

Carmona v Amato

2012 NY Slip Op 30876(U)

March 28, 2012

Sup Ct, Suffolk County

Docket Number: 08-25671

Judge: Daniel Martin

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL M. MARTIN
Justice of the Supreme Court

MOTION DATE 9-19-11 (# 002 & # 004)
MOTION DATE 10-11-11 (# 003)
ADJ. DATE 11-15-11
Mot. Seq. # 002 - MD
 # 003 - MD
 # 004 - XMD

-----X
JOSE A. CARMONA, SUSAN B. DOMINGUEZ :
and MILKIA SANTANA, :
 :
 :
 : Plaintiffs, :
 :
 :
 : - against - :
 :
JAMES AMATO, :
 :
 : Defendant. :
-----X

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Upon the following papers numbered 1 to 38 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; 22 - 25; Notice of Cross Motion and supporting papers 26 - 29; Answering Affidavits and supporting papers 30 - 34; Replying Affidavits and supporting papers 35 - 36; 37 - 38; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (# 002) by defendant for an order granting summary judgment dismissing the complaint against him on the ground that plaintiffs Jose Carmona, Susan Dominguez and Milkia Santana did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the motion (# 003) by plaintiff on the counterclaim, Jose Carmona, for an order granting summary judgment, *inter alia*, dismissing the complaint (*sic*) and any cross claims asserted by plaintiff Milkia Santana against him on the ground that plaintiff Milkia Santana did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

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ORDERED that the cross motion (# 004) by plaintiff Jose Carmona for an order granting summary judgment dismissing the complaint of plaintiff Milkia Santana against him on the ground that plaintiff Santana did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiffs when their vehicle collided with a vehicle owned and operated by defendant James Amato at the intersection of Brentwood Road and Union Boulevard in Bayshore, New York, on April 29, 2007. At the time of the accident, plaintiffs Susan Dominguez and Milkia Santana were passengers in a vehicle operated by plaintiff Jose Carmona and owned by plaintiff Dominguez. Defendant answered and asserted counterclaims against plaintiff Carmona, alleging that his negligence or culpable conduct caused the accident.

By their bill of particulars, plaintiffs allege that, as a result of the subject accident, plaintiff Carmona sustained serious injuries including bulging discs from L3-L4 through L5-S1; straightening of the lumbar lordosis; tenderness in upper trapezius; thoracic tenderness and spasm; low back tenderness; cervical, thoracic and lumbar strain and sprain; and cervical radiculopathy. Plaintiff Dominguez sustained serious injuries including chronic tear of the subscapularis tendon of the left shoulder; possible chronic tear of the anterior/anteroinferior labrocapsular ligament complex of the left shoulder; supraspinatus impingement of the left shoulder; loss of the normal cervical lordosis; and accentuated lumbar lordosis; tenderness in upper trapezius; thoracic tenderness; low back tenderness and spasm; cervical, thoracic and lumbar strain and sprain; and lumbar radiculopathy. Plaintiff Santana sustained serious injuries including cervical, thoracic and lumbar strain and sprain; cervical radiculopathy at C5-C6; lumbar radiculopathy; right wrist sprain; tenderness in upper trapezius; thoracic tenderness; low back tenderness; tenderness in right wrist; straightening of the cervical lordosis; cervical and lumbar herniated discs; cervical and thoracic sprain; and sprain in right shoulder and right wrist.

Defendant now moves (# 002) for an order granting summary judgment dismissing the complaint against him on the ground that plaintiffs Carmona, Dominguez and Santana have not sustained 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 a “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

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limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (see *Perl v Meher*, 2011 NY Slip Op 8452, 2011 NY Lexis 3320 [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]).

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 Eyley*, 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 own 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]; *Farozes 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.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Boone v New York City Tr. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

On March 17, 2011, approximately four years after the subject accident, defendant's examining orthopedist, Dr. Isaac Cohen, examined plaintiff Carmona using certain orthopedic and neurological tests, including Compression test, impingement signs, Hawkins' test, and straight leg raising test. All the test results were negative. Dr. Cohen performed range of motion testing on plaintiff Carmona's cervical and thoracolumbosacral spine and left shoulder using a goniometer. With respect to the plaintiff Carmona's cervical spine, Dr. Cohen indicated that flexion was 55 degrees (normal 45-65 degrees); hyperextension was 50 degrees (normal 45-65 degrees); right and left lateral bending were "in the 45 degree range" (normal 40-52 degrees); and right and left rotation were "in the 70 degree range" (normal 63-93 degrees). Regarding plaintiff Carmona's thoracolumbosacral spine, he indicated that range of motion testing "in active fashion" showed flexion to 70 degrees (normal 51-81 degrees); extension to 30 degrees (normal 28-38 degrees); right and left lateral bending to 30 degrees (normal 22-36 degrees); and right and left rotation to 25 degrees (up to 30 degrees normal). With respect to plaintiff Carmona's left shoulder, Dr. Cohen indicated that examination of the left shoulder revealed forward elevation to 165 degrees (normal 162-172 degrees); abduction to 180 degrees (normal 177-191 degrees); adduction to 30 degrees (up to 30 degrees normal); external rotation to 100 degrees (normal 96-112 degrees); and internal rotation to 60 degrees (normal 64-74 degrees).

