

Gomez v Galan

2020 NY Slip Op 33728(U)

January 3, 2020

Supreme Court, Nassau County

Docket Number: 608243/17

Judge: Jack L. Libert

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

AIDA GOMEZ,

Plaintiff,

-against-

**SANDORA A. GALAN, EL NOPAL RESTAURANT CORP.,
LESTER ALEXANDER RIVAS-GOMEZ and JOSE H.
RIVAS,**

Defendants.

LESTER RIVAS-GOMEZ,

Plaintiff,

-against-

**SANDOR A. GALAN and EL NOPAL RESTAURANT
CORP.,**

Defendants.

**TRIAL PART 20
NASSAU COUNTY**

INDEX # 608243/17

Action No. 1

**MOTION # 01
INDEX # 601875/18
MOTION SUBMITTED:
SEPTEMBER 11, 2019**

**MOD
Action No. 2**

The following papers having been read on this motion:

- Notice of Motion/Order to Show Cause.....1**
- Cross Motion/Answering Affidavits.....2**
- Reply Affidavits.....3**

Defendants move for summary judgment and to dismiss pursuant to CPLR 3212 on the grounds that the plaintiff, Lester Rivas-Gomez did not sustain serious injury within the meaning of Insurance Law Section 5102(d).

The instant litigation arises out of a motor vehicle accident that occurred on December 10, 2015 on Fulton Avenue at the intersection with Clinton Street, Village of Hempstead in the County of Nassau. Of

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mention is plaintiff's subsequent work related injury on July 19, 2018, wherein he injured his left knee.

Serious Injury

In a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York, supra*). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Dugga, Inc.*, 180 AD2d 579 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]).

In order to satisfy the serious injury threshold, plaintiff must submit objective proof of serious injury. In *Toure v. Avis Rent-A-Car Systems*, 98 NY2d 345 (2002), the Court of Appeals held that a plaintiff's proof of injury must be supported by objective medical evidence in admissible form, such as sworn MRI or CT scan tests. These sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Even when there is ample proof of plaintiff's injury, certain factors may override a plaintiff's objective medical proof of limitations and permit dismissal of the plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem, or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez*, 4 NY3d 566 [2005]). A plaintiff is required to provide, inter alia, objective medical evidence which demonstrates the extent and degree of the alleged physical limitation resulting from disc injury and its duration (*Perl v. Meher*, 18 NY3d 208 [2011]; *Ifrach v. Neiman*, 306 AD2d 380 [2nd Dept. 2003]; *Jason v. Danar*, 1 AD3d 398 [2nd Dept. 2003]; *Felix v. New York City Tr. Auth.*, 32 AD3d 529 [2nd Dept. 2006]; *Garcia v. Sobles*, 41 AD3d 426 [2nd Dept. 2007]; *Bestman v. Seymour*, 41 AD3d 629 [2nd Dept. 2007]).

Article 51 of the New York State Insurance Law defines serious injury as: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of a fetus; (6) permanent loss of use of

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body organ or member, function, or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury of a non-permanent nature that prevents the injured person from performing substantially all of the material acts which constitute his usual and customary daily activity for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury (*see McKinney's Consolidated Law of New York*, Insurance Law § 5102(d)). Whether the plaintiff can demonstrate the existence of a compensable serious injury depends upon the quality, quantity, and credibility of admissible evidence (*Manrique v. Warshaw Woolen Associates, Inc.*, 297 AD2d 519 [1st Dept. 2002]). Plaintiff claims permanent loss, permanent consequential limitation of use, significant limitation of use and 90/180 days categories of Insurance Law 5102(d). In the Verified Bill of Particulars, plaintiff claims he sustained serious injuries (See Exhibit F, Verified Bill of Particulars, Notice of Motion).

Defendants submitted the attested report of Stuart R. Hershon, an orthopedist. Dr. Hershon conducted an IME of plaintiff. Dr. Hershon reported plaintiff's gait to be stable and not antalgic. As to the cervical spine, range of motion was reported to be within normal limits, including flexion 50/50, extension 60/60, lateral bend 45/45 and lateral rotation 80/80. As to the cervical spine, there is no spinous process tenderness and no paravertebral spasm noted. As to the lumbar spine, there was no spinous process tenderness noted and no spasm. Range of motion of the lumbar spine was reported to be within normal limits, including flexion at 60/60, extension 25/25, lateral bend at 25/25 and straight leg raising 80/80. Examinations of both hands indicated no erythema, induration or edema.

As to the left shoulder, Dr. Hershon reported no asymmetry. Left shoulder range of motion was described as being within normal limits, including forward elevation at 180/180, abduction at 180/180, internal rotation 80/80 and an external rotation at 90/90. Examination of the right shoulder revealed no asymmetry, no AC joint tenderness. There was no crepitus or atrophy noted. The shoulder was described as being stable and nontender. Range of motion of the right shoulder was described as being within the same normal limits as the left shoulder, including forward elevation 180/180, abduction 180/180, internal rotation 80/80 and external rotation 90/90. Range of motion of the left knee was described as being within normal limits, including extension at 0/0 and flexion at 150/150. As to the right knee, range of motion was also described as being within normal limits, including extension and 0/0 and flexion 150/150.

Dr. Hershon affirmed that all range of motion values were obtained with use of a hand-held

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goniometer. The impression/diagnosis was status-post cervical sprain, lumbar sprain, both resolved, status-post contusion to left hand, resolved, status-post contusion to left shoulder and right knee, both resolved and status-post arthroscopic surgery, left knee, resolved. Dr. Hershon opined that, to a reasonable degree of medical certainty, plaintiff has no current disability referable to his activities of daily living or his occupation.

Dr. Jonathan Lerner, M.D., board-certified radiologist, reviewed the radiographs of plaintiff's bilateral knees, which were taken on November 21, 2016 at Orlin & Cohen Orthopedic Associates. Dr. Lerner reported that the studies indicated no evidence of fracture or dislocation, joint spaces were normal in appearance, there were no lytic/destructive or blastic lesions, the soft tissues were normal, and no joint effusion was present. His evaluation of the x-ray reexaminations revealed no causal relationship between the alleged accident and the x-ray findings. Dr. Lerner opined that there was no evidence of fracture/dislocation, no lastic lesions noted, surrounding soft tissues were normal and no change in comparison to the prior study.

Dr. Lerner also reviewed the radiographs of the lumbar spine. Dr. Lerner reports no evidence of fracture, subluxation or soft tissue swelling. Transitional anatomy was noted. No causal relationship between the x-ray findings and the alleged accident. Dr. Lerner reviewed the cervical spine radiographs. He opines that there is no evidence of fractures, subluxation or prevertebral soft tissue swelling to suggest an acute traumatic event, no causal relationship between the alleged accident and the x-ray findings.

As to the right knee radiograph, Dr. Lerner opines that the anterior and posterior cruciate ligaments appeared intact, as did the medical collateral ligament and lateral collateral ligamentous structure. Dr. Lerner reports an unremarkable MRI of the right knee, with no evidence of fracture or internal derangement, and no causal relationship between the alleged accident and the MRI findings. As to the left knee, Dr. Lerner reviewed the MRI and described it as being unremarkable, with no evidence of fracture or internal derangement. He further opines, that there is no causal relationship between the alleged accident and the MRI.

As to the MRI of Lumbar spine, Dr. Lerner noted loss of signal and height within L5-S1 vertebral disc consistent with dehydration. At L3-L4 there is a bilateral ligamentum flavum/facet hypertrophy with a cyst, with no evidence of stenosis or foraminal narrowing. At L4-5 there was a bilateral lugamentum flavum/facet osteoarthritis with no evidence of stenosis or neuroforaminal narrowing. At L5-S1, there was

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a mild bilateral facet osteoarthritis, no evidence of central canal spinal stenosis or neuroforaminal narrowing, no evidence of epidural/paraspinal mass or fluid collection. No evidence of fracture, subluxation or disc herniation.

Overall, Dr. Lerner opines that the findings are consistent with chronic degenerative processes as opposed to an acute traumatic event and that the examination revealed no causal relationship between the claimant's accident and the MRI findings. As to the cervical spine, Dr. Lerner concludes that this was an unremarkable MRI, and no fracture, subluxation or pre-vertebral soft tissue was found to suggest an acute traumatic event, and no causal relationship between the accident and the MRI findings.

In response, plaintiff's submitted: (1) the affirmed report of Joseph A. Cardinale, M.D. (2) the affirmed report of Craig L. Levitz, MD and (3) MRI Reports.

Dr. Cardinale stated that on December 17, 2015, plaintiff came under the care of his office for injuries he sustained in the December 17, 2015 motor vehicle accident. Plaintiff presented to Nassau University Medical Center later that day due to pain in neck, lower back, knees and left shoulder. Dr. Cardinale goes on to state that he performed complete detailed postural, spinal orthopedic and neurological examinations. Dr. Cardinale explains that plaintiff was given an initial diagnosis of acute cervical sprain and lumbar sprain. He was recommended physical therapy and chiropractic treatment. Range of motion testing was conducted by a different provider at Orlin & Cohen and not Dr. Cardinale himself, wherein decreased ranges of motion were found. Dr. Cardinale affirms that plaintiff received treatment including injections from December 17, 2015 until February 16, 2018. Plaintiff also underwent epidural steroid injections on August 22, 2016 and September 12, 2016. On October 10, 2016 plaintiff underwent an interlaminar lumbar epidural steroid injection under fluoroscopic guidance.

Dr. Cardinale states that the cervical spine and lumbar spine MRI scans showed certain degenerative changes. However he states that when trauma is superimposed on a pre-existing degenerative disc that was not causing pain, this can cause an awakening of the disc, resulting in pain and a more complicated healing process. In Dr. Cardinale's medical opinion the accident of December 10, 2015 aggravated and exacerbated plaintiff's dormant and latent cervical and lumbar degenerative changes, while causing new injury in the form of radiculopathy.

Dr. Cardinale states that on August 8, 2019, plaintiff presented to his offices for an updated evaluation. After fully examining patient Dr. Cardinale found: Radiculopathy of lumbosacral region;

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aggravation and exacerbation of latent cervical and lumbar degenerative changes; and cervical radiculopathy. Range of motion testing was conducted by Dr. Cardinale on August 8, 2019 and it revealed gross decreases with pain. He used a standard range of motion examination. His calculations were based upon the AMA Guides to the Evaluation. It is Dr. Cardinale's opinion within a reasonable degree of medical certainty the injuries caused by this accident, are to patient's discs, ligaments and nerves in the cervical spine and lumbar spine. He finds permanent tissue injury to plaintiff's cervical and lumbar spine. He also finds that plaintiff sustained a significant loss of use of his cervical spine and lumbar spine. He goes on to add that these plaintiff sustained a significant loss of use of his cervical spine and lumbar spine as a result of the subject accident. Dr. Cardinale states, that the accident aggravated and exacerbated plaintiff's cervical and lumbar condition. As to a gap in treatment, Dr. Cardinale explained that plaintiff had reached a plateau in treatment and that any additional care would be simply maintenance. He was directed to continue at home exercise.

As to plaintiff's alleged serious injury to his knee, plaintiff submitted the affirmed report of Dr. Levitz, also of Orlin & Cohen. Dr. Levitz states that plaintiff came under the care of Orlin & Cohen on December 17, 2015. Dr. Levitz did not personally examine plaintiff and does not indicate who performed the exam. No report as to the initial evaluation is provided. Dr. Levitz referred to the report of Steve Sharon, MD of Orlin & Cohen (see, Exhibit C, MRI Report, Affirmation in Opposition). As explained in plaintiff's reply, Dr. Levitz did not offer any opinion or any explanation of plaintiff's left knee since December 2015, or any opinion as to loss of function or permanent consequential disability. Also missing from Dr. Levitz's affirmation is any mention of the impact of injury to plaintiff's knee due to plaintiff's subsequent injury at work. However, Dr. Levitz does state that he believes that the MRI findings and the results of his needle arthroscopy are related to the subject accident.

Although there are some deficiencies in plaintiff's evidence, plaintiff provided sufficient evidence to establish a triable issue of fact concerning whether plaintiff suffered a "serious injury." Giving plaintiff every fair inference, this court cannot conclude summarily that plaintiff's injuries and limitations are "mild, minor or slight." Plaintiff's experts found that plaintiff's complaints were consistent with the injury alleged and that the injury was permanent. The conclusions of these physicians were founded on the plaintiff's history, physical examination and review of objective tests (see, *Toure v. Avis Rent A Car Sys., Inc.*, 98 N.Y.2d 345).

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90/180

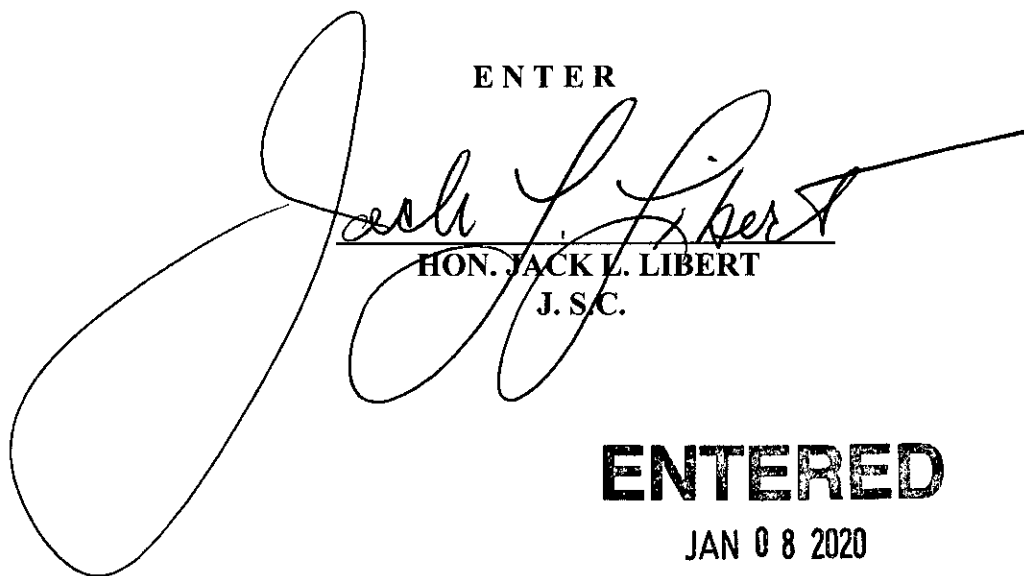
To prevail under the 90/180 day category, a plaintiff must demonstrate through competent, objective proof, a medically determined injury or impairment of a nonpermanent nature which would have caused the alleged limitations on the plaintiff's daily activities, and, furthermore, a curtailment of the plaintiff's usual activities to a great extent rather than some slight curtailment (*see, Licari v. Elliott*, 57 N.Y.2d 230, 236, 455 N.Y.S.2d 570, 441 N.E.2d 1088 [1982]; *see also, Sands v. Stark*, 299 A.D.2d 642, 749 N.Y.S.2d 334 [3rd Dept.2002]; *Gomez v. Ford Motor Credit Co.*, 10 Misc. 3d 900, 904-05, 810 N.Y.S.2d 838, 842 [Sup. Ct. 2005]; *Monk v. Dupuis*, 287 A.D.2d 187, 191, 734 N.Y.S.2d 684 [3rd Dept.2001]). Plaintiff herein offered no evidence that he was restricted from performing substantially limited material acts that constituted his usual and customary daily activities for 90 days out of the 180 days. Plaintiff testified that he lost two months of work from his employment at Costco. following the accident; his usual and customary daily activities for 90 days out of the 180 days following the accident; he missed eight days of work immediately following the subject accident. Plaintiff provided no evidence supporting his alleged 90/180 serious injury. Plaintiff did not meet his burden of proof with respect to the 90/180 category of threshold injury.

Based upon the evidence submitted, defendant's motion to dismiss pursuant on the grounds that the plaintiff did not sustain serious injury within the meaning of Insurance Law Section 5102(d) is granted solely to "category 9" of Article 51 of the New York State Insurance Law but otherwise denied.

This constitutes the decision and order of the court.

DATED: January 3, 2020

ENTER



HON. JACK L. LIBERT
J. S.C.

ENTERED

JAN 08 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE