

Cordero v Girma

2014 NY Slip Op 33292(U)

February 7, 2014

Supreme Court, Bronx County

Docket Number: 301131/12

Judge: Mitchell J. Danziger

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA 3

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KATIRIA CORDERO and CRYSRAL ARROYO,

Plaintiffs,

-against-

Index No.
301131/12

BERHANE A. GIRMA,

Defendant.

-----X

J. Danziger:

Defendant’s motion seeking summary judgment and dismissal of the within action on the grounds the plaintiffs herein hailed to sustain a “serious injury” as defined in the Insurance Law and cross-motion requesting partial summary judgment and a finding that each plaintiff satisfied the “serious injury” threshold as a matter of law have been administratively referred to this part for determination and are decided as follows. Further, an additional cross-motion on the counterclaim has been submitted.

From a review of the papers herein it appears that on August 26, 2010 Crystal Arroyo was a passenger in a 2006 Honda which was being operated by Katiria Cordero. At or near the intersection of West 58th Street and 10th Avenue in New York County, the Cordero vehicle came into contact with a 2008 Ford owned and operated by Berhane Girma. As a result of this incident, the within lawsuit was commenced wherein the plaintiffs’ are seeking monetary compensation for the injuries allegedly sustained as a result of this event. However, defendant contends that as neither plaintiff sustained a “serious injury” dismissal of these claims are warranted.

In support of this motion as against Ms. Cordero, defendant submits the affirmation of Ronald A. Paynter, MD a physician specializing in emergency medicine. As contained therein, Dr. Paynter did not examine Ms. Cordero but reviewed the medical records and claims made at the Lincoln Hospital Emergency Room on August 26, 2010. The doctor opines that if Ms. Cordero

actually sustained the injuries claimed in the Bill of Particulars, observable evidence would have been seen (i.e. redness, abrasions, ecchymoses and/or lacerations), or a specialist referral would have been given. Moreover, no MRI, C T Scans or X-Rays were taken and she was diagnosed with muscle contusion. Based thereon, Dr. Paynter contends that no acute traumatic findings other than the aforementioned muscle contusion was sustained.

The affirmation of radiologist Scott A. Springer, MD has been submitted. The doctor examined the MRI of the lumbar spine taken on September 4, 2010 and asserts that the film showed degenerative changes with mild disc bulges.

Additionally, the affirmation of Alan M. Crystal, MD an orthopedist has been included. Dr. Crystal reviewed the listed medical records and examined Ms. Cordero on February 28, 2013. The doctor opines that Ms. Cordero was not cooperative during the range of motion testing and that the straight leg sign and Lasegue test was negative. The orthopedist avers that based upon the history of the event, there was no force, motion or mechanism to cause the injuries claimed. Further, the doctor states that Ms. Cordero is fully functional and can do all of her usual and customary daily activities without restriction or limitation. Dr. Crystal also notes Ms. Cordero's involvement in a subsequent motor vehicle accident on October 8, 2010, shortly after this incident.

In opposition to this branch of the application, the affirmation of Dina Nelson, MD a physician specializing in physical medicine and rehabilitation. The doctor claims that she examined Ms. Cordero on September 1, 1010 (six days after the event). At that examination, deficits in flexion and extension to her lumbar spine was noted. The court also notes that in Dr. Nelson's plan she stated that the patient may benefit from trigger point injections but that same will be deferred until a course of conservative treatment had been tried. Notwithstanding that plan, the affirmation of Dr. Khakhar has indicated that Ms. Cordero was given such injections one week later without any statements as to whether she underwent the conservative treatment directed by Dr. Nelson and the results, if any, from such treatment. Dr. Nelson examined Ms. Cordero again on October 4, 2010 wherein the deficits in extension had resolved. A review of the doctor's statement fails to demonstrate what if any objective tests were conducted or the results therefrom.

Further, the affirmation of Peter C. Kwan, MD a neurologist has been submitted. Dr. Kwan

examined Ms. Cordero on November 17, 2010 (three months after the underlying incident and about six weeks after the second accident). The neurologist states that the incident of August 26, 2010 was the cause of the injuries complained of herein and were exacerbated by the subsequent event. However, same does not contain any medical basis for that conclusion. Dr Kwan's speculation as to causation absent any objective findings cannot be used to defeat the within motion.

As to Crystal Arroyo, Dr. Paynter suggests under oath that if her left shoulder, back and neck were seriously injured, Ms. Arroyo would have complained of radiating pain to the arms and legs. He continues to opine that the injuries claimed in the Bill of Particulars do not have acute traumatic findings to causally relate the incident of August 26, 2010 with the injuries claimed.

Dr. Crystal examined Ms. Arroyo on February 28, 2013 and found her to be without range of motion restrictions. The doctor did observe three surgical scars to the left shoulder. However, the orthopedist determined that she had full function and use without any impairment thereto. The doctor concludes that it is inconceivable to imagine that the incident of August 26, 2010 could have caused the tear of the anterior labrum. Finally, the doctor notes that there was no objective findings of shoulder injury at the emergency room.

In opposition, Dr. Nelson found quantified range of motion restrictions to Ms. Arroyo's left shoulder and spine. In addition, the affirmation of Emmanuel Hostin, MD an orthopedic surgeon was included detailing positive Neer and Hawkins tests and diagnosing her with an anterior labral tear which was addressed through a surgical procedure.

Summary judgment is a drastic remedy which should not be granted in the presence of a triable question. Issue finding rather than determination id the test, See *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395. Here, with respect to Ms. Cordero, defendant has satisfied their initial burden of establishing the lack of "serious injury" requiring plaintiff to submit sufficient evidence to raise a triable issue, See *Pommells v. Perez*, 4 NY3d 566. Plaintiff Cordero has failed to submit sufficient evidence to raise a triable question on that issue. Accordingly, the motion seeking summary judgment and dismissal of this action brought by Ms. Cordero is granted.

As to Ms. Arroyo, the medical evidence submitted in opposition to this branch of the motion raises questions of fact which cannot be resolved as a matter of law and must be reserved for

determination by the trier of fact, See *Toure v. Avis Rent-A-Car Systems* 98 NY2d 345 and *Lopez v. Senatore* 65 NY2d 1017. As a result, the branch of the application seeking dismissal of the claims brought by Ms. Arroyo are denied.

Plaintiff's cross-motions which seek a finding as a matter of law that the plaintiffs sustained a "serious injury" is denied. Clearly, this court has determined that Ms. Cordero's injuries do not satisfy the requirements of Section 5102 (d) of the Insurance Law. The question as to whether Ms. Arroyo sustained a "serious injury" is not ripe for summary judgment and that issue must be determined by the trier of fact. Branch of cross-motion relating to the counterclaim is resolved pursuant to the aforementioned findings.

Accordingly, upon defendant's service of a copy of this order with notice of entry upon all parties and the clerk, the claims brought by Ms. Cordero shall be dismissed and the claim brought by Ms. Arroyo shall continue. The caption of this action shall be amended to reflect same.

The above constitutes the decision and order of the court.

Dated; February 7, 2014



Mitchell J. Danziger, AJSC