

Bassani v Sharif

2007 NY Slip Op 30779(U)

March 26, 2007

Supreme Court, Suffolk County

Docket Number: 0015676/2004

Judge: Robert W. Doyle

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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 10-13-06
ADJ. DATE 12-20-06
Mot. Seq. # 002 MG

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TASIA BASSANI, an infant, by her mother and	:
and natural guardian, CHERYL BASSANI, and	:
CHERYL BASSANI, individually,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
LORI SHARIF and BOZORGMEHR SHARIF,	:
	:
Defendants.	:
-----X	

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Upon the following papers numbered 1 to 46 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 22 - 43; Replying Affidavits and supporting papers 44 - 46; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for summary judgment dismissing the claim of plaintiff Tasia Bassani is granted.

Plaintiff Tasia Bassani and her mother, plaintiff Cheryl Bassani, commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on Cenacle Road in the Town of Islip on February 15, 2002. The pleadings allege that plaintiffs sustained serious injuries when the vehicle they were riding in was struck in the rear by a vehicle owned by defendant Bozorgmehr Sharif and operated by defendant Lori Sharif. According to Tasia Bassani's deposition testimony, the vehicle plaintiffs were riding in was stopped for a red light at the time of the accident.

Plaintiffs' original bill of particulars, dated February 21, 2005, alleges, in relevant part,

that Tasia Bassani sustained numerous injuries in the accident, including cervical and lumbar radiculopathy; brachial neuritis or radiculitis; thoracic or lumbosacral neuritis or radiculitis; post-traumatic headaches with dizziness; shoulder pain; and “sensory deficits (numbness and tingling) bilaterally” in the upper extremities. At a pretrial deposition conducted on June 14, 2005, Tasia Bassani testified, among other things, that she missed a few days of school and had to quit her school’s kickline team due to the injuries she suffered in the accident. Miss Bassani testified that, upon the recommendation of her treating chiropractor, she did not participate in gym class during the 16-month period from the time of the accident to her high school graduation. When questioned about the medical treatment she received for her alleged injuries, Miss Bassani testified that she was seen on three occasions by a neurologist, Dr. Socorro Vicente, and that she regularly received chiropractic treatments for approximately eight months after the accident. In addition, Miss Bassani testified that she sprained two fingers on her right hand in motor vehicle collision that occurred in January 2005. On May 31, 2006, a note of issue and certificate of readiness were filed in this action.

Defendants now move for summary judgment dismissing the claim of Tasia Bassani on the ground that she did not suffer a “serious injury” within the meaning of Insurance Law §5102 (d). Defendants’ submissions in support of the motion include copies of the pleadings; a transcript of Ms. Bassani’s deposition testimony; a magnetic resonance imaging (MRI) report of plaintiff’s cervical spine dated March 26, 2002; electromyography (EMG)/nerve conduction velocity (NCV) studies of plaintiff’s upper extremities dated May 7, 2002; and sworn medical reports prepared by Dr. Michael Katz, Dr. Richard Pearl, and Dr. David Goldstein. At defendants’ request, Dr. Katz, an orthopedist, and Dr. Pearl, a neurologist, examined Miss Bassani in July and August 2005, and reviewed certain medical records concerning the alleged injuries. Dr. Goldstein, an internist, conducted an independent examination of plaintiff in October 2002 for the No-Fault insurance carrier.

Plaintiffs oppose defendants’ motion, arguing that medical evidence submitted in opposition raises triable issues of fact as to whether Ms. Bassani sustained injuries within the “limitation of use” categories or the 90/180 category set forth in Insurance Law §1502 (d). Relying primarily on an affirmation by Dr. Joseph Perez and sworn medical reports by Dr. Socorro Vicente, plaintiffs assert that findings of limited movement in Miss Bassani’s spine and right shoulder are sufficient to defeat the motion for summary judgment. Plaintiffs further argue that the fact that Miss Bassani received an excused medical absence from gym class and that she did not participate in sporting activities during the 16-month period from the accident to her graduation from high school is sufficient to raise a question as to whether she suffered an injury within the 90/180 category.

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.”

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a “serious injury” (*see, Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, “those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports” to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see, Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Pagano v Kingsbury, supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact or demonstrate an acceptable excuse for failing to meet the requirement of tender in admissible form (*Gaddy v Eyler, supra; Pagano v Kingsbury, supra; see, Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *see generally, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

The evidence submitted by defendants establishes prima facie that plaintiff did not sustain a serious injury in the accident (*see, Hasner v Budnik*, 35 AD3d 366, 826 NYS2d 387 [2d Dept 2006]; *Cennamo v Themistkleous*, 22 AD3d 700, 804 NYS2d 401 [2d Dept 2005]; *Meely v 4 G's Truck Renting Co.*, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). The medical report prepared by Dr. Katz states that plaintiff presented with complaints of difficulty sleeping, playing sports and working out. It states, in relevant part, that plaintiff exhibited full range of motion in her cervical and lumbar regions, and that examination of the spine revealed no vertebral tenderness and no paravertebral spasm. It states that the straight leg raise test, which checks for sciatic nerve and nerve root involvement, was negative, and that plaintiff's reflex and sensory responses in the upper and lower extremities were normal. The report also states that plaintiff demonstrated full range of motion in both shoulders; that the test for impingement of the supraspinatus muscle was negative; that there was no crepitation in the acromioclavicular joints; and that there was no evidence of dislocation, clicking or grating upon movement of the shoulders. Dr. Katz opines that plaintiff suffered strains in her cervical and lumbar regions and shoulder contusions, and that such injuries were resolved at the time of the examination. He concludes that plaintiff is not disabled and is capable of performing all of her activities of daily living, including attending school on a full-time basis. Similarly, Dr. Goldstein's report,

prepared eight months after the subject accident, indicates that plaintiff complained of right-sided neck pain and lower back pain. It states that plaintiff exhibited full range of motion in the cervical and lumbar regions, and in her upper and lower extremities, and that she walked without any difficulty. It also states that plaintiff exhibited normal motor strength and tone, and normal reflexes and sensation.

Further, Dr. Pearl's report states that plaintiff complained of neck pain, headaches causing nausea and dizziness, and difficulty sleeping. It states that plaintiff's gait was normal, and that she could heel and toe walk without difficulty. It states that an examination of plaintiff's extremities showed normal and symmetrical reflexes, and normal muscle tone and strength. The report further states that a sensory examination of plaintiff revealed intact sensation to pin prick, light touch, vibration and joint position, although plaintiff alleged hypersensitivity to pin prick in the left upper and lower extremities. Dr. Pearl concludes that there were no objective findings indicating that plaintiff suffered a neurological injury as a result of the accident, and that there were no findings to correlate the alleged hypersensitivity to pin prick on plaintiff's left side. In addition, as mentioned above, plaintiff's deposition testimony states that, except for a single examination in 2004 by Dr. Carrion, an orthopedist associated with Stony Brook University, she stopped receiving medical treatment for her injuries approximately eight months after the accident.

The burden of proof, therefore, shifted to plaintiffs to raise a triable issue of fact (*see, Gaddy v Eycler, supra*). To establish an injury within the "limitation of use" categories, the medical evidence submitted by the plaintiff must include objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment, based on objective findings, comparing the plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see, Toure v Avis Rent A Car Sys., supra*). Thus, a plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of limitations of movement and their duration (*see, Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). He or she must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see, Bell v Rameau*, 29 AD3d 839, 814 NYS2d 534 [2d Dept 2006]; *Suk Ching Yeung v Rojas*, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]; *Ifrach v Neiman*, 306 AD2d 380, 760 NYS2d 866 [2d Dept 2003]), as well as objective medical findings of limitations that are based on a recent examination of plaintiff (*see, Laruffa v Yui Ming Lau, supra; Murray v Hartford*, 23 AD3d 629, 804 NYS2d 416 [2d Dept 2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; *Batista v Olivo*, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]; *Kauderer v Penta*, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]). Further, a plaintiff claiming serious injury who terminates treatment after the accident must offer a reasonable explanation for having done so (*Pommells v Perez*, 4 NY3d 566, 574, 797 NYS2d 330 [2005]; *see, Joseph v Layne*, 24 AD3d 516, 808 NYS2d 253 [2d Dept 2005]; *Ali v Vasquez*,

19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]; *Batista v Olivo, supra*).

Initially, the Court notes that the bill of particulars dated November 26, 2006, although denominated as a “Supplemental Bill of Particulars,” in fact, improperly seeks to add new injuries and new claims for damages (*see, Wolfer v 184 Fifth Ave.*, 27 AD3d 280, 811 NYS2d 45 [1st Dept 2006]; *DeNicola v Mary Immaculate Hosp.*, 272 AD2d 505, 708 NY2d 152 [2d Dept 2000]; *Barrera v City of New York*, 265 AD2d 516, 697 NYS2d 132 [2d Dept 1999]; *cf., Zenteno v Geils*, 17 AD3d 457, 793 NYS2d 112 [2d Dept 2005]). As plaintiffs were not granted leave to serve an amended bill of particulars (*see, CPLR 3025 [b]*), the new injuries and the 90/180 claim asserted by Tasia Bassani in the recent bill of particular were not considered in this determination.

Contrary to the assertions by plaintiffs’ counsel, the admissible medical evidence offered by plaintiffs is insufficient to raise a triable issue of fact as to whether Tasia Bassani suffered injuries within the “permanent consequential” or the “significant limitation of use” category. Here, the unsworn medical reports prepared by Dr. Ahmed Elfiky, Dr. Michael Laucella, Dr. Bruce Campbell, and Dr. Elizabeth Schultz, as well as the unsworn “addendum” prepared by Dr. Joseph Perez in October 2006, submitted by plaintiffs in opposition to the motion were not in admissible form and, therefore, were not considered by the Court in its determination (*see, CPLR 2106; Grasso v Angerami, supra; Felix v New York City Tr.*, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]; *Legendre v Siqing Bao*, 29 AD3d 645, 816 NYS2d 495 [2d Dept 2002]; *Pagano v Kingsbury, supra*). However, as the unsworn reports prepared by plaintiff’s treating chiropractors were referred to by defendants’ medical experts, such reports were considered by the Court (*see, Zarate v McDonald*, 31 AD3d 632, 819 NYS2d 288 [2d Dept 2006]; *Ayzen v Melendez*, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]; *Perry v Pagano*, 267 AD2d 290, 699 NYS2d 882 [2d Dept 1999]).

The affirmation by Dr. Perez states that Tasia Bassani began treating at his facility, Village Medical & Rehabilitation, on February 27, 2002. It states that plaintiff “received chiropractic treatment, internal medicine evaluations, physical therapy, physiatry evaluation and diagnostic testing” from various colleagues at Village Medical & Rehabilitation during the period from February 27 to June 11, 2002, and that she also was referred to other providers for diagnostic testing. The affirmation, then, sets forth the various testing performed and treatment provided to Tasia Bassani by other physicians and chiropractors. According to the affirmation, Dr. Perez first examined plaintiff on August 24, 2006, at which time she complained of headaches, neck pain radiating to the upper back, numbness in both hands, mid-back pain, right shoulder weakness and instability, and weakness in her right hand. It states that range of motion testing performed by Dr. Perez on August 24 showed restricted lateral flexion in plaintiff’s cervical spine and “visible abnormal ranges of motion and clicking” in plaintiff’s right shoulder, and that certain clinical tests for nerve root compression were positive. The affirmation states that based upon the findings at the August 24 examination, Tasia Bassani was referred to other providers for a neurological examination and an MRI study of the right shoulder. The

affirmation then discusses the findings of the neurologist, Dr. Ahmed Elfiky, and the MRI study.

Dr. Perez concludes in his affirmation that “[a]s a result of the course of treatment which myself and my colleagues rendered to Tasia Bassani subsequent to the accident, as well as her physical examinations and objective testing, as well as a review of the above-referenced medical records,” plaintiff sustained numerous permanent injuries, including partial tear of the supraspinatus tendon of the right shoulder, carpal tunnel syndrome in the right hand, cervical and lumbar radiculopathy, cervical myofascial derangement, and post-traumatic headaches. He states that plaintiff’s injuries have caused “significant restrictions” in joint function in her cervical spine and right shoulder, and have “resulted in a permanent partial disability.” Dr. Perez also asserts that the injuries sustained in the accident caused Tasia Bassani to be “totally disabled from all physical activities for more than one year,” and that her prognosis is “guarded at this time.”

The affirmation fails to raise a triable issue of fact, as it is clear that Dr. Perez impermissibly relied on the unsworn reports of other medical providers in reaching his conclusions that Tasia Bassani suffered permanent and significant limitations in her cervical spine and right shoulder due to the injuries allegedly suffered in the accident (*see, Elder v Stokes*, 35 AD3d 799, 828 NYS2d 138 [2d Dept 2006]; *Baksh v Shabi*, 32 AD3d 525, 820 NYS2d 327 [2d Dept 2006]; *Felix v New York City Tr. Auth., supra*). In fact, Dr. Perez examined plaintiff on only one occasion, more than four years after the subject accident, and the only movement objectively measured during cervical range of motion testing was lateral flexion. Further, there is no indication in the medical evidence submitted by plaintiff that she received any treatment for a shoulder injury during the four-month period that she treated at Village Medical & Rehabilitation, or that Dr. Perez was advised of plaintiff’s involvement in a motor vehicle accident in 2005. Dr. Perez’s conclusions regarding causation, duration and significance of plaintiff’s alleged injuries, therefore, are rejected as speculative and tailored to meet the statutory requirements (*see, Zinger v Zylberberg*, 35 AD3d 851, 828 NYS2d 128 [2d Dept 2006]; *Bennett v Genas*, 27 AD3d 601, 813 NYS2d 446 [2d Dept 2006]; *Vaughan v Baez*, 305 AD2d 101, 758 NYS2d 648 [1st Dept 2003]; *Medina v Zalmen Reis & Assocs.*, 239 AD2d 394, 658 NYS2d 36 [2d Dept 1997]).

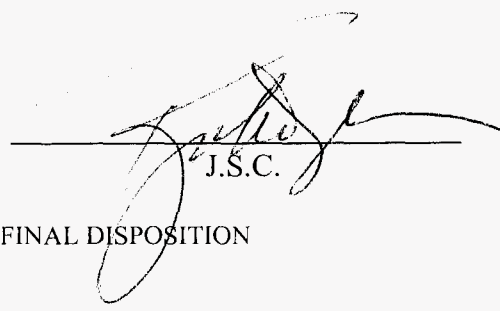
Dr. Vicente’s medical reports also are insufficient to defeat summary judgment, as her last examination of plaintiff occurred in June 2002 (*see, Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]; *Burgos v Vargas*, 33 AD3d 579, 822 NYS2d 297 [2d Dept 2006]; *Yakubov v CG Trans Corp.*, 30 AD3d 509, 817 NYS2d 353 [2d Dept 2006]; *Suk Ching Yeung v Rojas*, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]). Further, the reports show that Tasia Bassani suffered only minimal restrictions in joint function during the four-month period after the subject accident (*see generally, Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]). They do not contain an assessment of the significance or permanency of plaintiff’s injuries (*see, Bennett v Genas, supra*), or discuss the nature and extent of treatment provided to plaintiff (*see, Nixon v Muntaz*, 1 AD3d 329, 766 NYS2d 593 [2d Dept 2003]; *Smith v Askew*, 264 AD2d 834,

695 NYS2d 405 [2d Dept 1999]). Further, Dr. Vicente's reports do not indicate the clinical tests, if any, performed during her examinations of plaintiff (see, *Murray v Hartford*, 23 AD3d 629, 804 NYS2d 416 [2d Dept 2005]; *Ersop v Variano*, 307 AD2d 951, 763 NYS2d 482 [2d Dept 2003]; *Kassim v City of New York*, 298 AD2d 431, 748 NYS2d 265 [2d Dept 2002]; *Delgado v Hakim*, 287 AD2d 592, 732 NYS2d 233 [2d Dept 2001]; *Sainte-Aime v Ho*, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]). The sworn medical reports prepared by Dr. Sima Ahand, a physiatrist employed by Village Medical and Rehabilitation who examined plaintiff in April and May 2002, suffer from the same deficiencies.

Dr. Bonasera's report, dated June 11, 2002, states that plaintiff suffers from radiculopathy and subluxations in the cervical, thoracic and lumbar regions of her spine, and concludes that such injuries have resulted in a "permanent consequential limitation and a significant limitation" of use of the spine. This report, prepared less than four months after the subject accident, is insufficient to demonstrate the extent or duration of plaintiff's spinal injuries (see, *Burgos v Vargas*, supra; *Yakubov v CG Trans Corp.*, supra; *Tudisco v James*, 28 AD3d 536, 813 NYS2d 482 [2d Dept 2006]; *Suk Ching Yeung v Rojas*, supra). It also does it explain the nature or amount of treatments Dr. Bonasera provided to plaintiff, or when the various clinical tests listed therein were performed. In addition, while it appears range of motion testing was conducted, it does not indicate the measurements taken; rather, it states only that plaintiff's cervical joint function was "mildly restricted."

Finally, plaintiffs failed to present any evidence explaining Tasia Bassani's cessation of medical treatment for her alleged injuries just months after the subject accident (see, *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Albano v Onolfo*, 36 AD3d 728, ___ NYS2d ___ [2d Dept 2007]; *D'Alba v Yong-Ae Choi*, 33 AD3d 650, 823 NYS2d 423 [2d Dept 2006]; *Gomez v Epstein*, 29 AD3d 950, 818 NYS2d 101 [2d Dept 2006]). Accordingly, defendants' motion for summary judgment dismissing the claim of plaintiff Tasia Bassani for failure to meet the serious injury threshold is granted.

Dated: MAR 26 2007



J.S.C.

____ FINAL DISPOSITION NON-FINAL DISPOSITION