

Sanchez v Diallo

2017 NY Slip Op 31402(U)

June 30, 2017

Supreme Court, Kings County

Docket Number: 506303/15

Judge: Debra Silber

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of June, 2017

P R E S E N T :

HON. DEBRA SILBER

Justice.

CESAR A. SANCHEZ AND BELLA SANCHEZ,

Plaintiffs,

-against-

AMADOU T. DIALLO,

Defendant.

DECISION / ORDER

Index No. 506303/15
Mot. Seq. # 2 & 3
Cal. # 40 & 41
Submitted: 4/6/17

Papers numbered 1 to 29 were read on this motion:

Papers Numbered:

Notice of Motion/Order to Show Cause/Exhibits_____

1-17, 18-19

Affirmation in Opposition/Exhibits_____

20-28

Reply Affirmation/Exhibits_____

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Defendant Amadou Diallo moves for summary judgment and dismissal of plaintiffs' Cesar Sanchez and Bella Sanchez's action, pursuant to CPLR Rule 3212, in

that plaintiffs have failed to sustain "serious injuries," pursuant to Insurance Law § 5102(d). Plaintiff on the counterclaim Cesar Sanchez cross-moves for summary judgment as against plaintiff Bella Sanchez only, also on the issue of serious injury. The case concerns a motor vehicle accident which occurred on March 23, 2014. For the reasons which follow, both motions are denied.

The defendant has failed to meet his prima facie burden of showing that the plaintiff Cesar Sanchez 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 Eycler*, 79 NY2d 955, 956-957 [1992]. The papers submitted by the defendant fail to adequately address plaintiff Cesar Sanchez's claim, set forth in his bill of particulars, that he sustained a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. See *Che Hong Kim v Kossoff*, 90 AD3d 969, 934 [2d Dept 2011]; *Rouach v Betts*, 71 AD3d 977 [2d Dept 2010]. In arguing for dismissal of this claim, movant merely avers that the evidence supports its dismissal without offering any explanation why. Other than citing a radiologist's report, which, on its own, is insufficient, defendant's motion papers contain no other mention of the 90/180 category of injury other than the conclusory assertion that the evidence supports dismissal. In discussing the motion, defendant cites the following evidence which he argues is relevant to Mr. Sanchez's 90/180 claim: that he sought physical therapy for five months after the accident; that his cervical and lumbar spine MRIs show degenerative changes; that he was retired at the time of the accident; that he was confined to his bed for two days and to his home for three weeks

following the accident. This is insufficient to support dismissal of the plaintiff's 90/180 claim.

Movant also fails to address plaintiff Cesar Sanchez's claim that he sustained a severe disfigurement below his left knee. Not only do movant's papers fail to discuss this issue, but the affirmation of Dr. Naunihal Sachdev Singh, movant's independent neurologist, makes reference to swelling over plaintiff's left shin with an irregular scar.

Since the defendant has failed to meet his prima facie burden as to all applicable categories of injury, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition are sufficient to raise a triable issue of fact. See, *Yampolskiy v Baron*, 2017 NY App Div Lexis 3492 [2d Dept]; *Valerio v Terrific Yellow Taxi Corp.*, 2017 NY App Div Lexis 3141 [2d Dept]; *Koutsoumbis v Pacciocco*, 2017 NY App Div Lexis 3121 [2d Dept]; *Aharonoff-Arakanchi v Maselli*, 2017 NY App Div Lexis 2898 [2d Dept]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011].

Therefore, the motion for summary judgment as to plaintiff Cesar Sanchez is denied.

Defendant Amadou Diallo and plaintiff on the counterclaim Cesar Sanchez move for summary judgment and dismissal of plaintiff Bella Sanchez's action, pursuant to CPLR Rule 3212, claiming that plaintiff has failed to sustain a "serious injury" pursuant to Insurance Law § 5102(d). Movants have made a *prima facie* case with objective medical findings with regard to the following categories of injury:

- a permanent consequential limitation of use of a body organ or member.
- a significant limitation of use of a body function or system.
- a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident.

The court notes that, in finding that movant made a prima face showing with regard to “a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident,” that plaintiff admits (at her EBT) to only missing only three weeks of work after the accident.

Plaintiff Bella Sanchez, in opposition, has presented objective medical findings which demonstrate that she sustained a “serious injury” pursuant to Insurance Law § 5102(d) with regard to the following categories of injury:

- a permanent consequential limitation of use of a body organ or member
- a significant limitation of use of a body function or system
- a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident

Plaintiff's bill of particulars claims she sustained injuries to her cervical and lumbar spine, to her right shoulder, to her right and left knees, to her temporomandibular joint and to her teeth.

Plaintiff Bella Sanchez has overcome the defendants' prima facie case and

raised a triable issue of fact as to whether or not she sustained a serious injury in the accident. The affirmation of Dr. Joyce Goldenberg, plaintiff's physiatrist, provides sufficient evidence of significant restrictions in the range of motion in her cervical and lumbar spine, right shoulder and right and left knees, both from a recent examination and from tests which were contemporaneous with the subject accident. See, *Levin v Khan, supra*; *Morris v Edmond*, 48 AD3d 432, 433 [2d Dept 2008]; *McIntosh v O'Brien*, 69 AD3d 585 [2d Dept 2010]; *Yunatanov v Stein*, 69 Ad3d 708 [2d Dept 2010].

The evaluation of competing evidence (the battle of the experts) falls within the province of the trier of fact at trial, and it is not appropriate for the court to dismiss the complaint on a motion for summary judgment. See, *Dietrich v Puff Cab Corp.* 63 AD3d 778 [2d Dept 2009]; *Duffel v Green*, 84 NY2d 795 [1995]; *Lopez v Senatore*, 65 NY2d 1017 [1985]; *Mercafe Clearing, Inc. v Chemical Bank*, 216 AD2d 231 [1st Dept 1995]; *Kaiser v Edwards*, 98 AD2d 825 [3rd Dept 1983]; *Slack v Crossetta*, 75 AD2d 809 [2d Dept 1980].

It must be noted that if a plaintiff overcomes the motion with regard to one injury, the court is not permitted to dismiss the plaintiff's claims with regard to other injuries. "Since the Supreme Court properly determined that there were triable issues of fact as to whether each of the plaintiffs sustained a serious injury to the cervical and lumbar regions of his or her spine, the plaintiffs are entitled to seek recovery for all injuries allegedly incurred as a result of the accident." *Sin v Singh*, 74 AD3d 1320 [2d Dept 2010].

Therefore, as plaintiff Bella Sanchez has overcome the motion and raised triable issues of fact, the motions are denied as to her. See, e.g., *Yampolskiy v Baron*, 2017 NY App Div Lexis 3492; *Valerio v Terrific Yellow Taxi Corp.*, 2017 NY App Div Lexis

3141; *Koutsoumbis v Pacciocco*, 2017 NY App Div Lexis 3121; *Aharonoff-Arakanchi v Maselli*, 2017 NY App Div Lexis 2898; *Lara v Nelson*, 148 AD3d 1128; *Sanon v Johnson*, 148 AD3d 949; *Weisberg v James*, 146 AD3d 920; *Marte v Gregory*, 146 AD3d 874; *Goeringer v Turrisi*, 146 AD3d 754; *Che Hong Kim v Kossoff*, 90 AD3d 969.

This shall constitute the decision and order of the court.

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**