

Montoya v Surma Cab Corp.

2019 NY Slip Op 31324(U)

March 4, 2019

Supreme Court, Queens County

Docket Number: 710431/2016

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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ANDRES MONTOYA and VIVIANA VELEZ
HERNANDEZ,

Index No.: 710431/2016

Motion Date: 2/28/19

Plaintiffs,

Motion Nos.: 26 & 27

- against -

Motion Seqs.: 7 & 9

SURMA CAB CORP., "JOHN DOE", first and
last names being fictitious and
unknown, party intended to be the
driver of the motor vehicle, and
RAFIQUL ISLAM,

Defendants.

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The following electronically filed documents read on this motion
by defendant SURMA CAB CORP. (seq. no. 7) for an order pursuant
to CPLR 3212, granting defendant summary judgment and dismissing
the complaint of plaintiffs on the ground that plaintiffs did not
sustain a serious injury within the meaning of Insurance Law §§
5104(a) and 5102(d); on this motion by plaintiff on the
counterclaim ANDRES MONTOYA (seq. no. 9) for an order pursuant to
CPLR 3212, granting plaintiff on the counterclaim summary
judgment and dismissing the complaint of plaintiff Viviana Velez
Hernandez on the ground that plaintiff Viviana Velez did not
sustain a serious injury within the meaning of Insurance Law §§
5104(a) and 5102(d); and on this cross-motion by defendants SURMA
CAB CORP. and RAFIQUL ISLAM (seq. no. 9) for an order pursuant to
CPLR 3212, dismissing the complaint and granting summary judgment
to defendants:

Table with 2 columns: Document Description and Papers Numbered. Includes entries for Notice of Motion (seq. no. 7), Notice of Motion (seq. no. 9), Affirmation in Opposition, Affirmation in Reply, and Affirmation of Cross-Motion.

This is an action for personal injuries allegedly sustained by plaintiffs as a result of a motor vehicle accident that occurred on November 26, 2015 on Broadway near its intersection with 51st Avenue, in Queens County, New York. At the time of the accident, plaintiff Viviana Velez Hernandez was a passenger in the vehicle operated by plaintiff Andres Montoya. As a result of the accident, plaintiff Andres Montoya alleges that he sustained serious injuries to his bilateral shoulders, right ankle, bilateral wrists including a right wrist fracture, cervical spine, thoracic spine, and lumbar spine. As a result of the accident, plaintiff Viviana Velez Hernandez alleges that she sustained serious injuries to her cervical spine, thoracic spine, lumbar spine, right shoulder, right knee, and right ankle.

This Court will first address the cross-motion by defendants for summary judgment on the issue of liability will be addressed first. As this is a successive summary judgment motion, which is based on grounds and facts that could have been raised in the first motion, this successive motion for summary judgment is denied (see Manning v Turtel, 135 AD2d 511 [2d Dept. 1987]; Taylor v Brooklyn Hospital, 187 AD2d 714 [2d Dept. 1992]). In any event, by Short Form Order dated January 31, 2019, this Court granted plaintiffs summary judgment on the issue of liability.

Turning to the motion seeking summary judgment on the grounds that the injuries claimed by plaintiff Andres Montoya fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law, plaintiff Andres Montoya appeared for an examination before trial on November 2, 2017 and testified that he was involved in the subject accident. After the accident, he went to pick up other workers. He sought medical treatment three days after the accident.

Chandra M. Sharma, M.D. performed an independent neurologic examination on plaintiff Andres Montoya on January 6, 2018. Andres Montoya presented with current complaints of pain in the neck and lower back. When watching television, he has to change position every once in a while to avoid increasing pain. He also has difficulty lifting and carrying heavy items. Dr. Sharma identifies the records reviewed prior to rendering the report. Dr. Sharma performed range of motion testing and found decreased ranges of motion in plaintiff's cervical spine and lumbar spine. Dr. Sharma opines that there are subjective limitations due to perception of pain not confirmed on objective examination. Such limitations do not represent neurological problems. Ranges of motion are normal during spontaneous activities. Dr. Sharma concludes that despite Andres Montoya's subjective complaints, there were no objective findings to support them. Andres Montoya

is capable of working and performing his activities of daily living without any restrictions or limitations. A permanent injury has not been sustained.

Howard Levin, M.D. performed an independent orthopedic examination on plaintiff Andres Montoya on March 12, 2018. Andres Montoya presented with current complaints of pain in the neck, mid-low back, lower back, right shoulder, and right ankle. Dr. Levin identifies the records reviewed prior to rendering the report. Dr. Levin performed range of motion testing and found normal range of motion in plaintiff's cervical spine, lumbar spine, bilateral shoulders, bilateral wrists, and bilateral ankles. Dr. Levin opines that the orthopedic examination is objectively normal and indicates no findings that would result in orthopedic limitations in use of the body parts examined. Andres Montoya is capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities, including regular work duties.

Audrey Eisenstadt, M.D. reviewed the CT of Andres Montoya's cervical spine performed on January 26, 2016 and the MRIs of Andrew Montoya's right wrist and right hand performed on February 26, 2016. The studies revealed no evidence of osseous or soft tissue injury which may have resulted from the subject accident.

Here, the conclusion that plaintiff Andres Montoya did not suffer a disability or impairment as a result of the subject accident was directly contradicted by Dr. Sharma who examined plaintiff Andres Montoya more than two years after the subject accident and recorded objectively-measured limitations in range of motion regarding Andres Montoya's cervical spine and lumbar spine (see Sook Houg v Beers, 151 AD3d 995 [2d Dept. 2017]; Mercado v Mendoza, 133 AD3d 833 [2d Dept. 2015]; Ambroselli v Team Massapequa, Inc., 88 AD3d 927 [2d Dept. 2011]; Grant v Parsons Coach, Ltd., 12 AD3d 484 [2d Dept. 2004]; Lopez v Sentaroe, 65 NYS2d 1017 [1985] [finding that providing evidence of a ten degree limitation in range of motion is sufficient for the denial of summary judgment to defendants]). Although Dr. Sharma opines that there are subjective limitations due to perception of pain not confirmed on objective examination, Dr. Sharma never opines as to what extent the positive findings were self-imposed or limited by other variables. Moreover, as Dr. Levin found normal ranges of motion, defendants' submitted medical reports create issues of fact between themselves as to whether plaintiff Andres Montoya's ranges of motion are within normal limits. Additionally, defendants' experts are silent regarding plaintiff Andres Montoya's right wrist fracture, which is alleged in the Bill of Particulars.

Where a defendant fails to meet the defendant's prima facie burden, the court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Barrera v MTA Long Island Bus, 52 AD3d 446 [2d Dept. 2008]). Accordingly, defendants' branch of the motion seeking to dismiss plaintiff Andres Montoya's complaint is denied.

Turning to the motions seeking summary judgment on the grounds that the injuries claimed by plaintiff Viviana Velez Hernandez fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law, plaintiff Viviana Velez Hernandez appeared for an examination before trial on November 2, 2017 and testified that she was involved in the subject accident. After the accident, she went to pick up workers. She sought medical treatment three days after the accident.

Chandra M. Sharma, M.D. performed an independent neurologic examination on plaintiff Viviana Velez Hernandez on January 6, 2018. Viviana Velez Hernandez presented with current complaints of pain in the neck and back. Dr. Sharma identifies the records reviewed prior to rendering the report. Dr. Sharma performed range of motion testing and found normal ranges of motion in Viviana Velez Hernandez's cervical spine and lumbar spine. Dr. Sharma concludes that despite Viviana Velez Hernandez's subjective complaints, there were no objective findings to support them. Viviana Velez Hernandez is capable of working and performing her activities of daily living without any restrictions or limitations. A permanent injury has not been sustained.

Audrey Eisenstadt, M.D. reviewed the MRIs of Viviana Velez Hernandez's cervical spine and lumbar spine performed on January 26, 2016, which revealed no posttraumatic osseous, soft tissue etiology, ligamentous or intervertebral disc changes.

Based on the submitted evidence, defendants contend that the evidence submitted is sufficient to establish, prima facie, that plaintiff Viviana Velez Hernandez has not sustained an injury which resulted in a significant limitation of use of a body organ, member, function or system. However, defendants failed to adequately address plaintiff Viviana Velez Hernandez's claim that she sustained a serious injury under the 90/180 category. Defendants contend that plaintiff Viviana Velez Hernandez failed to establish that she was medically prevented from performing substantially all of her usual and customary activities for the requisite period. However, defendants' experts failed to relate

their respective findings, made more than two years after the subject accident, to the 90/180-day category for the period of time immediately following the subject accident (see Encarnacion v Smith, 70 AD3d 628 [2d Dept. 2010]). Thus, defendants failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff Viviana Velez Hernandez did not sustain a serious injury within the meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]). Moreover, in opposition, plaintiff Viviana Velez Hernandez submits an affidavit, stating, inter alia, when she returned to work following the subject accident, she only worked four days per work. Prior to the accident, she was working six days per week. Presently, she continues to only work four days per week. Based on such, and at the very least, issues of fact regarding whether plaintiff Viviana Velez Hernandez sustained an injury under the 90/180-day category preclude summary judgment.

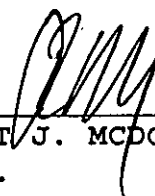
Accordingly, and for the above stated reasons, it is hereby

ORDERED, that the motions by defendant SURMA CAB CORP. (seq. no. 7) and plaintiff on the counterclaim ANDRES MONTOYA (seq. no. 9) for an order granting summary judgment and dismissing the complaint on the ground that plaintiffs have not sustained a serious injury are denied; and it is further

ORDERED, that the cross-motion by defendants SURMA CAB CORP. and RAFIQUL ISLAM (seq. no. 9) for an order granting summary judgment and dismissing the complaint is denied.

Dated: March 4, 2019
 Long Island City, N.Y

FILED
 MAR 08 2019
 COUNTY CLERK
 QUEENS COUNTY


 ROBERT J. McDONALD
 J.S.C.