

Feliz v Jimenez

2013 NY Slip Op 31505(U)

July 9, 2013

Sup Ct, New York County

Docket Number: 112609/10

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Index Number : 112609/2010
FELIX, MACDELINNE
VS.
JIMENEZ, YOLANDA
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for SJ - serious inj
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

with seq. 02 + 04 and

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER**

FILED

JUL 15 2013

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/9/13

[Signature], J.S.C.
HON. ARLENE P. BLUTH

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

FILED

JUL 15 2013

COUNTY CLERK'S OFFICE
NEW YORK

-----X

MACDELINNE FELIZ, an infant under the age of
fourteen, by her mother and natural
guardian, INMACULADA ZAPATA, and
INMACULADA ZAPATA, individually and
CARMEN ZAPATA,

Plaintiffs,

Index No. 112609/10

-against-

YOLANDA JIMENEZ, ANGEL JIMENEZ AND
REGINA BRUTUS,

Mot. Seq. 002, (003)
and 004

Defendants.

-----X

Arlene P. Bluth, J.:

In this motor vehicle accident action, defendants Yolanda Jimenez and Angel Jimenez (Jimenez) move for summary judgment dismissing the complaint for plaintiffs' alleged failure to establish serious injuries, as that term is defined in the New York Insurance Law (mot. seq. no. 002); defendant Regina Brutus (Brutus) moves for summary judgment dismissing the complaint as to her on the same ground (all defendants together, defendants) (mot. seq. no. 003); and the plaintiffs infant Macdelinne Feliz (Feliz) (and her mother and natural guardian Inmaculada Zapata), and Carmen Zapata (Zapata) move for summary judgment on the issue of defendants' liability for Feliz and Zapata's injuries (mot. seq. no. 004).

The Court notes that the infant Feliz and her grandmother Carmen Zapata were in the car and allege serious injuries. Inmaculada Zapata was not in the car and does not allege injuries; she asserts derivative claims. Hereafter, other than in the conclusion, "Zapata" refers only to defendant Carman Zapata.

Allegations of Accident

On September 5, 2008, Feliz and Zapata were passengers in a vehicle operated by Brutus, when their vehicle came into contact with a vehicle owned by Yolanda Jimenez, and operated by Jimenez, at the intersection of Palisades Center Drive and North Palisades Center Drive, in the town of Clarkstown, Rockland County, New York. Feliz was traveling in the front passenger seat, while Zapata was sitting in the back seat, behind Brutus. The front driver's side of Brutus's vehicle came into contact with the front driver's side of the Jimenez vehicle. The parties differ as to how the accident occurred.

Serious Injury

Under Insurance Law § 5102, parties injured in motor vehicle accidents may only sue in court if they have sustained a "serious injury" as that term is defined in the statute. *Perl v Meher*, 18

NY3d 208 (2011). Insurance Law § 5102 (d) defines "serious injury," as applicable to the instant case, as:

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 and eighty days immediately following the occurrence of the injury or impairment.

Since no recovery can be had for an injury suffered in a motor vehicle accident unless the accident results in a serious injury under the Insurance Law, the matter of the severity of the plaintiffs' injuries should be determined before the question of liability is addressed.

Summary Judgment

It is often noted that summary judgment is a "drastic remedy." *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 (2012). "[T]he 'proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.'" *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 (1st Dept 2010), quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Once the proponent of the motion meets this requirement, "the burden then shifts to the opposing party to

produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Ostrov v Rozbruch*, 91 AD3d 147, 152 (1st Dept 2012), citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224 (1st Dept 2002).

Injuries of Feliz

In her bill of particulars (Aff. of Ferrucci, Ex. B), Feliz complains of injuries to both knees, her cervical, lumbar and thoracic spine, and injury to her left shoulder. Specifically, and in short, she complains of a tear of the posterior horn of the medial meniscus of her left knee; sprain, strain and decreased motion of the bilateral knees; sacroiliitis, sprain, strain and decreased range of motion of the cervical, lumbar and thoracic spine; neck pain radiating to the upper left extremity; sprain, strain and decreased range of motion of the left shoulder; difficulty sleeping; and headaches.

Defendants, in order to meet their burden on summary judgment, must provide "expert medical reports finding normal ranges of motion in the claimed affected body parts and no

objective evidence that any limitations resulted from the accident." *Vega v MTA Bus Co.*, 96 AD3d 506, 507 (1st Dept 2012).

In their attempt to make their prima facie showing of entitlement to summary judgment as to Feliz's lack of a serious injury, defendants produce the affirmed report of Dr. Gregory Montalbano (Dr. Montalbano). Aff. of Ferrucci, Ex. C. Dr. Montalbano conducted an examination of Feliz on September 16, 2011, two years after the accident, and reviewed her medical records. He noted the following records: examination reports of office visits on September 14, 2009, October 14, 2009, and November 11, 2009 by Dr. Eric Jacobson (Dr. Jacobson), a physiatrist, and the interpretation of MRIs taken of Feliz's knees on September 27, 2009, and her spine, on October 25, 2009, as interpreted by the facility's radiologist. Dr. Montalbano also reviewed the interpretation of all of the MRIs by radiologist Dr. Melissa Sapan Cohn (Dr. Cohn), defendants' other expert witness. Aff. of Ferrucci, Ex. D.

Dr. Montalbano conducted range of motion tests on Feliz's cervical spine, lumbar/thoracic spine, right and left shoulder, and both knees with a goniometer. He noted that the readings were within normal ranges for all the allegedly affected body parts. He opined that Feliz did not sustain any permanent injury to her bilateral knees, cervical of lumbar spine, or left shoulder, as a result of the accident.

Defendants also provide the independent radiologic report of Dr. Cohn, who opined that the MRIs of Feliz's spine are within normal parameters; the MRI to her right knee shows no abnormality; and that, although the MRI to Feliz's left knee shows "[a] minimal amount of residual elevated signal intensity ... with the posterior horn of the medial meniscus consistent with minimal residual vascularity," this is normal in a pediatric knee.

This court finds that defendants have made a prima facie showing that Feliz did not sustain a "permanent consequential limitation of use of a body organ or member," or a "significant limitation of use of a body function or system" as a result of the accident, as required by the Insurance Law. Defendants have also shown, prima facie, that Feliz was not prevented from carrying out "substantially all" her daily activities for 90 out of the 180 days after the accident. Feliz reports that she missed some school at the beginning of her recovery, and was not able to participate in gym. This is insufficient to establish serious injury on this last ground.

Feliz responds to defendants' motions with a review of Feliz's treatment records. Following a trip to the emergency room at Nyack Hospital (for which records were not available), Feliz was seen several days later by Dr. Jacobson for complaints of bilateral knee pain, bilateral ankle pain, and for pain in her

back, neck and left shoulder. As to Feliz's knees, Dr. Jacobson diagnosed bilateral knee strain/sprain and meniscal tear. Report of Dr. Jacobson, Aff. of McMahon, Ex. F. An MRI performed on September 27, 2009, as read by the facility radiologist, showed a left knee with an abnormal signal in the posterior horn of the medial meniscus representing a tear of the posterior horn; a possible meniscal tear. The reading of the right knee was normal.

As to Feliz's back and spine, Dr. Jacobson reported an initial diagnosis of cervical strain/sprain; lumbar strain/sprain; thoracic strain/sprain; sacroiliitis; bilateral knee sprain; and left shoulder strain/sprain. He noted decreased ranges of motion in these areas on his first examination. MRIs of Feliz's lumbar spine taken on October 25, 2009 showed a normal lumbar spine. The cervical spine showed a straightening of the normal cervical lordosis. Dr. Jacobson's follow-up examination on November 11, 2009, noted some restriction of motion of the lumbar spine and cervical spine, with pain.

Feliz was also seen by Dr. Thomas Scilaris (Dr. Scilaris) on September 16, 2009, for an orthopedic examination of her bilateral knees and ankles. Aff. of McMahon, Ex. B. Dr. Scilaris, who noted pain and tenderness upon examination of these areas, diagnosed bilateral knee strain/sprain; meniscus tear and bilateral ankle strain/sprain. Feliz was seen in follow-up

examinations by Dr. Scilaris on October 21, 2009 and December 16, 2009. Each time, he noted restrictions in Feliz range of motion in her knees, and, after the MRI of her knees, also diagnosed a meniscal tear, although he seems to have misread the MRI, as he identified the meniscal tear to be on the right knee.

Feliz was given a course of therapy for her various complaints, until May 10, 2010, for her shoulder, and until July 12, 2010, for her cervical and lumbar complaints. She ended therapy, allegedly because she could no longer afford it.

Plaintiffs' expert witness, Dr. Mark S. McMahon, saw Feliz on March 19, 2012. He noted that Feliz reported continuing pain in her knees, which worsens with weather changes. Feliz further reported pain in her cervical spine radiating into her left shoulder, and pain in her lumbar spine with bilateral lower extremity numbness and tinging, with pain that wakens her from sleep. She claims that she has difficulty in gym, cannot jump, and runs with difficulty.

Dr. McMahon performed range of motion tests on Feliz's affected body parts. He found abnormal range of motion in Feliz right and left knees, and limited flexation and extension in her cervical and lumbar spine. All tests were performed with a goniometer. Dr. McMahon diagnosed a torn meniscus with post-traumatic chondromalacia of the patella of the left knee, and post-traumatic chondromalacia of the patella of the right knee.

He also notes that Feliz has a "cervical spine injury" and a "lumbar spine injury," without more.

Dr. McMahon concludes that Feliz "remains symptomatic two and a half years after the accident which portends a bad prognosis and a permanent condition" which "interferes with her quality of life, her activities of daily living and her performance in school." He suggests that she would benefit from a "left knee arthroscopic partial medial meniscectomy," and opines that Feliz has an increased likelihood of developing post-traumatic arthritis of the left knee.

Defendants object to Dr. McMahon's affirmation, based on their claim that Dr. McMahon relies on the records of Feliz's treatment from her various doctors, such as Dr. Jacobson, which records are certified, but not affirmed. This argument is based on case law which specifies that "reports of ... nontestifying physicians [are] inadmissible because the physicians [are] unavailable for cross-examination." See *Daniels v Simon*, 99 AD3d 658, 660 (2d Dept 2012). "Although office records which contain a treating physician's day-to-day business entries qualify for admission as business records if the foundational requirements of CPLR 4518 (a) are satisfied, a medical report is not admissible as a business record where ... it contains the physician's opinion or expert proof." *Id.*; see also *Matter of Bronstein-Becker v Becker*, 25 AD3d 796 (2d Dept 2006).

The records of Feliz's and Zapata's treating physicians are records of these physicians' business entries regarding the examinations of Feliz and Zapata. They are not provided to serve as proof by expert witnesses. The documents are admissible,¹ and Dr. McMahon is justified in relying on them.²

Although Dr. McMahon finds some restriction of motion in Feliz's cervical and lumbar spine, his conclusion that there are serious injuries in these body parts is conclusory at best. He only states that she has a "Cervical spine injury," and a "Lumbar spine injury." This is insufficient to make out a question of fact as to a serious injury to these body parts. See *Keena v Trappen*, 294 AD2d 405 (2d Dept 2002) (cervical and lumbar sprains insufficient to show serious injury).

Similarly, with respect to Feliz's knees, Dr. McMahon, while he notes some limitation in range of motion, relies on only the subjective report of pain, resulting in "patellar sensitivity and medial joint line tenderness," i.e., pain, in both knees. Despite the MRI report of a torn meniscus in Feliz's left knee, these subjective complaints are insufficient. A diagnosis of a

¹The court notes that defendants rely on the reports. It would be incongruous if plaintiffs could not.

²Plaintiffs respond to defendants' argument concerning the alleged inadmissibility of the records in an unauthorized sur reply, denoted as an "affirmation in further support." However, since the question was already before the court on defendants' reply, no sur-reply was necessary, and the objection can be addressed.

torn meniscus, without more, is not sufficient to meet the criteria of a serious injury. *McLoud v Reyes*, 82 AD3d 848 (2d Dept 2011). Feliz has failed to show a "permanent consequential limitation of use of a body organ or member," or "significant limitation of use of a body function or system" under the Insurance Law.

Feliz has also failed to establish serious injury under the 90/180 day rule. She has not alleged that she is unable to perform "substantially all" of her daily regime that this standard requires. Feliz's failure to establish a question of fact as to a serious injury requires dismissal of her action against defendants.

Injuries to Zapata

Zapata, in her bill of particulars, claims, in summary, injuries to her left shoulder; pain and weakness in her bilateral shoulders; posterior disc herniations at levels C3-4, C4-5, C5-6 and C6-7; posterior disc herniation of level L4-5, and disc bulges at L3-4 and L5-S1, with pain, tenderness and decreased range of motion; sacrolileitis; and other indicia of pain and tenderness in her back, shoulders and left knee.

Defendants again turn to Dr. Montalbano, who examined Zapata on September 9, 2011 (Aff. of Ferrucci, Ex. E.), and the report of Dr. Cohn, who examined Zapata's MRIs. *Id.*, Ex. F.

Dr. Montalbano found restriction in rotation, extension and flexion of Zapata's cervical and lumbar spine, but also noted that his examination was accompanied by Zapata's "very vocal" expressions of pain, and guarding. He noted Dr. Cohn's observations of disc herniations at C4-5, C5-6 and C6-7, with osteophyte formation, and a disc herniation at L4-5, and disc bulging at L3-4 and L5-S1, which Dr. Cohn attributed to general degeneration of the spine consistent with Zapata's age of 69. Dr. Montalbano concurred with this diagnosis, noting, however, that he was unable to clarify the extent of Zapata's range of motion deficiencies due to her "complaints of pain, guarding and loud cries" upon examination of these areas.

Dr. Montalbano opined that Zapata did not suffer any traumatic injury to her bilateral shoulders. He noted that, while the MRIs originally reported evidence of interstitial tears within the tendons, Dr. Cohn's reading of the MRI indicated that there were "mild acromioclaviular joint hypotrophic degenerative changes" to the right shoulder, indicative of chronic disease, not trauma, and that there were similar degenerative changes in the left shoulder, including fraying of the surface of the tendon, again, indicative of chronic changes, not trauma.

This court finds that defendants have made a prima facie showing that Zapata did not sustain "permanent consequential limitation of use of a body organ or member," or "significant

limitation of use of a body function or system" under the Insurance Law, and that Zapata was not incapacitated from doing substantially all her daily activities for 90 days out of the 180 days following the accident.

In response, Zapata turns to the report of Dr. McMahon, dated March 19, 2012. He refers to Zapata's visits to Dr. Jacobson, Dr. Scilaris and Dr. Capiola (also Feliz's physicians), and recounts Zapata's present complaints of difficulty walking, lifting heavy objects, and combing her hair. Zapata also complained of pain, stiffness, tingling and clicking in her various affected body parts.

Dr. McMahon examined Zapata with a goniometer, registering decreased flexation and extension of her cervical and lumbar spine, and her shoulders. In his diagnosis, he notes a right shoulder torn supraspinatus tendon and labrum; in her left shoulder a torn supraspinatus tendon and labrum; cervical disc herniations at C3-4, C4-5, and C6-7 with neural compression; and, to her lumbar spine, disc herniation at L4-5, and disc bulges at L3-4 and L5-S1 with neural compression, basically recounting the readings taken from the MRIs. He concludes that "[t]he above diagnosis occurred as a result of the accident of September 5, 2009."

It was incumbent upon Dr. McMahon to address defendants' physicians' findings that the shoulder complaints, and the disc

herniations and bulges in Zapata's cervical and lumbar spine were degenerative, and not caused by the accident. *Valentin v Pomilla*, 59 AD3d 184 (1st Dept 2009). Zapata is a senior citizen and Dr. McMahon only recounts that the damage exists; he does not back up his contention that the injuries were caused by the accident with any facts; he certainly does not address or rule out that her pain and problems are caused by degeneration. The fact that he finds Zapata's prognosis to be poor, and that she would benefit from surgeries does not go to establishing causation.

As a result of the foregoing, this court concludes that Zapata has failed to raise a question of fact as to the issue of serious injury. She has not established evidence which would indicate that she suffered a "permanent consequential limitation of use of a body organ or member," or "significant limitation of use of a body function or system" under the Insurance Law. She has failed to show that she was significantly limited in her daily activities for 90 out of the 180 days following the accident.

Conclusion

As a result of the foregoing, the motions brought by defendants must be granted and the complaint dismissed. Consequently, the motion brought by plaintiffs for summary judgment as to causation of the accident need not be reached.

Accordingly, it is

ORDERED that the motion for summary judgment dismissing the complaint brought by Yolanda Jimenez and Angel Jimenez (mot. seq. no. 002) is granted, and the complaint is dismissed as to these defendants; and it is further

ORDERED that the motion for summary judgment brought by defendant Regina Brutus (mot. seq. no. 003) is granted, and the complaint is dismissed as to this defendant; and it is further

ORDERED that the motion brought by plaintiffs infant Macdelinne Feliz, her mother and natural guardian Inmaculada Zapata and individually, and Carmen Zapata (mot. seq. no. 004) is denied as moot; and it is further

ORDERED that the Clerk is respectfully directed to enter judgment accordingly.

Dated: New York, New York
July 9, 2013

FILED

JUL 1 2013

COUNTY CLERK'S OFFICE
NEW YORK

FILED

JUL 15 2013

COUNTY CLERK'S OFFICE
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