

Vilardi v TBV, Inc.

2007 NY Slip Op 33306(U)

September 25, 2007

Supreme Court, Suffolk County

Docket Number: 0026763/2005

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

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 4-30-07
ADJ. DATE 6-29-07
Mot. Seq. # 001 MG; CASEDISP

-----X

JEFFREY VILARDI, an infant over the age of	:	
14 years by his father and natural guardian,	:	FERRO, KUBA, MANGARO et al.
MICHAEL VILARDI, and MICHAEL	:	Attorneys for Plaintiffs
VILARDI, individually,	:	350 Motor Parkway, Suite 200
	:	Hauppauge, NY 11788
	:	
Plaintiffs,	:	
	:	JEFFREY SAMEL & PARTNERS
-- against --	:	Attorneys for Defendants
	:	150 Broadway, 20th Floor
TBV, INC. and ROGER N. FIELITZ,	:	New York, NY 10038
	:	
	:	
Defendants.	:	

-----X

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 1-38; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 39-45; Replying Affidavits and supporting papers 46-49; Other 50; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for summary judgment dismissing the complaint is granted.

On May 7, 2004, the infant plaintiff, Jeffrey Vilardi, allegedly was struck by a passenger van while riding a bicycle through the intersection of Hempstead Road and Sound Beach Boulevard in the Town of Brookhaven. The van was owned by the defendant TBV, Inc. and driven by the defendant Roger Fielitz. Thereafter, this action was commenced to recover damages, individually and derivatively, for personal injuries allegedly sustained by the infant plaintiff as a result of the accident. The Court notes that a counterclaim seeking to recover property damages interposed by the defendants was withdrawn pursuant to a written stipulation dated June 21, 2006.

The plaintiffs' bill of particulars alleges, in relevant part, that the infant plaintiff suffered numerous injuries in the accident, including a concussion; post-concussion syndrome; contusion and hematoma to the forehead; traumatic iritis in the left eye; cervical sprain and strain; and abrasions to the left shoulder, left knee and hands. It alleges that the infant plaintiff was hospitalized for four days after the accident, and that he missed approximately three weeks of school due to his injuries. It further

alleges that as a result of the accident, the infant plaintiff sustained “serious injury” within the meaning of Insurance Law § 5102 (d), resulting in “a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and a medically determined injury or impairment of a non-permanent nature” that prevented him from performing substantially all of his normal daily activities for at least 90 days out of the 180 days immediately following the accident.

The defendants now move for summary judgment dismissing the complaint on the ground that the infant plaintiff was the sole proximate cause of the accident. Alternatively, the defendants seek judgment dismissing the complaint on the ground that the infant plaintiff is precluded by Insurance Law § 5104 from recovering for non-economic loss, as he did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d). The defendants’ submissions in support of the motion include copies of the pleadings; transcripts of the infant plaintiff and the defendant driver’s deposition testimony; a medical report prepared by the infant plaintiff’s treating neurologist, Dr. Nancy McLinskey; and sworn medical reports prepared by Dr. Edward Weiland, Dr. Eric Freeman, and Dr. Warren Cohen. Dr. Weiland, a neurologist, and Dr. Freeman, an orthopaedist, conducted examinations of the infant plaintiff on behalf of the No-Fault insurance carrier in September 2004 and reviewed various medical records concerning the alleged injuries. At the defendants’ request, Dr. Cohen, a neurologist, conducted an examination of the infant plaintiff in July 2006 and reviewed medical records related to the infant plaintiff’s alleged injuries.

The plaintiffs oppose the motion, arguing that issues of fact exist as to whether the defendant driver could have avoided the accident, and whether the infant plaintiff suffered “significant disfigurement” due to scarring on his forehead, hands and knees. Annexed to the opposition papers is a “Supplemental Bill of Particulars” dated May 18, 2007, which states, in relevant part, that the infant plaintiff sustained “contusion and hematoma to the forehead with residual scarring,” and “multiple abrasions/wounds to the left shoulder, left knee and both hands with residual scarring.” The defendants also submitted an affidavit by the infant plaintiff and an affirmation by Dr. Santiago Wong, the infant plaintiff’s regular treating physician. Dr. Wong’s report states that he examined the infant plaintiff on May 12, 2004 and on May 25, 2007; that the infant plaintiff had visible 3 centimeter scars on his forehead and 1 centimeter scars on his hands at the May 2007 examination; and that such scars are permanent and causally related to the accident.

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 Eyley**, 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, 537 NYS2d 692 [2d Dept 1992]). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (see, **Gaddy v Eyley**, *supra*; **Pagano v Kingsbury**, *supra*; see, **Grasso v Angerami**, *supra*; see generally, **Zuckerman v City of New York**, 49 NY2d 557, 427 NYS2d 595 [1980]).

The evidence submitted by the defendants establishes prima facie that the infant plaintiff did not sustain a serious injury as a result of the subject accident (see, **Burgos v Vargas**, 33 AD3d 579, 822 NYS2d 297 [2d Dept 2006]; **Mahabir v Ally**, 26 AD3d 314, 812 NYS2d 556 [2d Dept 2006]; **Faroze v Kamran**, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; **Khan v Hamid**, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]; **Kearse v New York City Tr. Auth.**, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). In particular, the medical report by Dr. Cohen states that the infant plaintiff, who presented with complaints of intermittent neck pain and the presence of a scar on his forehead, exhibited normal range of motion in his cervical and lumbar regions, as well as in his upper and lower extremities. It states, among other things, that examination of the spine revealed no vertebral tenderness spasm or trigger points, and that objective testing for cervical compression, sciatic nerve and nerve root involvement were negative. It also states that the infant plaintiff walked with a normal gait, and that his muscle tone, strength, deep tendon reflexes and sensation were normal. Dr. Cohen concludes that the results of the neurologic examination were normal, with no evidence of radiculopathy or traumatic neuropathy, and that the infant plaintiff can perform the activities of normal daily living without restriction.

In addition, the infant plaintiff's deposition testimony reveals that he returned to school approximately one month after the accident, and the only restriction placed on his activities at that time was that he was not permitted to participate in gym class for the remainder of the school year. It also shows that after the infant plaintiff was discharged from the hospital, his medical treatment consisted of only a follow-up examination by his treating neurologist, an examination by an ophthalmologist, and an examination by Dr. Wong.

The burden, therefore, shifted to the plaintiffs to present evidence raising a triable issue of fact (see, **Gaddy v Eyley**, *supra*). To recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (**Oberly v Bangs Ambulance**, 96 NY2d 295, 299, 727 NYS2d 378 [2001]). To establish an injury within the "limitation of use" categories, the medical evidence submitted by a 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.**, 98 NY2d 345, 746 NYS2d 865 [2002]). "Whether a limitation of use or function is 'significant' or 'consequential' * * * relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (**Dufel v Green**, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; see, **Toure v Avis Rent A Car Sys.**, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see, **Licari v Elliott**,

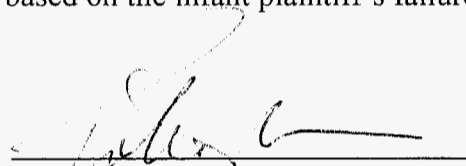
Vilardi v TBV
 Index No. 05-26763
 Page No. 4

57 NY2d 230, 455 NYS2d 570 [1982]). Further, subjective claims of pain and limitation of movement must be verified by objective medical findings that are based on a recent examination of the plaintiff (*see, Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; *Ali v Vasquez*, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]; *Batista v Olivo*, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]).

Here, the plaintiffs failed to offer any medical evidence substantiating the allegations in the pleadings that the infant plaintiff suffered a permanent loss of use or a significant limitation of use of a body function or system, or that he was unable to perform substantially all of his routine daily activities for at least 90 of the 180 days immediately following the accident due to his injuries (*see, Vishnevsky v Glassberg*, 29 AD3d 680, 815 NYS2d 152 [2d Dept 2006] *Davis v New York City Tr. Auth.*, 294 AD2d 531, 742 NYS2d 658 [2d Dept], *lv denied* 98 NY2d 612, 749 NYS2d 475 [2002]). Moreover, the affirmations by Dr. Wong and the infant plaintiff, both of which discuss the presence of scars on the infant's forehead, hands and knees, are insufficient to defeat summary judgment. Although denominated as a "Supplemental Bill of Particulars," the bill of particulars dated May 18, 2007, in fact, improperly attempts to add new injuries, namely scars, and a new claim 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 the plaintiffs were not granted leave to serve an amended bill of particulars (*see, CPLR 3025 [b]*), the "significant disfigurement" claim by the infant plaintiff was not considered in the determination of this motion.

Accordingly, summary judgment dismissing the complaint based on the infant plaintiff's failure to meet the serious injury threshold is granted.

Dated: SEP 25 2007



 J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION