Sanchez v Ahmed
2009 NY Slip Op 33325(U)
March 4, 2009
Sup Ct, NY County
Docket Number: 106920-2006
Judge: Paul Wooten

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 22
Justice

RUBEN SANCHEZ, an infant by his mother and natural Guardian, OLGA CORONA and OLGA CORONA, Individually
Plaintiffs,

- v -

NASIM AHMED and CHO-SIOA HACKING CORP.
Defendants.

INDEX NO. 106920-2006

MOTION DATE

MOTION SEQ. NO . 001

MOTION CAL. NO. 123

The following papers, numbered 1 to 3, were read on this motion by defendants' for summary judgment on the threshold "serious injury" issue.

NUMBERED	PAPERS
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

Cross-Motion: ☐ Yes ☒ No

On April 16, 2004, infant plaintiff Ruben Sanchez ("plaintiff Sanchez"), a nine year old boy, was struck by a yellow cab vehicle operated by Nasim Ahmed and owned by Cho-Sioa Hacking Corp., ("defendants") while crossing the intersection of East 12th Street and Avenue C, New York, New York. Plaintiff Sanchez was taken to Bellevue Medical Center, located at 462 First Avenue, New York, New York, where he was admitted and discharged the following day. The plaintiffs commenced this lawsuit as a result of injuries sustained as a result of the subject accident.

Defendants now move for an order, pursuant to CPLR § 3212, granting summary judgment on the issue of "serious injury" as defined by New York Insurance Law § 5102(d).

SERIOUS INJURY THRESHOLD

Pursuant to the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (now Insurance Law § 5101, *et seq.* - the "No Fault" statute), a party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has sustained at least one of the categories of "serious injury" as set forth in Insurance Law § 5102 (d) (*Marquez v New York City Tr. Auth.*, 686 NYS2d 18 [1 Dept 1999]; *DiLeo v Blumberg*, 672 NYS2d 319 [1 Dept 1998]).

Insurance Law § 5102 (d) defines "serious injury" as, inter alia:

> a personal injury which results in . . . significant disfigurement; . . . 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.

It is indisputable that five of the nine categories of serious physical injuries discussed by Insurance Law 5102 (d) are not applicable herein as there is no allegation of death, dismemberment, fracture or a loss of a fetus. Therefore, the court must determine if the injuries asserted by plaintiff constitute either: (1) a permanent loss of use of a body organ, member, function, or system; (2) a significant limitation of use of a body function or system; (3) a permanent consequential limitation of use of a body function or system; (4) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment; (5) or a significant disfigurement. (See defendants' motion, exhibit D, infant plaintiff's bill of particulars, paragraph 11 and 20.)

Serious injury is a threshold issue, and thus, a necessary element of plaintiff's prima facie case (*Licari v Elliott*, 57 NY2d 230 [1982]; *Toure v Harrison*, 775 NYS2d 282 [1 Dept 2004]; Insurance Law § 5104 [a]). This is in accord with the purpose of the "No-Fault" law, which was to "'weed out frivolous claims and limit recovery to significant injuries'" (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]; *Licari v Elliott*, 57 NY2d 234 [1982]; *Rubensccastro v Alfaro*, 815 NYS2d 514 [1 Dept 2006]).

In order to satisfy the statutory threshold, the plaintiff must submit competent objective medical evidence of his or her injuries, based on the performance of objective tests (*Grossman v Wright*, 707 NYS2d 233 [2 Dept 2000]; *Lopez v Senatore*, 65 NY2d 1017, 1019 [1985]). Subjective complaints alone are insufficient to establish a prima facie case of a serious injury (*Gaddy v Eyler*, 79 NY2d 955, 957 [1992]; *Scheer v Koubek*, 70 NY2d 678, 679 [1987]).

A CT scan or MRI may constitute objective evidence to support subjective complaints (*see Arjona v Calcano*, 776 NYS2d 49 [1 Dept 2004]; *Lesser v Smart Cab Corp.*, 724 NYS2d 49 [1 Dept 2001]). The plaintiff's medical submissions must show when the tests were performed, the objective nature of the tests, what the normal range of motion should be and whether the plaintiff' s limitations were significant (*see Milazzo v Gesner*, 822 NYS2d 49 [1 Dept 2006]; *Vasquez v Reluzco*, 814 NYS2d [1 Dept 2006]).

With respect to the categories of significant limitation of use of a body function or system and permanent consequential limitation of use, "'[w]hether a limitation of use or function is "'significant'" or "'consequential'" (i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part'" (*Toure v Avis Rent A Car Systems, supra* quoting *Dufel v Green*, *supra*).

Where the plaintiff claims serious injury under the "90/180 category of the Insurance law 5102(d), he must first demonstrate that his usual activities were curtailed during the requisite time period and Second submit competent credible evidence based on the objective medical findings of a medically determined injury or impairment which caused the alleged limitations in his daily activities. See *Toure v Avis Rent A Car Systems, supra.*

Furthermore, where the plaintiff claims a permanent disfigurement he must establish that a reasonable person would view her physical appearance as 'unattractive", "objectionable" or would be he would be the "object of pity or scorn." New York State Insurance Law 5102(d); *Aguilar v Hicks*, 781 NYS2d 318 [1 Dept 2004]; *Manrique v Warsaw Wooten Associates, Inc.*, 749 NYS2d 451, 297 AD2d 519 [1 Dept 2002]; *Hutchinson v Beth cab Corporation,* 612 NYS2d 10, 204 AD2d 151, [1 Dept 1994].

SUMMARY JUDGMENT STANDARD

The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the courts which may decide the issue on a motion for summary judgment (*Perez v Rodriguez,* 809 NYS2d 15 [1 Dept 2006]). On a motion for summary judgment based upon a failure to sustain a serious injury, the defendants bear the initial burden of establishing the absence of a serious injury by tendering evidentiary proof in admissible form eliminating any material issues of fact from the case (*Toure v Avis Rent A Car Sys., supra*; *see also Gaddy v Eyler, supra*; *Pirrelli v Long Is. R.R.*, 641 NYS2d 240 [1 Dept 1996]).

Defendant may rely either on the sworn or affirmed statements of their examining physician, plaintiff's deposition testimony and plaintiff's unsworn physician's records (*Fragale v Geiger*, 733 NYS2d 901 [2 Dept 2001]; *Pagano v Kingsbury*, 587 NYS2d 692 [2 Dept 1992]). An affirmed physician's report demonstrating that plaintiff was not suffering from any disability or consequential injury resulting from the accident is sufficient to satisfy a defendant's burden of

proof (*see Gaddy v Eyler, supra*). In addition, the Courts have unanimously held that a party may not use an unsworn medical report prepared by the parties' own physician on a motion for summary judgment (See *Grasso v Angerami*, 79 NY2d 813 [1991]; *Offman v Singh*, 813 NY2d 56 [1 Dept 2006]). Moreover, CPLR § 2106 requires a physician's statement be affirmed (or sworn) to be true under the penalties of perjury.

Once defendant has made such a showing, the burden shifts to the plaintiff to come forward with prima facie evidence, in admissible form, to rebut the presumption that there is no issue of fact as to the threshold question (*see Pommells v Perez*, 797 NYS2d 380 [2005]; *Gaddy v Eyler, supra*; *Perez v Rodriguez, supra*). A medical affirmation or affidavit based on a physician's own examination, tests, and review of the record, can support the existence and extent of a plaintiff's serious injury (*O'Sullivan v Atrium Bus Co.*, 668 NYS2d 167 [1 Dept 1998]).

In deciding a summary judgment motion, the court must bear in mind that issue finding rather that issue determination is the key to summary judgment. See *Sillman v Twentieth Century Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 489 (1957). Furthermore, since summary judgment is a drastic remedy which deprives a litigant of her day in court, the evidence adduced on the motion must be liberally construed in the light most favorable to the opposing party. See *Kesselman v. Lever House Restaurant*, 816 NYS2d 13, 29 AD3d 302,, [1 Dept 2006]; *Goldman v. Metropolitan Life insurance Company*, 788 NYS2d 25, 13 AD3d 289, [1 Dept 2004].

DISCUSSION

In support of their motion, the defendants submit the pleadings, the deposition testimony of plaintiff Sanchez, taken May 27, 2007 when plaintiff Sanchez was 12 years old ("plaintiff Sanchez's 2007 testimony"), the affirmed reports of Dr. Robert Israel, a board certified orthopedic surgeon and Dr. Robert Goldstein, a board certified plastic surgeon.

Dr. Israel examined plaintiff Sanchez on July 27, 2007, using among other things, a visual scale and goniometer. Dr. Israel concluded, that "the claimant has no disability as a result of the accident". However, Dr. Israel also noted that plaintiff Sanchez "continued with complaints of headaches" (See affirmed medical report of Dr. Israel, defendants' exhibit E.) Dr. Goldstein examined the plaintiff Sanchez on August 14, 2007. Dr. Goldstein noted that plaintiff Sanchez complained of headaches and "plaintiff points to a area of scarring on the right side of his forehead above the eyebrow." (See affirmed medical report of Dr. Goldstein, defendants' exhibit F, page two.) Dr. Goldstein also noted, "there are two areas of scarring. One scar measures 1.8 x 1.3 cms. and medial to this there is another faint line that measures 6 cm." Plaintiff alleges that the scar that measured 1.8 x 1.3 cms is the result of the subject accident.

Defendants have met their burden of proof with respect to plaintiff's claim that he suffered a "serious injury" due to significant disfigurement. The scar on infant plaintiff's forehead noted by Dr. Goldstein may be evidence that plaintiff injured his head in the accident, but it is not the "significant disfigurement" which constitutes a "serious injury" under the statute. "The standard of determining significant disfigurement within the meaning of the Insurance Law is whether a reasonable person would view the condition 'as unattractive, objectionable, or as the subject of pity or scorn'" (*Manrique v. Warshaw Woolen Associates, Inc.*, 297 AD2d 519, 526 [1st Dept 2002]; see also *Aguilar v. Hicks*, 9 AD3d 318, 319 [1st Dept 2004]; *Hutchinson v. Beth Cab Corp.*, 207 AD2d 283 [1st Dept 1994]). No such allegation has been made by plaintiff, who merely notes its existence.

Defendants have also met their initial burden to present evidence that plaintiff did not sustain a "serious injury" due to permanent loss of a body organ, member functions or systems; significant limitations of use of bodily functions or systems; or, permanent consequential limitations of use of body organ and/or member (see *DeAngelo v. Fidel Corp. Services, Inc.*,

171 AD2d 588, 589 [1st Dept 1991]).

The Court concludes that defendants have come forward with sufficient evidence in admissible form to warrant as a matter of law a finding that all infant plaintiff's claims have not sustained a "serious injury" within the meaning of Insurance Law § 5102 [d], previously discusses (See page two, paragraph two). (*See, Gaddy v Eyler,* 79 NY2d 955, 956-957 [1992]; *Lowe v Bennett*, 511 NYS2d 603 [1 Dept 1986], *Affd*, 69 NY2d 700 [1 Dept 1986]; *Pagano v Kingsbury*, 587 NYS2d 692 [2 Dept 1992]). Thus, the burden shifts to plaintiffs to produce evidentiary proof in admissible form to warrant the showing of the existence of a serious injury creating a triable issue of fact. *(See Zuckerman v City of New York, supra; Forrest v Jewish Guild for the Blind, supra*).

In opposition, plaintiffs submit plaintiff Sanchez's 2007 testimony, the deposition testimony and affidavit of plaintiff Sanchez's mother, Olga Corona ("plaintiff Corona") and the and the affidavit of Dr. Kamramu Fallahpour, a clinical psychologist and Director of the Brain Resource Center in New York City. Plaintiff Corona's deposition and affidavit details the injuries to her plaintiff son, including the injury and stitches to his head (see plaintiff in opposition, exhibit B, Corona's deposition p. 6-7) and his migraine headaches which she concludes have caused his inability," **to socialize, at times**". Plaintiffs also submit plaintiff Sanchez's medical prescription from Mt. Sinai Hospital for 400 milligrams of ibuprofen (see plaintiff's exhibit E, Corona's affidavit para 3-6, plaintiff's exhibit B, Corona's deposition p. 13-17 and 21, plaintiff's exhibit D, plaintiff's deposition p.23, 32-33).

The affidavit of Dr. Kamramu Fallahpour, a clinical psychologist is the plaintiffs' only submission to establish proof of plaintiff Sanchez's medical treatment. On May 27, 2007, Dr. Fallahpour conducted an EEG test on plaintiff Sanchez . The EEG test is an universally acceptable objective medical test to indicate serious injury. (See Guides to the Evaluation of Permanent Impairment, sixth edition, published by the American Medical Association, p. 324.)

(See *Pommells v. Perez, supra.*) Dr. Fallahpour determined that plaintiff Sanchez had an "abnormal EEG which is poorly organized . . . [d]ata suggest lack of proper cortical dynamics . . .[b]ased on profile, headache related symptoms may be post traumatic ischemic headaches" Dr. Fallahpour also concluded that plaintiff Sanchez 's "brain is not functioning normally and there is a lack of proper brain dynamics . . . suffered significant memory loss, loss of cognitive functioning and post traumatic ischemic headaches, which based on 'profile, and history, headache related symptoms' are due to the subject accident ".

In response to the plaintiffs opposition, defendants argue that Dr. Fallahpour's opinion lacks a sufficient foundation to assert that the subject accident is the *cause* of the plaintiff's mental impairment.

The issue now before the Court is whether Dr. Fallahpour's medical examination of the plaintiff which was conducted three years and one month after the subject accident, constitutes objective medical evidence performed contemporaneously with the occurrence of the accident, in order to substantiate plaintiff's claim (*Pommells v. Perez, supra*). The Appellate Courts have established that in order for a plaintiff to meet the contemporaneous treatment requirement for a summary judgment motion on the issue of "serious injury", a plaintiff to must establish medical treatment by admissable medical evidence, in a reasonable time, under all of the relevant circumstances (*Thompson v. Abbasi,* 788 NYS2d 48 [1 Dept 2005]).[1]

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[1]In *Thompson v. Abbasi,* 788 NYS2d 48 [1 Dept 2005], the First Department held,

> "the key fact that this plaintiff waited over 2 1/2 years to uncover evidence of the limitations to his neck which he now claims meets the threshold. The proof gives us no way to determine that the July 2002 alleged limitation was occasioned by the November 1999 accident, as there is no proof of what plaintiff's post-accident limitations were, if any. By "post-accident" we mean limitations suffered within a *reasonable time* (Emphasis added) after the accident under all the relevant circumstances."

Also see *Guadalupe v. Blondie Limo, Inc.*, 841 NYS2d 525, [1 Dept 2007], the quantitative range-of-motion assessment plaintiff did submit was made more than two years after the accident by a physician who examined her

This case presents several unique issues. Plaintiff Sanchez's alleged psychological condition is a subtle psychological impairment, which is more difficult to detect than a physical injury in a nine year old. All parties agree the infant plaintiff suffered a head injury as substantiated by the forehead scar. At his deposition, plaintiff Sanchez testified that since the accident he has continuously suffered from headaches, and that he has been taking " 400 *milligram pills."*[2] In addition, plaintiff Corona, asserts she has continuously given plaintiff Sanchez 400 milligrams of ibuprofen daily for his headaches. Further, the defendants medical expert, Dr. Israel noted that plaintiff Sanchez complained of headaches when he examined him on July 27, 2007. Moreover, both Dr. Goldstein and Dr. Israel chose not to review' the May 27, 2007 psychological findings by Dr. Fallahpour.

The Court notes that the facts of this case are unique, due to the age of the infant plaintiff and psychological nature of the injury. Based upon these circumstances we conclude that Dr. Fallahpour's May 27, 2007 report and opinion was taken within a *reasonable* time period after the subject accident, to establish the objective medical evidence

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only on that one occasion; *see* Atkinson v Oliver, 830 NYS2d 30 [1 Dept 2007]); see *Vaughan v Baez,* 758 NYS2d 246 [1 Dept 2003], the plaintiff cannot establish objective medical evidence to establish that there is a *causal connection* between plaintiff's condition and the accident, by physician, who was not the treating physician, saw the plaintiff only once (after the defendants motion for summary was commenced) and more than 2 years after the accident; *compare Silva v Vizcarrondo*, 819 NYS 2d 246 [1 Dept 2006] plaintiff met "minimal standard" to substantiate her serious injury claim where her expert, who began treatment for her injuries shortly after the accident, and conducted six physical examinations within the period, made the quantified assessment 17 months after the accident.

[2]The Court acknowledges that the subjective quality of a plaintiff's pain cannot by itself establish the objective standard to prove serious physical injury pursuant to the Insurance Law § 5102(d), see Scheer v. Koubeck, 70 NY2d 678, 518 NYS2d 788 (1987).

necessary to demonstrate a *causal connection* between infant plaintiff's serious injury and the subject accident, sufficient to raise a triable issue of fact for a jury. (see *Thompson v Abbasi, supra*). Moreover, the court concludes that the Appellate Division First Departments' requirements of *Bandoian v. Bernstein* 254 A.D.2d 205, 679 N.Y.S.2d 123 (plaintiff should prove a recent medical examination shortly after the accident) is met. While the defendants challenge the physical appearance of infant plaintiff scar for "disfigurement" the parties do not dispute the infant plaintiff's scar tissue is evidence of head trauma at the time of the accident. Hence this fact and infant plaintiff guardian deposition testimony of medical treatment immediately following the accident is sufficient.

Further, when the issue of causation is one that a juror can decide based upon a juror's own experience, medical proof is not necessary. (See *Lanpont v Savas Cab Corp.*, 644 NYS2d 285[1st Dept 1997], "plaintiff's medical proof established that she sustained a fracture, and although there was no medical proof of causation, jury could properly conclude that the accident was caused of fracture as such result 'within experience of layman'").

In the present case, again, while the defendants challenge the physical appearance of infant plaintiff scar the parties do not dispute the infant plaintiff's scar tissue is evidence of head trauma. Thus, the evidence submitted by plaintiff adduced on the motion liberally construed in the light most favorable to the opposing party demonstrates the existence of a material issue of fact for a jury as to whether or not plaintiff has sustained a "serious injuries" pursuant to Insurance Law § 5102(d) as a result of the subject accident regarding; (1) a permanent loss of use of a body organ, member, function, or system; (2) a significant limitation of use of a body function or system; or (3) a permanent consequential limitation of use of a body function or system.

Regarding infant plaintiff claim of significant disfigurement, plaintiffs have failed to produce any evidence to establish that "a reasonable person would view" the infant plaintiff's

scar "as unattractive, objectionable, or as the subject of pity or scorn" (*Hutchinson v Beth Cab Corp.*, *supra*; *Aguilar v Hicks, supra*. In addition, plaintiff has failed to submit sufficient evidence to support their "90/180"claim. Accordingly, plaintiff's significant disfigurement and "90/180" claims are dismissed.

For these reasons and upon the foregoing papers, it is,

ORDERED that the defendants' motion for summary judgment regarding; (1) a permanent loss of use of a body organ, member, function, or system; (2) a significant limitation of use of a body function or system; or (3) a permanent consequential limitation of use of a body function or system is denied; and it is further,

ORDERED that the defendants' motion for summary judgment is granted regarding; (1) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment; and (2) or a significant disfigurement.

ORDERED that within 30 days from the date hereof, defendants and plaintiff will seek the Court's mediation of this issue prior to a trial date which will include the presence of the infant plaintiff's guardian, plaintiff's counsel, defendants' counsel and the appropriate defendant's insurance carrier representative with settlement authority; and further,

ORDERED, plaintiff shall serve a copy of this order with a notice of entry within 30 days after the completion date of mediation.

This constitutes the Decision and Order of the Court.

Dated: March 4, 2009

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Paul Wooten J.S.C.

Paul Wooten
J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION

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