

Almonte v Francis

2022 NY Slip Op 34774(U)

January 3, 2022

Supreme Court, Queens County

Docket Number: Index No. 706820/2021

Judge: Ulysses B. Leverett

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

LIBERSON ALMONTE, FRAILIN BAEZ and
MERCEDES ALMONTE, AS M/N/G OF EMELI
FERNANDEZ,

Plaintiffs,

-against-

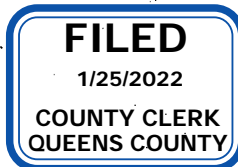
ROSEMARIE FRANCIS and THOMAS LOPEZ

Defendants.

Index No.: 706820/2021

Motion Seq. No. 002

Decision and Order



Present: **HONORABLE ULYSSES B. LEVERET:**

Papers Numbered

Notice of Motion-Affirmation-Exhibits.....

EF-16-25

Affirmation In Opposition-Exhibits.....

EF- 3-12

Upon the foregoing papers, it is ordered that defendants Rosemarie Francis and Thomas Lopez' motion for an order pursuant to CPLR § 3212, granting defendants summary judgment dismissing the plaintiffs' complaint and all cross claims on the grounds that plaintiffs Liberson Almonte and Emeli Fernandez have failed to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (d) is denied.

Plaintiffs Liberson Almonte and Emeli Fernandez seek to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on September 2, 2016 on Guy Lombardo Avenue, at or about Atlantic Avenue, County of Nassau, State of New York.

Plaintiffs Liberson Almonte and Emeli Fernandez assert that on September 2, 2016, plaintiff Almonte was operating a motor vehicle in which plaintiffs Frailin Baez and Emeli Fernandez were passengers. Plaintiff Almonte states that while his vehicle was at a complete stop at a red light, it was struck in the rear by a vehicle owned and operated by defendants Rosemarie Francis and Thomas Lopez. Plaintiff Almonte alleges that as a result of the accident, he sustained injuries to his left shoulder, left leg, lower back and left knee. Plaintiff Fernandez states that as a result of the accident, she sustained injuries to her neck, back, left wrist and both knees.

Insurance Law § 5102 (d) defines a "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 permanent nature which prevents the injured 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."

"[T]o prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury... An expert's qualitative assessment of a plaintiff's condition may also suffice,

provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" See *Toure v Avis Rent A Car Systems, Inc.*, 98 NY 2d 345, 350, (2002).

Defendants allege that plaintiffs have not suffered serious injuries within the meaning of the No Fault Law. In support of the motion, defendants submitted a recent orthopedic evaluation dated November 16, 2019 of plaintiff Liberson Almonte by Dr. John C. Killian, an orthopedic surgeon, who examined plaintiff using a goniometer and reviewed plaintiff's medical records. Dr. Killian reports that the examination of plaintiff Almonte's cervical spine range of motion revealed flexion to 50 degrees (normal 50 degrees), extension to 60 degrees (normal 60 degrees), right/left lateral flexion 45 degrees(normal 45 degrees), right/left rotation to 80 degrees (normal 80 degrees).

Plaintiff Almonte's lumbar spine range of motion examination revealed flexion 60 degrees (normal 60 degrees), extension to 25 degrees (normal 25 degrees), right/left rotation 30 degrees (normal 30 degrees), right/left lateral flexion 25 degrees (normal 25 degrees). Straight leg raising was negative bilaterally in the sitting position and in the supine position.

Plaintiff Almonte's left shoulder range of motion examination revealed full range of motion of the shoulder with forward flexion 180 degrees (normal 180 degrees), external rotation to 70 degrees (normal 70 degrees), internal rotation to allow both hands to be brought symmetrically up behind the back to mid thoracic region (normal mid thoracic). Plaintiff complained of pain with full forward flexion, but did not complain of pain with impingement testing and there was no anterior instability or weakness in external rotation.

Dr. Killian states that plaintiff Almonte's x-rays of the neck and back taken at the hospital were negative. MRI's of the neck and back showed minor disc bulges and protrusions. MRI of the left shoulder showed tendinosis and there were no traumatic abnormalities. Dr. Killian states that plaintiff Almonte has recovered fully from all alleged injuries from the subject accident and that he is able to work at his normal capacity and perform all of his usual activities of daily living without restrictions.

Defendants submitted an orthopedic evaluation dated December 9, 2019 of plaintiff Emeli Fernandez by Dr. John C. Killian, an orthopedic surgeon, who examined plaintiff on 11/26/2019 using a goniometer and reviewed plaintiff's medical records. Dr. Killian reports that the examination of plaintiff Fernandez' cervical spine range of motion revealed flexion to 50 degrees (normal 50 degrees), extension to 60 degrees (normal 60 degrees), right/left lateral flexion 45 degrees(normal 45 degrees), right/left rotation to 80 degrees (normal 80 degrees). There was no palpable muscle spasms.

Plaintiff Fernandez' lumbar spine range of motion examination revealed flexion 60 degrees (normal 60 degrees), extension to 25 degrees (normal 25 degrees), right/left rotation 30 degrees(30 degrees), right/left lateral flexion 25 degrees (normal 25 degrees). Straight leg raising was negative bilaterally in the sitting position and in the supine position.

Plaintiff Fernandez' shoulders range of motion examination revealed full range of motion of both shoulders with forward flexion 180 degrees (normal 180 degrees), external rotation to 70 degrees (normal 70 degrees), internal rotation to allow both hands to be brought symmetrically

up behind the back to mid thoracic region (normal mid thoracic). No complaint of pain with impingement testing, no weakness in external rotation and no instability on anticipation testing.

Dr. Killian states that plaintiff Fernandez' MRI's of her spine showed various disc bulges which are incidental findings of no clinical significance. The MRI of plaintiff's right knee showed no traumatic abnormalities. Examination of her spine showed subjective complaints of tenderness in the cervical and lumbar regions. The neck and back showed minor disc bulges and protrusions. MRI of the left shoulder showed tendinosis and there were no traumatic abnormalities. Plaintiff's neurological examination was remarkable only for vague sensory changes over the left lateral calf, which was unaccompanied by objective findings. The shoulder examination was normal. Dr. Killian states that plaintiff Fernandez has recovered fully from all alleged injuries from the subject accident. There is no impairment or disability from the injuries sustained and that she is able to work at her normal capacity and perform all of her usual activities of daily living without restrictions.

When defendant has established that plaintiff's injuries are not serious within the meaning of No-Fault Law, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. See *Jin v Reilly*, 296 AD 2d 373 (2002).

Plaintiffs in opposition to defendants motion for summary judgment assert that plaintiffs did sustain serious injuries in that plaintiff Almonte sustained permanent consequential limitations of the use of a body function or system (i.e., the spine and shoulder). Plaintiff submitted a sworn physician affirmation dated February 20, 2021 of Dr. Lam Quan who examined plaintiff and reviewed plaintiff's medical records relating to the subject accident. Dr. Quan's most recent examination of plaintiff Almonte's cervical spine range of motion by use of a goniometer revealed flexion to 35 degrees (normal 50 degrees), extension to 45 degrees (normal 60 degrees), left lateral flexion 30 degrees (normal 45 degrees), right lateral flexion 15 degrees (normal 40 degrees).

Plaintiff Almonte's lumbar spine range of motion examination found flexion 60 degrees (normal 90 degrees), extension to 15 degrees (normal 20 degrees), left lateral flexion 20 degrees (normal 25 degrees) right lateral flexion 15 degrees (normal 25).

Plaintiff Almonte's left shoulder range of motion examination revealed that abduction was 100 degrees (normal 180 degrees).

Dr. Quan states that within a reasonable degree of medical certainty, plaintiff Almonte's significantly and painfully reduced range of motion in plaintiff Almonte's cervical and lumbar spine and left shoulder are permanent and were traumatically induced by the subject accident.

Plaintiff Fernandez states that she was 14 years old at the time of the accident, a 9th grade student and only missed class a couple of times. She submitted a sworn physician affirmation dated February 20, 2021 of Dr. Lam Quan who examined plaintiff and reviewed plaintiff's medical records relating to the subject accident. Dr. Quan's most recent examination of plaintiff Fernandez' cervical spine range of motion by use of a goniometer revealed flexion to 40 degrees (normal 50 degrees), extension to 45 degrees (normal 60 degrees), left lateral flexion 35 degrees (normal 45 degrees), right lateral flexion 40 degrees (normal 45 degrees).

Plaintiff Fernandez' lumbar spine range of motion examination found flexion 80 degrees (normal 90 degrees), extension to 20 degrees (normal 25 degrees), left lateral flexion 20 degrees (normal 25 degrees), right lateral flexion 20 degrees (normal 25).

Dr. Quan states that plaintiff Fernandez' board certified radiologist's neck, back and right knee MRI reports confirms his diagnosis that plaintiff Fernandez suffers from disc herniation/ bulges/protrusions at C3-C4 and L4-S1 and right knee derangement and in his medical opinion, consistent and directly related to the subject accident.

Dr. Quan states that within a reasonable degree of medical certainty, plaintiff Fernandez' significantly and painfully reduced range of motion in her cervical and lumbar spine and left shoulder are permanent and were traumatically induced by the subject accident.

The Court finds that the medical evidence submitted by plaintiffs Liberson Almonte and Emeli Fernandez made out a prima facie case that plaintiffs did sustain a serious injury within the meaning of Insurance Law 5102 (d). Dr. Quan states that plaintiff Fernandez' board certified radiologist's neck, back and right knee MRI reports confirms his diagnosis that plaintiff Fernandez suffers from disc herniation/ bulges/protrusions at C3-C4 and L4-S1 and right knee derangement. As per Dr. Quan's report, plaintiff Fernandez' range of motion in her cervical and lumbar spine are not minimal and the existence of a herniated or bulging disc or radiculopathy is evidence of a "serious injury" within the meaning of the no-fault law governing the threshold for tort recovery with objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration. See *Garcia v Solbes*, 41 AD 3d 426 (2007).

It is well established that the proponent of summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. See *Zuckerman v City of New York*, 49 NY 2d 557 (1980). Here the affirmed medical reports of plaintiffs Almonte and Fernandez's doctors directly contradict each other. Where parties offer conflicting medical evidence on the existence of a serious injury, the existence of such injury is a matter for a jury's determination. See *Cracchiolo v Omerza*, 87 AD 3d 674 (2011).

Accordingly, it is ordered that defendants Rosemarie Francis and Thomas Lopez' motion for an order pursuant to CPLR § 3212, granting defendants summary judgment dismissing the plaintiffs' complaint and all cross claims on the grounds that plaintiffs Liberson Almonte and Emeli Fernandez have failed to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (d) is denied.

This is the decision and order of this Court.

Dated: January 3, 2022


Ulysses B. Leverett, JSC

