

Diaz v Lopresti

2008 NY Slip Op 30988(U)

February 13, 2008

Supreme Court, Nassau County

Docket Number: 9204-06/

Judge: James P. McCormack

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SHORT FORM ORDER

SUPREME COURT- STATE OF NEW YORK

Present: HON. JAMES P. McCORMACK, Acting Justice of the Supreme Court

TRIAL/IAS, PART 51
NASSAU COUNTY

ASHLEY DIAZ, an infant by her mother and natural guardian, DEBBIE DIAZ, DEBBIE DIAZ, individually, and NELSON DIAZ,

Plaintiff,

-against-

ROBERT LOPRESTI,

Defendants.

Index No.: 009204/06
Motion Seq. No.: 001
Submission Date: 11/7/07

The following papers read on this motion:

- Notice of Motion/Memorandum of Law.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Motion by defendant, Robert Lopresti, for an order pursuant to CPLR § 3212 granting summary judgement and dismissing the First, Second and Sixth cause of action of the plaintiff, Ashley Diaz, an infant by her mother and natural guardian, Debbie Diaz on the grounds that plaintiff did not sustain a “serious injury” within the meaning of Insurance Law §§ 5102(d) and 5104(a) and dismissing the derivative Third Cause of Action of the plaintiff, Debbie Diaz, for loss of services of Ashley Diaz, an infant. The defendant’s motion is denied to the extent hereinafter provided.

This action is brought by plaintiffs to recover money damages for what are alleged to be serious physical injuries sustained in an automobile accident which took place on January 20, 2006 at the intersection of W. Merrick Road and Arlington Avenue, Valley Stream, New York. Plaintiff's commenced this action for alleged personal injuries, property damages and economic loss sustained in a motor vehicle accident that occurred at or near W. Merrick Road and Arlington Avenue in Valley Stream, County of Nassau, State of New York, on January 20, 2006.

The plaintiff's Bill of Particulars alleges, inter alia, that plaintiff Ashley Diaz sustained the following personal injuries: cervical derangement; cervical myofascial strain; lumbar strain; and muscle spasm (Plaintiff's Verified Bill of Particulars Exhibit "F" Defendant's Motion).

Insurance Law 5102(d) defines "serious injury" as a personal injury which results in among other things "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."

With regard to the statutory categories of "permanent consequential limitation" and "significant limitations of use", the Court of Appeals has stated that whether a

limitation of use or function is “consequential” or “significant” 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” (*Toure v. Avis Rent A Car Systems*, 98 NY 2d 345, 353[2002]) Additionally, the doctor’s opinion as to the medical significance of the injury must be supported by objective medical evidence, such as an MRI or CT scan, or the observation of muscle spasms during the physical examination. *Id.*

On a motion for summary judgement, it is defendant’s burden to present a *prima facie* showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) as a matter of law (*Schultz v. Von Voight*, 86 NY 2d 865[1995]). If defendant makes that showing the burden shifts to plaintiff to come forward with sufficient evidence to overcome defendant’s motion by demonstrating that he/she sustained a serious injury under the No-Fault Law (*Gaddy v. Eycler*, 79 NY 2d 955[1992]). Thus, the question of whether plaintiff suffered a serious injury is not always a question of fact which requires a jury trial (*Licari v. Elliot*, 57 NY 2d 230, 237[1982]). However, where plaintiff submits objective evidence as to “the extent of the limitation of movement,” a factual issue will be presented (*Id.* at 238-239).

In support of their motion for summary judgement dismissing the complaint, defendants submit an affirmed report of one physician S. Farkas, M.D., a board certified orthopedic surgeon, who examined plaintiff, Ashley Diaz, and performed range of motion

and other clinical tests on plaintiff's cervical spine and lumbar spine on January 31, 2007 as part of an independent medical evaluation. Dr. Farkas reported:

Examination of Lumbar Spine:

Revealed no spasm or crepitus to palpation during static positioning or active range of motion. The claimant can forward flex to 90 degrees (90 degrees or more of forward flexion normal). Lateral bending was 30 degrees (30 degrees lateral bending normal). The claimant offered no complaint of pain. The claimant can toe and heel walk without difficulty. No limp was noted. Deep tendon reflexes were normal at both the Achilles tendon and patellar tendon regions. Motor exam is 5+. Straight leg raising was negative. The claimant sits and bends forward to remove her shoes with no indication of discomfort.

Examination of the Cervical Spine:

Examination revealed this individual to present with 80 degrees of rotation left and right (70 to 80 degrees rotation left and right is normal) and 50 degrees of flexion and extension (30 to 50 degrees of flexion and extension is normal). The claimant offered no complaint of pain. There was no spasm or crepitus to palpation during static positioning or active range of motion. Deep tendon reflexes are 2+ and motor examination is 5+. Tinel's sign was negative at the elbow and wrists bilaterally.

The conclusion reached by Dr. Farkas after his examination and review of the medical records was that plaintiff, Ashley Diaz, had resolved cervical and lumbar sprains. Dr. Farkas concluded there is "no orthopedic disability based on the physical examinations at this time...The claimant may perform usual duties of her education and may carry out the daily activities of living without restriction."

In support of their motion for summary judgement dismissing the complaint, the defendant has also submitted an affirmed report of physician Dr. Freddie S. Marton, M.D., a board certified neurologist, who performed a neurological exam of plaintiff, Ashley Diaz, on February 9, 2007 as part of an independent medical evaluation. Dr. Marton reported:

Neurological Evaluation:

The patient was alert and oriented to person, place and time. Higher cortical function was intact. Memory and calculation skills were normal. There was no signs of either a receptive or expressive aphasia. Speech was fluent.

Cranial Nerves:

Cranial nerve exam was normal. The pupils were equal and reactive to light and accommodation. The discs were benign. The extraocular muscles were full. There was no apparent field-cut. The face was symmetrical and the tongue was midline without fasciculations. There was positive gag reflex

Motor Exam:

The motor examination showed normal tone and strength throughout.

Sensory Exam:

Sensation was intact in all modalities.

Cerebellar Exam:

Romberg was negative. Cerebellar signs were absent. There was no ataxia, dysmetria or nystagmus. Finger-to-nose was performed well.

Gait:

The gait was normal.

Reflexes:

Deep tendon reflexes were physiological. Clonus was not elicited and the plantar response was flexor bilaterally.

Cervical Spine:

The patient does not exhibit any spinal tenderness or decreased range of motion of the cervical spine.

Lumbar Spine:

The patient does not exhibit any spinal tenderness or decreased motion of the lumbar spine.

Range of Motion:

Neck range of motion is as follows: flexion to 80° (normal); extension to 70° (normal); rotation to 80° (normal). Back range of motion is as follows: flexion is to 90° (normal); extension is to 30° (normal); rotation is to 70°.

The conclusion reached by Dr. Marton based on his examination of the plaintiff and review of the medical records was that, Ashley Diaz “has cervical and lumbar spine sprain and strain syndrome, which at the time of this evaluation has entirely resolved.” He concluded that: :There is no neurological disability. Further testing and treatment are not indicated. Ashley may continue to engage in all activities she so desires.”

The defendant has established, through the affirmed reports of Dr. Sol Stephen Farkas, M.D. and Dr. Freddie M. Marton, M.D., a prima facie case that plaintiff’s injuries were not serious within the meaning of Insurance Law § 5102(d). (*Chatah v. Iglesias*, 5

AD 3d 160; *Ziegler v. Ramadhan*, 5 AD 3d 1080). Accordingly, the burden now shifts to the plaintiff to demonstrate a serious injury. (*Attanasio v. Lashley*, 636 NYS 2d 834)

In opposition to the motion, plaintiff argues Ashley Diaz has suffered a serious injury, in that she sustained:

- (1) a permanent and consequential limitation of the use of a body organ or member;
- (2) a significant limitation of use of a body function or system; and
- (3) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

In support of that position plaintiff, Ashley Diaz, has submitted the affirmed reports of Dr. Richard L. Parker, M.D., a Board Certified Orthopedic Surgeon, who examined the plaintiff, Ashley Diaz on four separate dates, January 31, 2006; February 13, 2006; March 13; 2006 and May 18, 2006.

January 31, 2006 Report

Patient has pain in the cervical spine without radiation into the upper extremities. There are no paresthesias. There is no previous history of injury to the cervical spine. Upon physical examination of the cervical spine, patient has pain, tenderness and spasm on palpation. There are no palpable masses. There is restriction in range of motion of the cervical spine. Flexion is to 30/45 degrees, extension is to 20/55 degrees, right lateral flexion is to 30/40 degrees, left lateral flexion is to 30/70 degrees. Deep tendon reflexes are intact. Sensation is intact throughout all dermatomes. Motor strength is 5/5 throughout all muscle groups - triceps, biceps, and brachial radialis. The neurovascular status of the upper extremities is intact.

The conclusion reached by Dr. Parker based on his examination of the plaintiff and review of the medical records was that, Ashley Diaz had cervical derangement; cervical myofascial strain; straightening of the normal cervical lordotic curve; cervical/thoracic strain; myofascial strain; cervical and lumbar strain; lumbar derangement, myofascial strain; and cervical derangement, myofascial strain. In addition there was a limited range of motion in the cervical spine which was noted at each visit.

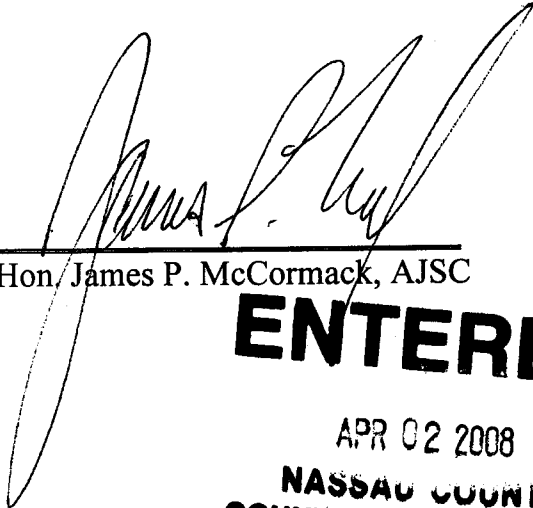
Dr. Parker 's findings contained in his affirmed reports lead this court to conclude that the plaintiff has met her burden of presenting sufficient evidence in admissible form as to present a triable issue of fact as to the serious nature of her injuries. The plaintiff herein has submitted objective medical evidence of a straightening of the normal cervical lordotic curve as well as cervical derangement; together with objective tests showing a decreased range of motion in the cervical spine of a sufficient quality as to preclude summary judgement. (*Toure v. Avis Rent A Car Systems, supra; Ejzerman v. Cruz, 309 AD 2d 893; Salomon v. Hadco, 1 AD 3d 426; Espinoza v. Dinicola, 8 AD 3d 225*).

In addition to the affirmed reports of Dr. Richard Parker, M.D., the plaintiff submitted the affidavit of plaintiff, Debbie Diaz, the mother of Ashley Diaz. The court is satisfied the affidavit raises an issue of fact regarding whether the plaintiff, Ashley Diaz, was limited in her customary daily activities due the injuries she sustained in the accident. Although plaintiff, Ashley Diaz , was able to return to school one week after the accident, it appears based on the affidavit, that the plaintiff was not able to return to gym class was

not able to resume full time attendance in gym class until September 2007, approximately seventeen (17) months after the accident. In addition, the plaintiff was not able to resume dance class twice a week or gymnastics class three times per week. Accordingly, defendant's motion is denied in its entirety.

This decision constitutes the order of this Court.

Dated: February 13, 2008



Hon. James P. McCormack, AJSC
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