Here, defendant failed to make a prima facie showing that plaintiff Carmona did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (see *Reitz v Seagate Trucking, Inc.*, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). Dr. Cohen's report is insufficient to sustain defendant's prima facie burden. Dr. Cohen's comparative analysis of the plaintiff Carmona's range of motion to the purported normal range of motion for the particular body part that was being tested lacked "specificity" in that he did not compare the purported limitation to a "definitive" normal reading (see *Lee v M & M Auto Coach*, 2011 NY Slip Op 30667U, 2011 NY Misc Lexis 1131 [Sup Ct. Nassau County 2011]). Rather, Dr. Cohen compared the results to a purported normal range which varied at times up to 30 degrees, i.e. normal cervical rotation 63-93 degrees and normal thoracolumbosacral flexion 51-81 degrees. Dr. Cohen referenced a spectrum of degrees that would qualify as a normal reading for a particular body part without indicating what other clinical components, unrelated to range of motion

(i.e., age), may factor into the ultimate determination of where the normal should fall within that spectrum for that particular patient (*see id.*). Dr. Cohen's findings that a varying range of up to 30 degrees is normal effectively eliminates the possibility that a patient with a limited range of motion of the cervical or lumbar spine within that spectrum has no significant injury (*see id.*). In this regard, the lack of "specificity" in Dr. Cohen's report essentially creates an issue of fact with respect to determining whether plaintiff Carmona has a significant limitation of range of motion for a particular body part (*see id.*). Moreover, Dr. Cohen reported that, with respect to plaintiff Carmona's cervical spine range of motion, right and left lateral bending were "in the 45-degree range" and right and left rotation were "in the 70 degree range," rather than providing specific numerical results (*see Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]). Furthermore, although plaintiff Carmona claimed in the bill of particulars that he sustained cervical radiculopathy as a result of this accident, the defendant has not submitted a report from a neurologist who examined plaintiff Carmona ruling out the claimed neurological injury (*see id.*; *Lawyer v Albany OK Cab Co.*, 142 AD2d 871, 530 NYS2d 904 [3d Dept 1988]).

On March 15, 2011, defendant's examining orthopedist, Dr. Isaac Cohen, examined plaintiff Dominguez using certain orthopedic and neurological tests, including Spurling test, Percussion test, straight leg raising test, impingement signs, Hawkins' test, and Neer's test. All the test results were negative. Dr. Cohen performed range of motion testing on plaintiff Dominguez' cervical and thoracolumbosacral spine and left shoulder using a goniometer. With respect to the plaintiff Dominguez' cervical spine, Dr. Cohen indicated that flexion and extension were 50 degrees (normal 45-65 degrees); right and left lateral bending were 45 degrees (normal 40-52 degrees); and right and left rotation were 80 degrees (normal 63-93 degrees). Regarding plaintiff Dominguez' thoracolumbosacral spine, he indicated that range of motion testing showed flexion to 70 degrees (normal 51-81 degrees); extension to 30 degrees (normal 28-38 degrees); right and left lateral bending to 30 degrees (normal 22-36 degrees); and right and left rotation to 30 degrees (up to 30 degrees normal). With respect to plaintiff Dominguez' left shoulder, Dr. Cohen indicated that examination of the left shoulder revealed forward elevation to 160 degrees (normal 162-172 degrees); backward elevation to 60 degrees (normal 56-74 degrees); abduction to 185 degrees (normal 177-191 degrees); adduction to 30 degrees (up to 30 degrees normal); external rotation to 100 degrees (normal 96-112 degrees); and internal rotation to 65 degrees (normal 64-74 degrees).

Here, defendant failed to make a prima facie showing that plaintiff Dominguez did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see Reitz v Seagate Trucking, Inc.*, *supra*). Dr. Cohen's report is insufficient to sustain defendant's prima facie burden. As discussed above, Dr. Cohen's comparative analysis of the plaintiff Dominguez' range of motion to the purported normal range of motion for the particular body part that was being tested lacked "specificity" in that he did not compare the purported limitation to a "definitive" normal reading (*see Lee v M & M Auto Coach*, *supra*). Moreover, although plaintiff Dominguez claimed in the bill of particulars that she sustained lumbar radiculopathy as a result of this accident, the defendant has not submitted a report from a neurologist who examined plaintiff Dominguez ruling out the claimed neurological injury (*see Browdame v Candura*, *supra*; *Lawyer v Albany OK Cab Co.*, *supra*).

On August 12, 2010, approximately three years after the subject accident, defendant's examining orthopedist, Dr. Isaac Cohen, examined plaintiff Santana using certain orthopedic and neurological tests.

including straight leg raising test, impingement signs, Hawkins' test, Neer's test, Tinel's test, and Phalant's test. All the test results were negative. Dr. Cohen performed range of motion testing on plaintiff Santana's cervical and lumbar spine, right shoulder, and right wrist using a goniometer. With respect to the plaintiff Santana's cervical spine, Dr. Cohen indicated that flexion and extension were 50 degrees (normal 45-65 degrees); right and left lateral bending were 45 degrees (normal 40-52 degrees); and right and left rotation were 80 degrees (normal 63-93 degrees). Regarding plaintiff Santana's lumbar spine, he indicated that range of motion testing showed flexion to 75 degrees (normal 51-81 degrees); hyperextension to 30 degrees (normal 28-38 degrees); right and left lateral bending to 30 degrees (normal 22-36 degrees); and right and left rotation to 30 degrees (up to 30 degrees normal). With respect to plaintiff Santana's right shoulder, Dr. Cohen indicated that examination of the right shoulder revealed forward elevation to 165 degrees (normal 162-172 degrees); backward elevation to 60 degrees (normal 56-74 degrees); abduction to 185 degrees (normal 177-191 degrees); adduction to 30 degrees (up to 30 degrees normal); external rotation to 95 degrees (normal 96-112 degrees); and internal rotation to 65 degrees (normal 64-74 degrees). With respect to plaintiff Santana's right wrist, Dr. Cohen indicated that examination of the right wrist revealed dorsiflexion to 75 degrees (normal 67-81 degrees); palmar flexion to 75 degrees (normal 68-82 degrees); radial deviation to 20 degrees (normal 17-25 degrees); ulnar deviation to 35 degrees (normal 31-39 degrees); and pronation and supination to 90 degrees (normal 90 degrees).

Here, defendant failed to make a prima facie showing that plaintiff Santana did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see Reitz v Seagate Trucking, Inc.*, *supra*). Dr. Cohen's report is insufficient to sustain defendant's prima facie burden. As discussed above, Dr. Cohen's comparative analysis of the plaintiff Santana's range of motion to the purported normal range of motion for the particular body part that was being tested lacked "specificity" in that he did not compare the purported limitation to a "definitive" normal reading (*see Lee v M & M Auto Coach, supra*). Moreover, although plaintiff Santana claimed in the bill of particulars that she sustained cervical and lumbar radiculopathy as a result of this accident, the defendant has not submitted a report from a neurologist who examined plaintiff Santana ruling out the claimed neurological injury (*see Browdame v Candura, supra; Lawyer v Albany OK Cab Co., supra*).

Inasmuch as defendant failed to meet his prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiffs in opposition to defendant's motion for summary judgment were sufficient to raise a triable issue of fact (*see McMillian v Naparano*, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; *Yong Deok Lee v Singh*, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]). Accordingly, defendant's motion for summary judgment is denied.

Plaintiff on the counterclaim, Carmona, moves (# 003) for an order granting summary judgment, *inter alia*, dismissing the complaint (*sic*) and all cross claims asserted by plaintiff Santana against him on the ground that plaintiff Santana has not sustained a serious injury as defined in Insurance Law § 5102 (d). Plaintiff on the counterclaim, Carmona, failed to submit a complete copy of the pleadings (*see* CPLR 3212 [b]; *Fiber Consultants, Inc. v Fiber Optek Interconnect Corp.*, 84 AD3d 1153, 924 NYS2d 276 [2d Dept 2011]; *Wider v Heller*, 24 AD3d 433, 805 NYS2d 130 [2d Dept 2005]). Plaintiff on the counterclaim, Carmona, failed to submit a copy of all cross claims asserted by plaintiff Santana against him, without which it is not possible to determine whether summary judgment is warranted. In

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view of the foregoing, the motion by plaintiff on the counterclaim, Carmona, for summary judgment is denied.

Plaintiff on the counterclaim, Carmona, also cross-moves (# 004) for summary judgment, *inter alia*, dismissing the complaint (*sic*) and all cross claims asserted by plaintiff Santana against him on the ground that plaintiff Santana has not sustained a serious injury as defined in Insurance Law § 5102 (d). To the extent the moving party, plaintiff on the counterclaim, Carmona, in this cross motion (# 004) seeks the same relief as is sought in his motion (# 003), the instant cross motion is denied as redundant.

Dated: MARCH 28, 2012.



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION