

Baigorría-Urbina v Lee
2012 NY Slip Op 30297(U)
February 7, 2012
Supreme Court, Queens County
Docket Number: 22125/09
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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JULIO BAIGORRIA-URBINA, MAGALY ALATRISTA, ANGELLA BAIGORRIA, AN INFANT UNDER THE AGE OF FOURTEEN YEARS OLD BY HER MOTHER NATURAL GUARDIAN MAGALY ALATRISTA and NATALIE BAIGORRIA, AN INFANT UNDER THE AGE OF FOURTEEN YEARS OLD BY HER MOTHER NATURAL GUARDIAN MAGALY ALATRISTA,
Index No.: 22125/09
Motion Date: 12/15/11
Motion No.: 2
Motion Seq.: 1

Plaintiffs,

- against -

LINA E. LEE,

Defendant.

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The following papers numbered 1 to 17 were read on this motion by defendant, LINA E. LEE, for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the complaint of JULIO CESAR BAIGORRIA-URBINA, ANGELLA BAIGORRIA and NATALIE BAIGORRIA and any cross-claims on the ground that each plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers
Numbered

Notice of Motion-Affidavits-Exhibits-Memorandum of Law...1 - 7
Affirmation in Opposition-Affidavits-Exhibits.....8 - 12
Reply Affirmation.....13 - 17

This is a personal injury action in which plaintiffs, Julio Cesar Baigorria-Urbina, Angella Baigorria and Natalie Baigorria, seek to recover damages for injuries they each sustained as a result of a motor vehicle accident that occurred on February 28, 2009, near the intersection of Northern Boulevard and East Shore Road, Nassau County, New York.

At the time of the accident, plaintiff, Baigorria-Urbina was operating his vehicle on Northern Boulevard waiting at a red light to make a left turn onto Shore Road when his vehicle was struck in the rear by the vehicle owned and operated by the defendant. Magaly Alatrasta was a front seat passenger and his two children, Angella age 7, and Natalie, age 4, were seated in the rear in child car seats. Baigorria-Urbina, Magaly, and their two children were allegedly injured as a result of the accident.

The plaintiffs commenced this action by filing a summons and complaint on August 18, 2009. Issue was joined by service of defendant's verified answer with counterclaim dated October 5, 2009.

Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the complaint of plaintiffs Julio Cesar Baigorria-Urbina, Angella Baigorria and Natalie Baigorria on the ground that each plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Stuart Kurland, Esq., a copy of the pleadings; plaintiffs' verified bill of particulars; a copy of the transcripts of the examinations before trial of each plaintiff and the affirmed medical reports of orthopedist Dr. Thomas Nipper with respect to his separate examination of plaintiffs Biagorria-Urbina, Angella Baigorria and Natalie Baigorria.

In their verified Bill of Particulars, plaintiffs allege as follows with respect to the injuries allegedly sustained in the accident:

Julio Cesar Baigorria-Urbina: neck pain, back pain, lower back pain; confined to bed for 20 days; confined home for 3 months; totally incapacitated from employment for 3 months.

Angella Baigorria: neck pain, back pain; confined to bed for 2 days; confined home for 2 days.

Natalie Baigorria: neck pain, back pain; confined to bed for 2 days; confined home for 2 days.

Plaintiffs contend that they each sustained a serious injury as defined in Insurance Law § 5102(d) in that they each sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or

impairment of a nonpermanent nature which prevented each plaintiff from performing substantially all of the material acts which constitute their respective 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.

Dr. Thomas Nipper, an orthopedist retained by the defendant, examined Mr. Baigorria-Urbina, Natalie and Angella on June 1, 2011. Dr. Nipper performed quantified and comparative range of motion tests. His affirmed reports state as follows:

Julio Cesar Baigorria-Urbina, age 45 - stated to Dr. Nipper that he is employed as a painter and that he lost 30 days from work due to his injuries. Range of motion testing revealed no limitations of range of motion of the cervical spine, thoracic spine and lumbar spine. Dr. Nipper's conclusion was resolved cervical, thoracic and lumbar sprain/strain and no objective evidence of any disability.

Angella Baigorria, age 9 - range of motion testing revealed no limitations of range of motion of the cervical spine and lumbar spine. Dr. Nipper's conclusion was resolved cervical and lumbar sprain/strain and no objective evidence of any disability.

Natalie Baigorria, age 6 - range of motion testing revealed no limitations of range of motion of the cervical spine and lumbar spine. His conclusion was resolved cervical and lumbar sprain/strain and no objective evidence of any disability.

The defendant also submitted the deposition testimony of each plaintiff. The plaintiffs testified as follows:

Julio Cesar Baigorria-Urbina: began treatments at Turner Chiropractic three or four days post accident for pain in his back and neck. He was treated for two years, initially several times per week and then once per week. He also received physical therapy from Christen Domino. He also went to see a neurologist Dr. Fleischer. He last treated two weeks prior to the examination.

Angella Baigorria: felt pain to her neck and back after the accident. Underwent treatments which continued to the present time.

Natalie Baigorria - Doesn't remember being in an accident, but she states she has pain to her head. She went for treatments. She had no pain at the present time on any part of her body.

Magaly Alatrasta: lives with but is not married to plaintiff Urbina and is the mother of Angella and Natalie. She was sitting in the front passenger seat on the date of the accident. Her daughters were in the rear in car seats. Her vehicle was stopped at a red light when she felt two heavy impacts to the rear of her vehicle. The following day she and her children were examined at the emergency room and released. She and her children were subsequently treated at Dr. Turner's for pain in the neck and back. She and her daughters continued treatment to the present time. Her daughters did not have MRIs taken. Her daughters did not miss any school as a result of the accident.

Defendant's counsel contends that the medical reports of Dr. Nipper as well as the deposition testimony of the plaintiffs are sufficient to establish, prima facie, that Julio Cesar Baigorria-Urbina, Angella Baigorria and Natalie Baigorria have not sustained a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented each plaintiff from performing substantially all of the material acts which constitute her 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 opposition, plaintiff's attorney Elliot Lewis, Esq., submits his own affirmation as well as the affidavit of Mr. Urbina, Ms. Magaly Alatrasta, three affidavits from chiropractor Deborah Turner and an affirmation of neurologist Dr. John Himelfarb. In their affidavits the plaintiffs state as follows:

Julio Cesar Baigorria-Urbina: treated with Dr. Turner from March 4, 2009 until December 27, 2010 when he stopped treating because he had reached maximum medical improvement. He missed approximately 3 months from work as a painter and construction worker.

Magaly Alatrasta: Angella treated with Dr. Turner from March 10, 2009 through April 16, 2011 when she stopped treating because she had reached maximum medical improvement. Angella is unable to participate in activities in gym as a result of the accident. Magaly states that Natalie also treated with Dr. Turner from March 10, 2009 until the present. She states that Natalie is unable to participate in any activities in gym or play strenuous activities without feeling pain to her neck mid back and lower back.

Dr. Turner's affidavit of November 16, 2011 regarding Mr.

Urbina: first examined Urbina on March 4, 2009 where she determined that he sustained injuries to his cervical and lumbar spine as a result of the accident. He was treated at her office from March 10, 2009 through December 27, 2010 when he stopped treating as he had reached maximum medical improvement for his chronic condition. Re-evaluated Urbina on November 12, 2011. Based upon his MRI reports she diagnosed plaintiff with disc bulge at C2-3 and disc herniation at C3-4, C4-5, C5-6 and C6-7 and L5-S1. She stated that he sustained a permanent and significant limitation of use of the cervical and lumbar spine as a result of the subject accident. She did not report on range of motion testing at the recent examination.

Radiologist, Dr. Himelfarb's Affirmation dated November 16,

2011: after reviewing MRI studies of the plaintiff's cervical and lumbosacral spine he found disc bulge at C2-3 level, disc herniation at C3-C4 level, C4-5 level, C5-6 level and L4-5 level.

Dr. Turner's Affidavit of November 16, 2011 regarding Angella

Baigorria: examined Angella on March 10, 2009 and treated her through April 16, 2011 when Angella stopped treating as she had reached maximum medical improvement. Based on her evaluation of March 10, 2011, Dr. Turner determined that Angella injured to her cervical, thoracic and lumbar spines as a result of the subject accident. On November 12, 2011, she re-evaluated Angela and using objective range of motion testing found that she had a 10 degree limitation of extension of the lumbar spine. She diagnosed Angella as having cervical segmental dysfunction, thoracic segmental dysfunction and lumbar segmental dysfunction. She concludes that Angella's injuries are permanent and significant and resulted from the accident of February 28, 2009.

Dr. Turner's Affidavit of November 16, 2011 regarding Natalie

Baigorria: Natalie first presented on March 10, 2009 with complaints of neck mid-back and low back pain. The examination revealed injuries to the cervical, thoracic and lumbar spines. She treated from March 10, 2009 through the present time with chiropractic treatments. She was re-evaluated on November 12, 2011 at which time Natalie complained of low back pain. There were no limitations of range of motion provided. Dr Turner diagnosed Natalie with permanent and significant limitation of use of the cervical and lumbar spine as a result of the motor vehicle accident of November 28, 2009.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557 [1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendant, including the affirmed medical reports of Dr. Nipper was sufficient to meet its prima facie burden by demonstrating that plaintiffs Baigorria-Urbina and Natalie and Angella Baigorria did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

In opposition, plaintiffs Baigorria-Urbina and Natalie Baigorria failed to raise a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557, [1980]; Cohen v A One Prods., Inc., 34 AD3d 517 006]). The respective affidavits of Dr. Turner were sufficient to show, based upon her contemporaneous examinations of March 2009 that all three plaintiffs sustained injuries which were causally related to

the accident (see Perl v Meher, 2011 NY Slip Op 8452 [2011]). However, with respect to plaintiffs Natalie Baigorria and Baigorria-Urbina, Dr. Turner's affidavit regarding her recent examination in November 2011, did not contain any objective range of motion limitations. Without a medical report indicating the plaintiff's current physical condition, the plaintiff's submissions were insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury (see Harris v Ariel Transp. Corp., 55 AD3d 323 [2d Dept. 2008]; Sullivan v Johnson, 40 AD3d 624 [2d Dept. 2007]; Barrzey v Clarke, 27 AD3d 600 [2d Dept. 2006]; Farozes v Kamran, 22 AD3d 458 [2d Dept. 2005] [in order to raise a triable issue of fact the plaintiff was required to come forward with objective medical evidence, based upon a recent examination, to verify his subjective complaints of pain and limitation of motion]; Ali v Vasquez, 19 AD3d 520 [2d Dept. 2005]). Dr. Turner's report failed to show, via objective medical evidence, that plaintiffs Natalie Baigorria and Baigorria-Urbina at their recent examination were limited in any capacity (see Valera v Singh, 932 NYS2d 530 [2d Dept. 2011]).

With respect to plaintiff Angella Baigorria, Dr. Turner did find on her recent examination that Angella had a ten degree or 40 per cent limitation of range of motion of the lumbar spine. Therefore, this Court finds that the said plaintiff raised triable issues of fact by submitting the affidavit of Dr. Turner attesting to the fact that Angella had a significant limitation in range of motion both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Ortiz v. Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, said plaintiff raised a triable issue of fact as to whether she sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903 [2d Dept. 2011]; Mahmood v Vicks, 81 ADd 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

Lastly, the plaintiffs failed to submit competent medical evidence that the injuries allegedly sustained by each of them as a result of the subject accident rendered them unable to perform substantially all of their daily activities for not less than 90 days of the first 180 days following the accident (see Valera v

Singh, 932 NYS2d 530 [2d Dept. 2011]; Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the defendants' motion for summary judgment is granted with respect to JULIO BAIGORRIA-URBINA and NATALIE BAIGORRIA and the complaint of plaintiffs JULIO BAIGORRIA-URBINA and NATALIE BAIGORRIA are dismissed and it is further,

ORDERED, that the motion of the defendant for an order granting summary judgment dismissing the complaint with respect to plaintiff ANGELLA BAIGORRIA is denied.

The clerk is directed to enter judgment accordingly.

Dated: February 7, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.