

**Canales v Cruz**

2019 NY Slip Op 32387(U)

August 2, 2019

Supreme Court, Suffolk County

Docket Number: 16-4019

Judge: Martha L. Luft

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SHORT FORM ORDER

INDEX No. 16-4019  
CAL. No. 17-02301MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 50 - SUFFOLK COUNTY

**PRESENT:**

Hon. MARTHA L. LUFT  
Acting Justice of the Supreme Court

MOTION DATE 4-30-18  
ADJ. DATE 1-22-19  
Mot. Seq. # 002 - MG; CASEDISP

-----X  
SONIA PATRICIA CANALES and JUANA  
CANALES,

Plaintiffs,

- against -

BARTOLOME A. CRUZ,

Defendant.  
-----X

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers 12 - 20; Replying Affidavits and supporting papers 21 - 22; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by defendant for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages for personal injuries sustained by plaintiffs when their vehicle was struck in the rear by a vehicle owned and operated by defendant. The accident allegedly occurred on April 25, 2014, at the intersection of Albany Avenue and Benjoe Drive, in Amityville, New York. At the time of the accident, Juana Canales was a passenger in the vehicle operated by Sonia Canales. By the bill of particulars, Sonia Canales alleges that, as a result of the accident, she sustained various serious injuries and conditions, including bulging and herniated discs in the cervical and lumbar regions and cervical radiculopathy. Juana Canales alleges that, as a result of the accident, she sustained various serious injuries and conditions, including bulging and herniated discs in the cervical and lumbar regions and lumbar radiculopathy.

Defendant moves for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a "serious injury" as defined in Insurance Law §5102 (d).

Insurance Law § 5102 (d) defines “serious injury” as “a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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.”

In order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose, and use of the body part (*see Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Cebbron v Tuncoglu*, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) (*see Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos*, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff’s deposition testimony and the affirmed medical report of the defendant’s own examining physician (*see Moore v Edison*, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; *Faroze v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, *supra*; *Boone v New York City Tr. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendant made a prima facie showing that Sonia Canales did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of his examining physician (*see Bailey v Islam*, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; *Sierra v Gonzalez First Limo*, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). On August 16, 2017, approximately three years and four months after the subject accident, defendant’s examining orthopedist, Dr. Craig Ordway, examined Sonia Canales and performed certain orthopedic and neurological tests, including the straight leg raising test, the Lachman’s test, the Slocum’s test, and the McMurray’s sign. Dr. Ordway found that all the test results were negative or normal, and that there was no spasm in Sonia Canales’ cervical and lumbar regions. Dr. Ordway found that there was no effusion in Sonia Canales’ right knee. Dr. Ordway also performed range of motion testing on Sonia Canales’ spine and right knee, using a goniometer to measure her joint movement, and found that Sonia Canales exhibited normal joint function. Dr. Ordway opined that Sonia Canales had no

orthopedic disability at the time of the examination (*see Willis v New York City Tr. Auth.*, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]).

Further, at her deposition, Sonia Canales testified that following the accident, she did not miss any classes at school, although she was confined to her bed and home for approximately two days. She testified that she has exercised at a gym three to four days since the accident. Sonia Canales' deposition testimony established that her injuries did not prevent her from performing "substantially all" of the material acts constituting her customary daily activities during at least 90 out of the first 180 days following the accident (*see Burns v McCabe*, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; *Curry v Velez*, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]).

Thus, defendant met his initial burden of establishing that Sonia Canales did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that she was not prevented from performing substantially all of her usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see Gonzalez v Green*, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]).

The burden, therefore, shifted to Sonia Canales to raise a triable issue of fact (*see Gaddy v Eyler, supra*). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see Ferraro v Ridge Car Serv.*, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; *Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination or a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose, and use of the body part (*see Perl v Meher, supra; Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott, supra; Cebon v Tuncoglu, supra*). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (*Pommells v Perez*, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see Vasquez v John Doe #1*, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; *Rivera v Bushwick Ridgewood Props., Inc.*, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]).

Sonia Canales, in opposition, argues that the report of defendant's examining physician is insufficient to meet his burden on the motion. She also argues that the affirmation of her treating physician, Dr. Nizarali Visram, and the unaffirmed MRI reports of her radiologist, Dr. David Payne, raise a triable issue as to whether she suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). Here, Dr. Visram's report set forth Sonia Canales' complaints and the findings, including significant limitations in her cervical and lumbar joint function measured during range of motion testing performed at his initial consultation on May 1, 2014, six days after the subject accident. Subsequently, Sonia Canales saw Dr. Visram in follow-up evaluations in the following months: May 2014, June 2014, July 2014, September 2014, October 2014, and November 2014. On

May 24, 2018, Dr. Visram re-examined Sonia Canales and performed range of motion testing on her cervical and lumbar regions and knees. Dr. Visram found a minor range of motion restriction in her cervical region of 73 degrees of right rotation and 70 degrees of left rotation (normal 80 degrees). Sonia Canales' showing of relatively minor limitations in recent examination is insufficient to sustain a serious injury claim (*see Gaddy v Eyley, supra; M.P. v New York Tr. Auth.*, 159 AD3d 492, 71 NYS3d 501 [1st Dept 2018]; *Rose v Tall*, 149 AD3d 554, 52 NYS3d 339 [1st Dept 2017]; *Cattouse v Smith*, 146 AD3d 670, 672, 45 NYS3d 453 [1st Dept 2017]). Dr. Visram's report, therefore, fails to raise a triable issue of fact.

Further, even assuming that Sonia Canales was entitled to rely on the unaffirmed MRI reports prepared by Dr. Payne, such reports are insufficient to warrant denial of defendant's motion for summary judgment. Dr. Payne's MRI reports revealed bulging and herniated discs in Sonia Canales' cervical and lumbar regions. The mere existence of a herniated or bulging disc, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury (*see Acosta v Alexandre*, 70 AD3d 735, 894 NYS2d 136 [2d Dept 2010]; *Pierson v Edwards*, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]; *Byrd v J.R.R. Limo*, 61 AD3d 801, 878 NYS2d 95 [2d Dept 2009]).

Moreover, Sonia Canales failed to offer competent evidence that she sustained nonpermanent injuries that left her unable to perform substantially all of her normal daily activities for at least 90 of the 180 days immediately following the accident (*see John v Linden*, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; *Il Chung Lim v Chrabaszcz*, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; *Rivera v Bushwick Ridgewood Props., Inc., supra*). Thus, the branch of the motion by defendant for summary judgment dismissing the claim of Sonia Canales on the ground that her injuries failed to meet the serious injury threshold of Insurance Law § 5102 (d) is granted.

Likewise, defendant made a prima facie showing that Juana Canales did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of his examining physician (*see Bailey v Islam, supra; Sierra v Gonzalez First Limo, supra; Staff v Yshua, supra*). On August 16, 2017, Dr. Ordway examined Juana Canales and performed certain orthopedic and neurological tests, including the straight leg raising test. Dr. Ordway found that all the test results were negative or normal, and that there was no spasm in Juana Canales' cervical and lumbar regions. Dr. Ordway also performed range of motion testing on Juana Canales' spine, using a goniometer to measure her joint movement, and found that Juana Canales exhibited normal joint function. Dr. Ordway opined that Juana Canales had no orthopedic disability at the time of the examination (*see Willis v New York City Tr. Auth., supra*).

Further, at her deposition, Juana Canales testified that following the accident, she missed five days from work. She testified that since the accident, she is able to clean the house, do laundry, and cook with the assistance of her husband. Juana Canales' deposition testimony established that her injuries did not prevent her from performing "substantially all" of the material acts constituting her customary daily activities during at least 90 out of the first 180 days following the accident (*see Burns v McCabe, supra; Curry v Velez, supra*).

Thus, defendant met his initial burden of establishing that Juana Canales did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that she was not prevented from performing substantially all of her usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see Gonzalez v Green, supra*).

Juana Canales, in opposition, argues that the report of defendant’s examining physician is insufficient to meet his burden on the motion. She also argues that the affirmation of her treating physician, Dr. Visram, and the unaffirmed MRI reports of her radiologist, Dr. Payne, raise a triable issue as to whether she suffered injury within the “significant limitation of use” category of Insurance Law § 5102 (d). Here, Dr. Visram’s report set forth Juana Canales’ complaints and the findings, including significant limitations in her cervical and lumbar joint function measured during range of motion testing performed at his initial consultation on May 1, 2014. Subsequently, Juana Canales saw Dr. Visram in follow-up evaluations in the following months: May 2014, June 2014, July 2014, September 2014, October 2014, and November 2014. On May 24, 2018, Dr. Visram re-examined Juana Canales and performed range of motion testing on her cervical and lumbar regions. With respect to Juana Canales’ cervical region, Dr. Visram indicated 45 degrees of flexion (normal 50 degrees), 50 degrees of extension (normal 60 degrees), and 64 degrees of right rotation and 65 degrees of left rotation (normal 80 degrees). With respect to Juana Canales’ lumbar region, Dr. Visram indicated 74 degrees of flexion (normal 90 degrees) and 30 degrees of extension (normal 30 degrees). Juana Canales’ showing of relatively mild limitations in recent examination is insufficient to sustain a serious injury claim (*see Gaddy v Eyer, supra; M.P. v New York Tr. Auth., supra; Rose v Tall, supra; Cattouse v Smith, supra*). Dr. Visram’s report, therefore, fails to raise a triable issue of fact.

Further, even assuming that Juana Canales was entitled to rely on the unaffirmed MRI reports prepared by Dr. Payne, such reports are insufficient to warrant denial of defendant’s motion for summary judgment. Dr. Payne’s MRI reports revealed bulging and herniated discs in Juana Canales’ cervical and lumbar regions, which is not evidence of serious injury (*see Acosta v Alexandre, supra; Pierson v Edwards, supra; Byrd v J.R.R. Limo, supra*).

Finally, Juana Canales failed to offer competent evidence that she sustained nonpermanent injuries that left her unable to perform substantially all of her normal daily activities for at least 90 of the 180 days immediately following the accident (*see John v Linden, supra; Il Chung Lim v Chrabaszcz, supra; Rivera v Bushwick Ridgewood Props., Inc., supra*). Thus, the branch of the motion by defendant for summary judgment dismissing the claim of Juana Canales on the ground that her injuries failed to meet the serious injury threshold of Insurance Law § 5102 (d) is granted.

Dated: August 2, 2019  
Riverhead, New York

Martha A. Luft  
A.J.S.C.  
HON. MARTHA A. LUFT

FINAL DISPOSITION     NON-FINAL DISPOSITION