

| |
|--|
| Andrews v McCartan |
| 2007 NY Slip Op 32616(U) |
| August 6, 2007 |
| Supreme Court, Suffolk County |
| Docket Number: 0012409/2005 |
| Judge: Robert W. Doyle |
| Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case. |
| This opinion is uncorrected and not selected for official publication. |

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5-1-07
ADJ. DATE 6-29-07
Mot. Seq. #003 - MG; CASEDISP
004 - XMG

| | | | |
|---|---|--|--|
| -----X | | | |
| SPENCER ANDREWS, an infant over the age of | : | KEEGAN & KEEGAN, ROSS & ROSNER, L.L.P. | |
| fourteen (14) years, by his brother and guardian, | : | Attorneys for Plaintiffs | |
| Ad Litem, ERIC ANDREWS, | : | 147 North Ocean Avenue, P.O. Box 918 | |
| | : | Patchogue, New York 11772 | |
| | : | | |
| | : | CASONE & KLUEPFEL, LLP | |
| Plaintiffs, | : | Attorneys for Defendants Andrews | |
| | : | 1399 Franklin Avenue, Suite 302 | |
| - against - | : | Garden City, New York 11530 | |
| | : | | |
| DANA McCARTAN, THOMAS McCARTAN, | : | BRYAN M. ROTHENBERG, ESQ. | |
| ALAN ANDREWS AND CHARLENE | : | Attorney for Defendants McCartan | |
| ANDREWS, | : | 100 Duffy Avenue, Suite 500 | |
| | : | Hicksville, New York 11801 | |
| Defendants. | : | | |
| -----X | | | |

Upon the following papers numbered 1 to 31 read on this motion and cross motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers 11 - 20; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 28 - 31; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by defendants Andrews and this cross motion (003) by defendants McCartan for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), are granted and the complaint is dismissed.

This is an action to recover damages for serious injuries allegedly sustained by infant plaintiff Spencer Andrews as a result of a motor vehicle accident that occurred at the intersection of Bellemeade Road and Route 347, Town of Brookhaven, New York on April 16, 2004. The accident allegedly occurred when the vehicle owned by Mr. McCartan and operated by Mrs. McCartan collided with the vehicle owned by defendants Alan Andrews/Charlene Andrews and operated by Mrs. Andrews. Defendants Andrews are the parents of Spencer Andrews and Eric Andrews. By order dated September 15, 2005 (Emerson, J.), plaintiff Eric Andrews was appointed guardian ad litem for his brother, plaintiff Spencer Andrews. Defendants Andrews now move and defendants McCartan cross move for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as

defined in Insurance Law § 5102 (d).

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 Inc.*, 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 Systems, Inc.*, 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 (*Tippling-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 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 [1st Dept 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 Eyley*, 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 [2d Dept 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 [3d Dept 1990]).

In support of their motion, defendants Andrews submit, inter alia, the pleadings; plaintiff’s bill of particulars; the affirmed report of defendants’ examining orthopedist, Arthur M. Bernhang, M.D.; and the affirmed report of defendants’ examining neurologist, Mathew M. Chacko, M.D. Plaintiff claims, in his bill of particulars, that he sustained cervical and lumbar sprains/strains; a subluxation of the lumbar vertebra region; a right knee contusion with joint effusion; and muscle spasms. He also claims that he was confined to his bed from April 19, 2004 through on or about April 21, 2004, and to his home from April 19, 2004 through on or about April 26, 2004. Moreover, plaintiff claims that he sustained a serious injury in the categories of a significant limitation and a permanent consequential limitation.

In his report dated July 28, 2006, Dr. Bernhang states that he performed an independent orthopedic examination of the plaintiff on that date, and his findings include a greater than average range of motion

of the cervical and lumbosacral spine with no palpable fibromyalgia, trigger points or spasm; a negative Spurling's test for cervical radiculopathy; symmetrical reflexes; and no fluid in the knees. He also observed that there was a greater than average range of motion of the lower extremities with no negative meniscal signs bilaterally. Dr. Bernhang opined that there was no objective orthopedic evidence of any residual of injury or disability to the cervical spine, lumbar spine or the right knee, and that plaintiff was not disabled.

In his report dated August 3, 2006, Dr. Chacko states that he performed an independent neurological examination of plaintiff on that date, and his findings include a normal active range of motion of the neck in all directions; an unremarkable cranial nerve examination; normal muscle strength with no atrophy or fasciculations; DTR's that were "2+"/symmetrical; and a normal gait. While plaintiff reported tenderness on palpation of the lower thoracic region, he noted that there was no palpable muscle spasm in the cervical, thoracic or lumbar areas. He also observed that there were no clear focal neurological deficits, reflex asymmetry or sensory changes noted on examination. Dr. Chacko opined that there was a history of strains to the lumbar spine and right knee, which had resolved from an objective standpoint, and that there was no objective evidence or any neurological sequelae attributable to the accident. He also concluded that plaintiff was capable of performing the normal activities of his daily living.

In support of their cross motion, defendants McCartan submit, inter alia, the infant plaintiff's John T. Mather Memorial Hospital emergency room records and x-ray studies, and infant plaintiff's deposition testimony. Plaintiff's John T. Mather Memorial Hospital emergency room records show that he was treated and released the day of the accident. The admitting and discharge diagnosis was that of back and right knee pain. X-rays of plaintiff's lumbar spine which were performed at the hospital show that there were no fractures or subluxations and that the disc spaces were preserved. Similarly, x-rays of plaintiff's right knee show that there was a small amount of joint effusion, but that there were no fractures or subluxations. The examining radiologist concluded that this was a negative examination of the lumbar spine and right knee/patella.

Plaintiff testified to the effect that he was driven home from the accident scene. His brother Eric subsequently drove him to the emergency room at Mather Memorial Hospital. Although plaintiff was examined at Mather and had x-rays taken by the hospital radiologist, he was not given any medications. Plaintiff received physical therapy for about two weeks and then chiropractic treatment for another two or three weeks. He received no treatment after that time and he had no future appointments to see any medical professionals. Plaintiff further testified that he could not recall the last time he had received medical treatment.

By their submissions, defendants made a prima facie showing that infant plaintiff did not sustain a serious injury (see, *Wright v Peralta*, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; *Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; *Teodoro v Conway Transp. Serv.*, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; *Gousgoulas v Melendez*, 10 AD3d 674, 782 NYS2d 103 [2d Dept 2004]). Defendants' examining orthopedist found a normal range of motion of the plaintiff's cervical and lumbar spine with no palpable muscle spasm. He also found that there was a greater than average range of motion of the lower extremities with negative meniscal signs bilaterally. Similarly, defendants' examining

neurologist found that there was a full range of motion of the plaintiff's neck, and he opined that there was a history of strains to the lumbar spine and right knee which had resolved (*see, Shepley v Helmerson*, 306 AD2d 267, 760 NYS2d 228 [2d Dept 2003]; *Puccio v Pazienza*, 289 AD2d 316, 734 NYS2d 100 [2d Dept 2001]). Additionally, defendants' experts opined that plaintiff was not disabled as a result of the accident. Defendants' remaining evidence, including plaintiff's deposition testimony, also supports a finding that he did not sustain a serious injury. As defendants have met their burden as to all categories of serious injury alleged by plaintiff, the Court turns to plaintiff's proffer (*see, Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]; *Dongelewic v Marcus*, 6 AD3d 943, 774 NYS2d 841 [3d Dept 2004]).

In opposition to these motions, plaintiff submits, among other things, the affidavit of plaintiff's treating chiropractor, Brett Desing, D.C., and the plaintiff's personal affidavit. In his affidavit, Dr. Desing avers that he first treated infant plaintiff on May 19, 2004 in connection with his motor vehicle accident the prior month. On that date, Dr. Desing observed limitations of movement of the cervical and lumbar spine and his diagnosis was cervical and lumbar strains and sprains as a result of the accident. Plaintiff continued treating with his office through and including June 25, 2004, at which time his no-fault benefits were denied. He examined plaintiff most recently on April 25, 2007, at which time he performed computerized range of motion measurements of plaintiff's cervical and lumbar spine showing various range-of-motion deficits. Dr. Desing opines that plaintiff continues to suffer permanent limitations in cervical and lumbar spine motion as a result of the accident and that his activities are restricted as a result.

