants.

-----X
The following papers numbered 1 to 3 read on these motions, noticed on March 3, 2017, 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	--
NOTICE OF CROSS MOTION AND AFFIDAVITS ANNEXED	2

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

The defendant, Mohammed Hossain (“Hossain”), moves by notice of motion dated February 2, 2017, and the defendant, Herbert Horton (“Horton”), moves by notice of cross-motion dated February 17, 2017, (and essentially joins in Hossain’s motion) for dismissal (CPLR 3212) of this automobile accident action, based on an alleged failure to meet the serious injury threshold of Insurance Law § 5102(d). In support of these motions, the defendants’ neurologist, Dr. Khaneja, examined plaintiff, Luis Peralta Saravia (“Saravia”), on April 10, 2015, the results of which were a normal neurological exam. On April 7, 2015, Saravia met with defendants’ orthopedist, Dr. Moon, who diagnosed plaintiff with a resolved cervical, thoracic and lumbar sprain/strain. On October 5, 2015, the defendants’ radiologist, Dr. Heyligers, reviewed MRIs of Saravia’s

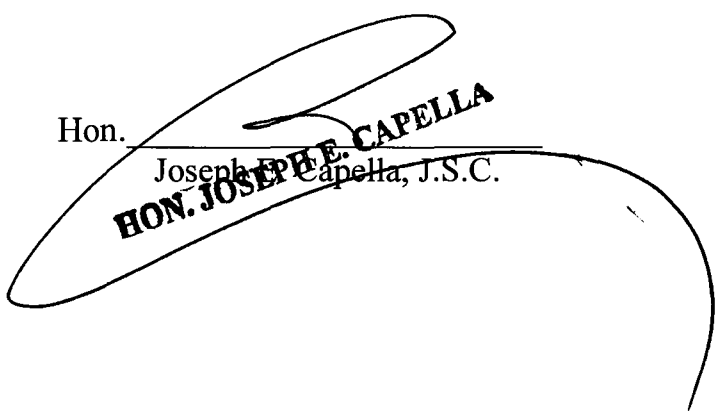
cervical spine from June 14, 2013, and found a “normal study . . . unremarkable.”

On April 10, 2015, the defendants’ neurologist, Dr. Khaneja, examined plaintiff, Maria Peralta (“Peralta”), and likewise found a normal neurological exam. On April 7, 2015, Peralta met with defendants’ orthopedist, Dr. Moon, who diagnosed her with a resolved cervical/lumbar sprain/strain, a resolved left shoulder sprain, and no clinical evidence of left carpal tunnel syndrome. The defendants’ also allege that plaintiffs cannot establish that substantially all of their activities were curtailed for the requisite 90/180 day period because neither missed any time from work. Based on the aforementioned, the court is satisfied that the burden now shifts to the plaintiffs to establish material issues of fact, (*Zuckerman v City of NY*, 49 NY2d 557 [1980]), regarding serious injury.

The plaintiffs can meet their burden by submitting recent quantitative objective findings in addition to an opinion(s) as to the significance of the injuries. (*Thompson v Abbasi*, 15 AD3d 95 [1st Dept 2005]; *Grossman v Wright*, 268 AD2d 79 [2nd Dept 2000].) Here, in opposition to defendants’ motions, there is an affirmation from Saravia’s treating physician, Dr. Sohal, who recently examined him on May 31, 2017, and found, *inter alia*, continued reduced range of motion to the cervical and lumbar spine. There is also an affirmation from Peralta’s treating physician, Dr. Teyibo, who recently examined her on June 1, 2017, and found, *inter alia*, continued reduced range of motion to the cervical and lumbar spine, and left shoulder. As for 90/180, Saravia states in his affidavit that within the first six months following the accident, he could not perform various household duties, and was unable to work at his job in the same capacity as he did before the accident. Peralta states in her affidavit that since the accident, she has had restrictions and difficulties in carrying out her job responsibilities as a home health aid. She goes on to state that given the aforementioned, she has been assigned less difficult work and limited hours. Based on the aforementioned, the court is satisfied that issues of fact exist to warrant denial of the instant motion and cross-motion.

The plaintiffs are directed to serve a copy of this decision/order with notice of entry by first class mail upon plaintiff within 30 days of receipt of copy of same. This constitutes the decision and order of this court.

10/5/17
Dated

Hon. 
Joseph P. E. Capella, J.S.C.
HON. JOSE P. E. CAPELLA