Perez-Hargrove v Rosario
2007 NY Slip Op 30124(U)
March 5, 2007
Supreme Court, Suffolk County
Docket Number: 0005230
Judge: Robert W. Doyle
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SHORT FORM ORDER

INDEX No. 05-5230
CAL. No. 06-02031-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10/16/06
ADJ. DATE 12/4/06
Mot. Seq. # 001 - MD

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JENNINE PEREZ-HARGROVE and SAMUEL HARGROVE,

Plaintiffs,

- against -

DANA M. ROSARIO and APOLONIO ROSARIO,

Defendants.

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Upon the following papers numbered 1 to 36 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 15 - 34; Replying Affidavits and supporting papers 35 - 36; Other ____: (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint against them on the grounds that plaintiffs have failed to prove that defendants were negligent and that plaintiff Jennine Perez-Hargrove has not sustained a serious injury as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Jennine Perez-Hargrove ("plaintiff") when her vehicle collided with a vehicle owned by defendant Dana Rosario and operated by defendant Apolonio Rosario ("defendant") in the southbound lane of Broadway in Oyster Bay, New York, on August 3, 2002. At the time of the accident, plaintiff was in the process of making a left turn onto New York Avenue across the southbound lane of Broadway.

Defendants now move for summary judgment in their favor dismissing the complaint on the ground that plaintiffs have failed to prove that defendants were negligent and that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendants submit, *inter*

alia, the pleadings; a bill of particulars; the deposition testimony dated November 10, 2003 given by Apolonio Rosario in a related action, ***Rosario v Perez-Hargrove*** (Suffolk County Index No. 02-24004)[1], the deposition testimony dated November 10, 2003 given by Perez-Hargrove in the related action; the deposition testimony dated February 3, 2006 given by Perez-Hargrove in the instant action; the affirmed report dated May 9, 2006 of their examining orthopedist, Dr. S. Farkas; the affirmed report dated June 13, 2006 of their examining neurologist, Dr. Beatrice Engstrand, based on an examination of plaintiff on June 12, 2006; the affirmed MRI report dated May 16, 2006 of Dr. Stephen Lastig concerning plaintiff's cervical spine, taken on September 3, 2002; and the report dated September 10, 2002 of plaintiff's treating physician, Dr. Juan Ledon.

At her November 10, 2003 deposition, Perez-Hargrove testified to the effect that she got into her vehicle which was parked on Broadway and proceeded north until the intersection of Broadway and New York Avenue. At the intersection, she came to a complete stop on Broadway for approximately two minutes with her left turn signal on, in order to make a left turn into New York Avenue. At this point on Broadway, there was no left turn lane or traffic control device. Perez-Hargrove also testified that there was nothing to block her vision of oncoming traffic in the opposing lane and she did not see the Rosario vehicle coming from the opposite direction. When Perez-Hargrove was in the process of making a left turn, she collided with the Rosario vehicle, which impacted the front passenger side of her vehicle. Perez-Hargrove further testified that, a split second before the impact, plaintiff heard a horn.

At his November 10, 2003 deposition, Rosario testified to the effect that he had been traveling at the speed of 30 miles per hour in the right southbound lane of Broadway. Rosario also testified that, a split second before the accident, he saw the Perez-Hargrove vehicle which had stopped in the opposing lane of traffic, distant from his vehicle by a car length and also saw that the Perez-Hargrove vehicle suddenly came across the center line and was heading towards New York Avenue. He sounded his horn continuously and applied his brakes with full force, but his vehicle went into a skid, leaving approximately five feet of skid marks and collided with the front side of the Perez-Hargrove vehicle.

A driver who has the right of way is entitled to anticipate that other vehicles will obey the traffic laws that require them to yield (***Jenkins v Alexander***, 9 AD3d 286, 780 NYS2d 133 [2004]; ***Namisnak v Martin***, 244 AD2d 258, 664 NYS2d 435 [1997]). Vehicle and Traffic Law §1141 provides that a left turning vehicle must yield the right of way to a vehicle approaching from the opposing direction (***Loweth v Estate of Agnes Cusack***, 273 AD2d 283, 708 NYS2d 720 [2000]). However, a driver is required to see what, by the proper use of his senses, he might have seen (***Levy v Town Bus Corp***, 293 AD2d 452, 739 NYS2d 459 [2002]; ***Gonzalez v County of Suffolk***, 277 AD2d 350, 716 NYS2d 404 [2000]; *see also*, PJI 2:77.1 [2006]).

Here, the adduced evidence indicates that the Perez-Hargrove vehicle was positioned immediately in front of the Rosario vehicle prior to the impact, that Rosario applied his brakes with full force and that the Rosario vehicle went into a skid and left a skid mark of five feet. These factors,

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[1] By order, dated March 10, 2005 (Pitts, J.) in that action, the Court granted defendants J. Perez-Hargrove and Bessie Smith's motion for summary judgment on the ground that plaintiffs Apolonio Rosario and Dana Rosario did not sustain a "serious injury" as defined in Insurance Law § 5102 (d).

considered in light of Rosario's failure to see anything prior to the impact, raise material questions of fact regarding the speed of his vehicle and his attentiveness and care as he drove (*see*, ***Gonzalez v County of Suffolk***, *supra*). Thus, defendants have failed to sustain the initial burden of establishing a prima facie entitlement to judgment as a matter of law. Accordingly, this branch of the motion by defendants for summary judgment on the issue of liability is denied.

Defendants also seek summary judgment on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d).

By their bill of particulars, plaintiffs allege that plaintiff sustained serious injuries as a result of the subject accident, including herniated discs at C4-C5 and C5-C6; straightening of the curvature; cervical radiculopathy; headache; cervical and lumbosacral sprain/strain; and cervical and lumbar segmental dysfunction. In addition, plaintiffs claim that plaintiff was confined to bed for two to three days and home for approximately three months.

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 (***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2000]). 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]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (***Rodriguez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808 [1990]).

Here, defendants made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) through the affirmed reports of the examining physicians and plaintiffs' bill of particulars (*see*, ***Thompson v Abbasi***, 15 AD3d 95, 788 NYS2d 48 [2005]). Based on her review of MRI films of plaintiff's cervical spine, taken on September 3, 2002, Dr. Eisenstadt opined in her report dated May 16, 2006 that plaintiff had a straightening of the cervical spine. "Medical testimony is necessary to warrant a recovery for the permanency of injuries and pain and suffering, at least where the injuries in question are subjective in nature" (***Daviero v Johnson***, 110 Misc 2d 381, 441 NYS2d 895 [1981]). On May 9, 2006, approximately three years and nine months after the subject accident, defendants' examining orthopedist, Dr. Farkas, examined plaintiff, using certain orthopedic and neurological tests. Dr. Farkas found that Straight Leg Raising and Tinel's sign were negative and that there was no spasm in plaintiff's cervical spine. Dr. Farkas reported his findings with respect to the various ranges of motion of plaintiff's cervical and lumbar spine. Although Dr. Farkas found that plaintiff had full flexion, extension and rotation in her cervical spine and full flexion and lateral bending in her lumbar spine, Dr. Farkas failed to specify the degree of range of motion in lateral flexion of plaintiff's cervical spine and extension of her lumbar spine in support of his conclusion that plaintiff did not sustain a serious injury (*see*, ***Browdame v Candura***, *supra*). It is to be noted that, although the affirmed report of Dr. Farkas was deficient in that he failed to specify the range of motion, the affirmed report of defendants' examining neurologist, Dr. Engstrand, was sufficient to establish a prima facie case that plaintiff did not sustain a serious injury (*see*, ***Kerzhner v N.Y. Ubu Taxi Corp.***, 17 AD3d 410, 792 NYS2d 622 [2005]). On June 12, 2006, Dr. Engstrand examined plaintiff, using certain orthopedic and neurological tests including Straight Leg Raising test, Tinel's sign and Phalen's sign. All the test results were negative or normal. Dr. Engstrand reported his findings with respect to the various ranges of motion of plaintiff's cervical and lumbar spine and compared those findings to the normal ranges of motion. Dr. Engstrand concluded that, although she found slight spasms over plaintiff's neck, plaintiff was capable of performing her usual daily activities and that there was no disability or restriction at the time of the examination (*see*, ***Willis v New York City Tr. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2005]). In addition, on September 10, 2002, approximately a month after the subject accident, Dr. Ledon examined plaintiff, using Cervical Compression test, Spurlings test, Jackson test and SLR test. All the test results were negative. Dr. Ledon found that plaintiff had full range of motion in her cervical and lumbar spine. Thus, defendants have sustained their burden of demonstrating that there is no objective evidence of physical limitations resulting from plaintiff's alleged injuries (*see*, ***Santos v Marcellino***, 297 AD2d 440, 746 NYS2d 111 [2002]; ***O'Neal v Cancilla***, 294 AD2d 921, 741 NYS2d 815 [2002]; ***Hutchinson v Beth Cab Corp.***, 204 AD2d 151, 207 AD2d 283, 612 NYS2d 10 [1994]).

In opposition, plaintiffs contend that plaintiff did sustain a serious injury within the meaning of Insurance Law § 5102 (d). In support, plaintiffs submit, *inter alia*, the medical record of New Island Hospital; the medical records of Chi Ti Acupuncture and Bedford Avenue Chiropractic & Rehab; the sworn affirmation dated June 26, 2006 of Dr. John Rigney, based on the MRI examination of plaintiff's cervical spine on September 4, 2002; the affirmed MRI report of plaintiff's cervical spine, taken on September 4, 2002 by Dr. John Rigney; the sworn affirmation dated October 11, 2006 of Dr. Huseyin Tuncel, based on the electrodiagnostic examination of plaintiff on August 30, 2002; the affirmed electrodiagnostic examination report of plaintiff's cervical spine, taken on August 30, 2002 by Dr. Huseyin Tuncel; the sworn affidavit dated November 10, 2006 of plaintiff's examining chiropractor, Dr. Fred Jones, based on an examination of plaintiff on June 28, 2006; the affirmed report dated September

6, 2006 of Dr. Fred Jones, based on an examination of plaintiff on June 28, 2006; the sworn affidavit dated October 18, 2006 of plaintiff's treating chiropractor, Dr. Tara O'Brien, based on an examination of plaintiff on August 5, 2002; the affirmed report dated August 7, 2002 of Dr. Tara O'Brien, based on an examination of plaintiff on August 5, 2002; the affirmed report dated August 8, 2002 of Dr. Juan Ledon, based on an examination of plaintiff on the same date; the unaffirmed report dated August 14, 2002 of Dr. Eduard Milman; and the unaffirmed report dated December 12, 2002 of Dr. Philip Rafiy.

Here, the MRI report of plaintiff's cervical spine, allegedly performed by Dr. Rigney on September 4, 2002, revealed that plaintiff had a straightening of curvature and small herniated discs at C4-C5 and C5-C6. For a herniated or bulging disc to constitute a serious injury, there must be objective evidence of the extent or degree of the alleged physical limitations resulting from the injury and its duration (*see*, ***Nelson v Amicizia,*** 21 AD3d 1015, 803 NYS2d 87 [2005]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2005]; ***Guzman v Paul Michael Mgt.***, 266 AD2d 508, 698 NYS2d 719 [1999]). On August 5, 2002, plaintiff's treating chiropractor, Dr. O'Brien, administered certain orthopedic and neurological tests including Cervical Compression test, Cervical Distraction test, Lasegue's test, Braggard's test, Kemp's test, Bechterew's test, Ely's test, Yeoman's test and Gaenslen's test. Dr. O'Brien found that all the test results were positive and there were tenderness and spasm in plaintiff's cervical, thoracic and lumbar spine. Dr. O'Brien reported her findings with respect to the various ranges of motion of plaintiff's cervical and lumbar spine and compared her findings to normal range of motion. Based on the positive orthopedic tests and the comparison of plaintiff's limitations of motion with normal function, Dr. O'Brien concluded that plaintiff sustained a significant limitation to her cervical and lumbar spine. On June 28, 2006, approximately three years and eleven months after the subject accident, Dr. Jones examined plaintiff using certain orthopedic and neurologic tests including Cervical Compression test, Jackson's Compression test and Soto Hall test. All the test results were positive. Dr. Jones reported his findings with respect to the various ranges of motion of plaintiff's cervical and lumbar spine and compared those findings to the normal ranges of motion. Dr. Jones concluded that plaintiff did sustain a serious injury within the meaning of Insurance Law § 5102 (d). Furthermore, Dr. Jones satisfactorily explained in his affidavit the approximate three-year-and-three-month gap between plaintiff's last date of treatment on March 2003 and the examination on June 28, 2006 (*see*, ***Williams v New York City Tr. Auth.***, 12 AD3d 365, 786 NYS2d 183 [2004]; ***Black v Robinson***, 305 AD2d 438, 759 NYS2d 741 [2003]). As an explanation for the cessation of treatment, Dr. Jones stated that, "[plaintiff] has received maximum medical benefit" and "has reached maximum medical improvement."

Thus, plaintiffs have raised a triable issue of fact as to whether the injured plaintiff sustained a significant limitation of use of a body function or system constituting a serious injury as defined by Insurance Law § 5102 (d) (*see*, ***Kraemer v Henning***, 237 AD2d 492, 655 NYS2d 96 [1997]). Accordingly, this branch of the motion by defendants for summary judgment is also denied.

Dated: MAR 0 5 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION