

Bonilla v Sottile

2013 NY Slip Op 31476(U)

June 20, 2013

Supreme Court, Suffolk County

Docket Number: 11-9550

Judge: Daniel Martin

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 2-8-13
ADJ. DATE 3-26-13
Mot. Seq. # 001 - MD

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ANA BONILLA, as Mother and Natural Guardian	:	HAROLD SOLOMON, ESQ.
of infant plaintiff, GENESIS BONILLA and	:	Attorney for Plaintiffs
ANA BONILLA, individually,	:	430 Sunrise Highway, P.O. Box 1100
	:	Rockville Centre, New York 11571-1100
	:	
Plaintiffs,	:	
	:	SHAYNE, DACHS, SAUER & DACHS, LLP
- against -	:	Attorney for Defendant
	:	114 Old Country Road, Suite 410
BARTLENE SOTTILE,	:	Mineola, New York 11501
	:	
	:	
Defendant.	:	

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Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 16 - 23; Replying Affidavits and supporting papers ; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by defendant for summary judgment dismissing the complaint against him on the ground that plaintiffs 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 plaintiff Ana Bonilla and infant plaintiff Genesis Bonilla when their vehicle was rear-ended by a vehicle owned and operated by defendant, Bartlene Sottile, on Straight Path in Babylon, New York, on October 31, 2010. At the time of the accident, plaintiff Ana Bonilla and infant plaintiff Genesis Bonilla were passengers in a vehicle owned and operated by a non-party driver.

By their bill of particulars, plaintiffs allege that, as a result of the subject accident, plaintiff Ana Bonilla sustained serious injuries including a herniated disc at S1; disc hydration loss at L4-L5 and L5-S1; diminished disc space height at L5-S1; lumbosacral radiculopathy at right L5-S1; straightening of the normal lumbar lordosis; loss of the normal cervical lordosis; tingling, numbness and sensation in right arm and leg; and bilateral shoulder pain. Infant plaintiff Genesis Bonilla sustained serious injuries including bulging discs from C2-C3 through T1-T2 and L1-L2 through L5-S1; herniated discs at C5-C6;

lumbar and cervical facet joint syndrome; pain in the back and hip; decreased sensation in the left L4, L5 and S1; and straightening of the lumbar lordosis.

Defendant now moves for summary judgment dismissing the complaint against her on the ground that plaintiffs have not sustained a serious injury as defined in Insurance Law § 5102 (d).

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 (see *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]). 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]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) (see *Gaddy v Eyer*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos* 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff’s own deposition testimony and the affirmed medical report of the defendant’s own examining physician (see *Moore v Edison*, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; *Faroze v Kamran* 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Boone v New York City Tr. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

On September 21, 2012, approximately one year and eleven months after the subject accident, defendant’s examining orthopedist, Dr. Salvatore Corso, examined plaintiff Genesis Bonilla using certain orthopedic and neurological tests, including cervical compression test, Spurling test, Sulcus test, Hawkin’s test, Neer’s test, apprehension test, and straight leg raising test. Dr. Corso found that all the test results were negative or normal, and that there was no spasm or tenderness in plaintiff Genesis Bonilla’s cervical and thoracolumbar spine. Dr. Corso performed range of motion testing on plaintiff

Genesis Bonilla's cervical and thoracolumbar spine, left shoulder and left hip using a goniometer, and found that her ranges of motion were all within normal ranges. With regard to the cervical spine, Dr. Corso indicated that flexion was 45 degrees (45 degrees normal), extension was 45 degrees (45 degrees normal), right and left lateral bending were 45 degrees (45 degrees normal), and right and left rotation were 80 degrees (80 degrees normal). With regard to the thoracolumbar spine, Dr. Corso indicated that flexion was 90 degrees (90 degrees normal), extension was 30 degrees (30 degrees normal), right and left lateral bending were 30 degrees (30 degrees normal), and right and left rotation were 30 degrees (30 degrees normal).

On October 25, 2012, defendant's examining neurologist, Dr. Edward Weiland, examined plaintiff Genesis Bonilla using certain orthopedic and neurological tests, including straight leg raising test, Fabere-Patrick sign, and Adson's Maneuver. All the test results were negative or normal. Dr. Weiland performed range of motion testing on plaintiff Genesis Bonilla's cervical, lumbar and thoracic spine and shoulders using a goniometer, and found that her ranges of motion were all within normal ranges. With respect to plaintiff Genesis Bonilla's cervical spine, Dr. Weiland indicated that flexion was 50 degrees (50 degrees normal); extension was 60 degrees (60 degrees normal); right and left lateral flexion were 45 degrees (45 degrees normal); and right and left rotation were 80 degrees (80 degrees normal). With respect to the lumbar spine, Dr. Weiland indicated that flexion was 60 degrees (60 degrees normal); extension was 25 degrees (25 degrees normal); and right and left lateral flexion were 25 degrees (25 degrees normal). Dr. Weiland failed to specify the degree of range of motion in right and left rotation of plaintiff Genesis Bonilla's lumbar spine (*see Barrera v MTA Long Island Bus*, 52 AD3d 446, 859 NYS2d 483 [2d Dept 2008]). Regarding the thoracic spine, Dr. Weiland indicated that flexion was 45 degrees (45 degrees normal); extension was 0 degrees (0 degrees normal); right and left rotation were 30 degrees (30 degrees normal); and right and left lateral flexion were 45 degrees (45 degrees normal).

On March 14, 2012, the moving defendant's examining radiologist, Dr. Craig Warshall, reviewed two MRI examinations of plaintiff Genesis Bonilla's cervical and lumbar spine, performed on December 13, 2010 and December 29, 2010 respectively. Dr. Warshall found that there were degenerative changes in plaintiff Genesis Bonilla's cervical spine, and concluded that plaintiff Genesis Bonilla did not sustain injuries which "can be causally related to" the subject accident.

Here, defendant failed to meet her prima facie burden of showing that plaintiff Genesis Bonilla did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Reitz v Seagate Trucking, Inc.*, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). Drs. Corso and Weiland's reports are insufficient to sustain defendant's prima facie burden. While Dr. Corso found that plaintiff Genesis Bonilla's cervical flexion and extension were 45 degrees, Dr. Weiland found that her cervical flexion and extension were 50 degrees and 60 degrees respectively. The conflicting medical opinions of the experts raise issues of credibility for the jury to determine (*see Manuel v New York City Tr. Auth.*, 82 AD3d 1059, 918 NYS2d 787 [2d Dept 2011]; *Kalpakis v County of Nassau*, 289 AD2d 453, 735 NYS2d 427 [2d Dept 2001]). Moreover, whereas Dr. Corso considered 45 degrees to be the normal range of cervical flexion and extension, Dr. Weiland considered 50 degrees and 60 degrees to be normal range of cervical flexion and extension respectively. When the measurements that the defendant's examining orthopedist and neurologist considered normal for their

range of motion testing differ, the Court is left to speculate as to which is the correct normal value (*see Cracchiolo v Omerza*, 87 AD3d 674, 928 NYS2d 644 [2d Dept 2011]; *Frey v Fedorciuc*, 36 AD3d 587, 828 NYS2d 454 [2d Dept 2007]). Thus, if the Court is to believe Dr. Weiland's position as to what is normal, then Dr. Corso's findings as to the plaintiff's range of motion would show a significant limitation.

Dr. Warshall's report is also insufficient to sustain defendant's prima facie burden. As to an alleged preexisting condition, there is only Dr. Warshall's conclusory notation, itself insufficient to establish that plaintiff Genesis Bonilla's pain might be chronic and unrelated to the accident (*see Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Linton v Nawaz*, 62 AD3d 434, 879 NYS2d 82 [1st Dept 2009]). Moreover, Dr. Warshall's MRI reports were not paired with a sufficient medical report of an orthopedist or neurologist who examined the plaintiff Genesis Bonilla (*cf. Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]).

Plaintiff Ana Bonilla, Genesis' mother, was also examined by Dr. Corso on September 21, 2012 using certain orthopedic and neurological tests, including cervical compression test, Spurling test, Sulcus test, Hawkin's test, Neer's test, apprehension test, and straight leg raising test. Dr. Corso found that all the test results were negative or normal, and that there was no spasm or tenderness in plaintiff Ana Bonilla's cervical and thoracolumbar spine. Dr. Corso performed range of motion testing on plaintiff Ana Bonilla's cervical and thoracolumbar spine, and shoulders using a goniometer, and found that her ranges of motion were all within normal ranges. With regard to the cervical spine, Dr. Corso indicated that flexion was 45 degrees (45 degrees normal), extension was 45 degrees (45 degrees normal), right and left lateral bending were 45 degrees (45 degrees normal), and right and left rotation were 80 degrees (80 degrees normal). With regard to the thoracolumbar spine, Dr. Corso indicated that flexion was 90 degrees (90 degrees normal), extension was 30 degrees (30 degrees normal), right and left lateral bending were 30 degrees (30 degrees normal), and right and left rotation were 30 degrees (30 degrees normal). It is noted that the two reports of Dr. Corso, as to the two plaintiffs, are remarkably similar and in many places, exactly word for word.

On October 25, 2012, defendant's examining neurologist, Dr. Weiland, examined plaintiff Ana Bonilla using certain orthopedic and neurological tests, including Fabere-Patrick sign, Adson's Maneuver, Lhermitte's test, Soto-Hall sign, Kemp's test, and Romberg's test. All the test results were negative or normal. Dr. Weiland performed range of motion testing on plaintiff Ana Bonilla's cervical, lumbar and thoracic spine and shoulders using a goniometer, and found that her ranges of motion were all within normal ranges. With respect to plaintiff Ana Bonilla's cervical spine, Dr. Weiland indicated that flexion was 50 degrees (50 degrees normal); extension was 60 degrees (60 degrees normal); right and left lateral flexion were 45 degrees (45 degrees normal); and right and left rotation were 80 degrees (80 degrees normal). With respect to the lumbar spine, Dr. Weiland indicated that flexion was 60 degrees (60 degrees normal); extension was 25 degrees (25 degrees normal); and right and left lateral flexion were 25 degrees (25 degrees normal). Dr. Weiland failed to specify the degree of range of motion in right and left rotation of plaintiff Ana Bonilla's lumbar spine (*see Barrera v MTA Long Island Bus, supra*). Regarding the thoracic spine, Dr. Weiland indicated that flexion was 45 degrees (45 degrees normal); extension was 0 degrees (0 degrees normal); right and left rotation were 30 degrees (30 degrees normal); and right and left lateral flexion were 45 degrees (45 degrees normal).

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Here, defendant has again failed to meet her prima facie burden of showing that plaintiff Ana Bonilla did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Reitz v Seagate Trucking, Inc., supra*). Drs. Corso and Weiland's reports are insufficient to sustain defendant's prima facie burden. While Dr. Corso found that plaintiff Ana Bonilla's cervical flexion and extension were 45 degrees, Dr. Weiland found that her cervical flexion and extension were 50 degrees and 60 degrees respectively. The conflicting medical opinions of the experts raise issues of credibility for the jury to determine (*see Manuel v New York City Tr. Auth., supra; Kalpakis v County of Nassau, supra*). Moreover, whereas Dr. Corso considered 45 degrees to be the normal range of cervical flexion and extension, Dr. Weiland considered 50 degrees and 60 degrees to be normal range of cervical flexion and extension respectively. When the measurements that the defendant's examining orthopedist and neurologist considered normal for their range of motion testing differ, the Court is left to speculate as to which is the correct normal value (*see Cracchiolo v Omerza, supra; Frey v Fedorciuc, supra*).

Inasmuch as defendant failed to meet her prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiffs in opposition to defendant's motion for summary judgment were sufficient to raise a triable issue of fact (*see McMillian v Naparano*, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; *Yong Deok Lee v Singh*, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]).

Accordingly, defendant's motion for summary judgment is denied.

Dated: June 20, 2013
Riverhead, NY



HON. DANIEL MARTIN, A.J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION