

**Jean-Baptiste v Walton**

2010 NY Slip Op 32741(U)

September 27, 2010

Supreme Court, Nassau County

Docket Number: 15574/08

Judge: Anthony L. Parga

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY**

Present:

HON. ANTHONY L. PARGA

Justice

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**PART 9**

**KLY JEAN-BAPTISTE and SHARDAE  
ALICIA JEAN-BAPTISTE, an infant under 18  
years old by her father and natural guardian,  
KLY JEAN-BAPTISTE,**

**INDEX NO. 15574/08**

**Plaintiff,**

**-against-**

**MOTION DATE: 9/10/10  
SEQUENCE NO. 003**

**DANIEL WALTON, M. PIERRE-GEORGES,  
MAURICE WALTON, and PV HOLDING  
CORP.,**

**Defendants.**

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Notice of Motion, Affs. & Exs.....	<u>1</u>
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Upon the foregoing papers, it is ordered that the motion by defendants Pierre-Georges and PV Holdings Corp. for summary judgement on the grounds that the plaintiff did not sustain a personal injury (pursuant to CPRL §3212 and New York State Insurance Law §5102(a) and (d)), and on the grounds the PV Holdings cannot be vicariously liable for the negligent acts of the operator of the rented vehicle (pursuant to CPLR §3211 (a)(7) and 49 U.S.C. §30106 (Graves Amendment)), is granted in part and denied in part as follows.

The portion of defendants' motion requesting that the plaintiffs' action against PV HOLDINGS CORP. be dismissed, pursuant to CPLR §3211(a)(7) and 40 U.S.C. §30106 (Graves Amendment), is granted without opposition. A rental car company cannot be held vicariously liable for the negligence of drivers where there is no negligence or criminal wrongdoing on the part of the rental company. (49 U.S.C. §30106). In support of its application, defendants submit an affidavit

of driver, M. Pierre Georges (“Georges”), which states that defendant Georges rented the vehicle from PV Holdings Corp. and did not experience any mechanical difficulties with the vehicle prior to the accident. Defendants have therefore met their burden, and the plaintiffs’ action against PV Holdings Corp. is dismissed, together with all cross-claims against the defendant.

Defendants’ motion for summary judgement on the grounds that neither plaintiff has sustained serious injury pursuant to New York State Insurance Law §5102(d) is denied, in part, and is granted only to the extent of finding for all purposes in the action, pursuant to CPLR §3212(g), that both plaintiffs failed to meet the threshold requirement of suffering a serious injury under the 90/180 category.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action to recover damages for the personal injuries sustained by plaintiff Kly Jean-Baptiste and Shardae Alicia Jean-Baptiste, an infant under the age of eighteen years, as a result of a motor vehicle accident which occurred on Remsen Avenue, near its intersection with Farragut Road, in Kings County, New York on January 18, 2008.

The proponent of a summary judgement motion “must make a prima facie showing of entitlement to judgement as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (Ct. Of App. 1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgement, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (Ct. Of App. 1980)).

Movants have failed to meet their burden in demonstrating that plaintiff Kly Jean-Baptiste (“Kly”) and plaintiff Shardae Alicia Jean-Baptiste (“Shardae”) have not sustained a serious injury in accordance with New York State Insurance Law §5102. Defendants have failed to establish a prima facie case with regard to either plaintiff as to the permanent consequential limitation and significant limitation use categories of serious injury.

With respect to plaintiff Kly, in support of their application for summary judgement, defendants submit the deposition testimony given by plaintiff Kly, detailing the accident and his

injuries and treatment therefrom. Defendants also submit the affirmed reports of orthopedist, Dr. Kachidurian, and neurologist, Dr. Chacko. Lastly, defendants submit MRI reports of plaintiff Kly's cervical and lumbar spines, dated October 17, 2001, relating to a prior 2001 accident, as well as a cervical MRI report, dated March 13, 2008, relating to the within accident.

Defendants' orthopedist, Dr. Kachidurian, examined plaintiff Kly on October 14, 2009. Dr. Kachidurian found normal ranges of motion within plaintiff's cervical spine and right hip, but found his lumbar spine to demonstrate a ten degree limitation in forward flexion. Further, defendants' neurologist, Dr. Chacko, who also examined plaintiff on October 14, 2009, found *several* limitations in the ranges of motion of plaintiff Kly's lumbar *and* cervical spines of up to 20 degrees nearly two years after the accident.

In addition, defendants' compare plaintiff Kly's cervical and lumbar MRI reports from a prior 2001 accident with plaintiff's 2008 cervical and lumbar MRI reports. This comparison reveals that plaintiff Kly has sustained additional injuries to his cervical and lumbar spines after the 2001 accident. To wit, defendants submit an MRI report of plaintiff Kly's cervical and lumbar spines from a prior accident, dated October 17, 2001. The MRI of Kly's 2001 cervical spine reveals posterior disc bulges at C3-4 and C4-5 impinging on the anterior aspect of the spinal canal. By contrast, plaintiff Kly's cervical MRI report, dated March 13, 2008, reveals posterior disc herniations impinging on the anterior spinal canal at C4-5 and C5-6, along with straightening of the cervical lordosis. Plaintiff's 2001 cervical MRI did not reveal a C5-6 disc herniation. The 2001 MRI also revealed a disc bulge, and not a disc herniation at C4-5, as indicated in the 2008 MRI report.

With respect to plaintiff Kly's lumbar spine, the 2001 lumbosacral MRI reveals posterior disc bulges at L3-4 and L4-5 impinging on the anterior aspect of the spinal canal and neural foramina. It also reveals subligamentous posterior disc herniation at L5-S1 with impingement on the anterior aspect of the spinal canal and neural foramina. Plaintiff Kly's 2008 lumbar MRI, by contrast, reveals posterior disc herniation impinging upon the anterior spinal canal at L4-5 and L5-S1. Accordingly, plaintiff's 2001 lumbar MRI indicated that plaintiff had a bulging disc at L4-5 and not a herniation at that level.

With respect to infant plaintiff Shardae, in support of their application for summary judgement, defendants submit the affirmed reports of orthopedist, Dr. Kachidurian, and neurologist, Dr. Chacho, as well as plaintiff Shardae's own deposition testimony.

Defendants' orthopedist, Dr. Kachidurian, examined plaintiff Shardae on January 27, 2010. Dr. Kachidurian found normal ranges of motion within plaintiff's lumbar spine and right knee, but found a ten degree limitation in forward flexion in plaintiff's cervical spine. Further, defendants' neurologist, Dr. Chacko, who examined plaintiff Shardae on January 27, 2010, found limitations in the ranges of motion in her cervical spine, specifically a twenty degree limitation in lateral rotations and a fifteen degree limitation in lateral flexions two years after the accident. Dr. Chacko also determined that plaintiff's straight leg raising test measure up to 70-8- degrees bilaterally, with 90 degrees being normal.

The defendants are not able to establish prima facie entitlement to judgement as a matter of law with regard to the permanent consequential and significant limitation of use categories of serious injury for either plaintiff, as defendants' own examining physicians find that the plaintiffs continue to have restrictions in motion in their cervical and lumbar spines two years after the accident. (*Mullen v. Lauffer*, 31 A.D.3d 402 (2d Dept. 2006); *Kaminsky v. Waldner*, 19 A.D.3d 370 (2d Dept. 2005); *Omar v. Bello*, 13 A.D.3d 430 (2d Dept. 2004)). As defendants have failed to establish a prima facie case of serious injury, it is unnecessary to consider whether the plaintiff's opposition papers were sufficient to raise a triable issue of fact with respect to these categories of serious injury. (*Volpetti v. Kap*, 28 A.D.3d 750 (2d Dept. 2006); *Mullen v. Lauffer*, 31 A.D.3d 402 (2d Dept. 2006); *Coscia v. 938 Trading Corp.*, 283 A.D.2d 538 (2d Dept. 2001)).

However, the defendants have established a prima facie case with respect to both plaintiffs as to the 90/180 day category. By submitting plaintiff's deposition testimonies, defendants demonstrated that both plaintiffs were able to perform "substantially all" of the material acts constituting their customary daily activities for more than 90 days of the first 180 days subsequent to the accident.

During his deposition, plaintiff Kly testified that he was not working at the time of the accident and therefore did not miss any time from work as a result of the accident. While he testified

that he could no longer play soccer or run since the accident, no doctor ever told him that he could no longer preform these activities

During plaintiff Sharda's deposition, she testified that she was in the eighth grade at the time of the accident. She testified that she did not miss any time from school as a result of the accident.

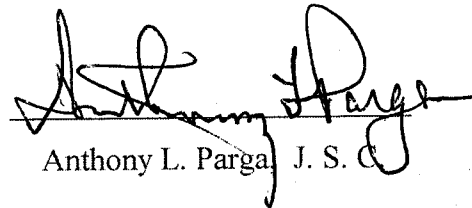
As the defendants have made a prima facie showing, the burden shifts to the plaintiffs to raise a triable issue of fact as to this category of serious injury. The evidence submitted by the plaintiffs is insufficient to raise a triable issue of fact with regard to the 90/180 day category.

Both plaintiffs submitted self-serving affidavits which are insufficient to demonstrate that either plaintiff had a medically determined injury of a non-permanent nature which prevented them from performing "substantially all" of the material acts constituting their customary daily activities for more than 90 days of the first 180 days subsequent to the accident.

Additionally, the affidavits submitted by chiropractor Mark Synder on behalf of both plaintiffs are insufficient to raise a triable issue of fact with regard to the 90/180 day category. Dr. Synder examined both plaintiff Kly and plaintiff Sharda for the first time on August 9, 2010, over two years after the accident. He never examined or treated these plaintiffs within the first 180 days following the accident. As such, his examination of the plaintiffs and the reported findings therefrom were not contemporaneous with the accident, and therefore, the plaintiffs are unable to submit competent medical evidence that they sustained a medically determined injury which prevented them from performing "substantially all" of the material acts constituting their customary daily activities for more than 90 days of the first 180 days subsequent to the accident. (*Knijnikov v. Mushtag*, 35 A.D.3d 545 (2d Dept. 2006); *Li v. Yun*, 27 A.D.3d 624 (2d Dept. 2006); *Ifrach v. Neiman*, 306 A.D.2d 380 (2d Dept. 2003); *Pajda v. Pedone*, 303 A.D.2d 729 (2d Dept. 2003); *Lanza v. Carlick*, 279 A.D.2d 613 (2d Dept. 2001)). While Dr. Synder cites the range of motion findings of plaintiffs' initial treating physician, Dr. Berg, within his report, same is without probative value since Dr. Synder recites from unsworn reports of Dr. Berg in discussing plaintiffs' initial range of motion findings. As Dr. Synder performed an examination of the plaintiffs himself to determine whether they sustained any limitations during the first 90 out of 180 days, his affidavit is insufficient to raise a triable issue of fact with respect to the 90/180 category of serious injury. (*Govori v. Agate Corp.*, 44 A.D.3d 821 (2d Dept. 2007); *Furrs v. Griffith*, 43 A.D.3d 389 (2<sup>nd</sup> Dept. 2007)).

Defendants have met their burden of a prima facie showing with respect to both plaintiffs as to the 90/180 day category, but have not made a prima facie demonstration as to the permanent consequential limitation and significant limitation use categories of serious injury. Accordingly, defendants' motion for summary judgement pursuant to New York Insurance Law §5102(d) is denied, in part, and pursuant to CPLR §3212(g), is granted only to the extent that it is established for all purposes in this action that the plaintiffs have failed to meet the threshold requirement of suffering a serious injury under the 90/180 category.

Dated: September 27, 2010.



Anthony L. Parga J. S. C.

**ENTERED**

SEP 29 2010

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