

Fordjour v Suarez

2016 NY Slip Op 30691(U)

March 10, 2016

Supreme Court, Bronx County

Docket Number: 309087/2010

Judge: Sharon A.M. Aarons

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 24

-----X
Francis Fordjour and Adelaide Sarfo

Plaintiffs,

-against-

DECISION and ORDER
Index No. 309087/2010

Luis A. Suarez and Kweku F. Manson

Defendants.
-----X

Upon the foregoing papers, the Decision/Order on this Motion is as follows:

In this personal injury action, defendant Kweku F. Manson (Manson) moves to dismiss plaintiffs Francis Fordjour (Fordjour) and Adelaide Sarfo (Sarfo) complaints on the ground that plaintiffs did not sustain a serious injury within the meaning of Insurance Law §5102 (d). Co-defendant Luis A. Suarez (Suarez) cross move seeking the same relief. Plaintiffs opposed the motions.

Plaintiffs claim arises out of an alleged automobile accident that occurred on December 5, 2007. On the day of the accident plaintiffs were transported by ambulance to the emergency room of St. Luke Roosevelt Hospital complaining of back pain. They were discharged the same day with a diagnosis of muscle strain (Fordjour) and neck strain (Sarfo).

The proponent of a motion for summary judgment must present evidence sufficient to show that no material issues of fact exist with regard to the threshold issue. (*Bray v Rosas* 29 AD3d 422 [1st Dept 2006]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Medical Center*, 64 NY2d 851 [1985].) Here, the burden rests on the defendant to establish by the submission of proof in admissible form that plaintiff did not suffer a serious injury. When a defendant's motion is sufficient to raise the issue as to whether a serious injury has been sustained by the plaintiff, the burden shifts to the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]; *Licari v Elliot*, 57 NY2d 230 [1982]; *Lopez v Senatore*, 65 NY2d 1017[1985].) Defendant contends that plaintiffs' injuries do not

meet the statutory mandate of a serious injury. In support of the motion to dismiss defendant submits a copy of the pleadings, plaintiffs' deposition transcripts, plaintiffs' bill of particulars, unsworn reports from Comprehensive Medical & Pain Services, P.C., the affirmed medical reports of Dr. Jean-Robert Desrouleaux, and Dr. Timothy G. Haydock. Dr. Desrouleaux, neurologist retained by the defendant, examined plaintiff Fordjour on March 24, 2014. He performed range of motion tests using a goniometer on the plaintiff's cervical and lumbar spine that revealed no restrictions. There was no tenderness or spasm noted. He opined that the plaintiff's alleged injury to the cervical and lumbar spine as well as headaches were resolved. Dr. Desrouleaux concludes that plaintiff demonstrates no permanence or residual effect of his claimed injuries and is able to function in his pre-accident capacity without neurological restrictions. Dr. Desrouleaux next examined plaintiff Sarfo on August 4, 2014. His findings were that plaintiff had normal range in motion with no deficits. There was no tenderness or spasm noted. He opined that the plaintiff's alleged injury to the cervical and lumbar spine as well as headaches, anxiety and insomnia were resolved. Dr. Desrouleaux concludes that plaintiff demonstrates no permanence or residual effect of her claimed injuries and is able to function in his pre-accident capacity without neurological restrictions. This court notes that even though he did not review plaintiffs' medical records, he is not required to review the same since he described the various tests performed on the plaintiffs and found full range of motion. (*In re Abreu ex rel. Castillo*, 107 AD3d 512 [1st Dept 2013], citing *Brand v Evangelista*, 103 AD3d 539 [1st Dept 2013]).

Defendant also offers the medical report of Dr. Timothy G. Haydock, Board Certified in Emergency Medicine, who reviewed plaintiffs Fordjour and Sarfo's emergency room records and rendered his opinion solely on said review. He stated in his report that the emergency room records are inconsistent with the injuries alleged in plaintiffs' bill of particulars. He opined that there is no indication that the plaintiff sustained any significant injury as a result of the accident other than muscle strain in the lower back (Fordjour) and neck strain (Sarfo). He also stated that the claimed injuries do not have an acute traumatic origin and cannot be casually related to the accident. Defendant also points to plaintiffs'

deposition transcripts and bill of particulars to demonstrate that plaintiffs missed approximately 30 days as a result of the accident. Based on the foregoing, defendant has met his burden of proof through the submission of admissible evidence thus shifting the burden of proof to the plaintiffs to support their claim of serious injury.

Plaintiffs' opposition consists of Fordjour's affidavit, medical records from Dr. Joseph K. Mintah of Comprehensive Medical & Pain Services, P.C., and the affirmed reports of Dr. Gabriel L. Dassa, orthopedic surgeon. On December 27, 2007, plaintiff Fordjour visited Comprehensive Medical & Pain Services, P.C., where he received medical treatment and therapy for approximately three (3) months. He was initially examined by Dr. Joseph K. Mintah who states that range of motion to his neck was reduced and range of motion to his back was maintained. No description of the objective test administered or of specific limitations, if any. Both the cervical compression and straight leg tests were negative. His diagnosis was neck and low back pain. He recommended therapy. No references are made to casually relate plaintiff's injuries to the subject accident. That same day, plaintiff Sarfo also visited Comprehensive Medical & Pain Services, P.C., where she received medical treatment and therapy for approximately one (1) month. She was initially examined by Dr. Joseph K. Mintah who states that range of motion to Sarfo's neck was moderately limited in all planes. No description of the objective test administered or of specific limitations, if any. Cervical compression test was positive. His diagnosis was cervical radiculopathy. He recommended therapy. No references are made to casually relate plaintiff's injuries to the subject accident

On March 30, 2015, Dr. Gabriel L. Dassa, orthopedist surgeon, examined plaintiff Fordjour and described restricted range of motion of plaintiff's cervical and lumbar spine. He did not identify any objective range of motion tests to determine the range of motions. His impression is cervical and lumbar radiculopathy and chronic neck and back pain. He states that these injuries are casually related to the accident. He noted that plaintiff is permanently disabled and that diagnostic tests should be conducted to properly evaluate his pain complaint. On June 12, 2015, Dr. Dassa examined plaintiff Sarfo and described

restricted range of motion of plaintiff's cervical and lumbar spine. He did not identify any objective range of motion tests to determine the range of motions. His impression is cervical and lumbar radiculopathy and chronic neck and back pain. He states that these injuries are casually related to the accident. He noted that plaintiff is permanently disabled and that diagnostic tests should be conducted to properly evaluate her pain complaints.

At the outset with respect to plaintiff Sarfo's claim, Dr. Dassa was not her treating physician, and his evaluation of the plaintiff took place more than eight years after plaintiff was last treated. Because plaintiff Sarfo did not adequately explain the gap in treatment, Dr. Dassa's opinion as to permanency, significance, and causation is speculative and seemingly tailored to meet the statutory definition of serious injury. *Merrick v Lopez-Garcia*, 954 NYS2d 25 (1st Dept. 2012) citing *Arjona v Calcano*, 776 NYS2d 49 (1st Dept. 2004). Plaintiff Sarfo failed to adequately address her complete cessation of all treatment, which interrupts the chain of causation and renders the finding of permanency speculative.

With respect to plaintiff Fordjour's claim, plaintiff has failed to present sufficient objective medical evidence to establish a genuine issue of fact sufficient to defeat summary judgment (see *Dembele v Cambisaca*, 59 AD3d 352 [1st Dept 2009]). To the extent that plaintiff Fordjour alleges a serious injury based on cervical or lumbar sprains/strains, such injuries do not, as a matter of law, constitute a serious injury (see *Maenza v Letkajornsook*, 172 AD2d 500 [2d Dept 1991] [allegations of sprains and contusions are insufficient to establish that the plaintiff sustained a serious injury as defined in the statute]). The medical reports submitted on behalf of plaintiff failed to raise a triable issue of fact as to whether the plaintiff sustained a serious injury to his spine since both reports to set forth the objective tests used to described plaintiff's restricted range of motion. (*Jean v Labin-Natochenny*, 77 AD3d 62 [2nd Dept 2010].)

In addition, the plaintiffs do not fall under the 90/180 day category wherein serious injury is defined as a plaintiff's inability to perform "substantially all of the material acts which constitute[d][her] usual and customary activities" for not less than 90 of the 180 days

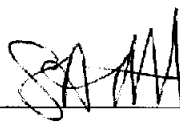
immediately following the date of the accident. (Insurance Law § 5102[d].) To prevail under this category, a plaintiff must demonstrate through competent, objective proof that he sustained a “medically determined injury or impairment of a nonpermanent nature” (Insurance Law § 5102[d]) which would have caused the alleged limitations on the plaintiff’s daily activities, and a curtailment of the plaintiff’s usual activities “to a great extent rather than some slight curtailment.” (*Berk v Lopez*, 278 AD2d 156 [1st Dept 2000]; *Licari v Elliott*, 57 NY2d 230 [1982].) Here, the evidence submitted by defendant, which includes plaintiffs’ deposition transcript, bill of particulars and medical records, demonstrates that plaintiffs cannot establish an inability to perform the requisite acts within the prescribed period.

After careful consideration and review, the defendants’ motion and cross motion for summary judgment is granted and plaintiffs’ complaints are dismissed.

This is the Decision and Order of the Court.

Dated: Bronx, New York

March 10, 2016



Hon. Sharon A.M. Aarons
Justice, Supreme Court