In his affidavit, plaintiff avers that the pain in his neck and back subsided shortly after the accident, but that his back has continued to bother him since the accident. While he plays soccer on a limited basis with a travel team, he has been unable to return to interscholastic soccer which would require him to play every day. Plaintiff further avers that he is also unable to perform all of his other daily activities without resting on an intermittent basis.

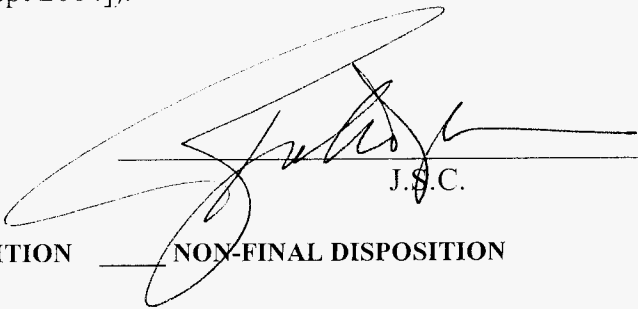
Plaintiff has provided insufficient medical proof to raise an issue of fact that he sustained a serious injury under the no-fault law (*see, Burke v Galli*, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *lv denied* 91 NY2d 806, 669 NYS2d 1 [1998]; *Picott v Lewis*, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]; *Paton v Weltman*, 23 AD3d 895, 804 NYS2d 129 [3d Dept 2005]; *Moore v County of Suffolk*, 6 AD3d 408, 774 NYS2d 375 [2d Dept 2004]). While Dr. Desing records plaintiff's complaints of pain, he has failed to present medical proof that was contemporaneous with the accident showing any initial range-of-motion restrictions for the affected body parts (*see, Ramirez v Parache*, 31 AD3d 415, 818 NYS2d 238 [2d Dept 2006]; *Yeung v Rojas*, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]), or any explanation for their omission. Consequently, there is a failure of proof relating to the subsequent range-of-motion restrictions in the cervical and lumbar spine approximately three years later (*see, Thompson v Abbasi*, 15 AD3d 788, 788 NYS2d 48 [1st Dept 2005]). Further, the affidavit of Dr. Desing largely consists of unsubstantiated speculation concerning the causal relationship between the accident and plaintiff's condition several years afterwards (*see, Damstetter v Martin*, 247 AD2d 893, 668 NYS2d 863 [4th Dept 1998]), as well as conclusory assertions tailored to meet the statutory requirements (*see, Khan v Hamid*, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). Additionally, Dr. Desing's failure to furnish any specific information concerning the alleged treatment rendered to plaintiff on or after June 25, 2004, or of the frequency and duration of said treatment, makes it clear that his report was tailored to meet the statutory

Andrews v McCartan
Index No. 05-12409
Page No. 5

requirements (*see, Barnes v Cisneros*, 15 AD3d 514, 790 NYS2d 513 [2d Dept 2005]; *Powell v Williams*, 214 AD2d 720, 625 NYS2d 634 [2d Dept 1995]). In any event, Dr. Desing has not provided an adequate explanation for the cessation of plaintiff's treatments approximately two and one-half months after the accident, and his recent examination of the plaintiff on April 25, 2007 (*see, Karabchievsky v Crowder*, 24 AD3d 614, 308 NYS2d 338 [2d Dept 2005]; *Puerto v Omholt*, 17 AD3d 650, 795 NYS2d 117 [2d Dept 2005]). Plaintiff's gap in treatment was, in essence, a cessation of treatment which he has failed to adequately address by way of competent medical proof (*see, Bycinthe v Kombos*, 29 AD3d 845, 815 NYS2d 693 [2d Dept 2006]; *Pimentel v Mesa*, 28 AD3d 629, 813 NYS2d 517 [2d Dept 2006]; *McNeil v Dixon*, 9 AD3d 481, 780 NYS2d 635 [2d Dept 2004]).

AUG 06 2007

Dated: _____



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION