

Torres v Sromawuda
2017 NY Slip Op 31723(U)
July 12, 2017
Supreme Court, Bronx County
Docket Number: 350172/13
Judge: Elizabeth A. Taylor
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 2

LAURA L. TORRES, and IRAIDA R. RIVERA, an
infant by her mother and natural guardian
LAURA L. TORRES,

Plaintiffs,

Index No. 350172/13

DECISION/ORDER

- against -

Present:
HON. ELIZABETH A. TAYLOR

ENOCH SROMAWUDA, JASON I. UYIOGHOSA
and HILDO F. QUIRINDOONGO,

Defendants.

The following papers numbered 1 to ___ read on this motion, _____

No ___ On Calendar of _____	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	1-2, 3
Answering Affidavit and Exhibits-----	4-5
Replying Affidavit and Exhibits-----	6
Affidavit-----	_____
Pleadings -- Exhibit-----	_____
Stipulation -- Referee's Report --Minutes-----	_____
Filed papers-----	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Motion pursuant to CPLR 3212 for an order dismissing the complaint against defendant Hildo F. Quirindoongo, on the ground that plaintiffs have not suffered serious injuries within the meaning of Insurance Law §5102 (d); and motion pursuant to CPLR 3212 for an order dismissing the complaint against defendants Enoch Sromawuda and Jason I Uyioghosa, on the ground that plaintiffs have not suffered serious injuries within the meaning of Insurance Law §5102 (d), are consolidated herein and decided as follows.

Plaintiffs commenced this personal injury action to recover damages for injuries allegedly sustained in a motor vehicle accident on February 21, 2013. Plaintiff Laura Torres alleges to have suffered injuries to her left shoulder, cervical and lumbar spine and a facial scar. Plaintiff Linda Rivera alleges to have suffered injuries to her left knee and thoracic and lumbar spine.

In the bill of particulars, plaintiffs allege "serious injuries" in the following categories: 1) "permanent consequential limitation of use of a body organ or member;" 2) "significant limitation of use of a body function or system;" 3) "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;" and 4) "a significant disfigurement."

To prevail on a motion for summary judgment, movants have the initial burden of presenting competent evidence establishing that plaintiff has not suffered a serious injury (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [1st Dept 2011]). Such evidence includes affirmations of medical experts who examined the plaintiffs and have concluded that no objective medical findings support plaintiffs' claim (*Id.*).

In support of the motions, movants submit the reports of 1) Dr. Lisa Nason; and 2) Dr. Jean Robert Desrouleaux. On January 26, 2015, Dr. Nason conducted an orthopaedic examination of Ms. Torres, which included range of motion testing of her left shoulder, and cervical and lumbar spine. Dr. Nason found that Ms. Torres did not have restrictions in the range of motion of her left shoulder, and cervical and lumbar spine. Dr. Nason concluded that Ms. Torres did not suffer from any disability. Dr. Desrouleaux conducted a neurological examination of Ms. Torres on November 14, 2014, which included range of motion testing of her left shoulder, and cervical and lumbar spine. Dr. Desrouleaux concluded that there were no restrictions in the range of motion of Ms. Torres' left shoulder, and cervical and lumbar spine and there was no objective basis for her complaints of pain.

On November 17, 2014, Dr. Nason conducted an orthopaedic examination of infant plaintiff, which included range of motion testing of her left knee, and thoracic and lumbar spine. Dr. Nason found that the infant did not have restrictions in the range of motion of her left knee, and thoracic and lumbar spine. Dr. Nason concluded that the infant did not suffer from any disability. Dr. Desrouleaux conducted a neurological examination of the infant on November 24, 2014, which included range of motion testing of her left knee, and thoracic and lumbar spine. Dr. Desrouleaux concluded that there were no restrictions in the range of motion of the left knee, and thoracic and lumbar spine.

Based upon the foregoing, this court finds that movants have met their prima facie burden of demonstrating that plaintiffs have not suffered a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system.

To create an issue of fact, plaintiffs must establish that they suffered serious injuries arising from a “permanent consequential limitation of use of a body organ, member, function or system” or “significant” limitation of use of a body function or system.” To establish a serious injury, plaintiffs must set forth medical proof containing objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiffs’ present limitation to the normal function, purpose and use of the affected body organ, member, function or system (*Perl v Mehis*, 18 NY3d 208 [2011]; *Toure v Avis Rent A Car System, Inc.*, 98 NY2d 345, 353 [2002]).

In opposition, plaintiffs submit the affirmations of 1) Dr. Jean Daniel Francois; 2) Dr. Gabriel Dassa; and 3) Dr. Satish Chandra.

On February 27, 2013, around six days after the accident, Dr. Francois examined the Ms. Torres. Dr. Francois conducted range of motion testing of her left shoulder, and cervical and lumbar spine and concluded that she suffered injuries to her left shoulder, and cervical and lumbar spine that were casually related to the accident. MRIs of her cervical spine were taken on March 20, 2013 and July 15, 2013. Dr. Chandra affirms that the March 20, 2013 MRI revealed disc herniation in her cervical spine and that the disc abnormalities remained unchanged in the July 15, 2013 MRI. Dr. Chandra further avers that the September 25, 2014 MRI of the left shoulder revealed a rotator cuff tear. On December 29, 2014, Dr. Dassa conducted an initial examination of Ms. Torres. On January 4, 2016, Dr. Dassa conducted an orthopedic examination, including range of motion testing of her left shoulder, and cervical and lumbar spine. Dr. Dassa concluded that there was restricted range of motion of her left shoulder, and cervical and lumbar spine and that the permanent injuries were casually related to the accident. Ms. Torres underwent surgery to her left shoulder on January 11, 2016, and has continuously received physical therapy since the accident. Further, Dr. Dassa concluded that a

March, 2008 MRI of the Ms. Torres' lumbar spine revealed disc herniation, however, he notes that the May 20, 2013 MRI revealed new injuries to her spine.

Based upon the forgoing, this court finds that plaintiffs raise an issue of fact as to whether Ms. Torres suffered a permanent consequential limitation or a significant limitation of use of a body function or system.

However, plaintiffs fail to raise an issue of fact as to whether Ms. Rivera suffered a permanent consequential limitation or a significant limitation of use of a body function or system. Plaintiff fail to submit a medical report of an examination of the infant plaintiff sufficiently contemporaneous to the accident (see *Rosa v Mejia*, 95 AD3d 402, 403 [1st Dept 2012]). Dr. Dassa's examination of the infant, conducted on November 17, 2014, almost two years after the accident, is insufficient to establish contemporaneous treatment (*id.*). Further, although Dr. Chandra affirms that the March 20, 2013 MRI revealed herniations to the infant's lumbar spine, and the May 18, 2013 MRI of the left knee revealed an internal derangement meniscal tear, Dr. Chandra does not indicate whether these injuries were causally related to the accident.

The branch of the motion to dismiss infant plaintiff's claim that she was unable to perform his usual and customary daily activities for 90 days out of the first 180 days following the date of the accident, is granted.

The branch of the motion to dismiss Mr. Torres' claim that she was unable to perform his usual and customary daily activities for 90 days out of the first 180 days following the date of the accident, is denied.

Defendants Sromawuda and Uyioghosa submit the deposition transcripts of plaintiffs. Infant plaintiff's testimony, that she only missed six weeks of school after the accident, sufficiently demonstrates entitlement to dismissal of the 90/180 claim (see *Torres v Dwyer*, 84 ad3d 626 [1st Dept 2011]). However, movants fail to submit any evidence to refute Ms. Torres' claim, in the bill of particulars, that she was totally incapacitated from performing her household duties for three months following the accident.

As movants have met her initial burden respect to infant plaintiff's 90/180 claim, the burden shifts to plaintiffs to create an issue of fact.

In opposition, plaintiffs fail to submit any expert medical evidence to support their claim that the infant was prevented from performing her usual activities for 90 out of the 180 days immediately following the accident (see *Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463, 464 [1st Dept 2010]; see *Cruz v Rivera*, 94 AD3d 576, 576 [1st Dept 2012]; *Hospedales v Doe*, 79 AD3d 536, 537 [1st Dept 2010]).

The branch of the motions to dismiss Ms. Torres' claim that she suffered a significant disfigurement, is granted.

In support of the motions, movants submit the affirmed report of Dr. Ignatius Roger, a plastic surgeon and two photographs. Dr. Roger examined Ms. Torres on December 12, 2014, and concluded that the scar to her frontal scalp was well healed and did not extend to her forehead. Dr. Roger further concluded the frontal scalp scar was cosmetically acceptable.

Based upon the foregoing, this court find that movants have met their initial burden to dismiss the significant disfigurement claim (see *Salter v New York City Transit Authority*, 13 Ad3d 92 [1st Dept 2004]).

In opposition, plaintiffs fail to submit objective medical proof to support the significant disfigurement claim (*Id.*). Further, the photographs of Ms. Torres' forehead immediately after the accident is insufficient to raise an issue of fact.

The Clerk is directed to dismiss Iraida Rivera's complaint and to amend the caption as follows:


SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:
LAURA L. TORRES, Plaintiff, Index No. 350172/13

- against -

ENOCH SROMAWUDA, JASON I. UYIOGHOSA
and HILDO F. QUIRINDOONGO, Defendants.

The foregoing shall constitute the decision and order of this court.

Dated: JUL 12 2017


A.J.S.C.