

Rosa v Siddique

2022 NY Slip Op 32389(U)

January 18, 2022

Supreme Court, Queens County

Docket Number: Index No. 702140/2018

Judge: Pam Jackman Brown

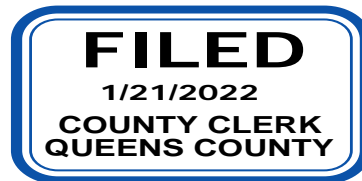
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**NEW YORK STATE SUPREME COURT
QUEENS COUNTY – IAS PART 19**

SHORT FORM ORDER

**Present: HON. PAM JACKMAN BROWN
Justice**



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**LLENI MARGARTIA ROSA, LLENNI MARGARITA
ROSA as Administrator of the Estate of ERCILIA
HERNANDEZ, deceased and AMERICAN UNITED
TRANSPORTATION INC.,**

Index No.:702140/2018

Plaintiffs,

Mot Seq #:003

-against-

**MOHAMMED SIDDIQUE and LUIS GERARDO
CRUZ MARTINEZ,**

Defendants.

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Recitation, as required by CPLR § 2219(a), of the following papers read on this motion by Defendants for an Order: pursuant to CPLR § 3212 granting Defendants’ summary judgment and dismissing the Complaint of Plaintiffs LLENI MARGARITA ROSA and ERCILIA HERNANDEZ, in as much as both plaintiffs fail to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (a) and granting such other further relief as the Court deems just and proper.

	PAPERS E-FILED NUMBERED	
	Papers	Exhibits
Notice of Motion, Affirmation/Affidavit in Support, Statement of Material Facts, Affidavit of Service (Defendant Cruz Martinez)	35-36, 48	37-47
Affirmation/Affidavits in Opposition, Memorandum of Law in Opposition, Statement of Material Facts (Plaintiffs)	51-53	54-78
Affirmation in Support, Affidavit of Service (Defendant Siddique)	79-80	-

This is an action by Plaintiffs to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident, which occurred on December 19, 2016 at approximately 12:30 p.m. on Babbage Street at or near the intersection of Hillside Avenue, County of Queens, New York. Plaintiff Lleni Rosa (hereinafter referred to as “Plaintiff Rosa”) and Plaintiff Ercilla Hernandez (hereinafter referred to as “Plaintiff Hernandez”) were passengers in a taxi owned by Plaintiff American Transportation Inc., (hereinafter referred to as “Plaintiff ATI”) but driven by Defendant Luis Gerardo Cruz Martinez (hereinafter referred to as “Defendant Martinez”). All Plaintiffs claim a vehicle driven by Defendant Mohammed Siddique (hereinafter referred to as “Defendant Siddique”) struck Plaintiff ATI’s vehicle. As a result of the accident, Plaintiff Rosa claims to have sustained serious physical injuries. Plaintiff Rosa and Hernandez commenced this action with the filing of a Summons and Verified Complaint on February 2, 2018. Since the filing of the action, Plaintiff Hernandez passed away and Plaintiff Rosa was appointed to represent Plaintiff Hernandez’s Estate on January 6, 2021. Plaintiff ATI commenced a separate action in Kings County against Defendants. The matters were consolidated per this Court’s Order dated August 12, 2019.

Now, upon motion, Defendant Martinez claims an entitlement to summary judgment and dismissal of the complaint on the grounds that neither Plaintiff did not suffer a serious injury as required by Insurance Law Section 5102(d). Defendant Siddique adopts the motion filed by Defendant Martinez. Plaintiff Rosa and the Estate of Plaintiff Hernandez oppose the motion.

“The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY 2d 320, 324 [Ct App 1986]). Thereafter, the opponent to the motion must show that there are issues of fact to be determined.

In support of the current motion, Defendant Martinez submits the Summons and Complaint, Answers and Bill of Particulars. Defendant Martinez also submits the MRI

Report of Plaintiff Rosa and Plaintiff Hernandez completed by Dr. Michael Setton (hereinafter referred to as “Dr. Setton.”), Orthopedic Examination of Plaintiff Rosa and Plaintiff Hernandez completed by Dr. Joseph Elfenbein (hereinafter referred to as “Dr. Elfenbein”), MRI Report of Plaintiff Hernandez completed by Dr. Eric Postal (hereinafter referred to as “Dr. Postal”), and the transcripts of Plaintiff Rosa and Plaintiff Hernandez.

As it pertains to Plaintiff Hernandez, within the transcript Plaintiff Hernandez describes being injured during the alleged accident. Due to the impact of the accident, Plaintiff Hernandez claims to have become unconscious and hit the floor of the car. An ambulance was called, and she was carried away on a stretcher. She claims she sustained injuries due to the accident and after the accident, she was actively involved in physical therapy to recover.

The MRI Report completed by radiologist, Dr. Setton, concludes that there is no evidence of an injury which may have resulted from the alleged accident. Further, the report indicates there is no evidence of an acute fracture nor evidence of a “more significant joint effusion.” Dr. Setton notes the lack of a significant joint effusion strongly mitigates the likelihood of any recent traumatic rotator cuff injury or internal joint derangement. In sum, the report of Dr. Setton concludes there is no injury that corresponds directly with the alleged incident.

The second examination of the MRI report of Plaintiff Hernandez was completed by Dr. Eric Postal. Dr. Postal reviewed the cervical spine of Plaintiff Hernandez. Dr. Postal concluded the showing of degeneration of the intervertebral discs and bony overgrowth of the intervertebral facet-joints are commonly found in individuals the same age as Plaintiff Hernandez. His report states there are no signs of recent injuries to Plaintiff Hernandez.

The Examination of Plaintiff Hernandez completed by Orthopedic Surgeon Dr. Elfenbein, indicates Plaintiff Hernandez has no orthopedic limitations in the use of her neck, lower back, left shoulder, wrists and hands. Although Plaintiff Hernandez reported to Dr. Elfenbein the aforementioned areas of her pain, there were no findings by

Dr. Elbenbein that substantiate her complaints. Accordingly, the Defendant has met their burden as it pertains to Plaintiff Hernandez.

The Court now turns to Defendant Cruz's submissions regarding Plaintiff Rosa. Plaintiff Rosa's transcripts indicate that while Plaintiff Rosa was in the car, she was turned speaking to Plaintiff Hernandez when the accident occurred. She did not see the accident occur but felt the impact as it moved her body. According to Plaintiff Rosa, Plaintiff Hernandez, became unconscious and fell on top of her. The ambulance was called. Plaintiff Rosa and Plaintiff Hernandez both were transported to the hospital via ambulance. Both Plaintiffs were treated and released. Due to her mother's injuries Plaintiff Rosa and her sister took care of Plaintiff Hernandez's daily household chores. Plaintiff Rosa sought additional care for her injuries approximately three weeks after the initial accident. Plaintiff Rosa had complaints of a left shoulder area pain as well as her lower back and neck areas. In addition to many MRIs, Plaintiff Rosa saw a physical therapist and chiropractor. As part of her treatment, she received injections as well.

In reviewing the MRI Report of Dr. Setton, there is no indicated evidence of a soft tissue injury as a result of the alleged accident. Dr. Setton further concludes there is a lack of evidence of disc herniation. Within the report, there is indication of mild hypertrophic lower lumbar facet joint degeneration. However, Dr. Setton remarks indication reflects a common joint disease and is not indicative of an injury relating to the alleged accident.

Turning to the Orthopedic report of Dr. Elfenbein after examining Plaintiff Rosa, Dr. Elfenbein concludes Plaintiff Rosa has no orthopedic abnormalities. There were no indications within the report indicating limitations in the use of the areas examined. Dr. Elfenbein examined Plaintiff Rosa's cervical spine, thoracic spine, lumbar spine, left shoulder and left elbow. After an examination of all five areas, Dr. Elfenbein concluded all sprains/strains have been resolved and are no longer at issue.

Based on the above, Defendant has established *prima facie* that Plaintiffs Rosa and Plaintiff Hernandez did not sustain a serious injury and has met the requirement for

summary judgment. However, Plaintiff Rosa and Plaintiff Hernandez must then show that there is a serious injury, a connection to the accident and that there are issues of fact to be determined at trial.

The Court now turns to the Plaintiff's opposition. In support of their opposition, the Court was provided with portions of the affidavit of Plaintiff Rosa and Plaintiff Hernandez, the reports of Dr. Steven Ross (hereinafter referred to as "Dr. Ross"), Dr. Alexandre De Moura (hereinafter referred to as "Dr. De Moura"), Dr. Derek Johnston hereinafter referred to as "Dr. Johnston"), Dr. David Payne (hereinafter referred to as "Dr. Payne"), Dr. Emmanuel Hostin (hereinafter referred to as "Dr. Hostin"), Dr. Richard Seldes (hereinafter referred to as "Dr. Seldes").

