

Tolentino v Carranla

2007 NY Slip Op 34014(U)

December 6, 2007

Supreme Court, Suffolk County

Docket Number: 0017633/2005

Judge: Robert W. Doyle

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 8-15-07
ADJ. DATE 10-30-07
Mot. Seq. # 004 - MD

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CATHERINE TOLENTINO, an infant under the	:	
age of 14 years by and through her father and	:	
natural guardian, MANUEL TOLENTINO,	:	ALAN M. SANDERS, LLC
EMMANUEL TOLENTINO, an infant under the	:	Attorneys for Plaintiffs
age of 14 years by and through his father and	:	One Old Country Road, Suite 320
natural guardian, MANUEL TOLENTINO, and	:	Carle Place, New York 11514
MANUEL TOLENTINO, individually,	:	
SOCORRO TOLENTINO, TASHAY KELLY, an	:	PICCIANO & SCAHILL, P.C.
infant under the age of 14 years by and through her	:	Attorneys for Defendants
mother and natural guardian, MARIE KELLY	:	900 Merchants Concourse, Suite 310
and MARIE KELLY, individually,	:	Westbury, New York 11590
	:	
Plaintiffs,	:	
	:	
- against -	:	
	:	
	:	
FRANK CARRANLA and MARILUZ ZAVALA,	:	
	:	
	:	
Defendants.	:	

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 15 - 19; Replying Affidavits and supporting papers 20 - 22; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for partial summary judgment dismissing the complaint against them on the ground that plaintiffs Catherine Tolentino, Emmanuel Tolentino and Tashay Kelly 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 collided with a vehicle owned by defendant Mariluz Zavala and operated by defendant Frank Carranla at the intersection of Route 110 and Jefferson Avenue in Babylon, New York on May 7, 2004. At the time of the accident, plaintiffs Catherine Tolentino, Emmanuel Tolentino and Tashay Kelly were passengers in a vehicle owned and operated by plaintiff Manuel Tolentino.

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By their bill of particulars, plaintiffs allege that, as a result of the subject accident, plaintiff Catherine Tolentino sustained cervical radiculopathy, tenderness and positive Spurling sign in the cervical spine, and right ankle pain; plaintiff Emmanuel Tolentino sustained tenderness in lumbar and cervical spine, left ankle pain and cervical sprain with radiculopathy; plaintiff Tashay Kelly sustained cervical and lumbar radiculopathy and bulging discs at L3-L4, L4-L5, L5-S1, C3-C4, C4-C5 and C6-C7. In addition, plaintiffs claim that plaintiffs Catherine Tolentino and Emmanuel Tolentino were confined to bed for a week and to their home for two weeks and that plaintiff Tashay Kelly was confined to bed and home for two weeks.

Defendants now move for partial summary judgment in their favor dismissing the complaint against them on the ground that plaintiffs Catherine Tolentino, Emmanuel Tolentino and Tashay Kelly have not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendants submit, *inter alia*, the pleadings; a bill of particulars; the affirmed report dated April 24, 2006 of their examining neurologist, Dr. Freddie Marton, based on an examination of plaintiff Catherine Tolentino; the affirmed report dated April 25, 2006 of their examining orthopedist, Dr. S. Farkas, based on an examination of plaintiff Catherine Tolentino; the affirmed report dated April 24, 2006 of Dr. Freddie Marton based on an examination of plaintiff Emmanuel Tolentino; the affirmed report dated April 25, 2006 of Dr. S. Farkas based on an examination of plaintiff Emmanuel Tolentino; the affirmed report dated April 24, 2006 of Dr. Freddie Marton based on an examination of plaintiff Tashay Kelly; and the affirmed report dated December 19, 2006 of Dr. S. Farkas based on an examination of plaintiff Tashay Kelly.

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 Killhenny*, 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

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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 Eyler*, 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 nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [1990]).

Here, defendants failed to make a prima facie showing that plaintiffs Catherine Tolentino, Emmanuel Tolentino and Tashay Kelly 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 April 24, 2006, approximately two years after the subject accident, Dr. Marton examined plaintiff Catherine Tolentino, using certain orthopedic and neurological tests and found that there was no tenderness in her cervical and lumbar spine. Although Dr. Marton reported his findings with respect to the various ranges of motion of plaintiff Catherine Tolentino’s cervical and lumbar spine and found that she had a normal range of motion, he failed to compare his findings with a normal range of motion (see, *Baudillo v Pam Car & Truck Rental*, 23 AD3d 420, 803 NYS2d 922 [2005]; *Aronov v Leybovich*, 3 AD3d 511, 770 NYS2d 741 [2004]). Dr. Marton also failed to set forth any objective tests that were performed to support his conclusion that plaintiff Catherine Tolentino did not suffer from any limitation of the range of motion in her cervical and lumbar spine (see, *Vazquez v Basso*, 27 AD3d 728, 815 NYS2d 626 [2006]; *Kennedy v Brown*, 23 AD3d 625, 805 NYS2d 408 [2005]; *Nembhard v Delatorre*, supra). On April 25, 2006, Dr. Farkas examined plaintiff Catherine Tolentino, using certain orthopedic and neurological tests and found that Tinel’s sign was negative at the elbow and wrist and that there was no spasm in her cervical spine. Dr. Farkas reported his findings with respect to the various ranges of motion of plaintiff Catherine Tolentino’s cervical spine and left elbow. Although Dr. Farkas found that plaintiff Catherine Tolentino had normal range of motion in her cervical spine and left elbow, he failed to specify the degree of range of motion in lateral bending in the cervical spine in support of his conclusion that plaintiff Catherine Tolentino did not sustain a serious injury (see, *Browdame v Candura*, supra). Moreover, Dr. Farkas also failed to set forth any objective tests.

On April 24, 2006, Dr. Marton examined plaintiff Emmanuel Tolentino, using certain orthopedic and neurological tests and found that there was no tenderness in his cervical and lumbar spine. Dr. Marton reported his findings with respect to the various ranges of motion of plaintiff Emmanuel Tolentino’s cervical and lumbar spine and found that he had a normal range of motion. Nevertheless, Dr. Marton failed to compare his findings with a normal range of motion (see, *Baudillo v Pam Car & Truck Rental*, supra; *Aronov v Leybovich*, supra). Dr. Marton also failed to set forth any objective tests (see, *Vazquez v Basso*, supra; *Kennedy v Brown*, supra). On April 25, 2006, Dr. Farkas examined plaintiff Emmanuel Tolentino, using certain orthopedic and neurological tests and found that Tinel’s sign was negative at the elbow and wrist and that there was no spasm in his cervical spine. Dr. Farkas reported his findings with respect to the various ranges of motion of plaintiff Emmanuel Tolentino’s cervical spine and left ankle. Dr. Farkas found that plaintiff Emmanuel Tolentino had normal range of motion in his cervical spine and left ankle. Nevertheless, Dr. Farkas failed to specify the degree of range of motion in lateral bending in the cervical spine in support of his conclusion that plaintiff Emmanuel Tolentino did not sustain a serious injury (see, *Browdame v Candura*, supra). Moreover, Dr.

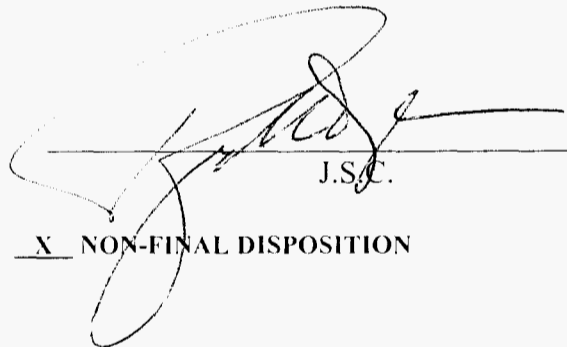
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Farkas also failed to set forth any objective tests.

On April 24, 2006, Dr. Marton examined plaintiff Tashay Kelly, using certain orthopedic and neurological tests and found that there was no tenderness in her cervical and lumbar spine. Although Dr. Marton reported his findings with respect to the various ranges of motion of plaintiff Tashay Kelly's cervical and lumbar spine and found that she had a normal range of motion, he failed to compare his findings with a normal range of motion (*see, Baudillo v Pam Car & Truck Rental, supra; Aronov v Leybovich, supra*). Moreover, Dr. Marton failed to set forth any objective tests (*see, Vazquez v Basso, supra; Kennedy v Brown, supra*). On December 19, 2006, Dr. Farkas examined plaintiff Tashay Kelly, using certain orthopedic and neurological tests and found that Straight Leg Raising and Tinel's sign were negative and that there was no spasm in her cervical spine. Dr. Farkas reported his findings with respect to the various ranges of motion of plaintiff Tashay Kelly's cervical and lumbar spine. Dr. Farkas found range of motion restrictions when compared to normal range of motion with respect to plaintiff Tashay Kelly's lumbar spine: 60 degrees forward flexion (90 degrees normal). Moreover, Dr. Farkas failed to specify the degree of range of motion in extension in the lumbar spine. Although Dr. Farkas found that plaintiff Tashay Kelly had normal range of motion in her cervical spine, he also failed to specify the degree of range of motion in lateral bending in the cervical spine. Furthermore, Dr. Farkas failed to set forth any objective tests that were performed to support his conclusion that plaintiff Tashay Kelly did not suffer from any limitation of the range of motion in her cervical spine.

Thus, defendants failed to establish, prima facie, their entitlement to judgment as a matter of law. Accordingly, defendants' motion for summary judgment dismissing the complaint on the ground that plaintiffs Catherine Tolentino, Emmanuel Tolentino and Tashay Kelly have not sustained a serious injury as defined in Insurance Law § 5102 (d) is denied. 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: DEC 06 2007



 J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION