

Canales-Ruiz v Velasquez

2014 NY Slip Op 31021(U)

April 17, 2014

Sup Ct, Suffolk County

Docket Number: 11-10295

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 9-13-13
ADJ. DATE 12-12-13
Mot. Seq. # 002 - MG

-----X

JOSE CANALES-RUIZ and MARIA BONILLA,

Plaintiffs,

- against -

JAIRO VELASQUEZ and MIGUEL
MAYORGA,

Defendants.
-----X

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Upon the following papers numbered 1 to 26 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 13 - 24; Replying Affidavits and supporting papers 25 - 26; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants for an order granting summary judgment dismissing the complaint of plaintiff Jose Canales-Ruiz on the ground that he did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted.

Plaintiffs Jose Canales-Ruiz and Maria Bonilla commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on New York Avenue in the Town of Huntington on October 17, 2010. The accident allegedly happened when a vehicle owned by defendant Miguel Mayorga and driven by defendant Jairo Velasquez struck the rear of a vehicle driven by Canales-Ruiz, which was stopped on New York Avenue in heavy traffic. Maria Bonilla allegedly was riding as a passenger in the vehicle driven by Canales-Ruiz when the collision occurred.

By his bill of particulars, plaintiff Canales-Ruiz alleges that, as a result of the subject accident, he sustained serious injuries including bulging discs at C5-C6, C6-C7, and C7-T1; loss of normal cervical lordosis; stiffness; and numbness.

The defendants now move for summary judgment dismissing the complaint of plaintiff Canales-Ruiz on the ground that he has 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 limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (see *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [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 Eyster*, 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]; *Faroze 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]).

Here, the defendants made a prima facie showing that plaintiff Canales-Ruiz did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed reports of his treating physician and the defendants’ examining physician and plaintiffs’ bill of particulars (see *Bailey v Islam*, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; *Sierra v Gonzalez First Limo*, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]). On January 26, 2011, approximately three months after the subject accident, plaintiff Canales-Ruiz’s treating physician in physical medicine and rehabilitation, Dr. Miguel Vargas, performed range of

motion testing on plaintiff Canales-Ruiz's cervical spine and found that "C-Spine range of motion is within normal limits."

On January 8, 2013, approximately two years and three months after the subject accident, the defendants' examining orthopedist, Dr. Lee Kupersmith, examined plaintiff Canales-Ruiz using certain orthopedic and neurological tests, and found that there were no sensory deficits in the upper extremities. Dr. Kupersmith performed range of motion testing on plaintiff Canales-Ruiz's cervical spine using a goniometer, and found that his range of motion testing results when compared to normal findings were all normal. Dr. Kupersmith opined that plaintiff Canales-Ruiz had no orthopedic disability at the time of the examination (*see Willis v New York City Tr. Auth.*, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]).

At his deposition, plaintiff Canales-Ruiz testified that he worked for a construction company as a laborer at the time of the accident; that, after he missed approximately a month of work as a result of the accident, he returned to work on the same job; and that he received chiropractic treatment for approximately two years. Plaintiff Canales-Ruiz also testified that there is no activity that he is unable to perform, except lifting heavy things. His deposition testimony reveals that his injuries did not prevent him from performing "substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident (*see Burns v McCabe*, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; *Curry v Velez*, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]).

Thus, the defendants have met their initial burden of establishing that plaintiff Canales-Ruiz did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that he was not prevented from performing substantially all of his usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see Gonzalez v Green*, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]).

In opposition, plaintiff Canales-Ruiz contends that he did sustain a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff Canales-Ruiz submits the affirmed reports of several follow-up evaluations of his treating physicians, dated February 14, 2011, April 18, 2011, June 14, 2011, July 26, 2011, August 2, 2011, September 26, 2011, April 24, 2012, and April 29, 2013. Plaintiff Canales-Ruiz also submits the sworn affirmation dated October 16, 2013 of his treating physician, Dr. Alvin Stein, who treated plaintiff Canales-Ruiz on January 28, 2013, April 29, 2013, September 3, 2013, and September 26, 2013.

It is well established that limitations and restrictions purportedly attributable to injuries sustained in the accident which are duly observed and properly quantified months after the accident, rather than contemporaneously therewith, are insufficient to establish an actionable serious injury under § 5102 (d) of the Insurance Law (*see Borgella v D& L Taxi Corp.*, 38 AD3d 701, 834 NYS2d 199 [2d Dept 2007]; *Imusen v Konopka*, 38 AD3d 608, 831 NYS2d 530 [2d Dept 2007]; *Ponce v Magliulo*, 10 AD3d 644, 781 NYS2d 703 [2d Dept 2004]). To demonstrate the causation of plaintiff's alleged injuries, plaintiff was required to submit medical evidence based on an initial examination close to the date of the accident (*see Borgella v D& L Taxi Corp.*, *supra*; *Imusen v Konopka*, *supra*) as well as medical evidence based on a recent examination in admissible form (*see Oliva v Gross*, 29 AD3d 551, 816 NYS2d 110 [2d Dept 2006]; *Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). "The absence of a contemporaneous

medical report invites speculation as to causation” (*Griffiths v Munoz*, 98 AD3d 997, 950 NYS2d 787, 790 [2d Dept 2012]).

On February 14, 2011, Dr. Joseph Perez, plaintiff Canales-Ruiz’s treating physician, stated in his evaluation that there was mild pain and a decreased range of motion in the plaintiff’s cervical spine, especially on lateral flexion. Dr. Perez failed to specify the degree of range of motion. On April 18, 2011, Dr. Perez found that the plaintiff sustained cervical disc displacement without specifying the degree of range of motion. On September 26, 2011, Dr. Perez administered range of motion testing on the plaintiff’s cervical spine and reported his findings.

On June 14, 2011, July 26, 2011, and August 2, 2011, Dr. Matthew Miller, plaintiff Canales-Ruiz’s treating physician, stated in his evaluation that the plaintiff sustained mild pain, a decreased range of motion, and myofascitis in his cervical spine. Dr. Miller also failed to specify the degree of range of motion.

On April 24, 2012, Dr. Roberto Rivera, plaintiff Canales-Ruiz’s treating physician, stated in his evaluation that the plaintiff sustained a decreased range of motion in his cervical spine without specifying the degree of range of motion.

On January 28, 2013, Dr. Stein examined plaintiff Canales-Ruiz and found that he sustained pain in his cervical spine. On April 29, 2013, Dr. Stein found that the plaintiff had range of motion pain and that there was a paraspinal muscle spasm in his right cervical spine. On September 3, 2013, Dr. Stein administered range of motion testing on the plaintiff’s cervical spine using a dual inclinometer and found that the plaintiff remained restricted on cervical flexion, extension, lateral flexion, and rotation. On September 26, 2013, Dr. Stein examined the plaintiff and found paraspinal muscle spasm and trigger points in his cervical spine.

Here, plaintiff Canales-Ruiz failed to raise a triable issue of fact that he had sustained a “serious injury” under Insurance Law § 5102 (d) as a result of the subject accident (*see Mack v Valfort*, 61 AD3d 831, 876 NYS2d 887 [2d Dept 2009]; *Sims v Megaris*, 15 AD3d 468, 790 NYS2d 487 [2d Dept 2005], *lv denied* 5 NY3d 703, 800 NYS2d 374 [2d Dept 2005]). The evaluation reports of the plaintiff’s treating physicians were insufficient to establish a serious injury. Their failure to include competent medical evidence of restrictions and/or limitations resulting from the injuries allegedly sustained in the subject accident that were measured contemporaneously with the subject accident renders their reports insufficient to establish a serious injury under Insurance Law § 5102 (d). The MRI report of the plaintiff’s cervical spine, performed by the plaintiff’s treating radiologist, Dr. John Himelfarb, on January 28, 2011, revealed that the plaintiff had bulging discs at C5-C6, C6-C7, and C7-T1 and straightening of the cervical curvature. The mere fact that a plaintiff suffers from bulging discs is insufficient to establish “serious injury” for purposes of Insurance Law § 5102 (d) (*see Furrs v Griffith*, 43 AD3d 389, 841 NYS2d 594 [2d Dept 2007]; *Howell v Reupke*, 16 AD3d 377, 790 NYS2d 703 [2d Dept 2005]; *Guzman v Paul Michael Mgt.*, 266 AD2d 508, 698 NYS2d 719 [2d Dept 1999]). Instead, for such injuries to constitute a “serious injury” within the contemplation of the Insurance Law, it is incumbent upon a plaintiff to provide objective medical evidence of the degree of the alleged physical limitation resulting from the injuries and their duration (*see Furrs v Griffith*, *supra*; *Foley v Karvelis*, 276 AD2d 666, 714 NYS2d 337 [2d Dept 2000]). Moreover,

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plaintiff Canales-Ruiz also failed to produce objective medical evidence to substantiate the existence of an injury which limited his usual and customary daily activities for at least 90 of the first 180 days following the accident (*see Laguerre v Chavarria*, 41 AD3d 437, 837 NYS2d 716 [2d Dept 2007]).

Under the circumstances, this Court notes that the plaintiffs failed to raise a triable issue of fact as to whether plaintiff Canales-Ruiz sustained a "serious injury" under Insurance Law § 5102 (d) as a result of the subject accident.

Accordingly, the defendants' motion for summary judgment dismissing the complaint of plaintiff Jose Canales-Ruiz is granted, and the plaintiff Jose Canales-Ruiz's complaint against the defendants is dismissed.

Dated: April 17, 2014



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION