Morales v Calcano
2020 NY Slip Op 34615(U)
May 7, 2020
Supreme Court, Queens County
Docket Number: Index No. 712753/17
Judge: Richard G. Latin
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **RICHARD G. LATIN** IA PART 40
Justice

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DIANA MORALES AND YADIRA GARCIA,

Plaintiff(s),

-against-

OLIVER CALCANO AND THE METRO GROUP, INC.,

Defendant(s).

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Index No.: 712753/17
Motion Date: 3/5/2020
Motion Cal. No.: 34, 35
Motion Seq. No.: 3, 4

The following numbered papers read on these motions by defendants for summary judgment.

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
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Answering-Affidavits-Exhibits.....	9 - 11
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Upon the foregoing cited papers, it is ordered that defendants' motions, pursuant to CPLR 3212, are determined as follows:

Plaintiffs commenced the instant action to recover for injuries they allegedly sustained as a result of a motor vehicle accident on April 1, 2016. Defendants now move for summary judgment on the basis that neither plaintiff suffered a "serious injury," as defined in Insurance Law § 5102(d).

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]).

In support of the motion the defendants submit, inter alia, the affirmed medical reports of Jeffrey M. Spivak, an orthopedic surgeon, Leon Sultan, M.D., an orthopedic surgeon, and Arkady Voloshin, Ph.D, a biomechanical engineer..

Plaintiff Morales was examined by Dr. Spivak on April 23, 2019 and he opined that Morales did not sustain any causally related structural injuries to her lumbar or cervical regions. He stated that minor strains may have been causally related and that Morales demonstrated normal ranges of motion. However, Dr. Spivak did not state how plaintiff Morales' range of motion was objectively measured such as through the use of a goniometer and

does not provide the Court with the source of the values he considers normal, leaving the Court to speculate as to their origins and accuracy (*see Harman v Busch*, 37 AD3d 537 [2d Dept 2007]). Additionally, Dr. Spivak also determined that Morales did not have any current disability and that no injury stemming from this accident would have prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident.

Plaintiff Garcia was examined by Dr. Sultan on September 17, 2018 and he opined that Garcia demonstrated classic spinal disc degeneration. Dr. Sultan did not find any trauma, disability, or limitation as a result of the accident, nor did he find a causal relationship with respect to Garcia's ruptured breast implant. Similarly, Dr. Sultan opined that no injury stemming from this accident would have prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident.

With respect to both plaintiffs' injuries, Arkady Voloshin, PhD. conducted a crash damage analysis and opined that all forces and accelerations were within the normal limits of human tolerance and that no force or movement could have caused plaintiffs' respective injuries.

However, the doctors examinations all took place outside of the scope of the first 180 days following the subject accident, and the doctors failed to address the claims, clearly set forth in the bills of particulars, that the plaintiffs sustained a medically determined injury which prevented them from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (*see e.g. Mugno v Juran*, 81 AD3d 908, 908 [2d Dept 2011]; *Pinder v Salvatore*, 69 AD3d 823, 823-24 [2d Dept 2010]; *Menezes v Khan*, 67 AD3d 654, 654 [2d Dept 2009]). A physician's normal examination results, coupled with deposition testimony that plaintiff had no restriction in activity, can sometimes overcome this obstacle (*see Kouros v Mendez*, 41 AD3d 786, 788 [2d Dept 2007]). Here, the plaintiffs were asked and proclaimed limitations to numerous customary activities.

Inasmuch as the movants failed to meet their prima facie burden, it is unnecessary to examine the sufficiency of plaintiffs' opposition papers (*see Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993];*Wallace v Adam Rental Transp. Inc.*, 68 AD3d 856, 857 [2d Dept 2009]; *Ortiz v S & A Taxi Corp.*, 68 AD3d 734, 735 [2d Dept 2009]).

Nevertheless, even if the defendants had met their burden, the motions would still be denied as in response, plaintiffs submit, inter alia, the affirmed medical reports of Alexandre B. De Moura, M.D., an orthopedic surgeon.

Plaintiffs Morales and Garcia initially treated with Dr. Tim Canty, pain medicine specialist, on April 11, 2016 and April 13, 2016, respectively, and then most recently on September 3, 2019 and September 16, 2019, respectively, with Dr. De Moura. Dr. De Moura stated within a reasonable degree of medical certainty that there is no minimum amount of force required to cause a spinal injury. Moreover, with respect to plaintiff Morales, after objective testing and treatment, Dr. De Moura determined that Morales' spinal symptomology and subsequent surgery were causally related to the subject accident and that her injuries and range of motion deficits are permanent and progressive in nature. Likewise, with respect to plaintiff

Garcia, whom Dr. De Moura still sees, De Moura opined that her injuries the neck and back were also causally related to the subject accident and permanent and progressive in nature, thereby raising triable issues of fact (*see Rodriguez v Reyes*, 51 AD3d 654, 655 [2d Dept 2008]; *Grullon v Perez*, 41 AD3d 783 [2d Dept 2007]).

Additionally, movants' contentions that neither plaintiff accounted for their respective gaps in treatment are disregarded as improperly raised for the first time on reply (*see Davis-Hassan v Siad*, 101 AD3d 932 [2d Dept 2012]).

Accordingly, defendants' motions for summary judgment are denied.

Plaintiffs shall serve a copy of this order, together with notice of entry, on the defendants within 30 days of the date of entry of this order.

This constitutes the decision and order of the Court.

Dated: May 7, 2020

FILED

5/12/2020
11:39 AM

COUNTY CLERK
QUEENS COUNTY

RICHARD G. LATIN, J.S.C.