

<b>Daniels v Seabrooks</b>
2015 NY Slip Op 30859(U)
May 5, 2015
Supreme Court, Suffolk County
Docket Number: 19794/2012
Judge: William B. Rebolini
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK****I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**  
**Justice**


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Deana Daniels, an infant by her mother  
and natural guardian, Bianca Daniels a/k/a  
Bianca Crawford-Daniels, and Bianca Daniels  
a/k/a Bianca Crawford-Daniels individually,

Plaintiff,

-against-

Niekya Seabrooks,

Defendant.

Index No.: 19794/2012Motion Sequence No.: 001; MDMotion Date: 10/24/14Submitted: 2/11/15Motion Sequence No.: 002; XMGMotion Date: 10/24/14Submitted: 2/11/15Motion Sequence No.: 003; XMG; CDMotion Date: 10/24/14Submitted: 2/11/15Attorney for PlaintiffBianca Daniels a/k/a Bianca Crawford-Daniels:  
(on the counterclaim)Russo, Apoznanski & Tambasco  
115 Broad Hollow Road, Suite 300  
Melville, NY 11747Clerk of the CourtAttorney for Plaintiff:Siben & Siben, LLP  
90 East Main Street  
Bay Shore, NY 11706Attorney for Defendant:Law Office of Frank J. Laurino  
999 Stewart Avenue  
Bethpage, NY 11714

Upon the following papers numbered 1 to 38 read upon this motion for partial summary judgment and two cross motions for summary judgment: Notice of Motion and supporting papers, 1 - 7; Notice of Cross Motion and supporting papers, 10 - 20; 21 - 24; Answering Affidavits and supporting papers, 8 - 9; 27 - 34; Replying Affidavits and supporting papers, 25 - 26; 35 - 36; 37 - 38; it is

**ORDERED** that this motion by Bianca Crawford Daniels, plaintiff on the counterclaim, for an order awarding partial summary judgment in her favor on the issue of liability, the cross-motion by defendant Seabrooks for an order granting summary judgment in her favor dismissing the complaint on the ground that neither plaintiff sustained a “serious injury” within the meaning of the Insurance Law, and the separate cross-motion by plaintiff on the counterclaim Crawford-Daniels for an order dismissing the complaint of the infant plaintiff Deana Daniels on the ground that she did not sustain a “serious injury” are determined as set forth herein.

Plaintiffs, Deana Daniels, an infant, by her mother and natural guardian, Bianca Daniels, also known as Bianca Crawford-Daniels (Daniels), and Bianca Daniels, also known as Bianca Crawford-Daniels, individually (Crawford-Daniels), commenced this action to recover damages for personal injuries allegedly sustained as the result of a motor vehicle accident that occurred on April 8, 2011. At the time of the accident, plaintiff Crawford-Daniels was operating her motor vehicle along the westbound service road of Route 27. The infant plaintiff was a passenger. It is alleged that as Crawford-Daniels came to a gradual stop at a yield sign before merging on to Route 27, the vehicle owned and operated by the defendant, Niekya Seabrooks, struck plaintiffs’ vehicle in the rear. Plaintiffs commenced this action by the filing of a summons and complaint on July 2, 2012. Defendant served an answer with a counterclaim, and a reply to the counterclaim was served on behalf of the plaintiff Crawford-Daniels. Plaintiff on the counterclaim now moves for an order awarding partial summary judgment in her favor on the issue of liability. Defendant Seabrooks has opposed the motion.

Plaintiff Crawford-Daniels testified at her deposition that as she drove along the entrance ramp to merge onto Route 27, she brought her vehicle to a complete stop at the yield sign at the end of the ramp. She remained stopped at the sign for two minutes, waiting for vehicles on Route 27 to pass so that she could merge onto the roadway, when her vehicle was struck from behind. It was defendant’s deposition testimony that the plaintiffs’ vehicle was stopped for about three minutes, that it started to move forward five to ten feet, and that it stopped again a “little bit past” the yield sign. Defendant also testified that at the time of the impact her foot was on the gas pedal.

It is well-settled that where a vehicle is lawfully stopped, there is a duty imposed upon the operators of vehicles traveling behind it in the same direction to come to a timely halt (*Parise v Meltzer*, 204 AD2d 295, 611 NYS2d 291, 292 [2d Dept 1994]). Accordingly, a rear-end collision with a stopped vehicle creates a *prima facie* case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (see *Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007], citing *Carhuayano v J & R Hacking*, 28 AD3d 413, 414, 813 NYS2d 162; *Milskiy v Solanky*, 8 AD3d 353, 777 NYS2d 734; *Gaeta v Carter*, 6 AD3d 576, 775 NYS2d 86). Defendant Seabrooks failed to present a non-negligent explanation for the rear-end collision, since a driver of a vehicle to the rear of another vehicle is required to maintain a reasonably safe distance to avoid a collision (see *Giangrasso v Callahan*, 87 AD3d 521, 928 NYS2d 68 [2d Dept 2011]).

Defendant cross-moved for an order dismissing the complaint in its entirety on the ground that neither plaintiff sustained a “serious injury” and plaintiff on the counterclaim cross-moved for an order dismissing the infant’s claims on the same ground. Plaintiffs opposed both applications.

In order to effectuate the purpose of no-fault legislation to reduce litigation, a court is required to decide, in the first instant, whether a plaintiff has made out a *prima facie* case of “serious injury” sufficient to satisfy the statutory requirements (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [1982]; *Brown v Stark*, 205 AD2d 725, 613 NYS2d 705 [2d Dept 1994]). If it is found that the injury sustained does not fit within the definition of “serious injury” under Insurance Law § 5102(d), then the plaintiff has no judicial remedy and the action must be dismissed (*Licari v Elliott*, *supra*, at 57 NY2d 238; *Velez v Cohan*, 203 AD2d 156, 610 NYS2d 257 [1st Dept 1994]). A “serious injury” is defined 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 constitutes 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” (Insurance Law § 5102 [d]).

It is alleged in the bill of particulars that plaintiff Daniels sustained cervical brachial radicular syndrome, cervical derangement and other soft tissue injuries. In support of her motion, defendant submitted the affirmed report of Edward M. Weiland, M.D., who examined Daniels on May 15, 2014. At the time of the examination, plaintiff complained of episodic headaches two or three times a week. Testing with a goniometer revealed that range of motion of the cervical spine, the lumbar spine, the thoracic spine and the shoulders was within normal limits on all planes. Sensation was intact in upper and lower extremities, and deep tendon reflexes were 2+ and symmetric. The doctor concluded that the plaintiff sustained no neurologic disability and no residual or permanent neurological injuries.

Plaintiff Crawford-Daniels alleges in the bill of particulars that she sustained a herniated disc at C6-7 and other soft tissue injuries as a result of the accident. Crawford-Daniels was examined by Shariar Sotudeh, M.D., on February 28, 2014, at which time plaintiff admitted to having sustained a back injury in a prior accident in 2008. Testing with a goniometer revealed that range of motion of the cervical spine was normal, and the cervical compression test, Jackson’s test and Soto Hall test were negative. Range of motion of the lumbar spine was normal and the Fabere test, Ely’s test, Kemp’s test and Lasague’s test were negative. Deep tendon reflexes were 2+ bilaterally. Range of motion of the right and left shoulders was normal. The doctor concluded that the plaintiff sustained cervical, thoracic and lumbar sprain/strain as well as bilateral shoulder sprain/strain, all of which had resolved with no permanent disability.

The defendant met her initial burden of establishing, as a matter of law, that neither plaintiff sustained a “serious injury” within the meaning of Insurance Law § 5102(d) (*see McCauley v Ross*,

298 AD2d 506, 748 NYS2d 409 [2d Dept 2002]; *see also McKinney v Lane*, 288 AD2d 274, 733 NYS2d 456 [2d Dept 2001], citing *Gaddy v Eyster*, 79 NY2d 955, 591 NE2d 1176, 582 NYS2d 990; *Licari v Elliott*, 57 NY2d 230, 441 NE2d 1088, 455 NYS2d 570).

In opposition to the applications, plaintiffs submitted the affirmed radiological report of Glenn Gray, M.D., relating to the MRI of the infant plaintiff's lumbar spine that was taken on December 12, 2011, which showed a straightening of the lumbar lordosis but no significant disc bulge or focal herniation. The report does not causally connect the findings to the underlying accident, nor does it provide objective evidence of injury or limitation.

Plaintiffs also produced the affirmed radiological report of Albert Zilkha, M.D., concerning the MRI taken of plaintiff Crawford-Daniels on May 24, 2011, which showed a bulging disc and narrowing of the right neural foramen at L5-S1 as well as active degenerative disc disease. An MRI of plaintiff's cervical spine taken on May 23, 2011 reportedly showed a small central herniated disc at C6-C7 with anterior disc protrusion but without deformity of the cervical cord. Plaintiff also submitted the medical report of Michael H. Kalter, M.D., who first examined plaintiff on June 7, 2011, at which time she complained of pain in her neck and back, but motor strength was found to be 5/5 in all areas, reflexes were 2+ throughout and sensation was intact. Plaintiff continued to complain of low back pain during her medical visit on July 5, 2011 and was found to have a positive straight leg raise on the right but negative on the left. On August 3, 2011, September 22, 2011 and December 29, 2011, plaintiff underwent a series of transforaminal selective nerve root block and facet injections at L4-L5 and L5-S1 under local anesthesia. She was last seen by Dr. Kalter on January 9, 2012, at which time motor strength was 5/5 in all areas, sensation was intact and reflexes were 2+ throughout. Straight leg raising was negative bilaterally. Plaintiff was diagnosed to have lumbar spondylosis and radiculitis. While Dr. Kalter causally related "the patient's symptoms of cervical, lumbar pain, left shoulder pain, right shoulder pain, and pain in left leg" to the underlying motor vehicle accident, he did not establish a causal connection between any objective evidence of injury and the underlying accident. Objective proof of a plaintiff's injury is required in order to satisfy the statutory "serious injury" threshold, and subjective complaints alone are not sufficient (*see Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 774 NE2d 1197, 746 NYS2d 865 [2002]).

Although plaintiff also submitted the affirmation of Steven L. Mendelsohn, M.D. in which reference is made to CT films taken on April 21, 2011, the doctor improperly relied on the unsworn CT report prepared by another physician (*see Harney v Tombstone Pizza Corp.*, 279 AD2d 609, 719 NYS2d 704 [2d Dept 2001]). The unsworn medical report of Dr. Tice is not in admissible form and is of no evidentiary value (*see Mazzotta v Vacca*, 289 AD2d 305, 733 NYS2d 916 [2d Dept 2001]).

Plaintiffs also submitted the affidavit of Craig Selzer, D.C., who initially saw Crawford-Daniels on April 20, 2011, at which time she complained of cervical-thoracic pain that radiated into both shoulders with numbness and tingling into both hands. While the chiropractor reported significant range of motion restrictions of the cervical spine as well as range of motion restrictions of the lumbar spine at visits on that date as well as on May 11, 2011 and November 9, 2011, he failed to indicate what objective medical tests he performed to measure the limitations of motion

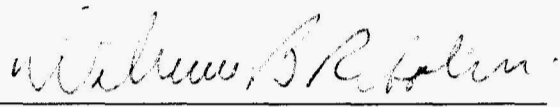
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and, consequently, his findings do not constitute evidence of the extent or degree of the alleged limitations (*see Gorbas v Dowgiallo*, 287 AD2d 690, 732 NYS2d 80 [2d Dept 2001]; *see also Lentini v Melina*, 287 AD2d 550, 731 NYS2d 233 [2d Dept 2001]). Moreover, there is no comparison of objective findings with plaintiff's condition prior to the accident and otherwise there is no medical evidence to support any opinion that the underlying accident caused any permanent injuries. Furthermore, plaintiff failed to submit competent medical evidence that the injuries she allegedly sustained as a result of the accident rendered her unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days thereafter (*see Il Chung Lim v Chrabaszcz*, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]).

As the plaintiffs failed to submit admissible evidence sufficient to raise a triable issue of fact as to whether they sustained a "serious injury," the cross-motions are granted, the motion is denied as moot, and the complaint is dismissed.

Dated:

5/5/2015



**HON. WILLIAM B. REBOLINI, J.S.C.**

  X   FINAL DISPOSITION            NON-FINAL DISPOSITION