

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

Menjivar v. Capers

2023 NY Slip Op 01083 (Supreme Court of the State of New York Appellate Division Second Judicial
Department 2023) · No. 2020-04774 · Decided March 1, 2023

SUMMARY

The Appellate Division, Second Department modified an order granting the defendants summary judgment in a motor-vehicle personal-injury action. It held that the defendants failed to establish prima facie that either plaintiff lacked a serious injury under Insurance Law § 5102(d) or that the injuries were unrelated to the accident, but affirmed the denial of Cruz Menjivar's cross-motion concerning the 90/180-day category.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Colleen D. Duffy, J.P.; Joseph J. Maltese, J.; Linda Christopher, J.; Lara J. Genovesi, J.
JURISDICTION	New York
DECIDED	March 1, 2023
DOCKET	2020-04774
DISPOSITION	other
PROCEDURAL POSTURE	Plaintiffs appealed from an order granting defendants' motion for summary judgment dismissing the personal-injury complaint for failure to establish a serious injury under Insurance Law § 5102(d), and denying plaintiffs' cross-motion for summary judgment on Cruz Menjivar's serious-injury claim.
STANDARD OF REVIEW	Summary judgment is proper only where the movant establishes entitlement to judgment as a matter of law; in a serious-injury case under Insurance Law § 5102(d), defendants bear the prima facie burden of showing that the plaintiffs did not sustain a qualifying injury and that any alleged injury was not caused by the accident.
PRECEDENTIAL VALUE	published appellate decision

PARTIES

Cruz Menjivar, Jorge Castillo v. Rodney Capers, et al.

TOPICS

personal injury

insurance

summary judgment

standard of review

appellate procedure

PRACTICE AREAS

personal injury

automobile accident litigation

New York no-fault serious-injury threshold

civil procedure

QUESTIONS PRESENTED

1. Whether defendants established prima facie that neither plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d).
2. Whether defendants established prima facie that the plaintiffs' alleged injuries were not caused by the subject accident, including claimed aggravation of preexisting injuries and degenerative conditions.
3. Whether Cruz Menjivar was entitled to summary judgment establishing a serious injury under the 90/180-day category of Insurance Law § 5102(d).

HOLDINGS

1. Defendants failed to meet their prima facie burden because they did not submit competent medical evidence establishing that either plaintiff lacked serious injuries under the permanent consequential limitation of use or significant limitation of use categories.
2. Defendants failed to establish prima facie that the plaintiffs' alleged injuries were not caused by the subject accident because their experts' opinions that the injuries were degenerative did not address plaintiffs' claims that the accident exacerbated preexisting injuries and degenerative conditions.
3. Menjivar was not entitled to summary judgment under the 90/180-day category because plaintiffs failed to eliminate all triable issues as to whether her injuries prevented her from performing substantially all of the material acts constituting her usual and customary daily activities for at least 90 of the first 180 days after the accident.

KEY QUOTATIONS

“Since the defendants failed to establish that the plaintiffs' alleged injuries were not caused by the accident, the burden never shifted to the plaintiffs to explain any gap in their treatment” ([*2])

“As the defendants failed to meet their prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiffs in opposition to the motion were sufficient to raise a triable issue of fact” ([*2])

FACTUAL BACKGROUND

The plaintiffs allegedly sustained injuries in a motor vehicle accident, including injuries to their shoulders and cervical, thoracic, and lumbar spinal regions. Defendants' experts characterized the injuries as degenerative but did not address plaintiffs' claims that the accident exacerbated preexisting injuries and degenerative conditions.

Plaintiffs also sought summary judgment that Cruz Menjivar sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d).

PROCEDURAL HISTORY

Plaintiffs commenced an action for personal injuries arising from a motor vehicle accident. The Supreme Court, Nassau County, granted defendants' motion for summary judgment and denied the relevant branch of plaintiffs' cross-motion. The Appellate Division modified the order by denying defendants' motion and otherwise affirmed the order insofar as appealed from.

DISPOSITION

other

CASES CITED

- Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345
- Gaddy v. Eyler, 79 N.Y.2d 955, 956-957
- Zennia v. Ramsey, 208 A.D.3d 735, 735
- Reddick v. Hickey, 197 A.D.3d 581, 581-582
- Singleton v. F & R Royal, Inc., 166 A.D.3d 837, 838
- Nuñez v. Teel, 162 A.D.3d 1058, 1059
- D'Augustino v. Bryan Auto Parts, Inc., 152 A.D.3d 648, 650
- Edouazin v. Champlain, 89 A.D.3d 892, 895
- Keenum v. Atkins, 82 A.D.3d 843, 844
- Washington v. Asdotel Enters., Inc., 66 A.D.3d 880
- Confredo v. Moore, 210 A.D.3d 1050, 1050-1051
- Cortez v. Nugent, 175 A.D.3d 1383, 1384
- Pommells v. Perez, 4 N.Y.3d 566, 572
- Che Hong Kim v. Kossoff, 90 A.D.3d 969, 969
- Cabey v. Leon, 84 A.D.3d 1295, 1296

OPINION

Menjivar v. Capers 183 N.Y.S.3d 310

PER CURIAM.

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Menjivar v Capers

2023 NY Slip Op 01083

Decided on March 1, 2023

Appellate Division,
Second Department

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Decided on March 1, 2023

SUPREME COURT OF THE
STATE OF NEW YORK

Appellate Division, Second Judicial
Department

COLLEEN D. DUFFY, J.P.

JOSEPH J. MALTESE

LINDA CHRISTOPHER

LARA J. GENOVESI, JJ. 2020-04774 (Index No. 603720/17)

Cruz Menjivar, et al., appellants, v Rodney Capers, et al., respondents.

Nichols & Cane, PLLC, Syosset, NY (Jamie Persky Mitchnick of counsel), for appellants.

Russo & Gould, LLP, New York, NY (Trishé L.A. Hynes of counsel), for respondents.

DECISION & ORDER

In an action to recover damages for personal injuries, the plaintiffs appeal from an order of the Supreme Court, Nassau County (Leonard D. Steinman, J.), dated April 20, 2020. The order, insofar as appealed from, granted the defendants' motion for summary judgment dismissing the complaint on the ground that neither plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident, and denied that branch of the plaintiffs' cross-motion which was for summary judgment determining that the plaintiff Cruz Menjivar sustained a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting the defendants' motion for summary judgment dismissing the complaint on the ground that neither plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident, and substituting therefor a provision denying the motion; as so modified, the order is affirmed insofar as appealed from, with costs to the plaintiffs.

The plaintiffs commenced this action to recover damages for personal injuries that they allegedly sustained in a motor vehicle accident. The defendants moved for summary judgment dismissing the complaint on the ground that neither plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. The plaintiffs cross-moved, among other things, for summary judgment determining that the plaintiff Cruz Menjivar sustained a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. In an order dated April 20, 2020, the Supreme Court, inter alia,

granted the defendants' motion and denied that branch of the plaintiffs' cross-motion. The plaintiffs appeal.

The defendants failed to meet their prima facie burden of showing that neither plaintiff sustained 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](/opinion/2057079/toure-v-avis-rent-a-car-systems-inc/); *Gaddy v Eyler*, [79 NY2d 955, 956-957](/opinion/5690838/gaddy-v-eyler/#956)). The defendants failed to submit competent medical evidence establishing, prima facie, that Menjivar did not sustain serious injuries to her right and left shoulders, and the cervical and thoracic regions of her spine under the permanent consequential limitation of use or significant **[*2]** limitation of use categories of Insurance Law § 5102(d). The defendants likewise failed to submit competent medical evidence establishing, prima facie, that the plaintiff Jorge Castillo did not sustain serious injuries to his right shoulder, and the cervical, thoracic, and lumbar regions of his spine under the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102(d) (*see* *Zennia v Ramsey*, [208 AD3d 735](..); *Reddick v Hickey*, [197 AD3d 581](..); *Singleton v F & R Royal, Inc.*, [166 AD3d 837](..); *Nuñez v Teel*, [162 AD3d 1058](..)). Furthermore, the defendants failed to establish, prima facie, that the alleged injuries to the plaintiffs were not caused by the subject accident (*see* *Zennia v Ramsey*, 208 AD3d at 735; *Reddick v Hickey*, [197 AD3d at 581-582](/opinion/4906808/reddick-v-hickey/#581)). Although the defendants' experts opined that both plaintiffs' injuries were degenerative in nature, the defendants failed to address the plaintiffs' claims, set forth in the bill of particulars, that the subject accident exacerbated their preexisting injuries and degenerative conditions (*see* *D'Augustino v Bryan Auto Parts, Inc.*, [152 AD3d 648](..); *Edouazin v Champlain*, [89 AD3d 892](/opinion/5971816/edouazin-v-champlain/); *Edouazin v Champlain*, [895](..)).

target="_blank"><i>Keenum v Atkins</i>, 82 AD3d 843, 844; <i>Washington v Asdotel Enters., Inc</i>., 66 AD3d 880). Since the defendants failed to establish that the plaintiffs' alleged injuries were not caused by the accident, the burden never shifted to the plaintiffs to explain any gap in their treatment (<i>see Confredo v Moore</i>, 210 AD3d 1050, 1050-1051; <i>Cortez v Nugent</i>, 175 AD3d 1383, 1384; <i>see generally Pommells v Perez</i>, 4 NY3d 566, 572).</p><p>As the defendants failed to meet their prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiffs in opposition to the motion were sufficient to raise a triable issue of fact (<i>see Che Hong Kim v Kossoff</i>, 90 AD3d 969, 969). Accordingly, the Supreme Court should have denied the defendants' motion for summary judgment dismissing the complaint.</p><p>However, the Supreme Court properly denied that branch of the plaintiffs' cross-motion which was for summary judgment determining that Menjivar sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d). The plaintiffs failed to eliminate all triable issues of fact as to whether Menjivar sustained an injury or impairment which 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 (<i>see Cabey v Leon</i>, 84 AD3d 1295, 1296).</p><p>The parties' remaining contentions need not be reached in light of our determination, or are improperly raised for the first time by the plaintiffs in their reply brief.</p><p>DUFFY, J.P., MALTESE, CHRISTOPHER and GENOVESI, JJ., concur.</p><para type="quote">ENTER: <p>Maria T. Fasulo</p><p>Clerk of the Court</p>

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