

Flores v Littera

2007 NY Slip Op 32675(U)

August 23, 2007

Supreme Court, Suffolk County

Docket Number: 0024758/2004

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.

near its intersection with Howells Road, in Bay Shore, New York. By their amended verified complaint, plaintiffs allege a first cause of action seeking to recover damages for serious injuries that they sustained as defined in Insurance Law § 5102 (d) and a second, derivative, cause of action on behalf of Raul Flores, the husband of plaintiff Rosa Aminta Flores for loss of services.

By their bill of particulars, plaintiffs allege that as a result of the subject accident plaintiff Douglas Flores sustained the following serious injuries, fracture of the transverse process at the L1 vertebral body; bulging disc at C5-6; cervical and lumbar sprains; and contusion of the chest and abdomen and that plaintiff Rosa Aminta Flores sustained bulging discs at the C4-5 and C6-7 intervertebral disc spaces; disc bulge at the T11-12 intervertebral disc space; disc bulge at L4-5 with bilateral neural stenosis; internal derangement of the left shoulder; limited range of motion and weakness of the muscles of the cervical and lumbar spines as well as the left shoulder; and dextroscoliosis. Plaintiffs claim that following the accident, plaintiffs Douglas Flores and Rosa Aminta Flores were treated at and released from the Southside Hospital emergency room and confined to bed for two days, confined to home for two weeks and incapacitated from work for three weeks. At the time of the accident, plaintiffs were employed at LNK International, plaintiff Douglas Flores as an inspector and plaintiff Rosa Aminta Flores in packaging.

Plaintiffs seek to recover under the serious injury categories of 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. Plaintiffs also seek to recover economic loss greater than basic economic loss as defined in Insurance Law 5102 (a).

Defendant Venetia Miller now moves for summary judgment on the grounds that the plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of her motion, she submits, among other things, the unsworn police accident report; the summons and verified complaint dated October 27, 2004; the answer of defendant Littera dated January 5, 2005; the supplemental summons and amended verified complaint dated June 27, 2005; defendant Miller's answer dated October 3, 2005; plaintiffs' bill of particulars dated March 31, 2006; the deposition transcript of plaintiff Douglas Flores; the affirmed report dated November 28, 2006 of defendant's examining orthopedic surgeon, Arthur M. Bernhang, M.D. (Dr. Bernhang), based on an examination of plaintiff Douglas Flores on November 17, 2006; the affirmed report dated August 29, 2006 of defendant's examining radiologist Steven L. Mendelsohn, M.D. (Dr. Mendelsohn) who reviewed the radiographs dated October 20, 2003 of plaintiff Douglas Flores' lumbar spine; the affirmed report dated September 6, 2006 of defendant's examining radiologist Stephen W. Lastig, M.D. (Dr. Lastig) who reviewed an MRI dated December 8, 2003 of plaintiff Douglas Flores' lumbar spine and an MRI dated December 4, 2003 of plaintiff Douglas Flores' cervical spine; the unsworn reports of plaintiff's radiologist dated December 8, 2003 and December 9, 2003, respectively, on MRI's of the cervical spine and lumbosacral spine of plaintiff Douglas Flores; the deposition transcript of plaintiff Rosa Aminta Flores; the affirmed report dated November 28, 2006 of defendant's examining orthopedic surgeon, Dr. Bernhang, based on an examination of plaintiff Rosa Aminta Flores on November 17, 2006; the affirmed report dated

Flores v Littera
Index No. 04-24758
Page No. 3

November 21, 2006 of defendant's examining neurologist, Richard A. Pearl, M.D. (Dr. Pearl), based on an examination of plaintiff Rosa Aminta Flores one day earlier; and the affirmed report dated September 6, 2006 of defendant's examining radiologist Dr. Lastig who reviewed an MRI's of plaintiff Rosa Aminta Flores of the cervical spine dated December 4, 2003, thoracic spine dated December 12, 2003, and of the lumbar spine dated December 8, 2003.

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 "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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 (*see, Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*see, Tipping-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 Eycler*, 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]).

With respect to plaintiff Douglas Flores, defendant's examining orthopedist Dr. Bernhang indicated in his affirmed report dated November 28, 2006 that he reviewed plaintiff's emergency room records, reports dated December 2003 of MRI's of plaintiff's lumbar spine and cervical spine, x-ray reports of plaintiff's cervical spine and lumbar spine, and various other medical records. Dr. Bernhang noted plaintiff's present complaints to be pain in the lower back with muscle cramps if plaintiff sat for too long and that plaintiff avoided heavy lifting. Upon examining plaintiff three years after the subject accident, Dr. Bernhang provided range of motion findings measured by goniometer as compared to the Average Range of Joint Motion (ARJM). Notably, his bilateral measurements concerning lateral flexion

of 40/45 showed apparent limitations when compared to one another and his bilateral findings relating to active shoulder abduction of 130/130, active shoulder flexion of 140/140 and internal rotation of 60/60 were below the ARJM provided of 170, 158 and 70 respectively. Without a comparative quantification of those findings as to what is normal, it cannot be concluded that the ranges of motion in plaintiff's cervical spine and shoulders were normal, or that any limitations were mild, minor, or slight so as to be considered insignificant within the meaning of the no-fault statute (*see, McLaughlin v Rizzo*, 38 AD3d 856, 832 NYS2d 666 [2d Dept 2007]). In addition, the standard of comparison used, ARJM, does not comport with the required comparison to the normal range of motion one would expect of a healthy person of the same age, weight, and height (*see, Frey v Fedorciuc*, 36 AD3d 587, 828 NYS2d 454 [2d Dept 2007]; *Powell v Alade*, 31 AD3d 523, 818 NYS2d 600 [2d Dept 2006]; *see also, Somers v Macpherson*, 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]). Also, Dr. Bernhang indicated that on the FADIR test there was reported pain on the right side. Therefore, his conclusion that he found no objective orthopedic evidence of any residual of injuries and that whatever soft tissue injuries plaintiff may have sustained as a result of the subject accident have resolved without residual is unsupported by his findings.

Defendant's examining radiologist Dr. Lastig and plaintiff's radiologist Dr. Sappan noted similar findings in the MRI films they reviewed but Dr. Lastig attributed all significant findings to disc dessication and degenerative disc disease and noted that the straightening of plaintiff's cervical spine might be due to muscle spasm. Dr. Lastig opined that there were no findings that were causally related to the subject accident. However, Dr. Lastig's findings were insufficient to satisfy defendant Miller's burden without admissible proof that plaintiff had full range of motion and that he suffered from no disabilities (*see, Meely v 4 G's Truck Renting Co., Inc.*, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]). As indicated above, the affirmed report of defendant's examining orthopedist did not show that plaintiff had full range of motion and no disabilities. Thus, the proof submitted by defendant Miller failed to objectively demonstrate that plaintiff Douglas Flores did not suffer a permanent consequential or significant limitation of use of his cervical and lumbar spine as a result of the subject accident (*see, Fudol v Sullivan*, 38 AD3d 593, 831 NYS2d 504 [2d Dept 2007]; *Abraham v Bello*, 29 AD3d 497, 816 NYS2d 118 [2d Dept 2006]).

Regarding plaintiff Rosa Aminta Flores, Dr. Bernhang's affirmed report dated November 28, 2006 had the same deficiencies as his report concerning her son. Initially in the report, Dr. Bernhang reviewed various records including reports of MRI's of plaintiff's cervical spine, lumbosacral spine and thoracic spine performed in December 2003 and x-ray reports dated October 2003 of plaintiff's cervical spine, lumbosacral spine and thoracic spine. Dr. Bernhang noted plaintiff's complaints as pain in the upper back with motion and while moving objects; increasing pain in her lower back when lifting heavy objects and bending, which pain radiated as a sharp pain from her lower back up to her neck; and increasing pain in her left shoulder with a small amount of motion at work. Dr. Bernhang recorded range of motion measurements, measured by goniometer, as compared to ARJM. The majority of his findings were below the ARJM for that category, such as, cervical flexion 30 (ARJM 38); cervical extension 35 (ARJM 38); lateral flexion 30/35 (ARJM 43); cervical rotation 55/35 (ARJM 45); active shoulder abduction 135/135 (ARJM 170); active shoulder forward flexion 135/135 (ARJM 158); and internal rotation 30/30 (ARJM 70). As discussed above, without a comparative quantification of those findings as to what is normal, it cannot be concluded that the ranges of motion in plaintiff's cervical spine and shoulders were normal, or that any limitations were mild, minor, or slight so as to be

Flores v Littera
Index No. 04-24758
Page No. 5

considered insignificant within the meaning of the no-fault statute (*see, McLaughlin v Rizzo, supra*). In addition, the standard of comparison used, ARJM, does not comport with the required comparison to the normal range of motion one would expect of a healthy person of the same age, weight, and height (*see, Frey v Fedorciuc, supra; Powell v Alade, supra; see also, Somers v Macpherson, supra*). Dr. Bernhang also noted that plaintiff reported some tenderness on palpation of the left trapezius muscle; that plaintiff complained of low back pain when getting up after touching her toes; and that during the FABER test she complained of pain in her left leg. Thus, his conclusion that he found no objective orthopedic evidence of any residual of injuries and that whatever soft tissue injuries plaintiff may have sustained as a result of the subject accident have resolved without residual is unsupported by his findings.

The affirmed report dated November 21, 2006 of defendant's examining neurologist, Dr. Pearl, indicated that plaintiff Rosa Aminta Flores' range of motion measurements for her cervical spine and her lumbar spine when compared to normal measurements were all normal. In conclusion, Dr. Pearl opined that plaintiff had sustained a cervical and lumbosacral sprain; that the cervical sprain had resolved; and that there were no objective findings to indicate neurological injury or disability. He added that he deferred discussion of alleged left shoulder injuries to appropriate orthopedic consultants. However, Dr. Pearl did not address plaintiff's injuries of the thoracic spine as alleged in the bill of particulars or provide range of motion measurements with respect to the thoracic spine (*see, Hughes v Cai*, 31AD3d 385, 818 NYS2d 538 [2d Dept 2006]; *see also, Ayach v Ghazal*, 25 AD3d 742, 808 NYS2d 759 [2d Dept 2006]). Thus, his findings did not remedy the deficiencies found in Dr. Bernhang's report and instead raised issues of fact.

Defendant's examining radiologist Dr. Lastig reviewed the MRI studies of plaintiff Rosa Aminta Flores' cervical, thoracic and lumbar spine and concluded in his affirmed report that there was evidence of degenerative disc disease with disc space narrowing and desiccation at the L5-S1 level and opined that there were no findings which were causally related to the subject accident. Nevertheless, Dr. Lastig's findings standing alone could not satisfy defendant Miller's burden without admissible proof that plaintiff Rosa Aminta Flores had full range of motion and that she suffered from no disabilities (*see, Meely v 4 G's Truck Renting Co., Inc.*, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]). The affirmed reports of defendant's examining orthopedist and neurologist failed to establish full range of motion and no disabilities. Therefore, the evidence submitted by defendant Miller failed to objectively demonstrate that plaintiff Rosa Aminta Flores did not suffer a permanent consequential or significant limitation of use of her cervical, thoracic and lumbar spine and left shoulder as a result of the subject accident (*see, Fudol v Sullivan, supra; Abraham v Bello, supra*).

Inasmuch as defendant Miller failed to establish her prima facie entitlement to judgment as a matter of law based on whether plaintiffs sustained a serious injury, it is unnecessary to consider whether plaintiffs' opposition papers were sufficient to raise a triable issue of fact on that matter (*see, Nembhard v Delatorre*, 16 AD3d 390, 791 NYS2d 144 [2d Dept 2005]; *McDowall v Abreu*, 11 AD3d 590, 782 NYS2d 866 [2d Dept 2004]; *Coscia v 938 Trading Corp.*, 283 AD2d 538, 725 NYS2d 349 [2d Dept 2001]).

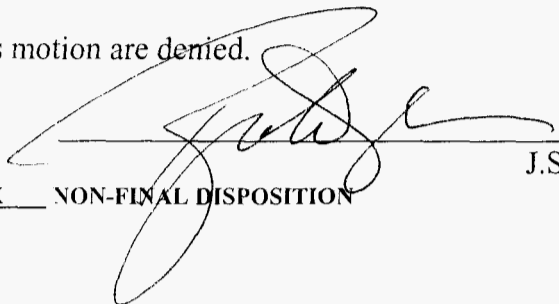
Defendant Littera cross-moves for summary judgment dismissing the complaint as against her on the grounds that plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Defendant Littera's attorney states in his affirmation that he adopts all arguments made by co-defendant Miller's attorney on the motion. However, defendant Littera's cross motion must be denied as

Flores v Littera
Index No. 04-24758
Page No. 6

procedurally defective for failure to submit a complete copy of the pleadings, that is, the complaint and the answers of all of the defendants (*see*, CPLR 3212 [b]; **Wider v Heller**, 24 AD3d 433, 805 NYS2d 130 [2d Dept 2005]; **Gallagher v TDS Telecom**, 280 AD2d 991, 720 NYS2d 422 [4th Dept 2001]; **Mathiesen v Mead**, 168 AD2d 736, 563 NYS2d 887 [3d Dept 1990]). The pleadings submitted with another party's motion or cross motion cannot be incorporated by reference (*see*, CPLR 3212 [b]). In addition, inasmuch as defendant Littera relied on the same evidentiary submissions as defendant Miller, defendant Littera also failed to make a prima facie showing that the plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see*, **Gerson v C.L.S. Transp., Inc.**, 37 AD3d 530, 829 NYS2d 688 [2d Dept 2007]).

Accordingly, the instant motion and cross motion are denied.

Dated: AUG 23 2007



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION