

Hawkins-Williams v Perez

2010 NY Slip Op 31077(U)

April 19, 2010

Sup Ct, Richmond County

Docket Number: 104877/2008

Judge: Judith N. McMahon

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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LAURETTE HAWKINS-WILLIAMS, KEITH WILLIAMS, SAMAYRA WILLIAMS, an infant under the age of eighteen years by her mother and natural guardian, LAURETTE HAWKINS-WILLIAMS, KARISH WILLIAMS, an infant under the age of eighteen years, by her mother and natural guardian, LAURETTE HAWKINS-WILLIAMS, and LAURETTE HAWKINS-WILLIAMS, individually, RASHAWN CASSELL, an infant over the age of fifteen years by his mother and natural guardian, BONITA CASSELL, and BONITA CASSELL, individually,

DCM Part 5

**Present:
HON. JUDITH N. MCMAHON**

Plaintiff(s),

DECISION AND ORDER

- against-

**Index No. 104877/2008
Motion No. 003**

ALEX R. PEREZ,

Defendant(s).

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The following papers numbered 1 to 3 were used on this motion this 30th day of March, 2010:

Notice of Motion (Defendant)(Affirmation in Support)-----	1
Affirmation in Opposition -----	2
Reply Affirmation -----	3

On March 24, 2008, the plaintiffs allegedly sustained serious injuries after their vehicle, driven by plaintiff Laurette Hawkins-Williams, was involved in a collision with the vehicle owned and operated by defendant Alex R. Perez. Plaintiff Laurette Hawkins-Williams was operating her motor vehicle at or near the intersection of Oder Avenue and Narrows Road North when she was allegedly struck in the rear by the defendant’s vehicle. Infant plaintiffs Samayra Williams, Karish Williams and Rashawn Cassell were all passengers in Laurette Hawkins-William’s vehicle.

Plaintiffs commenced this action on or about December 5, 2008. Discovery is complete and the defendant is now moving for summary judgment seeking to dismiss the complaint of plaintiffs Laurette Hawkins-Williams, Samayra Williams and Rashawn Williams alleging that they each did not sustain serious injuries pursuant to Insurance Law § 5102(d).

It is well settled that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of triable issues of fact (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Herrin v Airborne Freight Corp., 301 AD2d 500, 500-501 [2d Dept 2003]). The party moving for summary judgment bears the initial burden of establishing its right to judgment as a matter of law (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]), and in this regard “the evidence is to be viewed in a light most favorable to the party opposing the motion, giving [it] the benefit of every favorable inference” (Cortale v Educational Testing Serv., 251 AD2d 528, 531 [2d Dept 1998]). Nevertheless, upon a prima facie showing by the moving party, it is incumbent upon the party opposing the motion to produce “evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

New York Insurance Law § 5102(d) defines "serious injury" as

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.

Here, the defendant has made a prima facie showing of entitlement to summary judgment by submitting proof in admissible form sufficient to establish that the plaintiffs did not sustain serious injury as defined by Insurance Law § 5102(d) (Toure v. Avis Rent A Car Sys, 98 NY2d 345 [2002]; Chou v. Welsh, 15 AD3d 622 [2d Dept. 2005]). The defendant has submitted the medical reports of Drs. Robert Israel and Stephen W. Lastig who opined that each plaintiff has not sustained a serious injury as a result of the accident.

In opposition, the plaintiff Laurette Hawkins-Williams and Samayra Williams have each submitted evidence sufficient to establish triable issues of fact regarding whether they sustained a serious injury (Mauro v. Gold Star Limo Corp., 8 AD3d 352 [2d. Dept. 2004]; Fabiano v. Kirkorian, 306 AD2d 373 [2d Dept. 2003]). Plaintiff Laurette Hawkins-Williams has submitted the reports of Drs. Robert Scott Schepp and Jason S. Brattner who each opined that plaintiff Laurette Hawkins-Williams suffered a permanent significant limitation that was causally related to the accident. In addition, the doctors submitted that plaintiff Laurette Hawkins-Williams suffers from cervical strain, decreased range of motion, posterior disc bulging, right shoulder tendonitis and bony impingement.

Plaintiff Samayra Williams has submitted the affirmations of Dr. Schepp and Brattner as well, who each opined that plaintiff Samayra Williams suffered permanent injuries as a direct result of the accident on March 24, 2008. Specifically, the doctors opined that Samayra Williams suffered reduced range of motion, disc space narrowing, disc bulging and right shoulder tendonitis. The plaintiffs Laurette Hawkins-Williams and Samayra Williams have

both submitted objective medical evidence and established triable issues of fact which precludes the court from granting defendant's summary judgment motion dismissing the complaint as against them (Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002]; Mauro v. Gold Star Limo Corp., 8 AD3d 352 [2d. Dept. 2004]; Fabiano v. Kirkorian, 306 AD2d 373 [2d Dept. 2003]).

However, the plaintiff, Rashawn Cassell, has failed to present admissible evidence to raise questions of fact (Yunatanov v. Stein, 69 AD3d 708, 710 [2d Dept., 2010]). Specifically, plaintiff Rashawn Cassell's medical records only indicate a marginal reduction in his range of motion and back/neck pain and stiffness. Further, the reports fail to indicate any permanency of the injuries or their contemporaneousness with the subject accident (Yunatanov v. Stein, 69 AD3d at 710); Gould v. Ombrellino, 57 AD3d 608, 609 [2d Dept., 2008]). In addition, the plaintiff Rashawn Cassell also failed to submit competent medical evidence that the injuries he allegedly sustained in the subject accident rendered him unable to perform substantially all of his usual and customary daily activities for not less than 90 days of the first 180 days subsequent to the accident (Garcia v. Lopez, 59 AD3d 593 [2d Dept., 2009]; Sainte-Aime v. Ho, 274 AD2d 569 [2d Dept., 2000]). As a result, the plaintiff Rashawn Cassell has failed to rebut the defendant's prima facie showing of entitlement to summary judgment as a matter of law.

Accordingly, it is,

ORDERED that defendant's motion for summary judgment is denied as against plaintiff Laurette Hawkins-Williams and plaintiff Samayra Williams, and it is further

ORDERED that the defendant's motion for summary judgment is granted as against plaintiff Rashawn Cassell, and it is further

ORDERED that any and all additional requests for relief are hereby denied, and it is further,

ORDERED that the Clerk enter Judgment Accordingly.

E N T E R,

Dated: April 19, 2010

Hon. Judith N. McMahon
Justice of the Supreme Court