

**Perez v New York City Hous. Auth.**

2007 NY Slip Op 33028(U)

September 10, 2007

Supreme Court, Kings County

Docket Number: 0039343/2003

Judge: Gloria Dabiri

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At an IAS Term, Part 39 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10<sup>th</sup> day of September 2007.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

-----X

CECILIO PEREZ AND RAQUEL PEREZ,

Plaintiffs,

- against -

Index No. 39343/03

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

-----X

The following papers numbered 1 to 4 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross-Motion and Affidavits (Affirmations) Annexed _____	1-2 _____
Opposing Affidavits (Affirmations) _____	3 _____
Reply Affidavits (Affirmations) _____	4 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendant New York City Housing Authority (“NYCHA”) moves, pursuant to CPLR 3212, for partial summary judgment dismissing the second cause of action of the complaint of plaintiffs Cecilio Perez and Raquel Perez (“plaintiffs”) for loss of services, society and consortium.

This is an action to recover for personal injuries sustained by Cecilio Perez (“Cecilio”) on January 22, 2003 when he slipped on vomit on a stairwell landing, in a housing development owned and operated by defendant. The building is located at 160 Boerum Street in Kings County. In the second cause of action Raquel Perez (“Raquel”) seeks to recover for loss of services. The second claim alleges that Raquel Perez is the wife of Cecilio Perez with whom she resided and enjoyed his services, society, consortium and companionship prior to accident.

In support of summary judgment, defendant argues that the testimony of plaintiffs at their 50-h hearings and depositions, as well as the documentary evidence, reveal that plaintiffs did not have a healthy or happy marriage for at least ten years prior to Cecilio’s accident.

Defendant points to plaintiffs’ supplemental Bill of Particulars which alleges that Raquel resided at 160 Boerum Street, Apt. 7E in Brooklyn for the ten years prior to Cecilio’s accident and that, during that period, Cecilio resided at 89 Siegal Street in Brooklyn for seven to eight years and in New Jersey for approximately one year. The supplemental Bill of Particulars indicates that for at least five years prior to the accident, Cecilio provided no financial support to Raquel.

Defendant notes that Cecilio testified at the 50-h hearing and at his deposition that he and Raquel were not living together at the time of the accident and had not lived together for at least seven years due to marital difficulties; that before the accident, the plaintiffs had no

plans for a reconciliation; that it was after the accident that Cecilio returned to Raquel so that she allegedly could help him recuperate from injuries sustained in the accident; that while he resided at 89 Siegal Street he provided no financial support to Raquel, and that he and Raquel shared no marital relations during their separation.

Defendant also relies upon Raquel's testimony at the 50-h hearing and deposition. Raquel testified that she and Cecilio stopped living together approximately seven years prior to the accident and that during their separation she received no support from him; that Cecilio moved in with her after his accident so she could help him with his injured foot; that during the ten years prior to the accident, Cecilio did not assist with household chores, nor did they share marital relations; and that prior to the accident she had no plans to reconcile with Cecilio.

Based upon the foregoing, defendant argues, that plaintiffs cannot establish their claim for loss of services.

In opposition, plaintiffs argue that they have been married since 1967 and reunited the day after Cecilio's accident so that Raquel could take care of Cecilio, and that their claim for loss of services is viable. In this regard, Cecilio testified that he returned to Raquel on January 24, 2003, he has no plans to move out of his wife's apartment, the marital relationship has improved, and he and Raquel have engaged in marital relations. Raquel testified that since the accident, her relationship with Cecilio has improved and she and Cecilio have had marital relations. Raquel also testified that she has taken time off from

work in order to care for Cecilio. Plaintiffs contend that notwithstanding a period of separation, the services Raquel has provided to Cecilio are compensable.

Defendant replies that the mere fact that plaintiffs were married before the accident and that Raquel assisted Cecilio with recuperating does not automatically qualify Raquel to maintain a cause of action for loss of services/consortium. Defendant reiterates its contention that plaintiffs have not sustained any loss with regard to their marriage since prior to the accident, there was no marital relationship in existence.

“[C]onsortium . . . represents the interest of the injured party’s spouse in the continuance of a healthy and happy marital life and . . . the cause of action seeks to compensate for the injury to that relationship” (*Millington v Southeastern Elevator Co., Inc.*, 22 NY2d 498, 505 [1968]). “The essence of recovery for loss of services is to compensate for the loss of such elements as ‘love, companionship, affection, society, sexual relations, solace and more’” (*Briggs v Julia L. Butterfield Memorial Hospital*, 104 AD2d 626, 626 [1984], quoting *Millington*, 22 NY2d at 502). Where it has been established that a spouse cares for an injured or ill spouse, such evidence supports an award for loss of services (*see, Grant v City of New York*, 4 AD3d 158 [2004]; *Quigley v Sikora*, 269 AD2d 812 [2000]; *O’Rourke v Berner*, 249 AD2d 975 [1998]; *Prunty v YMCA of Lockport, Inc.*, 206 AD2d 911 [1994]). The nature and duration of the plaintiffs’ marital relationship are merely factors to be considered by the trier of fact in determining the amount, if any, to be awarded on this derivative claim (*see ie., Lowe v State*, 194 AD2d 898 [1993]; *Karagiannis v New York State*

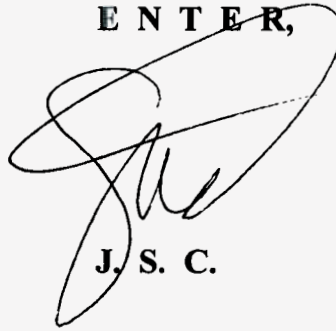
*Thruway Authority*, 187 AD2d 1009 [1992]).

Defendant's reliance upon *Briggs v Butterfield Memorial Hospital* (104 AD2d 626 [1984]) is misplaced. In that case, the court held that "[a]n action for loss of consortium cannot be maintained unless the plaintiff was married to the injured person at the time of the actionable conduct." However, unlike the instant case, the plaintiffs in *Briggs* were not married at the time the action was commenced (*see also Nicholson v South Oaks Hospital*, 27 AD3d 628 [2006]). Defendant also maintains that "[t]he facts of this matter reveal that there was no true marital relationship by any definition recognized by New York State Courts." To the extent that the defendant is suggesting that plaintiffs do not have a bona fide marriage, it fails to support this claim with any evidentiary proof. As previously noted, the evidence supports a contrary conclusion.

Finally, the defendant argues that "plaintiff[s] have failed to provide any proof that a claim [for loss of consortium] is proper in this matter." However, "the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*). Inasmuch as defendant has failed to make a *prima facie* showing that the cause of action for loss of services/consortium should be dismissed, its motion must be denied. Accordingly, it is

ORDERED, that the defendant's motion is denied.

**E N T E R,**

A handwritten signature in black ink, appearing to be 'Gloria Dabiri', written in a cursive style. The signature is positioned between the words 'ENTER,' and 'J. S. C.'.

**J. S. C.**

**HON. GLORIA DABIRI**