

Mays v Guerrier

2007 NY Slip Op 32701(U)

August 23, 2007

Supreme Court, Suffolk County

Docket Number: 0016212/2004

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 5-21-07
ADJ. DATE 7-30-07
Mot. Seq. # 002 - MD

-----X
ALICIA MAYS, EBONY MAYS, MARIA :
BATISTA, TARA ROPER and YOLANDA :
BROWN, :
Plaintiffs, :
- against - :
MICHEL GUERRIER, :
Defendant. :
-----X

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Upon the following papers numbered 1 to 50 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 26 - 48; Replying Affidavits and supporting papers 49 - 50; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for summary judgment dismissing the complaint against her on the ground that plaintiffs did not sustain 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 plaintiffs when their vehicle was rear-ended by a vehicle owned and operated by defendant Michel Guerrier on Route 110 in Babylon, New York, on January 31, 2003. At the time of the accident, plaintiffs Ebony Mays, Maria Batista, Tara Roper and Yolanda Brown were passengers in a vehicle owned and operated by plaintiff Alicia Mays.

By their bill of particulars, plaintiffs allege that, as a result of the subject accident, plaintiff Alicia Mays sustained bulging discs at L4/5 and L5/S1; plaintiff Ebony Mays sustained bulging discs at L4/L5 and L5/S1; plaintiff Maria Batista sustained bulging discs at L4/L5 and L5/S1 and carpal tunnel syndrome; plaintiff Tara Roper sustained serious injuries including bulging discs at C4/5-C6/7, L4/5 and L5/S1, disc protrusion at C4/5 and C5/6, radiculopathy at L5/S1, left ulnar neuropathy of the elbow, and bilateral carpal tunnel syndrome; and plaintiff Yolanda Brown sustained serious injuries including

bulging discs at C2/3-C6/7, L3/4 and L5/S1, lateral meniscus injury of the left knee with joint effusion, and Grade II signal of the lateral meniscus. In addition, plaintiffs claim that, following the subject accident, they were confined to bed and home for approximately three months.

Defendant now moves for summary judgment in her favor dismissing the complaint against her on the ground that plaintiffs have not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendant submits the pleadings; a bill of particulars; the medical record of Action Sports Medicine and Rehabilitation, based on an examination of plaintiff Alicia Mays; the affirmed report dated July 25, 2005 of her examining neurologist, Dr. Richard Pearl, based on an examination of plaintiff Alicia Mays on the same date; the affirmed MRI report dated January 10, 2005 of Dr. Steven Mendelsohn concerning plaintiff Alicia Mays' lumbar spine, taken on March 19, 2003; the medical record of Action Sports Medicine and Rehabilitation, based on an examination of plaintiff Ebony Mays; the affirmed report dated January 24, 2006 of Dr. Arthur Bernhang based on an examination of plaintiff Ebony Mays on January 10, 2006; the affirmed MRI report dated January 10, 2005 of Dr. Steven Mendelsohn concerning plaintiff Ebony Mays' lumbar spine, taken on March 19, 2003; the affirmed report dated February 10, 2006 of Dr. Arthur Bernhang based on an examination of plaintiff Maria Batista on February 3, 2006; the affirmed MRI report dated January 10, 2005 of Dr. Steven Mendelsohn concerning plaintiff Maria Batista's lumbar spine, taken on March 24, 2003; the affirmed report dated August 5, 2005 of Dr. Arthur Bernhang based on an examination of plaintiff Tara Roper on August 1, 2005; the affirmed report dated July 25, 2005 of Dr. Richard Pearl based on an examination of plaintiff Tara Roper on the same date; the affirmed report dated July 25, 2005 of Dr. Richard Pearl based on an examination of plaintiff Yolanda Brown on the same date; and the affirmed MRI report dated January 10, 2005 of Dr. Steven Mendelsohn concerning plaintiff Yolanda Brown's lumbar spine, taken on March 19, 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*, 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 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 [1992]). The proof must be viewed in a light most favorable to the non-moving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [1990]).

Here, defendant failed to make a prima facie showing that plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see, Nembhard v Delatorre*, 16 AD3d 390, 791 NYS2d 144 [2005]). On July 25, 2005, approximately two years and six months after the subject accident, defendant’s examining neurologist, Dr. Pearl, examined plaintiff, using certain orthopedic and neurological tests including Babinski sign, Romberg test, Tinel’s sign and Straight Leg Raising test. All the test results were negative. Dr. Pearl reported his findings with respect to the various ranges of motion of plaintiff Alicia Mays’ cervical and lumbar spine and compared those findings to the normal ranges of motion. Although Dr. Pearl found that plaintiff Alicia Mays had full range of motion in her cervical spine, he also found range of motion restrictions with respect to the lumbar spine: 30 degrees flexion (80 degrees normal). In addition, the MRI report of plaintiff Alicia Mays’ lumbar spine revealed that there is “no evidence of focal disc herniation or any abnormality causally related to trauma” and that she had “very mild age related degenerative changes” at L5/S1.

On January 10, 2006, approximately three years after the subject accident, defendant’s examining physician, Dr. Bernhang, examined plaintiff Ebony Mays, using certain orthopedic and neurological tests including Provocative test, Spurling’s test and sitting and supine Straight Leg Raising. All the test results were negative or normal, although supine Straight Leg Raising was positive. He reported his findings with respect to the various ranges of motion of plaintiff Ebony Mays’ cervical spine and shoulders. Dr. Bernhang found range of motion restrictions when compared to normal range of motion with respect to plaintiff Ebony Mays’ cervical spine and shoulders: 40/30 degrees lateral flexion (43 degrees average) and 70/35 degrees rotation (45 degrees average) in the cervical spine and 155/145 degrees abduction (170 degrees average) and 105/105 degrees forward flexion (90 degrees average) in the shoulder. Moreover, Dr. Bernhang failed to provide objective test measurements for plaintiff Ebony Mays’ lumbar extension, flexion and rotation. Dr. Bernhang’s report indicates that “[d]orsal lumbar expansion with the knees extended is 6” [and] on lateral flexion she reaches her knees.” In addition, the MRI report of plaintiff Ebony Mays’ lumbar spine revealed that there is “no evidence of focal disc herniation or any abnormality causally related to trauma” and that she had “mild age related degenerative changes” at L4/5 and L5/S1.

Dr. Mendelsohn’s MRI report of plaintiff Maria Batista’s lumbar spine revealed that there is “no evidence of focal disc herniation or any abnormality causally related to trauma” and that she had “very mild degenerative bulging” at L4/5 and L5/S1. For a bulging disc to constitute a serious injury, there must be objective evidence of the extent or degree of the alleged limitation resulting from the injury and its duration (*see, Guzman v Paul Michael Mgt.*, 266 AD2d 508, 698 NYS2d 719 [1999]). On February

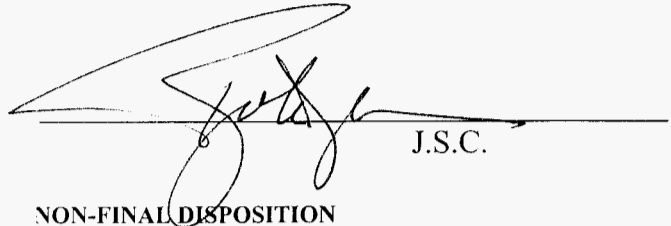
3, 2006. approximately three years after the subject accident, Dr. Bernhang, examined plaintiff Maria Batista, using certain orthopedic and neurological tests including Provocative test, Tinel sign, Naffziger's test and sitting and supine Straight Leg Raising. All the test results were negative or normal, although supine Straight Leg Raising and Naffziger's test were positive. He reported his findings with respect to the various ranges of motion of plaintiff Maria Batista's wrists and compared those findings to the normal ranges of motion. He found that plaintiff Maria Batista had almost normal range of motion in her wrist. Nevertheless, Dr. Bernhang failed to provide objective test measurements for plaintiff Maria Batista's lumbar extension, flexion and rotation. Dr. Bernhang's report indicates that "[d]orsal lumbar expansion with the knees extended is 2" [and] lateral flexion is to the distal femur."

On August 5, 2005, approximately two years and six months after the subject accident, Dr. Bernhang, examined plaintiff Tara Roper, using certain orthopedic and neurological tests including Spurling's test, Provocative test, Tinel sign, Phalen's test, sitting and supine Straight Leg Raising and FABER and FADIR tests. All the test results were negative or normal, although supine Straight Leg Raising was positive. He reported his findings with respect to the various ranges of motion of plaintiff Tara Roper's cervical spine, shoulders and wrists and compared those findings to the normal ranges of motion. Dr. Bernhang found range of motion restrictions with respect to the cervical spine and shoulders: 30 degrees flexion (38 degrees average), 20/25 degrees lateral flexion (43 degrees average) and 30/20 degrees rotation (45 degrees average) in the cervical spine and 115/115 degrees abduction (170 degrees average) and 105/105 degrees forward flexion (158 degrees average) in the shoulder. Moreover, Dr. Bernhang failed to provide objective test measurements for plaintiff Tara Roper's lumbar extension, flexion and rotation. Dr. Bernhang's report indicates that "[d]orsal lumbar expansion with the knees extended is 6½" [and] lateral flexion is to the lower femur." On July 25, 2005, Dr. Pearl examined plaintiff Tara Roper, using certain orthopedic and neurological tests including Babinski sign, Romberg test, Tinel's sign and Straight Leg Raising test. All the test results were negative or normal. Dr. Pearl reported his findings with respect to the various ranges of motion of plaintiff Tara Roper's cervical and lumbar spine and compared those findings to the normal ranges of motion. He found that plaintiff Tara Roper had normal range of motion in her cervical and lumbar spine. Nevertheless, Dr. Pearl failed to specify the degree of range of motion in lateral bending of the cervical spine in support of his conclusion that plaintiff Tara Roper did not sustain a serious injury (*see, Browdame v Candura, supra*).

On July 25, 2005, Dr. Pearl examined plaintiff Yolanda Brown, using certain orthopedic and neurological tests including Babinski sign, Romberg test, Tinel's sign and Straight Leg Raising test. All the test results were negative or normal. Although Dr. Pearl found that plaintiff Yolanda Brown had normal range of motion in her cervical and lumbar spine, he failed to specify the degree of range of motion in lateral bending of the cervical spine in support of his conclusion that plaintiff Yolanda Brown did not sustain a serious injury (*see, Browdame v Candura, supra*). Moreover, defendant failed to make a prima facie showing that plaintiff Yolanda Brown did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) inasmuch as defendant's motion papers never addressed plaintiff Yolanda Brown's claim, clearly set forth in the bill of particulars, that she sustained a left knee joint effusion and a lateral meniscus injury (*see, Volpetti v Kap*, 28 AD3d 750, 814 NYS2d 236 [2006]; *Sayers v Hot*, 23 AD3d 453, 805 NYS2d 571 [2005]). Defendant failed to submit evidence from a medical expert concerning said alleged injury (*see, Villavicencio v Miele*s, 7 AD3d 517, 776 NYS2d 82 [2004]; *Smolyar v Krongauz*, 2 AD3d 518, 767 NYS2d 873 [2003]).

Thus, defendant failed to objectively demonstrate that plaintiffs' injuries were not casually related to the subject accident or that they were not serious within the meaning of Insurance Law § 5102 (d) (*see, Browdame v Candura, supra; Zavala v DeSantis*, 1 AD3d 354, 766 NYS2d 598 [2003]). Thus, defendant failed to establish, prima facie, her entitlement to judgment as a matter of law. Under the circumstances, it is unnecessary to consider the sufficiency of plaintiffs' opposition papers (*see, Barrett v Jeannot*, 18 AD3d 679, 795 NYS2d 727 [2005]).

Dated: AUG 23 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION