

**Patino v Delacruz**

2011 NY Slip Op 33417(U)

December 16, 2011

Supreme Court, Queens County

Docket Number: 5945/2010

Judge: Robert J. McDonald

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

- - - - - x

FRANCISCO PATINO, Index No.:5945/2010  
Plaintiff, Motion Date: 11/17/11  
- against - Motion No.: 25  
Motion Seq.: 4  
MAXIMO A. DELACRUZ and CATHY DELACRUZ,  
Defendants.

- - - - - x

The following papers numbered 1 to 12 were read on this motion by defendants, MAXIMO A. DELACRUZ and CATHY DELACRUZ for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the complaint of FRANCISCO PATINO on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers  
Numbered

Notice of Motion-Affidavits-Exhibits-Memorandum of Law...1 - 5  
Affirmation in Opposition-Affidavits-Exhibits.....6 - 10  
Reply Affirmation.....11 - 12

This is a personal injury action in which plaintiff FRANCISCO PATINO, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on April 16, 2007 on Hempstead Turnpike near its intersection with Fieldmere Street in Nassau County, New York.

At the time of the accident the plaintiff's motor vehicle was stopped at a red traffic light when his vehicle was struck in the rear by the vehicle owned by defendant Cathy Delacruz and operated by defendant Maximo A. Delacruz. Plaintiff contends that as a result of the accident he sustained injuries to his right shoulder, neck and back.

The plaintiff commenced this action by filing a summons and complaint on March 10, 2010. Issue was joined by service of

defendant's verified answer on April 16, 2010.

Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Andrea E. Ferrucci, Esq.; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical reports of radiologist, Dr. Melissa Sapan Cohn; orthopedic surgeon, Dr. Edward A. Toriello; and a copy of the transcript of the examination before trial of plaintiff Francisco Patino.

In his verified Bill of Particulars, plaintiff, age 53, states that as a result of the accident he sustained, inter alia, disc bulges at C4-5, L1-2 and L4-5 and L5-S1 as well as a partial tear of the infraspinatus tendon of the right shoulder. He states that he was confined to bed for two weeks, confined to his home for one month and incapacitated from employment for one month following the accident.

Plaintiff contends that he sustained a serious injury as defined in Insurance Law § 5102(d) in that he sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

Dr. Edward A. Toriello, a board certified orthopedic surgeon, retained by the defendants, examined Mr. Patino on November 22, 2010. Plaintiff presented with pain in his back. Dr. Toriello performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine, lumbosacral spine, right shoulder, left shoulder, right elbow, left elbow, right wrist, right hand, left wrist and left hand. He concluded that the plaintiff had a resolved right shoulder strain and resolved low back strain. He stated that he found no evidence of carpal tunnel syndrome and no permanent or temporary impairment as a result of the injuries in the accident.

Dr. Melissa Sapan Cohn, a radiologist reviewed the MRI

studies of the plaintiff's right shoulder. In her affirmed report she states that she found acromioclavicular joint hypertrophic changes; supraspinatus tendinosis and infraspinatus tendinosis and partial interstitial tearing with bursal surface full thickness tear at the insertion of the greater tuberosity. She found that the plaintiff's condition, as well as the tear, were a result of degenerative changes. She also found that the age of the tendon tear was indeterminate and that none of the findings would confirm that an acute injury to the shoulder has occurred.

Defendant's counsel contends that the medical reports of Drs. Toriello and Cohn are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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 opposition, plaintiff's attorney Larry Hallock, Esq., submits his own affirmation, an affidavit from the plaintiff as well as the affirmation of Dr. Paul Ackerman, the certified records of Dr. Jean Demetrius and the report of radiologist Dr. Sasan Azar.

In his examination before trial the plaintiff testified that after the accident he was experiencing pain in his back and arm so he sought treatment at Corona Comprehensive Medical. He received physical therapy for three or four months at a rate of three sessions per week. He stated that he stopped treating because he was told he had enough treatments and no-fault was no longer paying for his care. He stated that he went back a few times after that and paid on his own but he couldn't afford further treatment. He testified that he still has pain in his lower back and right shoulder on a daily basis.

Dr. Azar, a radiologist examined the MRI of the plaintiff's right shoulder and found that the plaintiff had sustained an intrasubstance partial tear of the infraspinatus tendon as well as a high grade partial bursal surface full-thickness tear.

Plaintiff also submitted the affidavit of orthopedist,

Dr. Paul Ackerman. On September 30, 2011, Dr. Ackerman performed quantified and comparative range of motion tests of the plaintiff's right shoulder and cervical and lumbar spines. Dr Ackerman found that there were significant range of motion limitations of the plaintiff's right shoulder, cervical spine and lumbosacral spine. Dr. Ackerman also reviewed the objective range of motion test results contained in the certified medical records of Dr. Jean Demetrius, plaintiff's treating physician. His own review of the objective range of motion test results performed on April 26, 2007, 10 days after the accident showed that plaintiff's range of motion of his right shoulder, lumbar and cervical spines was significantly limited. Dr. Ackerman also personally examined the plaintiff's MRI films which showed a tear on the tendon in the right shoulder. Dr Ackerman concluded that the tear cannot be attributed to degenerative changes and could only be attributed to the accident of April 16, 2007. He states that the plaintiff's injuries are a result of the accident of April 17, 2007, that they are unresolved and permanent in nature. He states that the injuries have caused a permanent significant loss of the use and function of the right shoulder, cervical spine and lumbar spine.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff

to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendants, including the affirmed medical reports of Drs. Toriello and Cohn was sufficient to meet its prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical report of Dr. Ackerman and the certified records of Dr. Demetrious attesting to the fact that the plaintiff had significant limitations in range of motion both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Ortiz v. Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether he sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 ADd 606[2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, the plaintiff adequately explained the gap in his treatment in his deposition testimony in which he testified under oath that no-fault had stopped his benefits and he could not afford further treatment thereafter (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

Accordingly, for the reasons set forth above, it is hereby

ORDERED, that the motion of the defendants for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: December 16, 2011  
Long Island City, N.Y.

---

**ROBERT J. MCDONALD**  
**J.S.C.**