As it relates to Plaintiff Hernandez, submitted to the Court are reports of Dr. Payne, Dr. Ross, Dr. De Moura, and Dr. Hostin.

Dr. Hostin examined Plaintiff Hernandez and noted a partial thickness tear of her rotator cuff and a labral/Bankart tear. She was referred to therapy and advised to not receive a cortisone injection due to the possibility of rotator cuff repair. Dr. Hostin advised Plaintiff Hernandez they would later discuss the necessity of surgery based on the outcome of therapy. Dr. De Moura's examination of Plaintiff Hernandez revealed excessive discomfort, bilateral paraspinal musculator spasms, tenderness to palpation and decreased range of motion.

Dr. Payne reviewed Plaintiff Hernandez's MRIs. Dr. Payne notes there are multiple bulging discs and herniations. Plaintiff Hernandez informed Dr. Payne of lower back pain.

Dr. Ross' report of Plaintiff Hernandez reveals Plaintiff Hernandez has tenderness on the majority of her extremities. There was bruising on her left chest. Dr. Ross' reports acknowledged Plaintiff Hernandez's scans displays evidence of bilateral L5 radiulopathy and bilateral sensory motor median neuropathy at the wrists without evidence of cervical radiculopathy. Dr. Ross recommended therapy become tailored to the results of the electrodiagnostic testing performed and made a referral for a spine surgeon.

In support of Plaintiff Rosa's opposition, Plaintiff Rosa submitted reports by Dr. Payne, Dr. Seldes, Dr. Ross, Dr. De Moura, and Dr. Johnston.

Presented to the Court are the reports by Dr. Seldes from the January 13, 2018, February 9, 2018, April 18, 2018, May 2, 2018 and May 16, 2018 examinations of Plaintiff Rosa. Within the report, Dr. Seldes documents Plaintiff Rosa reported elbow and left shoulder pain. As per MRI scan, Plaintiff Rosa has a partial tear of the left elbow of the extensor tendon and also a high-grade partial/near complete rotator cuff tear of the left shoulder. On April 18, 2018, Plaintiff Rosa received an injection to help with pain relief as physical therapy did not help alleviate the pain.

The examination conducted by Dr. De Moura noted a decrease in range of motion. The range of motion was reported as painful. Dr. De Moura also indicated there was evidence of bilateral paraspinal musculator spasms. It was recommended Plaintiff Rosa continue physical therapy and use medication as needed. In Dr. Payne's interpretation of Plaintiff Rosa's MRI, he notes there is an exaggerated thoracic kyphosis. Plaintiff Rosa also has bulging discs and herniations. Dr. Johnston administered a left trigger point injection to Plaintiff Rosa's left trapezius as a form of treatment.

Further, Dr. Ross examined Plaintiff Rosa and concluded Plaintiff Rosa is partially disabled. He further concluded causality is established between the accident in question and his findings. Dr. Ross came to that conclusion after determining Plaintiff's range of motion in the cervical and lumbar spine were lower than what the normal range of motion should be. There was also a report of pain and tenderness with range of motion. Dr. Ross suggested injection and electro diagnostic studies of the upper and lumbar extremities to decide if there should be more invasive therapy such as a spinal procedure. Plaintiff Rosa was also recommended for a neurologist to address headache issues. Both reports created by Dr. Ross and submitted by Plaintiff Rosa acknowledge a causal link between the injuries described and the alleged accident.

The 2021 report of Dr. Ross states Plaintiff continues to have pain in the neck, mid back, and low back. He further reports, Plaintiff Rosa has reached maximum medical

improvement. Despite reaching maximum medical improvement, it is reported Plaintiff Rosa has sustained significant and permanent injuries to the cervical, thoracic and lumbar spine that have placed physical limitations on her daily activities. Dr. Ross concludes the prognosis for a full and complete recovery remains poor.

After a full review of the instant motion filed by Defendants to dismiss Plaintiffs' complaint for failure to meet the serious injury threshold according to Insurance Law § 5102 and as such has no cause of action under NY Insurance Law § 5104, there is a disagreement between the medical experts regarding the nature and context of the serious injury warranting a trial.

Accordingly, motion sequence 003 is denied.

The above constitutes the Decision and Order of the Court determining motion sequence #003.

Dated: January 18, 2022
Jamaica, New York



HON. PAM JACKMAN BROWN, JSC

